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**Datasheet for the decision
of 13 October 2016**

Case Number: T 0174/14 - 3.3.09

Application Number: 02754594.6

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Language of the proceedings: EN

Title of invention:
Bouillon powder

Patent Proprietor:
Nestec S.A.

Opponents:
Unilever N.V. / Unilever PLC

Headword:

Relevant legal provisions:
RPBA Art. 13(1), 13(3)
EPC Art. 84, 123(3), 56

Keyword:

Admission of fresh experimental evidence E8 to E10 (no)
Admission of third auxiliary request filed at the oral
proceedings (yes)
Clarity (yes)
Amendments - extension of protection conferred (no)
Inventive step (yes)

Decisions cited:

G 0003/14, T 0306/14, T 1360/11, T 0287/11

Catchword:



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Case Number: T 0174/14 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 13 October 2016

Appellant:
(Patent Proprietor)

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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted on 20 November
2013 revoking European patent No. 1404188
pursuant to Article 101(3) (b) EPC.**

Composition of the Board:

Chairman W. Sieber
Members: J. Jardón Álvarez
E. Kossonakou

Summary of Facts and Submissions

I. This decision concerns the appeal filed by the proprietor of European patent No. 1 404 188 against the decision of the opposition division to revoke it.

II. With the notice of opposition the joint opponents had requested revocation of the patent in its entirety on the grounds of Article 100(a) (lack of novelty and inventive step) and 100(b) EPC, and had cited *inter alia* the following document:

D6: EP 0 780 058 A1.

III. The opposition division's decision was based on the sole claim request filed with letter of 13 August 2013. Claim 1 read as follows (features deleted from or added to claim 1 as granted struck through and underlined, respectively):

"1. A bouillon and/or seasoning powder, which comprises, in total powder weight %, from 1 to 20% of an oil and possibly fat, ~~up to 95%, preferably from 4 to 95%~~ of a milled filler, and up to 95% of a non milled filler, and, in total oil and fat weight %, up to 40% or preferably up to 30%, even more preferably up to 20% or even up to 10%, and still even more preferably up to only 5% or even up to only 1% fat, as well as optionally spices, flavours, and/or plant extracts;

wherein oil means oil or mixture of oils which is liquid at room temperature and which has a solid fat content (SFC) of less than 5% at 20°C; and

wherein the milled filler is a milled crystalline ingredient and has a mean diameter of from 5 to 80 µm."

IV. The opposition division acknowledged that the claimed invention was sufficiently disclosed, that the subject-matter of claim 1 was clear, fulfilled the requirements of Articles 123(2) and (3) EPC and was novel over the cited prior art. However, it revoked the patent because the subject-matter of claim 1 lacked inventive step starting from D6 as the closest prior-art document. The opposition division saw the problem to be solved in the provision of a seasoning that was both flowable and contained a healthy oil. In its view the mere replacement of an unhealthy ingredient with a healthier one in order to produce a healthier composition could not be seen as involving an inventive step.

V. The patent proprietor (in the following: the appellant) filed an appeal on 17 January 2014. The statement setting out the grounds of appeal was filed on 13 March 2014. It included a main request, an auxiliary request and the following documents:

D16: S. T. Beckett, "Control of Particle Size Reduction During Chocolate Grinding", *The Manufacturing Confectioner*, 1994, pages 90 to 97;

D17: F. Mohos, "Confectionery and Chocolate Engineering: Principles and Applications", Wiley-Blackwell, 2010, Chapter 6, pages 239, 248 and 249;

D18: B. A. Al-Helou, "Modeling and Comparative Study between a 250 and 1000 kg Wiener Machines for Chocolate Softness", *International Journal of Applied Science and Engineering*, 2012, pages 227 to 239; and

D19: Declaration of Mr Angel Máñez, Nestlé Product Technology Centre, York (UK), dated 10 October 2013 (3 pages).

VI. With their reply dated 29 July 2014 the opponents (in the following: the respondents) requested that the appeal be dismissed, and filed the following document:

D20: The Lipid Handbook with CD-ROM, ed. by F.D. Gunstone *et al.*, Third Edition, CRC Press, 2007, pages 308 to 311.

