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**Datasheet for the decision
of 13 June 2013**

Case Number: T 2038/11 - 3.3.09

Application Number: 02726108.0

Publication Number: 1408760

IPC: A01N 63/00, A23K 1/00,
C12P 1/02, C12P 1/04,
C12P 1/06, C12N 1/04

Language of the proceedings: EN

Title of invention:
Consumable product containing probiotics

Patent Proprietor:
Société des Produits Nestlé S.A.

Opponent:
N.V. Nutricia

Headword:
-

Relevant legal provisions:
EPC Art. 84, 100(c)
RPBA Art. 13(3)

Keyword:
"Late filed requests - admitted (yes, all requests)"
"Clarity in opposition appeal proceedings (no, main request
and auxiliary request 1)"
"Added subject-matter (yes, auxiliary request 2)"

Decisions cited:
G 0001/93

Catchword:
-



Case Number: T 2038/11 - 3.3.09

D E C I S I O N
of the Technical Board of Appeal 3.3.09
of 13 June 2013

Appellant: Société des Produits Nestlé S.A.
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 14 July 2011
revoking European patent No. 1408760 pursuant
to Article 101(3) (b) EPC.

Composition of the Board:

Chairman: M. O. Müller
Members: N. Perakis
K. Garnett

Summary of Facts and Submissions

- I. This decision concerns the appeal by the proprietor of European patent No. 1 408 760 against the opposition division's decision to revoke it.
- II. The opponent had requested revocation of the patent in its entirety on the grounds that the claimed subject-matter was neither novel nor inventive (Article 100(a) EPC), that the patent did not disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art (Article 100(b) EPC) and that the patent contained subject-matter which extended beyond the content of the application as filed (Article 100(c) EPC).
- III. The opposition division's decision, announced orally on 6 June 2011 and issued in writing on 14 July 2011, was based on a main request and auxiliary requests 1 to 4.

Claim 1 of the main request read as follows:

"1. A dried consumable cereal product comprising probiotic micro-organisms, wherein the probiotic micro-organisms were freshly applied to the dried consumable cereal product, and wherein after the application of the fresh probiotic micro-organisms the water activity (Aw) is less than 0.3."

Each claim 1 of auxiliary requests 1, 3 and 4 equally required the water activity after the application of the fresh probiotic micro-organisms to be less than 0.3.

In claim 1 of auxiliary request 2, the wording "after application of the fresh probiotic micro-organisms" had been deleted and the condition for the water activity was now that it had to be less than 0.3 at the beginning of shelf life.

IV. The opposition division's reasoning can be summarized as follows:

Main request and auxiliary requests 1, 3 and 4

The feature "after application of the fresh probiotic micro-organisms the water activity (A_w) is less than 0.3" was not based on the application as filed. The application as filed merely disclosed a water activity of less than 0.3 at the beginning and during shelf life and it was nowhere stated that the water activity at the beginning of the shelf life was the same as after application of the microorganisms. In fact, the water activity could change after application of the microorganisms and before the beginning of the shelf life. This was confirmed by page 15 of the application as filed where it was stated that the food product comprising the microorganisms could be subjected to further treatments, such as exposing it to elevated temperatures or freezing.

Auxiliary request 2

The only condition for the water activity was that it had to be less than 0.3 at the beginning of the shelf life. Contrary thereto, in claim 1 as granted, the relevant point in time was after the

application of the microorganisms. This led to a violation of Article 123(3) EPC. For instance a product having a water activity of 0.6 after application of the microorganisms and an activity of 0.2 at the beginning of its shelf life was encompassed by claim 1 of auxiliary request 2 but not covered by claim 1 as granted.

V. On 13 September 2011, the proprietor (hereinafter: "the appellant") filed an appeal including a main request and eight auxiliary requests, and on the same day paid the prescribed fee. The statement setting out the grounds of appeal was filed on 10 November 2011.

VI. A response was filed by the opponent (hereinafter: "the respondent") with its letter of 22 March 2012 together with:

D18: "Appendix: Water Activity and growth of microorganisms in food".

