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**Datasheet for the decision
of 9 January 2019**

Case Number: T 0922/15 - 3.3.09

Application Number: 08774413.2

Publication Number: 2178384

IPC: A23C9/137, A23C9/133

Language of the proceedings: EN

Title of invention:

NOVEL FUNCTIONAL FOOD PRODUCT CONTAINING A SPECIFIC FIBRE
MIXTURE

Patent Proprietor:

Compagnie Gervais Danone

Opponent:

Fresenius Kabi Deutschland GmbH

Headword:

Relevant legal provisions:

EPC Art. 100(c), 123(2)

EPC R. 115(2)

RPBA Art. 15(3)

Keyword:

Amendments (Main request and auxiliary requests 1-3) - Added
subject-matter (yes)
Oral proceedings - Continuation in the absence of duly
summoned party

Decisions cited:

T 0341/92, T 0802/12, T 0568/00, T 1798/09

Catchword:



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Case Number: T 0922/15 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 9 January 2019

Appellant: Fresenius Kabi Deutschland GmbH
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Respondent: Compagnie Gervais Danone
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 5 March 2015
rejecting the opposition filed against European
patent No. 2178384 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman W. Sieber
Members: A. Veronese
E. Kossonakou

Summary of Facts and Submissions

- I. The appeal is directed against the decision of the opposition division rejecting the opposition filed against European patent No. EP 2 178 384.
- II. By its notice of opposition the opponent had requested the revocation of the patent in its entirety on the grounds under Article 100(a) EPC (lack of novelty and lack of inventive step), Article 100(b) and 100(c) EPC.
- III. Claims 1, 21 and 22 of the granted patent read as follows:

*"1. Stable, fluid or semi-fluid food product having a dry extract of less than 30 weight % compared with the total weight of the product, advantageously less than 20 weight %, containing between 1 and 24 weight % fibres relative to the total weight of the food product, **characterized in that** the fibres consist of a mixture of:*

A) 0.4 to 5 weight %, relative to the total weight of the product, of viscosifying hydrosoluble polysaccharide fibres.

B) 0.8 to 20 weight %, relative to the total weight of the product, of non-viscosifying hydrosoluble fibres, having a mean molar mass of between $3 \cdot 10^5$ and $3 \cdot 10^6$ g/mol and an intrinsic viscosity in aqueous solution of less than 0.3 dl/g.

C) 0.04 to 0.6 weight %, relative to the total weight of the product, of non-hydrosoluble cellulose fibres".

"21. Food or product according to any of claims 1 to 14 for its use as medicinal product".

IV. "22. Food product according to claim 21 for its use as satiating food to increase the feeling of gastric fullness, to delay the onset of feelings of hunger and/or to manage a person's body weight and/or as functional food reducing an individual's circulating blood cholesterol and delaying glycaemic and insulinaemic responses of such individual after a meal, and thereby preventing the onset of symptoms of metabolic syndrome and/or as functional food reducing the level of an individual's circulating blood cholesterol and preventing the onset of symptoms related to cardiovascular disorders".

V. The documents submitted during the opposition proceedings included, among others:

D1: US 5,126,143

D3: US 2006/0093720 A1

D12: Anonymous: "CNI Announces the Market Launch of the First Nutritional Texturizer: EQUACIA(TM)", NewHope360.com, 14 March 2007, Retrieved from the Internet: URL:<http://newhope360.com/managing-your-business/cni-announces-market-launch-first-nutritional-texturizer-equaciatm>

D13: US 5,545,411 (CHANCELLOR CINDY L [US]) 13 August 1996

VI. The **decision** of the **opposition division** can be summarised as follows.

Claim 22 of the granted patent defined a food as a medicinal product for use as a "satiating food to increase the feeling of gastric fullness, to delay the onset of feelings of hunger and/or to manage a person's body weight". Although the application as filed (pages

24-25, claim 21) disclosed these uses as non-therapeutic, claim 22 did not introduce new subject-matter because the mechanism underlying the alleged effect remained unchanged, irrespectively of its qualification.

The claimed invention was sufficiently disclosed, despite possible difficulties in measuring the mean molar mass or the viscosity of the claimed fibres. The alleged therapeutic uses were plausibly achieved.