VII. In a communication dated 26 April 2016 the board indicated the points to be discussed during the oral proceedings.

VIII. In their submission of 15 September 2016, the respondents raised for the first time in appeal various fresh issues, including objections under Article 123(3) EPC. The following further documents and experimental evidence were also filed:

D21: Bouillon cubes with oil; taken from "The Mintel Global New Products Database" (GNPD) dated 1998 and 2000 (two pages);

D22: Four documents originating from different sources and cited as "Common General Knowledge" (10 pages);

E8: Experimental report filed by Unilever (the respondents) with letter of 1 November 2013 in the related opposition/appeal against EP 1 401 295, T 0306/14;

E9: Experimental report filed by Nestlé (the appellant) with the statement of grounds of appeal

in the related opposition/appeal against
EP 1 401 295, T 0306/14; and

E10: Experimental report T. Blijdenstein *et al.*, dated
14 September 2016 (13 pages) filed by Unilever with
letter of 16 September 2016 in the related
opposition/appeal against EP 1 401 295, T 0306/14.

IX. By letter dated 6 October 2016 the appellant filed
first, second and third auxiliary requests to deal with
the new objections under Article 123(3) EPC.

X. During the oral proceedings held on 13 October 2016 the
appellant filed an amended third auxiliary request,
consisting of seven claims, which ultimately became its
sole request. Independent claims 1 and 5 read as
follows:

"1. A bouillon and/or seasoning powder, which
comprises, in total powder weight %, from 1 to 20% of
an oil and possibly fat, from 4 to 95% of a milled
filler, and up to 95% of a non milled filler, and, in
total oil and fat weight %, up to 40% or preferably up
to 30%, even more preferably up to 20% or even up
to 10%, and still even more preferably up to only 5% or
even up to only 1% fat, as well as optionally spices,
flavours, and/or plant extracts;
wherein the milled filler is a milled crystalline
ingredient and has a mean diameter of from 5 to 80 μm ;
wherein the total amount of milled filler is up
to 95%."

"5. A process for the production of a bouillon and/or
seasoning powder, which consists of preparing a premix
of powdered constituents comprising, in total powder
weight %, from 4 to 95% of a milled filler, up to 95%

of a non milled filler, and optionally spices, flavours, and/or plant extracts, and atomising an emulsion comprising, in total powder weight %, from 1 to 20% of an oil and possibly fat and up to 10%, preferably up to 8% and more preferably up to 4% of water onto the dry premix while further mixing, wherein, in total oil and fat weight %, up to 40% or preferably up to 30%, even more preferably up to 20% or even up to 10%, and still even more preferably up to only 5% or even up to only 1% fat are added to the dry premix and/or the emulsion; wherein the milled filler is a milled crystalline ingredient and has a mean diameter of from 5 to 80 µm; wherein the total amount of milled filler is up to 95%."

Claims 2 to 4, 6 and 7 are dependent claims.

XI. The relevant arguments of the appellant may be summarised as follows:

- E8 to E10 should not be admitted into the proceedings. They had been filed only just before the oral proceedings, without giving it time to analyse the experiments.
- The third auxiliary request should be admitted into the proceedings as it was a reaction to objections raised for the first time by the respondents in their submission of 15 September 2016.
- The claimed subject-matter was clear. The expressions "milled filler" and "non milled filler" were present in granted claim 1 and could not be discussed under Article 84 EPC in opposition proceedings. The milled crystalline ingredient was

defined by the mean diameter, that is to say, mathematically, and was entirely clear for the skilled person. In any case, the claim was directed to a bouillon and/or seasoning powder and the mean diameter could be determined in the obtained powder by the skilled person.

- The amendment "wherein the total amount of milled filler is up to 95%" had been made to overcome the Article 123(3) EPC objection and it was analogous to the amendments allowed in decisions T 0287/11 and T 1360/11. It was also clear, as it established a double condition ensuring that the total amount of milled filler was not over 95%, as in the granted claims.

- Starting from D6 as closest prior art, the appellant saw the technical problem to be solved by the invention as to provide a bouillon or seasoning powder which in its composition had basically solid fat replaced by liquid oil and which was still a free-flowing powder. The claimed solution using a liquid oil was not obvious in view of D6. Actually, there was no teaching in D6 that a liquid oil could be used to replace the solid or hardened fat and oil mixture in the making of a seasoning powder. On the contrary, D6 taught that such a mixture would be a paste, not a powder, and hence D6 taught away from considering using a liquid oil.