VII. Further arguments were submitted by the appellant with its letter of 5 July 2012.

VIII. By communication of 12 November 2012, the parties were summoned to oral proceedings and the board's preliminary opinion was issued. As regards the main request, the board addressed the allowability of the definition of the product of claim 1 as a cereal product under Article 123(2) EPC. Furthermore, in the board's preliminary view, claim 1 lacked clarity as regards the conditions during shelf life and the term "beginning of shelf life".

IX. With its letter of 13 May 2013, the appellant submitted a new main request and new auxiliary requests 1 to 7, which replaced the previous auxiliary requests on file. The appellant's submission further contained:

D19: Excerpt from the Internet "Inspections, Compliance, Enforcement, and Criminal Investigations Water (aw) in Foods", 16 April 1984 (printed on 17 April 2013);

and

D20: Declaration of C. Cavadini, signed 3 June 2011.

X. With its letter of 7 June 2013, the respondent requested that the appellant's new claim requests should not be admitted into the proceedings.

XI. On 13 June 2013, oral proceedings were held before the board. During the oral proceedings, the appellant maintained the main request and auxiliary request 1 filed in writing. After the board had indicated its opinion on these requests, the appellant filed a new auxiliary request 2 and withdrew the former auxiliary requests 2 to 7. The respondent requested that the new auxiliary request 2 should not be admitted into the proceedings.

Claim 1 of the main request reads as follows:

"1. A dried consumable product comprising probiotic micro-organisms, wherein the probiotic micro-organisms were freshly applied to the dried consumable product, and wherein after the application of the fresh

probiotic micro-organisms the water activity (Aw) of the consumable product at the beginning and during shelf life is less than 0.3."

Claim 1 of auxiliary request 1 differs from claim 1 of the main request in that the requirement has been added at the end of the claim that *"the product has a packaging to maintain the water activity (Aw) during the shelf life of the consumable product"*.

Claim 1 of auxiliary request 2 reads as follows:

"1. A dried consumable product comprising probiotic micro-organisms, wherein the probiotic micro-organisms were freshly applied to the dried consumable product, and wherein after the application of the fresh probiotic micro-organisms the water activity (Aw) is less than 0.3."

XII. The appellant's arguments can be summarized as follows:

(a) Main request

The main request should be admitted into the proceedings as the deletion of the term "cereal" constituted a reaction to the board's preliminary opinion.

Furthermore, the amendments in claim 1, ie the insertion of the requirement that the water activity had to be less than 0.3 at the beginning and during the shelf life, met the requirements of Article 84 EPC.

Firstly, the starting point of the time period during which the water activity had to be less than 0.3 was clear. More specifically, the beginning of the shelf life was the point in time when the product left the production site and this was some time after the application of the microorganisms. So, in fact, the requirement "at the beginning of shelf life" in claim 1 specified the time at which, after the application of the microorganisms, the water activity had to be less than 0.3. In this respect, the statement made in the letter of 5 July 2012 that the shelf life started prior to the application of the microorganisms was wrong. It was thus clear that the starting point according to claim 1 was the beginning of the shelf life.

Secondly, it was not correct that due to the fact that claim 1 did not specify the conditions during the shelf life, one and the same product could be within or outside the scope of claim 1. More specifically any product not having a water activity after application of the microorganisms at the beginning and during its shelf life of less than 0.3 was outside the scope of claim 1. Furthermore it was clear to the skilled person that the shelf life was the length of time before foods were considered to be unsuitable for sale, use, or consumption. Finally, the argument that one and the same bakery product, when stored during its shelf life by the consumer for some days, could be inside or outside of the scope of claim 1, depending on the air humidity, was not correct either. More specifically, the patent was

not addressing private consumers but food professionals and such persons knew how to store products without changing water activity.

(b) Auxiliary request 1

Auxiliary request 1 should be admitted into the proceedings. The insertion of the packaging feature was an attempt to overcome the clarity objection with regard to the conditions during the shelf life. This auxiliary request therefore constituted a reaction to the board's preliminary opinion.

When the board pointed out the ambiguity in the main request with regard to the starting point of the period during which the water activity had to be less than 0.3, the appellant acknowledged that this problem was not solved by the amendment in auxiliary request 1. No further submissions were made.

