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**Datasheet for the decision
of 24 February 2016**

Case Number: T 1230/13 - 3.2.04

Application Number: 06701684.0

Publication Number: 1843685

IPC: A47J31/40

Language of the proceedings: EN

Title of invention:

METHOD OF PREPARING A NUTRITIONAL COMPOSITION

Applicant:

Nestec S.A.

Headword:

Relevant legal provisions:

EPC Art. 84, 56

Keyword:

Clarity - claim 1 of the main request (yes)
Inventive step - main request (yes)

Decisions cited:

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

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Case Number: T 1230/13 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 24 February 2016

Appellant: Nestec S.A.
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Decision under appeal: **Decision of the Examining Division of the European Patent Office posted on 2 January 2013 refusing European patent application No. 06701684.0 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman E. Frank
Members: J. Wright
C. Heath

Summary of Facts and Submissions

- I. On 27 February 2013 the appellant (applicant) lodged an appeal against the examining division's decision of 2 January 2013 refusing the European patent application No. 06701684.0 and paid the prescribed fee at the same time. The statement of grounds of appeal was received on 13 May 2013.
- II. The examining division held that the subject matter of independent claim 1 filed on 17 May 2011 lacked clarity.
- III. The following documents cited in the search report have been considered for the present decision:
- D3 = US 2002/0127005 A1
D5 = WO 2003/059778 A3
- IV. After a summons to attend oral proceedings and a brief telephone conversation with the rapporteur, the appellant subsequently filed a new main and auxiliary request 1 on 15 February 2016. The oral proceedings were duly held on 24 February 2016. During the oral proceedings, the appellant withdrew its then new main and auxiliary request 1, and a new main request together with a newly adapted description was submitted instead.
- V. The appellant requests that the decision under appeal be set aside and a patent be granted based on the main request as filed during the oral proceedings, and an adapted description.
- VI. The independent claims according to the main request read as follows:

"1. A method of preparing a single serving of a nutritional composition comprising introducing water into a sealed disposable capsule (30) containing a unit dose of the composition in concentrated form so as to reconstitute the concentrated composition and operate opening means (14, 15, 16) contained within the capsule (30) to permit draining of the resulting liquid directly from the capsule (30) into a receiving vessel, wherein the method further includes controlling the temperature at which the water is introduced into the capsule (30) such that the nutritional composition in the receiving vessel is at a temperature between 30 and 40°C, wherein the water is introduced into the capsule (30) in two steps:

- a first amount of from 30 to 50% of the volume of the serving at a temperature between 70 and 80°C and a second amount of the remainder of the volume of the serving at room temperature; or
- a first amount of from 70 to 50% of the volume of the serving at room temperature and a second amount of the remainder of the volume of the serving at a temperature between 70 and 80°C."

"6. A method for the safe and convenient preparation of a liquid nutritional composition comprising inserting a sealed disposable capsule (30) containing a unit dose of the composition in concentrated form into a dispenser (28) which contains a source of water (22), the capsule (30) having means (14, 15, 16) for opening the capsule (30) located within the capsule (30) and an outlet (21) which opens in response to pressure within the capsule (30), placing a drinking vessel underneath the capsule outlet (21), and activating the dispenser (28) to open the sealed capsule (30) and to introduce water into the capsule (30) to mix with the concentrate

and form the liquid nutritional composition, the water being at a pressure sufficient to open the capsule outlet (21) whereby the nutritional composition flows directly from the capsule outlet (21) into the drinking vessel without contacting the dispenser (28), wherein the method further includes controlling the temperature at which the water is introduced into the capsule (30) such that the nutritional composition in the receiving vessel is at a temperature between 30 and 40°C, wherein the water is introduced into the capsule (30) in two steps:

- a first amount of from 30 to 50% of the volume of the serving at a temperature between 70 and 80°C and a second amount of the remainder of the volume of the serving at room temperature; or
- a first amount of from 70 to 50% of the volume of the serving at room temperature and a second amount of the remainder of the volume of the serving at a temperature between 70 and 80°C."

VII. The appellant submitted essentially the following arguments:

Claim 1 clearly teaches that the introduced water causes the opening means within the capsule to function. Thus, the opening means are operable in response to conditions generated in the capsule by the introduction of water. Thus claim 1 of the main request complies with the requirements of Article 84 EPC.

D5 is considered the closest prior art. However, the subject matter of claims 1 and 6 differ from D5's disclosure in that the water temperature is controlled by a two step introduction of water into the capsule at different temperatures. In so doing, a better reconstitution of the nutritional composition is

ensured, in particular in case of powdered compositions contained in the capsule. The objective problem is therefore to increase the efficiency of dissolving infant formula prepared from a capsule. Only the document D3 of the cited prior art documents describes a preferred temperature range, however, without anticipating the mixing of water having two different temperatures, much less by introducing the water in two consecutive steps into the capsule. Thus, claims 1 and 6 of the main request are inventive in view of D5 and D3, and all the other cited prior art.

Reasons for the Decision

1. The appeal is admissible.
2. Amendments
 - 2.1 Claims 1 and 6 of the main request stem from claims 1 and 11 as filed, respectively, and a straightforward combination of the features of claims 5 to 7 as filed. The two step introduction of water of claims 1 and 6 is also derivable from page 6 as filed, last paragraph.