XII. The arguments of the respondents, insofar as they are relevant for the present decision, may be summarised as follows:

- E8 to E10 should be admitted into the proceedings. E8 and E9 were already known to the appellant from

the related appeal case T 0306/14, and E10 further supported the argument that the problem was not solved over the whole scope of the claims.

- The third auxiliary request should not be admitted into the proceedings because it had been filed too late, was not clear (Article 84 EPC) and did not fulfil the requirements of Article 123(3) EPC.
- The subject-matter of the claims was not clear. The wording "milled filler", "non milled filler" and "milled crystalline ingredient" were unclear because according to the specification the milled ingredients did not need to have been milled at all and the non-milled filler could have been milled. Apart from that, the expression "milled filler" in claim 1 had two different meanings and the "mean diameter" was an unclear "pseudo-product feature" as it was lost in the final powder.
- The introduction of the particle size range in claim 1 extended the scope of the granted claims, which now embraced embodiments not covered by the granted claims.
- The subject-matter of claim 1 was obvious in view of D6 alone or combined with common general knowledge. The objective technical problem was to provide a more healthy product and it would be obvious for the skilled person to increase the amount of oil to provide such a product. D6 itself gave a hint by using products with different amounts of oil; in any case, to increase the oil amount to provide a healthy product was within the common general knowledge of the skilled person. Additionally, the claims lacked inventive step also

because the technical problem was not solved over the whole scope of the claims. The experimental evidence supplied showed that over a considerable range of the claimed scope the oil/fat was not absorbed and the bouillon powder was sticky, oily and lumpy and not free-flowing.

XIII. The appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of claims 1 to 7 of the third auxiliary request filed on 13 October 2016 during the oral proceedings.

The respondents requested that the appeal be dismissed.

Reasons for the Decision

1. *Procedural matters*

1.1 With letter of 15 September 2016, that is to say less than one month before the oral proceedings, the respondents filed a 24-page submission including:

- new objections not raised before in appeal proceedings,
- two new documents, namely D21 and D22, each document being a bundle of several citations; and
- three new experimental reports, E8 to E10.

1.2 As to the reasons for the late filing of this submission, the respondents stated that the new attacks were a reaction to the communication of the board. Only after reading the communication of the board summarising the points to be discussed during the oral proceedings did they realise that their position on various points was apparently not entirely understood

by the board and that their objections in their reply to the grounds of appeal were incomplete.

Concerning the experimental reports, the respondents stated that E8 and E9 were already known to the appellant from the related appeal case T 0306/14 and that E10 was presented in support of the objection that the technical problem was not solved over the whole scope of the claim.

1.3 The appellant requested that E8 to E10 not be admitted into the appeal proceedings. In particular E10 related to new experimental evidence and had been received by the appellant only two weeks before the oral proceedings. There had been no time left to discuss the new evidence with the technical department in order to properly react to the new situation.

1.4 Admission of E8 to E10

1.4.1 Experimental reports E8 to E10 were filed by the respondents in support of a new inventive-step attack, namely that the claims were so broadly phrased that the problem was not solved over the whole scope claimed. This attack was presented for the first time after oral proceedings had been arranged by the board, and shortly before the scheduled oral proceedings.

1.4.2 Article 13(3) RPBA provides that if amendments to a party's case are made after oral proceedings have been arranged, then they will be admitted only if the board and the parties can reasonably be expected to deal with them at the oral proceedings.

1.4.3 In this case the board accepts that the appellant could not properly take a position on the new issue

without prior consultation with a technical expert, let alone provide experiments of his own.

1.4.4 Since said fresh experimental reports, in particular E10, raised issues that could not be dealt with without adjourning the oral proceedings, the board decided not to admit them into the proceedings.

1.5 Admission of the third auxiliary request filed at the oral proceedings

1.5.1 This request was filed during the oral proceedings in direct reaction to some of the respondents' late-filed objections and the board's subsequent finding that the subject-matter of claim 1 of the then pending main and first auxiliary requests lacked clarity and infringed Article 123(3) EPC.