(c) Auxiliary request 2

Auxiliary request 2 should be admitted into the proceedings as (a) it differed from the previous main request simply by the deletion of the objected feature "at the beginning and during shelf life" and (b) it essentially corresponded to the claims as granted.

The requirement that the water activity had to be less than 0.3 after the application of the microorganisms was not explicitly disclosed in the

application as filed. Nevertheless, it formed part of the implicit disclosure. More specifically, it was disclosed on page 11, lines 4 to 7 that at the beginning and during the shelf life the water activity was below 0.3. Furthermore, according to page 6, lines 29 to 32, page 7, line 28 to page 8, line 9 and the paragraph bridging pages 12 and 13 of the application as filed, no drying step needed to be applied after the application of the microorganisms. This implied that the same water activity was already present after the application of the microorganisms.

Irrespective of this, the added feature was allowable under Article 123(2) EPC in view of G 1/93 as this feature constituted a mere restriction of the claim without any technical contribution.

XIII. The respondent's arguments can be summarized as follows:

(a) Main request

The main request should not be admitted into the proceedings as it was filed late and broadened the extent of the appeal. More specifically, the main request filed with the statement of grounds of appeal was restricted to a cereal product and this restriction had been deleted in the present main request. When asked by the board, the respondent acknowledged that the deletion of the term "cereal" did not raise any new issues the respondent could not deal with during the oral proceedings.

Apart from the request not being admissible, the insertion of the wording "at the beginning and during shelf life" rendered claim 1 unclear.

Firstly, it was not clear when the time period during which the water activity had to be less than 0.3 started. In view of the wording "wherein after application of the fresh probiotic microorganisms the water activity ...", this could be directly after the application of the microorganisms. It could however equally be at a later point in time, namely at the beginning of the shelf life. In this respect, it was unclear whether shelf life began for example after the product containing the microorganisms had been subjected to further treatment steps or after packaging or, as asserted by the appellant, at an even later point in time when the product left the production site.

Secondly, the shelf life conditions had a strong impact on water activity, as was eg confirmed by D19. As these conditions were not specified in claim 1, a product having initially a water activity as required by the claim could later on, during its shelf life, have an increased water activity outside of the claimed range, for instance due to water absorption. Hence depending on the storage conditions, one and the same product could be inside or outside of the scope of claim 1 (this was further illustrated by the board during the oral proceedings by comparing the example of a bakery product being bought and

stored by a consumer in a country with low air humidity with that bought in a country with high air humidity).

(b) Auxiliary request 1

This request should not be admitted into the proceedings as the new feature of a packaging gave rise to new objections under Article 123(2) EPC and as it still did not fully solve the clarity issue raised with regard to the main request.

(c) Auxiliary request 2

The opposition division had already decided that the feature "a water activity of less than 0.3 after the application of the microorganisms" was not based on the application as filed. Therefore this request should not be admitted into the proceedings. When asked by the board, the respondent's representative acknowledged that he was able to deal with this request during the oral proceedings.

The requirement that the water activity was less than 0.3 after the application of the microorganisms in claim 1 was not based on the application as filed. Firstly, this requirement was not explicitly disclosed in the application as filed. Secondly, contrary to the appellant's assertion, no implicit disclosure was present in the application as filed either. The passages in the application as filed relied upon by the appellant merely disclosed that a high-temperature

treatment and excessive drying had to be avoided after the application of the microorganisms in order not to kill the microorganisms. This did however not imply that no heating at all was carried out after the application of the microorganisms. In fact such a heating step was even explicitly disclosed on page 15, lines 30 to 32 of the application as filed. Consequently, the water activity after the application of the microorganisms could change and therefore did not need to be the same as that at the beginning of the shelf life (which was disclosed in the application as filed to be less than 0.3).

- XIV. The appellant requested that the decision under appeal be set aside and the patent be maintained on the basis of the main request, alternatively on the basis of the first auxiliary request, both as filed with letter of 13 May 2013, alternatively on the basis of the second auxiliary request filed during the oral proceedings on 13 June 2013.
- XV. The respondent requested that the appeal be dismissed.

Reasons for the Decision

1. The appeal is admissible.

Main request

2. *Admissibility*

This request was submitted with letter of the 13 May 2013, ie roughly one month prior to the oral proceedings. The respondent requested that the main request should not be admitted into the proceedings as it was filed late and, due to the deletion of the term "cereal", extended beyond the extent of the appeal.

