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**Datasheet for the decision
of 17 April 2019**

Case Number: T 1230/15 - 3.3.09

Application Number: 05799494.9

Publication Number: 1827137

IPC: A23L1/30, A23L1/24, A23L1/48,
A23L1/307, A23D7/005, A23D7/01,
A23D7/015

Language of the proceedings: EN

Title of invention:
LOW ENERGY FOOD PRODUCT

Patent Proprietor:
Raisio Nutrition Ltd

Opponent:
BASF SE

Headword:

Relevant legal provisions:
EPC Art. 54, 56, 113(1)
EPC R. 43(2)

Keyword:

Novelty - main request (yes)
Inventive step - main request (yes)
Right to be heard - remittal (no)
Reimbursement of appeal fee (no)

Decisions cited:

Catchword:



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Case Number: T 1230/15 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 17 April 2019

Appellant: BASF SE
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted on
31 March 2015 concerning maintenance of the
European Patent No. 1827137 in amended form.

Composition of the Board:

Chairman W. Sieber
Members: F. Rinaldi
E. Kossonakou

Summary of Facts and Submissions

- I. This decision concerns the appeal filed by the opponent against the interlocutory decision of the opposition division that European patent No. EP 1 827 137 as amended meets the requirements of the EPC.
- II. In its notice of opposition, the opponent requested revocation of the patent based on Article 100(a) EPC (lack of novelty and lack of inventive step).

The documents submitted during the opposition proceedings included:

- D1: WO 02/055639 A1
- D3: WO 01/72136 A1
- D5: US 6,274,574 B1
- D6: WO 98/19556 A1
- D8: W0 99/56558 A1
- D9: Y. H. Hui, "Bailey's industrial oil and fat products", vol. 4, 5th edn., New York, 1996 (6 pages)
- D10: US 6,267,963 B1
- D11: EP 1 197 153 A1
- D12: EP 1 011 343 A1
- D13: EP 1 075 191 B1.

- III. In the appealed decision, the opposition division held that the main request (claims 1 to 42 filed by letter dated 14 May 2012 and received on 18 May 2012) complied with the requirements of the EPC.

Claim 1 of this request reads as follows:

"An emulsified food product selected from the group consisting of spreads, mayonnaises and dressings comprising water, from 0 to 5% by weight triglycerides, from 0.5 to 60% by weight plant sterol and/or stanol fatty acid ester, wherein the fatty acid composition of the plant sterol and/or stanol fatty acid ester comprises from 0 to 7% by weight saturated fatty acids, and optionally one or more emulsifiers, wherein the weight ratio of emulsifier(s) to the sum of plant sterol and/or stanol fatty acid ester and triglycerides, if present, is between 0-0.10:1".

Claims 13 and 23 of this request are drafted as independent claims. However, they are actually more restricted embodiments of claim 1. Independent claim 36 relates to a method for preparing an emulsified food as described in claim 1.

- IV. During the oral proceedings, the opposition division did not allow the opponent to present all the inventive-step attacks it had wished to discuss. The opponent objected that the original minutes of the oral proceedings (dated 31 March 2015) did not correctly summarise the proceedings, and it requested that the opposition division modify the minutes. The opposition division acceded to this request and issued corrected minutes (dated 19 June 2015).
- V. In its statement setting out the grounds of appeal, the opponent (appellant) requested that the decision under appeal be set aside, that the case be remitted to the opposition division and that the appeal fee be reimbursed on the ground that the opposition division had violated its right to be heard (substantial procedural violation). The appellant subsidiarily requested that the patent be revoked in its entirety.

VI. In its reply, the patent proprietor (respondent) requested that the appeal be dismissed. It also filed the following document:

D15: L. E. Gutierrez et al. "Fatty acid composition of commercially important fish from Brazil", Sci. agric. Piracicaba, 50(3), 1993, 478-483.

VII. The parties were summoned to attend oral proceedings. The board set out its preliminary opinion in a communication.

VIII. By letter dated 13 February 2019, the respondent withdrew its request for oral proceedings and announced that it would not attend the oral proceedings. By letter dated 9 April 2019, the appellant alleged, *inter alia*, that the respondent had surrendered the patent for all contracting states, withdrew its request for oral proceedings, but maintained all other requests from its statement setting out the grounds of appeal.