The claimed subject-matter was novel over D1 and D3, which did not disclose compositions comprising the fibres specified in the claims. It also involved an inventive step over the teaching of the closest prior art D13, which disclosed a food differing from the claimed one in the nature and amount of fibres. Starting from D13 the underlying problem was the preparation of a food providing fibres to the consumer with better stability. Neither D13 alone nor D13 in combination with D12 hinted at the claimed composition and at the possibility of developing a food which, as the claimed one did, increased viscosity during digestion.

- VII. The opponent ("the appellant") filed an appeal against the decision and requested that the patent be revoked in its entirety.

- VIII. By letter dated 13 November 2015 the proprietor ("the respondent") requested that the appeal be dismissed or, alternatively, that the patent be maintained on the basis of one of auxiliary requests 1-3 filed with that letter.

IX. Claim 8 of auxiliary request 1 reads as follows:

"8. Food product according to claims 6 or 7, characterised in that it is a fresh diary product with fruit and that the weight content of each of the fibres, relative to the total weight of the product, is as follows:

A1) 0.4 to 2 weight % viscosifying hydrosoluble polysaccharide fibres,

B1) 0.8 to 8% non-viscosifying hydrosoluble polysaccharide fibres, and

C1) 0.09 to 0.25% non-hydrosoluble cellulose fibres".

Claim 7 of auxiliary request 2 and claim 8 of auxiliary request 3 define the same food product as claim 8 of auxiliary request 1.

X. In a communication issued in preparation for the oral proceedings, the board drew the parties' attention to the points to be discussed. The board expressed, *inter alia*, the preliminary opinion that claim 22 of the main request introduced new subject-matter extending beyond the teaching of the application as filed. Furthermore, it noted that, when filing the auxiliary requests, the respondent had neither indicated the basis for the amendments nor provided reasons as to how such amendments could overcome the objections raised by the appellant.

XI. By letter of 5 December 2018, the respondent informed the board that it would neither attend nor be represented at the oral proceedings.

XII. On 9 January 2019, oral proceedings took place before the board in the absence of the respondent, in accordance with Rule 115(2) EPC and Article 15(3) RPBA.

At the end of the debate the chairman announced the decision.

XIII. The appellant's arguments, where relevant for the decision, may be summarised as follows.

In view of its back-reference to claim 21, reading "...for its use as medicinal product", claim 22 as granted qualified the uses of "satiating food to increase the feeling of gastric fullness, to delay the onset of feelings of hunger and/or to manage a person's body weight" as therapeutic. Since these uses were defined in the application as filed as non-therapeutic, claim 22 introduced new subject-matter extending beyond the content of the application as filed.

Claim 8 of auxiliary request 1 defined a food which contained non-hydrosoluble cellulose fibres (ingredient C1) in an amount of from 0.09 to 0.25% by weight. Conversely, the amount of non-hydrosoluble cellulose fibres present in the corresponding food disclosed in the application as filed was from 0.04 to 0.25 % by weight. Thus, claim 8 introduced new subject-matter extending beyond the content of the application as filed. Auxiliary requests 2 and 3 contained a corresponding dependent claim to a food product where the lower limit of ingredient C1 had been amended to 0.09 % by weight. Thus, these requests also contained added subject-matter.

XIV. The respondent's arguments, where relevant for the decision, may be summarised as follows.

Claim 21 and the paragraph bridging pages 24 and 25 of the application as originally filed provided a basis for claim 22 of the granted patent.

These parts of the original application disclosed the food of the invention for use in order "to increase the feeling of gastric fullness, to delay the onset of feelings of hunger and/or to manage a person's body weight".

Although these uses were qualified as non-therapeutic in the application as filed, re-labelling them as therapeutic did not change the technical teaching of the invention. The uses remained in effect the same. The amendments made in the course of the proceedings aimed to avoid an objection under Article 53c EPC and were legal, rather than technical in nature.

Thus, claim 22 did not introduce new, originally undisclosed, subject-matter.

Reasons for the Decision

Main request (patent as granted)

1. *Added matter*

- 1.1 Claim 21 of the granted patent is directed to a food for use as a medicinal product. Thus, due to its dependence on claim 21, claim 22 relates to a medicinal food for use as "*satiating food to increase the feeling of gastric fullness, to delay the onset of feelings of hunger and/or to manage a person's body weight*". Since said food has medicinal properties, the specified uses are carried out in a therapeutic context, in a subject needing a therapeutic treatment.