It is true that compared to the main request submitted with the statement of grounds of appeal, the term "cereal" has been deleted in claims 1 and 10 of the current main request. However, this deletion can be seen as a reaction to the board's preliminary view expressed in the annex to the summons where the allowability of the term "cereal" under Article 123(2) EPC was addressed. As not disputed by the respondent during the oral proceedings, the deletion of this term does not raise any new issues the respondent could not deal with during the oral proceedings.

The board therefore decided to admit the main request into the proceedings (Article 13(3) RPBA).

3. *Amendments - Article 84 EPC*

- 3.1 Claim 1 contains the requirement that "after the application of the fresh probiotic micro-organisms the water activity (Aw) of the consumable product at the beginning and during shelf life is less than 0.3" (for the exact wording of claim 1, see point XI above). As the wording "at the beginning and during shelf life" was inserted into the claim by way of amendment after grant, it has to be examined whether the requirements of Article 84 EPC are met in this respect.
- 3.2 It was a matter of dispute between the parties whether, in view of this insertion, the starting point of the time period during which the water activity has to be less than 0.3 (hereinafter also denoted as "relevant time period") is clear.
- 3.3 The appellant argued in this respect during the oral proceedings that the requirement in claim 1 "after the application of the fresh probiotic microorganisms" referred to some point in time after the application of the microorganisms and that this point in time was further specified in claim 1 to be the beginning of the shelf life. Hence, the starting point of the relevant time period was the beginning of the shelf life.
- 3.3.1 However, firstly, this argument is not supported by the claim language, which requires a water activity of less than 0.3 to be present after, rather than at some point after, the application of the microorganisms.

Secondly, the appellant's argument is in contradiction to its own statement on page 2 of its letter of 5 July 2012, according to which the beginning of the shelf life and hence the start of the relevant time period lies before rather than at some point after the application of the fresh probiotic microorganisms (*"shelf life of the product starts already prior to adding the fresh biomass to the consumable product and it is absolutely clear to a person skilled in the art upon reading the entire description that the point of time of adding fresh microorganisms is after beginning of shelf life ..."*).

Thirdly, if indeed the starting point of the relevant time period was the beginning of the shelf life, the wording "after application of the fresh probiotic microorganisms" in claim 1 would in fact be superfluous and the question would then arise why it is contained in the claim at all.

There is thus at the very least some doubt whether, as argued by the appellant, the starting point "at the beginning of shelf life" is a mere re-statement of the wording "after application of the fresh probiotic microorganisms" or whether claim 1 in fact defines two different starting points for the relevant time period, namely firstly the application of the fresh probiotic microorganisms and secondly the beginning of the shelf life. For this reason alone, the amendment of claim 1 renders the claim unclear.

3.3.2 Even if one disregards the above ambiguity as regards the two possible interpretations of claim 1, claim 1 is still unclear. More specifically, irrespective of which

of the two interpretations is chosen, the starting point for the relevant time period is always the beginning of the shelf life (either as the only starting point or as one of two starting points). But it is not clear at what point in time the shelf life starts. More specifically, it is unclear whether it starts

- directly after the application of the microorganisms,
- after the application of the microorganisms and one or more of the subsequent treatment steps described on page 6, lines 24 to 28 of the opposed patent, namely exposure to ambient or elevated temperature, freezing or aeration with nitrogen or nitrogen and carbon dioxide,
- after the application of the microorganisms, one or more of the above treatment steps and packaging or
- as argued by the appellant, after the product has left the production site.

3.3.3 The amendment of claim 1 thus renders the starting point of the relevant time period unclear.

3.4 The wording inserted into claim 1 by way of amendment after grant defines a further requirement, namely that the water activity is less than 0.3 "during shelf life". Neither claim 1, nor the remaining part of the patent specification contains any information as regards the conditions during the shelf life. However, depending on these conditions, products first having a water activity of less than 0.3, ie as required by claim 1, can readily exhibit higher water activities outside

the range defined in claim 1 later on, for instance due to moisture absorption from the environment. Thus, depending on these conditions during the shelf life, one and the same product may be within or outside the scope of claim 1. This can be illustrated by way of the following example:

An unpackaged bakery product contains probiotic microorganisms and has a water activity of slightly less than 0.3 when sold to a consumer. The consumer keeps the product at home for two days and then, still within the shelf life, eats it.