IX. Oral proceedings were held on 17 April 2019 in the absence of the parties.

X. The appellant's arguments relevant to the present decision may be summarised as follows:

Right to be heard / remittal / reimbursement of appeal fee: The opposition division had allowed the opponent to present only two inventive-step attacks (starting from D1 and D11 as the closest prior art in combination with a single document) and to reply to the patent proprietor's problem and solution approach which started from D5. It had not been allowed to present further inventive-step attacks. In addition, the

opposition division, in the decision under appeal, adduced as evidence of patentability further inventive-step attacks which had, however, not been discussed at the oral proceedings. Thus, the opponent's right to be heard had been violated. In view of this, the case had to be remitted to the opposition division. A direct decision by the board on these inventive-step arguments would deprive the appellant of a first-instance decision on them. The breach of the right to be heard constituted a serious procedural violation. Therefore, the reimbursement of the appeal fee was equitable.

Objection under Rule 43(2): The main request did not comply with the requirements of Rule 43(2) EPC in view of the fact that the set of claims contained three independent product claims.

Novelty: The subject-matter of at least claim 1 lacked novelty in view of D3 and D11. As to D3, the salad dressing of example 8, when produced with the salad and cooking oil composition of example 12, anticipated the subject-matter of claim 1. As to D11, the coherent description starting on paragraph [0034] through to paragraph [0059] provided a step-by-step description of each individual feature described in claim 1.

Inventive step: The subject-matter of claim 1 at least lacked inventive step. D1, D3, D5, D6, D8, D9 and D11 could each be regarded as the closest prior art. The technical problem resided in the provision of an emulsified product (spread, mayonnaise, dressing) having the required amounts of sterol ester, saturated fatty acids and triglyceride. Starting from D5 as the closest prior art, the distinguishing feature was that D5 did not disclose that the fatty acid composition of the plant sterol and/or stanol fatty acid ester

comprised from 0 to 7% by weight saturated fatty acid. However, this modification would have been obvious in view of D5 in combination with D1, D3, D6, D8, D12 or D13.

XI. The respondent's arguments relevant to the present decision may be summarised as follows:

Right to be heard / remittal / reimbursement of appeal fee: At the oral proceedings before the opposition division, the opponent was given the opportunity to argue which document it considered to be the closest prior art. It selected D1 and presented an attack starting from this document. In the interest of procedural economy, it was reasonable for the opposition division to provide the opponent with only a single further opportunity to select the closest prior art. No violation of the right to be heard occurred.

Objection under Rule 43(2): This objection had been withdrawn during the opposition proceedings and could not be revisited on appeal.

Novelty: Neither D3 nor D11 disclosed the subject-matter of claim 1. As to D3, the dressing composition of example 8, even if prepared using the salad and cooking oil composition of example 12, would have a triglyceride content above the one required in claim 1. As to D11, it did not disclose that the phytosterol ester comprised from 0 to 7% by weight saturated fatty acids, and the ratio of any emulsifier to the sum of plant sterol and/or stanol fatty acid ester and triglyceride was between 0 to 0.1 :1.

Inventive step: Only D5 qualified as the closest prior art; not any of the other documents D1, D3, D6, D8 and

D11. Example 7 of D5 disclosed neither the fatty acid composition of the plant sterol and/or stanol fatty acid ester nor the weight ratio of emulsifier(s) to the sum of plant sterol and/or stanol fatty acid ester and triglycerides of claim 1. The technical problem was to provide a healthier food product with good texture, stability and mouthfeel. The invention would not have been obvious even when considering D1, D3, D6, D8, D12 or D13.