1.5.2 Thus, given that all these objections were raised for the first time by the respondents in their letter of 15 September 2016 (see point 1.1 above) and/or emerged during the further discussion at the oral proceedings, it was a matter of procedural fairness to allow the appellant to file a new request to address the new developments. Since, furthermore, the third auxiliary request did not give rise to new questions which could not be dealt with during the oral proceedings, the board exercised its discretion under Article 13(1) RPBA and decided to admit it into the appeal proceedings.

Nor is the deletion of a feature which had been added to the claim during the opposition proceedings ("wherein oil means oil or mixture of oils which is liquid at room temperature and which has a solid fat content (SFC) of less than 5% at 20°C") any bar to the board exercising its discretion in favour of the

appellant. This feature had never been objected to before, and its deletion appeared to be the most straightforward solution to overcome the new objections.

THIRD AUXILIARY REQUEST (sole request)

2. *Amendments*

2.1 Claim 1 of this request, with a feature analysis added by the board, reads (features deleted from or added to claim 1 as granted struck through and in bold, respectively):

A bouillon and/or seasoning powder, which comprises, in total powder weight %,

(i) from 1 to 20% of an oil and possibly fat,

(ii) ~~up to 95%, preferably~~ from 4 to 95% of a milled filler, and

(iii) up to 95% of a non milled filler, and,

(iv) in total oil and fat weight %, up to 40% or preferably up to 30%, even more preferably up to 20% or even up to 10%, and still even more preferably up to only 5% or even up to only 1% fat, as well as

(v) optionally spices, flavours, and/or plant extracts-;

(vi) **wherein the milled filler is a milled crystalline ingredient and has a mean diameter of from 5 to 80 μm ;**

(vii) **wherein the total amount of milled filler is up to 95%.**

2.2 The respondents maintained that the amendments made to the claim gave rise to objections under Articles 84 and 123(3) EPC.

3. *Amendments (clarity, Article 84 EPC)*

3.1 The respondents objected to the clarity of claim 1 for several reasons, namely that:

(a) the terms "milled filler" in feature (ii) and "non milled filler" in feature (iii) had the same meaning because a milled filler did not necessarily have to be milled, as was apparent from paragraph [0017] of the patent;

(b) for the same reasons, the term "milled crystalline ingredient" in feature (vi) was unclear; it also covered non milled crystalline ingredients;

(c) the term "milled filler" used in claim 1 had two different meanings, namely a broader one in features (ii) and (vii) and a more specific one in feature (vi); and

(d) the mean diameter was a "pseudo-product feature" that introduced a lack of clarity; this feature was irrevocably lost in the end product after the milled filler and the unmilled filler had been mixed, especially if the milled filler and the unmilled filler were of the same chemical nature.

3.2 Concerning (a) it is noted that the terms "milled filler" and "non milled filler" formed part of claim 1 as granted. Taking into account that in G 0003/14 it was decided that:

"the claims of the patent may be examined for compliance with the requirements of Article 84 EPC only when, and then only to the extent that, the amendment

introduces non-compliance with Article 84 EPC" (see order),

the above terms cannot be examined under Article 84 EPC at this stage of the proceedings.

- 3.2.1 Notwithstanding the above, it is necessary for the board to establish the meaning of these terms in order to arrive at a technically meaningful interpretation of the claim.

According to paragraph [0017] of the specification the expression "milled filler" means:

"a powdered filler which has been milled to an especially fine granulometry or which has an especially fine granulometry";

and according to paragraph [0018] the expression "non milled filler" means:

"a powdered filler which has not been milled to an especially fine granulometry or which does not have an especially fine granulometry".

- 3.2.2 Thus, according to paragraphs [0017] and [0018] the broadest definition for "milled filler" is simply a powdered filler having an especially fine granulometry. Thus, in contrast to its literal meaning, a "milled filler" does not have to be milled at all. Similarly, the broadest definition for "non milled filler" is a powdered filler which does not have such an especially fine granulometry. In other words, a non-milled filler is simply coarser than the milled filler.