If this scenario takes place in a country with low air humidity, the bakery product will get drier during the two days at the consumer's home and thus the water activity will further decrease. The water activity will hence stay below 0.3 during the shelf life and the bakery product will be covered by the scope of claim 1. If the same scenario however happens in a country with high air humidity, the bakery product will absorb moisture and the water activity may increase to values above 0.3 before the product is eaten. The bakery product will then not be according to claim 1. So, one and the same bakery product will at the same time be both within and outside of the scope of claim 1.

The appellant argued in this respect that the patent was not addressed to private consumers but to food professionals who would not store bakery products under conditions that lead to an increase of water activity. This argument is however not convincing as claim 1 does not restrict the product in any way in terms of the group of people that uses the product. Furthermore, the

shelf life of a product is not restricted to the time during which the product remains at the point of sale (and thus probably in the hand of food professionals). On the contrary, shelf life is the time during which the product can be consumed and thus embraces the time during which the product is in the hands of a private consumer.

Consequently, in the absence of a definition of the conditions during shelf life, it is not possible to tell whether or not a given product is within the scope of claim 1.

Therefore, also the requirement inserted by way of amendment after grant into claim 1 that during the shelf life, the water activity is less than 0.3, renders claim 1 unclear.

3.5 The main request is therefore not allowable.

Auxiliary request 1

4. *Admissibility*

In the same way as the main request, auxiliary request 1 was filed with the appellant's letter of 13 May 2013.

Claim 1 (and in the same way claim 10) of auxiliary request 1 differs from claim 1 (and claim 10) of the main request in that the requirement has been added at the end of the claim that *"the product has a packaging to maintain the water activity (Aw) during the shelf*

life of the consumable product" (for the exact wording of claim 1, see point XI above).

The respondent requested that auxiliary request 1 should not be admitted into the proceedings as the new feature of a packaging gave rise to new objections under Article 123(2) EPC.

However, the amendment can be considered as a *bona fide* attempt to deal with the board's objection raised in the annex to the summons to oral proceedings that depending on the conditions during the shelf life, one and the same product may fall within or outside of the scope of claim 1 (point 1.1.1 of the annex). More specifically, it can be argued that due to the fact that the product of claim 1 contains a packaging that maintains the water activity, the water activity of the product during its shelf life no longer depends on the shelf life conditions.

Furthermore, as it was not argued by the respondent that it could not deal with the new request at the oral proceedings, the board decided to admit auxiliary request 1 (Article 13(3) RPBA).

5. *Amendments - Article 84 EPC*

- 5.1 Claim 1 still contains the same wording as regards the starting point of the relevant time period as claim 1 of the main request, namely "after application of the fresh probiotic micro-organisms ... at the beginning and during shelf life" (emphasis added). As was acknowledged by the appellant during the oral proceedings, the objection raised in this respect

against the main request therefore still applies (point 3.3 above). Therefore, auxiliary request 1 is not allowable.

Auxiliary request 2

6. *Admissibility*

Auxiliary request 2 was filed during the oral proceedings before the board. This request differs from the main request by the deletion of the objected feature "at the beginning and during shelf life" in independent claims 1 and 10. By way of this deletion, these claims correspond to claims 1 and 12 as granted except that the water activity has been restricted to the preferred alternative of these claims, namely less than 0.3.

The respondent acknowledged during the oral proceedings that it was not confronted with any new issues by the submission of auxiliary request 2. The board therefore decided to admit this request into the proceedings (Article 13(3) RPBA).

7. *Amendments - Article 100(c) EPC*

- 7.1 The only requirement present in claim 1 as regards the water activity of less than 0.3 is that it is present "*after the application of the fresh probiotic micro-organisms*". (for the exact wording of claim 1, see point XI above). Claim 1 in this respect is identical to claim 1 as granted. It was a matter of dispute between the parties whether this feature of claim 1 was

based on the application as filed and thus fulfilled the requirements of Article 100(c) EPC.