Reasons for the Decision

1. In its letter dated 9 April 2019, the appellant alleged that the respondent had surrendered the patent for all contracting states ("sämtliche Länder aufgegeben"). However, at the date of the oral proceedings, the board had no information that the patent had lapsed in all those states (including Poland). Since, furthermore, the appellant maintained all its initial requests (apart from its auxiliary request for oral proceedings), the appeal proceedings were to be continued in any case.
2. *Right to be heard and remittal*
 - 2.1 The appellant argued that its right to be heard had been violated at the oral proceedings before the opposition division since it was allowed to present only two lines of attack on inventive step, namely, one starting from D1 and one starting from D11, each in combination only with a single document. In addition, the opposition division discussed in the decision under appeal, as evidence of patentability, further inventive-step attacks which had not been discussed at

the oral proceedings. In view of these deficiencies, the case had to be remitted to the opposition division. Moreover, a decision by the board on those inventive step arguments would deprive the appellant of a first-instance decision on them.

2.2 The appellant's understanding appears to be that there exists an absolute right to present all possible inventive-step attacks orally before the opposition division. Anything else incurs, in its view, a violation of its right to be heard.

2.3 This is, however, in fundamental contradiction to the problem and solution approach as applied by the departments of the EPO for assessing inventive step.

The first step in this approach entails selecting the closest prior art (Case Law of the Boards of Appeal of the European Patent Office, 8th edn., 2016 ["Case Law"], Chapter I.D.2. first paragraph). It is in the very nature of the problem and solution approach that the closest prior art constitutes "the easiest route for the skilled person to arrive at the claimed solution or the most promising starting point for an obvious development leading to the claimed invention" (*ibid.*, Chapter I.D.3.1., second paragraph). If an invention is not obvious when starting from the closest prior art, it is reasonable to say that it will not be obvious when starting from a more remote document.

2.4 In cases where there is arguably more than one document which might constitute the closest prior art, the discussion should ideally be structured so as to first establish which document(s) constitute(s) the most promising starting point (*ibid.*, Chapter I.D.2., last

paragraph). As a result of such a discussion, the closest prior art may or may not turn out to be a document proposed by the opponent.

- 2.5 It appears that this first round of discussion to establish the (single) closest prior art did not take place with the necessary clarity of purpose in the present case. It may have even been omitted. As unfortunate as this course of action may be, it is on its own not sufficient for the board to decide that a violation of the right to be heard occurred, let alone a substantial one which would justify the remittal of the case.
- 2.6 On the basis of the appellant's own account, it was allowed to present, at the oral proceedings, a complete problem and solution approach starting from a document of its choice, namely, D1, as the closest prior art (corrected minutes of the oral proceedings, page 2), and it presumably presented at this point its strongest case. The opponent was also allowed to reply to the patent proprietor's arguments based on D5 as the closest prior art (statement setting out the grounds of appeal, page 6). Indeed, D5 was ultimately used as the only closest prior-art document in the appealed decision. Finally, the opponent was also allowed to present a further attack starting from D11 (corrected minutes of the oral proceedings, page 2). This was another document taken from the pool of (potential) closest prior-art documents proposed by the opponent.
- 2.7 This chain of events shows that the opponent had the opportunity to present its comments on the essential legal and factual reasoning on which the appealed decision is based (Article 113(1) EPC) and cannot,

hence, demonstrate a violation of the right to be heard.

2.8 As regards the argument that the opposition division discussed further inventive-step *attacks* as evidence for patentability, the board cannot agree with the appellant's reading of the appealed decision. The relevant section (points 6.1.5 to 6.1.8) merely sets out the opposition division's reasoned assessment as to why some of the documents which the opponent had cited were not the closest prior art.

2.9 It follows that no violation of the right to be heard has occurred, at any rate none which would justify the remittal of the case to the opposition division. The board thus proceeded with the examination of the appeal as to the substance (Article 111(1), second sentence, EPC).

3. *Objection under Rule 43(2) EPC*

3.1 In the statement setting out the grounds of appeal, the appellant argued that the main request, as amended during opposition proceedings, did not comply with the requirements of Rule 43(2) EPC in view of the fact that the set of claims contained three independent product claims, namely, claims 1, 13 and 23. The latter two could have been easily formulated as dependent claims, since they were in fact more restricted embodiments of claim 1.