Summing up, a "milled filler" is an ingredient with a finer granulometry than a "non milled filler", regardless of whether it has actually been subjected to a milling step. At the same time, a non-milled filler includes, despite its literal meaning, embodiments which have been milled, provided they have a coarser granulometry than the milled filler.

- 3.3 Concerning (b), feature (vi) has been introduced into claim 1 and further specifies that the milled filler **is** a milled crystalline ingredient and has a mean diameter of from 5 to 80 μm . Thus, via the cascade-like formulation in claim 1, it is now mandatory that the milled filler is a crystalline ingredient and has a specific fine granulometry from 5 to 80 μm . Bearing in mind that the non-milled filler was defined as not having the especially fine granulometry of the milled filler, the skilled reader would understand that the non-milled filler in amended claim 1 would still have a coarser granulometry than the milled filler, i.e. a mean diameter above 80 μm .

It is worth mentioning that even the more specifically defined "milled filler" still embraces crystalline ingredients which have not been milled; the actual limiting feature in this regard is the specified granulometry of "from 5 to 80 μm ".

- 3.4 Concerning (c), the board cannot follow the respondents' objection. As already said, the claim defines the presence of the milled filler in a cascade-like manner. Feature (ii) requires that the bouillon and/or seasoning powder contains a component - defined rather broadly in functional terms as a milled filler - in amounts of from 4 to 95%, in total powder weight. Feature (vi) further requires that the milled filler **is**

a milled crystalline ingredient and **has** a mean diameter of from 5 to 80 μm . The skilled reader would understand from such a claim construction that the only milled filler which can be present in the claimed bouillon and/or seasoning powder is a crystalline ingredient having the specified granulometry in the amounts indicated in feature (ii). Other milled fillers which fulfil the broader functional definition of feature (ii) can no longer be present, due to further requirement (vi). In other words, the only milled filler that can be present in the bouillon and/or seasoning powder is a milled crystalline ingredient that has a mean diameter of 5 to 80 μm and which are present in the amount specified in feature (ii).

The respondents argued in relation to Article 123(3) EPC that such a claim would encompass a powder with 95% of milled crystalline filler with a mean diameter of 5 to 80 μm and 1% of a milled non-crystalline filler like milled maltodextrin, a constellation which was excluded from claim 1 as granted. Although a proper reading of the claim as set out above excludes the respondents' example, the appellant nevertheless inserted feature (vii), i.e. "wherein the total amount of milled filler is up to 95%", to overcome this objection. The board sees no clarity problem arising from this amendment, because it (maybe unnecessarily) repeats what feature (ii) already requires, namely that components which qualify as a milled filler can only be present in an amount up to 95%.

3.5 Lastly, the board disagrees with the respondents that the mean diameter is a "pseudo-product feature" that is lost after mixing the ingredients. This feature can indeed be determined in the final product, as

maintained by the appellant during the oral proceedings and no longer disputed by the respondents.

- 3.5.1 This objection is essentially based on situations in which one and the same ingredient, for instance salt, glutamate and/or sugar, is used as the milled filler, but in fractions with different particle sizes. The respondents' main concern in this respect was the purported difficulty for a skilled person trying to prepare a bouillon and/or seasoning powder outside the scope of the claim. In this context, the respondents gave the following example:

Starting with two fractions of the same crystalline ingredient differing only in their particle size, namely

- 3% with a mean diameter of 4 μm , and
- 3% with a mean diameter of 100 μm ,

one would arrive at a bouillon and/or seasoning powder as claimed with 6% of a crystalline ingredient having a mean diameter within the claimed range, without ever having used a fraction having the required granulometry.

- 3.5.2 There is, however, no lack of clarity in the claim in this respect. The claim is directed to a bouillon and/or seasoning powder *per se*, not to a method for its preparation. Therefore, what matters is the particle size in the product and not in the "starting" materials. In the respondents' example, the particle size distribution of the two initial, chemically identical fractions will be lost, and a new "overall" particle size distribution will emerge in the product.

Thus, a skilled person aiming to work outside the scope of the claim cannot work outside its scope merely by using two separate "starting" fractions, because they would result, when mixed, in an embodiment as claimed.