1.2 However, the same uses were explicitly disclosed in claim 21 and in the paragraph bridging pages 24 and 25 of the application as filed as being non-therapeutic. These parts of the application, which are the only ones disclosing the aforementioned uses, indeed explicitly teach that the invention relates to:

"...the non-therapeutic use of the food product according to the invention as satiating food to increase the sensation of gastric fullness, to delay the onset of feelings of hunger and/or to manage a person's body weight" (paragraph bridging pages 24 and 25, with emphasis added).

1.3 By qualifying the originally disclosed non-therapeutic uses as therapeutic ones, the nature of the invention has changed. The question of whether a treatment is therapeutic or non-therapeutic is in fact not only a matter of semantics and legal interpretation, as submitted by the respondent. Rather, it has a technical impact on the disclosure of the invention. Carrying out a therapeutic method typically requires a deliberate selection of a specific population of non-healthy subjects. This is not the case when a non-therapeutic method is carried out.

1.4 For these reasons, irrespectively of whether in the present case the amendments might have been made for legal rather than technical reasons, as submitted by the respondent, the technical teaching of the invention has changed, and new subject-matter has been introduced extending beyond the content of the application as filed.

1.5 Accordingly, the main request is not allowable (Article 100(c) EPC).

Auxiliary requests 1-3

2. Added matter

2.1 The food product defined in claim 8 of auxiliary request 1 contains non-hydrosoluble cellulose fibres (ingredient C1) in an amount of from 0.09 to 0.25% by weight.

2.2 The only parts of the application as filed which disclose a food product which is, in terms of composition, close to the one defined in claim 8 of auxiliary request 1, are claim 9 and page 18, lines 24-34. Yet these parts define a product containing non-hydrosoluble cellulose fibres in an amount of from 0.04 to 0.25 % by weight. Since no other part of the application as filed provides a basis for a food comprising an amount of said fibres in the range of 0.09 to 0.25%, claim 8 of auxiliary request 1 introduces new subject-matter extending beyond the content of the application as filed.

2.3 The food product specified in claim 8 of auxiliary request 1 is also defined in claim 7 of auxiliary request 2 and claim 8 of auxiliary request 3. Thus, these requests also contain subject-matter extending beyond the content of the application as filed.

2.4 For these reasons, none of the auxiliary requests is allowable (Article 100(c) and Article 123(2) EPC).

3. Procedural issues

3.1 As far as the auxiliary requests are concerned, the issue of added-matter was brought up by the appellant

for the first time during the oral proceedings, which the applicant, although duly summoned, did not attend.

- 3.2 According to Rule 115(2) and Article 15(3) RPBA, the board is not obliged to delay any step in the proceedings, including its decision, owing to the absence at the oral proceedings of any party duly summoned, who may then be treated as relying only on its written case.
- 3.3 Based on the facts on this case, the board is not prevented from ruling on the aforementioned issue. At the stage reached in the proceedings the absent - albeit duly summoned - respondent should have expected the claims of the auxiliary requests to be examined as to whether they contained added-matter. It should also have known the basis on which this issue would be judged.
- 3.4 It is indeed noted that in the communication issued in preparation for the oral proceedings the board had already expressed a negative preliminary opinion on the main request and expressly drawn the respondent's attention to the fact that the basis for the amendments in the claims of the auxiliary requests had not been indicated when these requests were filed by letter of 13 November 2015.
- 3.5 The respondent however did not react to that communication; it did not indicate in writing the basis for the amendments, nor did it participate at the oral proceedings to defend its case orally. The respondent's written case therefore did not offer any considerations or arguments for a different decision than the present one and its absence from the oral proceedings did not allow to fill in the gaps.

3.6 In such circumstances a party cannot expect either that the proceedings continue in writing or that the case be remitted to the opposition division; rather the case will be decided by the board along the already indicated lines, so that the reasoning should not come as a surprise. In this context, reference is made to decisions T 341/92 (OJ 1995, 373), T 802/12, T 568/00 and T 1798/09.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



M. Cañueto Carbajo

W. Sieber

Decision electronically authenticated