3.2 Firstly, the granted claims already contain three independent product claims, whereby granted claims 14 and 24 are identical to claims 13 and 23 of the main request. Secondly, Rule 43 EPC relates to the provisions governing the application; not the amendment

of claims in opposition. Lastly, the opponent had withdrawn its request to discuss the objection under Rule 43(2) EPC in the opposition proceedings (appealed decision, Facts and submissions, point 1.6). It provided no reason whatsoever why it revisited the objection in these appeal proceedings.

3.3 In view of the above, the objection must fail.

4. *Novelty*

The appellant raised objections of lack of novelty against the subject-matter of claim 1 of the main request based on D3 and D11.

4.1 Lack of novelty in view of D3

4.1.1 The appellant considered that the salad dressing disclosed in example 8 of D3 anticipated the subject-matter of claim 1 when produced with the salad and cooking oil of example 12.

4.1.2 Example 8 discloses a salad dressing which includes 1/3 cup of balsamic vinegar, 2/3 cup of the hypocholesterolemic salad and cooking oil from example 7, and small amounts of sugar, dry mustard, salt and pepper. Example 7 provides a hypocholesterolemic salad and cooking oil using the sterol ester composition of example 3 (31.6 g) and Crisco™ Brand canola oil (68.4 g). From the available data given in D3, the respondent calculated that the final product of example 8 (salad dressing) contained approximately 52% by weight of oil (triglycerides), which is well above the range of 0 to 5% by weight of triglycerides defined in claim 1. The respondent's calculation was not contested by the appellant.

- 4.1.3 Whilst page 18, line 25, to page 21, line 7, of D3 provides a general teaching of suitable oils, there is no teaching in D3 that any of these many options may be specifically selected to replace the oil composition used in example 8, let alone to select the salad and cooking oil of example 12. Moreover, page 18, line 30 to page 19, line 1, states that the preferred suitable oils are natural salad oils such as the canola oil used in example 8.
- 4.1.4 But even if the salad and cooking oil according to example 12 were to be used in example 8, as the appellant suggests, there would be still more than 5% by weight of triglycerides in the resulting product. The board has no reason to doubt the respondent's calculation in this regard, in particular because it was not contested by the appellant.
- 4.1.5 Thus, D3 does not directly and unambiguously disclose the subject-matter of claim 1.
- 4.2 Lack of novelty in view of D11
- 4.2.1 D11 relates to aqueous dispersions of plant sterols and other high-melting lipids, which are useful in spreads and other food products (abstract). The board concedes that D11 discloses most of the features of claim 1 although not in the claimed combination. There is, however, no disclosure in D11 that the plant sterol and/or stanol fatty acid ester comprises from 0 to 7% by weight saturated fatty acids and that the weight ratio of emulsifier(s) to the sum of plant sterol and/or stanol fatty acid ester and triglycerides, if present, is between 0 to 0.10:1.

4.2.2 The appellant referred to paragraphs [0050] and [0061] in respect of the emulsifier ratio. However, paragraph [0050] relates to a ratio of emulsifier to sterol but not to a ratio of emulsifier to sterol ester and triglyceride. Moreover, the ratio of 0 to 0.1:1 is not disclosed. Paragraph [0061] defines the amount of surfactant as a percentage of the food product, not as a ratio of emulsifier to the sum of sterol/stanol ester and triglycerides.

4.2.3 As to the requirement that the plant sterol and/or stanol fatty acid ester comprises from 0 to 7% by weight saturated fatty acids, the appellant failed to explain where this feature was disclosed, even in isolation, in D11, let alone in combination with the other features of claim 1.

4.2.4 In view of the above, D11 does not directly and unambiguously disclose the subject-matter of claim 1.

4.3 To conclude, the subject-matter of claim 1 is novel (Article 54 EPC) over the cited prior art. This also applies to claims 2 to 42, which are more restricted in scope than claim 1.

5. *Inventive step*

5.1 The claimed invention relates to the provision of low-energy emulsified food products with improved texture and low or even no content of triglycerides whilst providing an optimal intake of plant sterol and/or stanol fatty acid esters for the reduction of serum levels of total and LDL cholesterol (paragraphs [0003], [0004] and [0016]).

5.2 The closest prior art

5.2.1 In its statement setting out the grounds of appeal, the appellant argued that D1, D3, D5, D6, D8, D9 and D11 each qualified as the closest prior art.