- 3.5.3 In this context the board can also not accept the argument that the final product "theoretically" contains two fractions of milled filler not covered by claim 1. As indicated above, due to the identical chemical nature of the particles of the milled filler a "new" mean diameter will be formed upon mixing the fractions.

In other words, a skilled person cannot circumvent the claim by dividing a given ingredient, falling within the scope of the claim, into two different fractions, both outside the scope of the claim, because the product obtained in both cases is the same, namely a product falling within the scope of the claim.

- 3.5.4 Similar considerations apply to the other hypothetical bouillon powders suggested by the respondents during the oral proceedings, using "10% salt with a mean diameter of 10 microns and 10% salt with a mean diameter of 200 microns" or "3.5% of salt with a mean diameter below 80 microns and 1% salt with a mean diameter above 80 microns". In every case the skilled person knows whether or not he is preparing a bouillon powder as claimed, either by analysing the final bouillon powder or by calculating the mean diameter that will be achieved by the starting materials in the bouillon product.

- 3.6 For these reasons the subject-matter of claim 1 fulfils the requirements of Article 84 EPC.

4. *Amendments (extension of protection, Article 123(3) EPC)*

4.1 As set out in point 3.4 above, the respondents argued that the introduction of the particle size range of the milled filler (feature (vi)) extended the scope of the granted claims (Article 123(3) EPC). For instance, amended claim 1 would encompass a bouillon powder with 95% of milled crystalline filler having a mean diameter of from 5 to 80 μm and 1% of a milled non-crystalline filler like milled maltodextrin, i.e. an embodiment not covered by the granted claims wherein the total maximum amount of milled filler was limited to 95%.

However, as stated in point 3.4 above a proper reading of the amended claim excludes the respondents' example.

4.2 Furthermore, the respondents ignore the further amendment to the claim made by the appellant to overcome this objection, namely feature (vii) which requires that the total amount of milled filler is up to 95%.

As in decisions T 0287/11 and T 1360/11 cited by the appellant, the added feature ensures that, as in granted claim 1, the total amount of milled filler in amended claim 1 does not exceed 95%.

4.3 Thus, the board concludes that the scope of protection conferred by claim 1, and by the same token that of independent claim 5 which has been amended in the same way, has not been extended over the scope of the granted claims. The requirement of Article 123(3) EPC is satisfied.

5. *Novelty*

5.1 The respondents contested in their reply to the grounds of appeal the novelty of the subject-matter of claim 1 of the then pending main request in view of the disclosure of D6, but they stated during the oral proceedings that they had no novelty objections against claim 1 of the third auxiliary request.

5.2 The board saw no reason to raise an objection of its own motion.

6. *Inventive step*

6.1 The patent relates to a bouillon powder and to a process for its production. It aims to provide a powder which only or mainly contains oil and no or only little fat besides non-fat conventional bouillon ingredients (see [0006]). In particular, claim 1 is directed to a bouillon and/or seasoning powder comprising:

[in total powder weight%]

- from 1 to 20% of an oil and possibly fat,
 - from 4 to 95% of a milled filler, and
 - up to 95% of a non-milled filler, and
 - up to 40% fat [in total oil and fat weight%],
- as well as
- optionally spices, flavours, and/or plant extracts;
 - wherein the milled filler is a milled crystalline ingredient and has a mean diameter of from 5 to 80 μm ; and
 - wherein the total amount of milled filler is up to 95%.

6.2 Closest prior art

6.2.1 The board agrees with the parties that D6 represents the closest prior-art document. It discloses a process for producing a powdered, fat-containing product, the process comprising mixing at least one crystalline food ingredient and a fat to provide a paste, and milling the paste to reduce the size of the crystals of the crystalline ingredient and to coat the crystals with the fat, the milling continuing until a flowable powder forms (claim 1).

6.2.2 The crystalline ingredient may be salt, monosodium glutamate or sugar (see page 2, lines 49 to 51). Preferably, the fat used includes a large proportion of a fat with a high melting point, and conventionally solid at room temperature (see page 2, lines 53 to 54). The fats used in the process may be any suitable ones (see page 3, lines 19 to 26).

6.2.3 The fat mixture chosen is conveniently such that the fat is solid at room temperature (see page 3, lines 29 to 30). In examples 1 to 3 a fat mixture comprising about 80% by weight of hydrogenated palm oil fat and about 20% by weight peanut oil is used, and in example 4 the same mixture is used but in a ratio of 60% to 40% by weight.