The Board is, therefore, satisfied that the subject matter of claims 1 and 6 of the main request does not extend beyond the content of the application as filed in accordance with Article 123(2) EPC.

- 2.2 Moreover, dependent claims 2 to 5 and 7 to 9 of the main request are based on originally filed claims 2 to 4, 8 and 12 to 14, respectively and, thus, are also not objectionable under Article 123(2) EPC. The description pages 3, 6 and 7 have been adapted accordingly.

3. Clarity of claim 1

3.1 The examining division held that, in order to open the capsule to permit draining of the resulting liquid, viz. concentrated composition mixed with water, an "outlet which opens in response to pressure" is missing from method claim 1. The latter constituted an essential feature of the invention and, thus, claim 1 contravened Article 84 EPC.

3.2 However, claim 1 requires that the method step of introducing water into the sealed capsule operates opening means contained within the capsule to permit draining of the resulting liquid from the capsule. Thus, the skilled person with a mind willing to understand would readily glean from this wording of claim 1 that any opening means may be used, provided that it is the introduced water which causes it to function, that is, to open due to the introduction of water.

3.3 This understanding is also supported by the description. Based on one embodiment, water pressure can serve to press a foil 15 against spikes 16 within the capsule, cf. page 6, lines 1-6, page 7, lines 2-4, and page 8, lines 1-3. Moreover, as also argued by the appellant, various (and simple) other solutions, well known to those skilled in the art, may achieve the capsule's opening from inside, e.g., in response to conditions generated in the capsule by the introduction of water into the capsule, cf. page 5, lines 28-33 of the description as filed.

3.4 Therefore, method claim 1 of the main request is clear and concise and also supported by the description, in accordance with the requirements of Article 84 EPC.

3.5 The above considerations likewise apply to method claim 6 of the main request, which however explicitly requires water pressure to open the capsule outlet.

4. Inventive step

4.1 The figure 7 embodiment of the capsule of document D5 is considered to form the closest prior art by the Board. The described capsule is designed to be extracted under pressure in an extraction device, and contains a substance for the preparation of a food product such as a beverage, cf. D5, abstract. The capsules can contain substances capable of being extracted or dissolved in hot, cold or warm water. Cf. D5, abstract, page 2, lines 12-32. Moreover, D5's inside out opening means contained within the capsule operates as in method claim 1 of the main request, cf. D5, page 15, lines 15-33, and figure 7.

However, D5 does not disclose to control a desired water temperature by introducing water in two steps at different temperatures into the capsule.

4.2 Thus, method claim 1 differs from the disclosure of D5's figure 7 embodiment in that the method further includes controlling the temperature at which the water is introduced into the capsule such that the nutritional composition in the receiving vessel is at a temperature between 30 and 40°C, wherein the water is introduced into the capsule (30) in two steps:
- a first amount of from 30 to 50% of the volume of the serving at a temperature between 70 and 80°C and a second amount of the remainder of the volume of the serving at room temperature; or

- a first amount of from 70 to 50% of the volume of the serving at room temperature and a second amount of the remainder of the volume of the serving at a temperature between 70 and 80°C.

4.3 As argued by the appellant, the introduction of water in two steps contributes to the effect that a powdered nutritional composition is efficiently dissolved, in particular because the second step of the water introduction dissolves any remaining powder, cf. application, page 8, line 37 to page 9, line 3. Thus, a better reconstitution of the nutritional composition is achieved. Moreover, the mixture of hot water with water at room temperature will ensure that a resulting ready to drink infant formula is at a temperature suitable for immediate consumption, cf. application, page 6, last paragraph.

Thus, in the light of D5, the problem to be solved can be seen as how to efficiently improve the preparation of powdered nutritional compositions contained in the capsule in concentrated form.

4.4 To introduce water in two steps at different temperatures into the capsule is nowhere hinted at in the prior art documents cited in the search report. D3 (cf. abstract, and paragraph 0033) does not concern the introduction of water into a capsule, but an apparatus for dispensing water into a baby bottle containing powdered infant formula. Moreover, D3 only refers to a heating element for a consistent temperature of water to be mixed with the powdered infant formula.

4.5 Therefore, starting from the figure 7 embodiment of D5, and faced with the problem of how to improve preparing powdered nutritional compositions contained in the

capsule, the skilled person would not get any suggestions from the known prior art to introduce water in two steps at different temperatures into the capsule, let alone at certain defined temperatures and percentages of volumes of the serving, thus to arrive at the subject matter of claim 1, without hindsight.

Thus, the subject matter of claim 1 of the main request involves an inventive step.

4.6 The aforesaid applies to claim 6 of the main request *mutatis mutandis*. Claims 2 to 4, 5, and 7 to 9 directly or indirectly depend on claims 1 and 6, respectively. Therefore the subject-matter of claims 1 to 9 of the main request complies with the requirements of Article 56 EPC.

5. The Board is moreover satisfied that the other requirements of patentability of the main request are also fulfilled.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the examining division with the order to grant a patent based on the following application documents:

Claims: 1-9 of the main request as filed during the oral proceedings

Description: Pages 1, 2, 4, 5, 8 and 9 as published
Pages 3, 6, and 7 as filed during the oral proceedings

Drawings: Figures 1 and 2 as published.

The Registrar:

The Chairman:



G. Magouliotis

E. Frank

Decision electronically authenticated