5.2.2 As explained above in point 2.3, the first step in the problem and solution approach is the selection of the closest prior art. The respondent agreed with the opposition division that D5 was the closest prior art.

In D5, cholesterol-reducing plant sterol and/or stanol esters are incorporated into mouthfeel-enhancing, texture-building and compositions-stabilising mesophase-stabilised compositions, which are then used for preparing low-fat, fat-free and triglyceride-free food products (abstract). Thus, D5 is directed to the same purpose as the claimed invention, and the board therefore agrees that D5 is the appropriate closest prior art.

5.2.3 The board is not convinced that more than one document could be regarded as a possible closest prior-art document in the present case. On the contrary, D1, D3, D6, D8, D9 and D11 are further remote from the claimed invention than D5 for the following reasons:

D1 discloses the direct interesterification of sterol with triglycerides in a one-pot process (claim 1). The composition obtained by this process contains 10 to 95% by weight of sterol esters (claim 12) and is used in food products (claim 16). Example 4 discloses a spread which comprises sterol/stanol esters. This spread contains 23% by weight of triglycerides (calculated by the respondent, not contested by the appellant) and is characterised as a low-fat spread. As concerns the

texture of the obtained product, D1 suggests in general terms to optimise the solubility and melting point of the sterol/stanol ester (page 11, first full paragraph, last sentence). But it provides no incentive for producing emulsified food products with improved texture and with a reduced or low, or even no content of triglycerides.

D3 relates to sterol compositions in which more than 50% of the fatty acid moieties are monounsaturated fatty acids (claim 1). This composition can be incorporated into food products, especially clear cooking and salad oils (page 4, lines 10 to 15). Whilst D3 mentions food products such as mayonnaise, spreads and dressings, the products contain more triglycerides than those of claim 1. Furthermore, D3 is concerned with solubilising the sterol and stanol esters in edible oils and does not address the problem of providing improved texture.

D6 is concerned with the replacement of the hardstock in fat blends with stanol and/or sterol fatty acid esters without the loss of texture (page 4, lines 6 to 12). Whilst D6 is concerned with reducing the amount of triglycerides, it does not teach or suggest the reduction of triglycerides in the liquid oil component of the food product. Thus, the overall objective of D6 is not to provide food product with low or no triglyceride content. For instance, levels of 26.7% and 24.8% of triglycerides were present in examples 7 and 10, respectively. Thus, D6 does not address the problem of improved texture of low-fat products.

D8 relates to sterol and/or stanol fatty acid ester compositions, in which the fatty acid moiety comprises a blend of less than 7% of saturated fatty acids and

more than 50% of polyunsaturated fatty acids (claim 1). Whilst D8 mentions salad dressings and mayonnaises (page 7, line 22), it is silent on the reduction of triglycerides and suitable emulsifier concentrations.

D9 is an excerpt from a handbook. The appellant's brief reference to D9 in combination with almost any of the cited documents (statement setting out the grounds of appeal, page 25) does not allow the board to understand why this document could possibly serve as the closest prior art. Thus, this document is disregarded.

D11 discloses that plant sterols and other high melting lipids can be used to impart structure to water and fat continuous spreads (paragraph [0021]). Although plant sterols that have not been esterified are preferred, D11 also suggests using esterified plant sterols "so long as they are high melting, immiscible in water and fall in the desired melting temperature range of 75-200°C" (paragraph [0036]). Thus, D11 teaches away from plant sterol esters and, in addition, is silent on sterol esters low in saturated fatty acids.

5.3 Distinguishing feature

5.3.1 Example 7 of D5 describes a mayonnaise-type dressing product using the plant-sterol-containing mesophase-stabilised gel of example 6 (batch 2). The sterols were obtained from a soybean source and were esterified with fatty acids from soybean oil (column 19, lines 58-59). According to the respondent's calculations, which were not disputed by the appellant, the fatty acid composition comprised about 14 wt% saturated fatty acids, which falls outside the range of from 0 to 7 wt% required by claim 1.