6.3 Problem to be solved and its solution

6.3.1 According to the appellant, the technical problem underlying the patent in view of D6 is the provision of an alternative bouillon and/or seasoning powder which in its composition has basically solid fat replaced by liquid oil, and which is still a free-flowing powder

and not a paste (see also paragraph [0006] of the patent).

- 6.3.2 As a solution to this problem the patent proposes the bouillon powder of claim 1, including a crystalline ingredient having a mean diameter of from 5 to 80 μm . By using this crystalline filler it is possible to prepare a bouillon powder having up to 20% oil and no or only little entrapped hardened fat (see paragraph [0019]).
- 6.3.3 The example in the patent shows that this problem is credibly solved by the measures taken. In example 1 a granulated herb bouillon powder was produced containing only olive oil and no fat besides the non-fat ingredients (see paragraphs [0046] to [0056]).
- 6.3.4 Shortly before the oral proceedings, the respondents argued for the first time in appeal proceedings that the claims were so broad that the problem could not have been credibly solved over the whole scope claimed. In this context they relied on newly filed experimental reports E8 to E10.
- 6.3.5 Since, however, E8 to E10 have not been admitted into the proceedings (see point 1.4 above), they could not be taken into account when discussing whether or not the problem has been solved.
- 6.3.6 Thus, in view of working example 1 in the patent and in the absence of validly filed evidence to the contrary, the board is satisfied that the above problem has been credibly solved by the measures taken.

6.4 Obviousness

6.4.1 It remains to be decided whether, in view of the available prior art, it would have been obvious for the skilled person to solve the technical problem, as defined above, by the means claimed.

6.4.2 D6 itself does not give any hint to the claimed solution. On the contrary, the presence of fat in solid, crystal form is an essential element of the seasoning powder composition. D6 addresses the stability and distribution of the solid fat in the powder by providing a new process for coating other crystalline ingredients present in the powder with that fat.

Thus, D6 states on page 2, lines 53 to 54: "Preferably the fat used includes a major proportion of a fat with a high melting point. In this way, the fat is conveniently solid at room temperature". The examples of oils and fats to be used on page 3, lines 19 to 26, state that such suitable fats are usually hydrogenated or fractionated fats or oils. It is well known in the art that hydrogenation of a liquid oil, e.g. a vegetable oil such as sunflower oil or olive oil, hardens and solidifies it. Hence, the oil is no longer liquid at room temperature.

In examples 1 to 3 in D6, a fat mixture of 80% by weight hydrogenated palm oil fat and 20% by weight peanut oil is used; in example 4 a fat mixture of 60% by weight hydrogenated palm oil fat and 40% by weight peanut oil is used. The fat mixture is in all cases solid at room temperature (cf. page 4, line 43 wherein it is stated that: "The fat mixture is then melted").

6.4.3 The board cannot accept the argument of the respondents that the claimed subject-matter lacks inventive step in view of D6 alone, because it would have been obvious for the skilled person to increase the amount of healthy oil from 40% (in example 4 of D6) to at least 60% as now claimed.

In the board's view, this attack is based on hindsight. It ignores the clear teaching of D6 discussed in 6.4.2 above that a solid fat is the key feature for the preparation of the powders of D6. The constant teaching of D6 is to use a fat mixture that is solid at room temperature, and there is no room in D6 for using a liquid oil as starting material for the preparation of the powder. If anything, the skilled person would tend to replace the solid non-healthy fat with a solid healthy fat but not with a liquid oil.

6.5 For these reasons, the subject-matter of claim 1 involves an inventive step. This conclusion also applies to the process for the production of the bouillon and/or seasoning powder of claim 1 according to independent claim 5 and, for the same reasons, to the preferred embodiments defined in dependent claims 2 to 4, 6 and 7.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division with the order to maintain the patent in amended form on the basis of claims 1 to 7 filed as third auxiliary request in the oral proceedings before the board, after any necessary consequential amendment of the description.

The Registrar:

The Chairman:



M. Cañueto Carbajo

W. Sieber

Decision electronically authenticated