7.2 The only explicit disclosure of a water activity of less than 0.3 is present on page 11, lines 4 to 7 of the application as filed where it is stated that the water activity at the beginning and during shelf life has to be smaller than 0.3. As set out in point 3.3.2 above, and as was argued by the appellant during the oral proceedings, the point in time when the shelf life begins can be assumed to be later than the point in time when the microorganisms are applied. The relevant question with regard to Article 100(c) EPC is thus whether there is any disclosure of a water activity of less than 0.3 between the application of microorganisms and the later point in time when the shelf life begins.

7.3 The appellant argued during the oral proceedings that an implicit disclosure was present on page 6, lines 29 to 32 and page 7, line 28 to page 8, line 9 of the application as filed. According to these passages, no drying step needs to be applied after the application of the microorganisms. This implies that the water activity after the application of the microorganisms does not change and is therefore the same as that at the beginning of the shelf life.

The board does not find the appellant's argument convincing. All that the cited passages disclose is that a "*high temperature treatment*" (page 6, lines 30 to 31) and a "*destructive drying process*" (page 7, line 36) can be avoided such that the microorganisms and their metabolites are not killed or destroyed. The cited passages thus only exclude high temperature

destructive drying but not any elevated temperature or any drying process. In fact, as the purpose is to keep the microorganisms and their metabolites alive/undestroyed, it is clear on the basis of these passages that the application of an elevated temperature and/or of a drying process is possible as long as the microorganisms and the metabolites are not killed or destroyed. This is explicitly confirmed by the application as filed on page 15, lines 30 to 32 where it is stated that "*[D]epending on particularities and preferences, the food product now comprising probiotics may be exposed to ambient or elevated temperature, in a way that no substantial loss of cfu is taken into account.*" (emphasis added; "cfu" stands for colony forming units).

The skilled person would thus deduce from the application as filed that after the application of microorganisms and before the beginning of the shelf life, a treatment at elevated temperature is possible, which implies that the water activity may decrease within this time period. This implies in turn that, contrary to the appellant's assertion, the water activity after the application of microorganisms and before the beginning of the shelf life does not necessarily need to be already less than 0.3.

- 7.4 The same applies to the further passage cited by the appellant during the written proceedings, namely the paragraph bridging pages 12 and 13 of the application as filed as, which states that "*[A] high-temperature drying process can be avoided by spraying or otherwise supplying not concentrated or relatively little concentrated biomass to the consumable product, so that*

the water activity of the overall product does not decisively increase". More particularly, in the same way as the passages referred to by the appellant during the oral proceedings (point 7.3 above), this passage only refers to the avoidance of a high temperature drying step and thus does not exclude the application of elevated temperatures.

- 7.5 The appellant finally referred in the written proceedings to decision G 1/93 (OJ 1994, 541) and argued that in view of this decision the added feature that the water activity after the application of the microorganisms had to be less than 0.3 is allowable under Article 123(2) EPC. According to this decision "*[A] feature which has not been disclosed in the application as filed but which has been added to the application during examination and which, without providing a technical contribution to the subject-matter of the claimed invention, merely limits the protection conferred by the patent as granted by excluding protection for part of the subject-matter of the claimed invention as covered by the application as filed, is not to be considered as subject-matter which extends beyond the content of the application as filed in the sense of Article 123(2) EPC.*" (headnote 2, emphasis added).

In the present case, it has been acknowledged by the appellant that the feature added to claim 1, namely a water activity of less than 0.3 after the application of microorganisms, provides a technical contribution. It has in particular been stated by the appellant that "*... a water activity value below 0.3, gives rise to several unforeseen advantages*" and that "*a low water*

activity of the final consumable product ... increases the products shelf life." (Fourth and sixth paragraph on page 24 of the appellant's letter of 13 May 2013). The appellant's argument based on G 1/93 thus must fail.

- 7.6 Consequently, contrary to the appellant's assertion, the application as filed does not provide a basis for the requirement in claim 1 that after the application of the microorganisms the water activity is less than 0.3. Claim 1 of auxiliary request 2 therefore is not based on the application as filed. This request is thus not allowable under Article 100(c) EPC.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

M. Cañueto Carbajo

M. O. Müller