The parties agreed that the amount of saturated fatty acids of the plant sterol and/or stanol fatty acid ester is a distinguishing feature of claim 1 over example 7 of D5. The board sees no reason to differ.

- 5.3.2 However, the parties disagreed as to whether the ratio of emulsifier to the sum of plant sterol and/or stanol fatty acid ester and triglycerides of claim 1 represented a further distinguishing feature over D5. The appellant considered that the ratio of claim 1 was already disclosed in D5 (column 7, line 8 to 15).

However, the board does not need to decide this issue because, as set out below, the subject-matter of claim 1 involves an inventive step over D5 even if only one distinguishing feature is considered, namely, the amount of saturated fatty acids of the plant sterol and/or stanol fatty acid ester.

- 5.4 Effects of the invention and objective technical problem

- 5.4.1 In its statement setting out the grounds of appeal, the appellant repeatedly formulated the technical problem as the provision of an emulsified product (spread, mayonnaise, dressing) having the required amounts of sterol ester, saturated fatty acids and triglyceride (e.g. page 15, lines 7 to 5, from the bottom of the page; page 16, lines 12 and 13, page 17, lines 1 and 2).

- 5.4.2 The board cannot accept this technical problem since it contains elements of the solution. The objective technical problem addressed by an invention has to be formulated in such a way that it does not contain pointers to the solution or partially anticipate the

solution. Including part of the solution offered by an invention in the statement of the problem necessarily has to result in an ex-post-facto view being taken (Case Law, Chapter I.D.4.3.1, first paragraph). Consequently, the technical problem as formulated by the appellant must be rejected.

5.4.3 Rather, "the correct procedure for formulating the problem is to choose a problem based on the technical effect of exactly those features distinguishing the claim from the prior art that is as specific as possible without containing elements or pointers to the solution" (Case Law, Chapter I.D.4.3.1, second paragraph).

5.4.4 The effects provided by the distinguishing feature can be identified in example 1 (table 1) of the opposed patent. In this example, products 1 to 3, which include plant stanol fatty acid ester having respectively 1.9, 4.1 and 6.5% by weight of saturated fatty acids, and which consequently fall under the scope of claim 1, are compared with product 5. This product differs from products 1 to 3 in that it includes plant stanol fatty acid ester having 8% by weight of saturated fatty acids. In this respect, product 5 is similar to the composition of D5 which also includes an amount of saturated fatty acids of the plant sterol and/or stanol fatty acid ester outside the scope of claim 1. Thus, product 5 reflects the closest prior art and allows a fair comparison with the claimed invention.

The results discussed in paragraphs [0070] and [0071] show that product 5 had an undesired texture and the stability of the product was poor, whereas products 1 and 3 (according to the invention) had a creamy and

smooth product consistency and at the same time a low-energy value.

- 5.4.5 Having regard to these results, the opposition division correctly identified the objective technical problem as the provision of a healthier food product with good texture and mouthfeel characteristics. This problem is solved.

5.5 Obviousness

The appellant merely stated that the amount of saturated fatty acids in the sterol ester was suggested in D1, D3, D6, D8, D12 or D13. However, apart from this statement, the appellant did not explain why the skilled person would have been directed to the teaching of these documents with the expectation to solve the objective technical problem, without hindsight. Nor could the board find a pointer in the prior art towards the use of plant sterol and/or stanol fatty acid ester comprising from 0 to 7% by weight saturated fatty acids to solve the objective technical problem.

- 5.6 It follows from this that the subject-matter of claim 1 (and consequently also of claims 2 to 42) involves an inventive step (Article 56 EPC).

6. Reimbursement of the appeal fee

The appellant requested the reimbursement of the appeal fee in view of the (alleged) procedural violation. However, a prerequisite for the reimbursement of the appeal fee is that the board deems the appeal to be allowable (Rule 103(1)(a) EPC). The present appeal does not succeed for the reasons given above. In view of this, there is no basis for a refund of this fee.

Order

For these reasons it is decided that:

1. The appeal is dismissed.
2. The request for reimbursement of the appeal fee is refused.

The Registrar:

The Chairman:



M. Cañueto Carbajo

W. Sieber

Decision electronically authenticated