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**Datasheet for the decision
of 15 September 2022**

Case Number: T 0677/19 - 3.3.09

Application Number: 08770585.1

Publication Number: 2166863

IPC: A23L13/40, A23B4/20, A23B4/22,
A23B4/24

Language of the proceedings: EN

Title of invention:
METHOD AND COMPOSITION FOR PREPARING CURED MEAT PRODUCTS

Patent Proprietor:
Kerry Luxembourg S.a.r.l.

Opponents:
Strawman Limited
Finnegan Europe LLP

Headword:
Preparing cured meat products/KERRY

Relevant legal provisions:
EPC Art. 56

Keyword:
Inventive step - (no)

Decisions cited:

Catchword:



Beschwerdekammern

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Case Number: T 0677/19 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 15 September 2022

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
19 December 2018 concerning maintenance of the
European Patent No. 2166863 in amended form.**

Composition of the Board:

Chairman A. Haderlein
Members: M. Ansorge
 D. Rogers

Summary of Facts and Submissions

- I. The proprietor and opponents 1 and 2 lodged an appeal against the opposition division's interlocutory decision holding the first auxiliary request allowable.
- II. With their notice of opposition, the opponents had requested revocation of the patent on several grounds for opposition including Article 100(a) EPC (lack of inventive step).
- III. The opposition division decided, *inter alia*, that the first auxiliary request, corresponding to the first auxiliary request filed with the proprietor's grounds of appeal, met the requirements of the EPC, in particular that the claimed process of the first auxiliary request involved an inventive step in view of D7 (BE 1014557 A6), D7a being an English translation of this document.
- IV. Claim 1 of the first auxiliary request (being identical to claim 1 of the main request) reads as follows:

"A process for preparing a curing agent outside a meat curing process, comprising:

(a) selecting a plant material comprising at least 50 ppm nitrate,

(b) contacting said plant material with an organism capable of converting said nitrate to nitrite, and

(c) converting a predetermined amount of said nitrate to nitrite;

wherein the organism is inactivated or removed from the curing agent after the predetermined amount of nitrite is produced."

V. The parties' relevant arguments, submitted in writing and during the oral proceedings, are reflected in the reasons for the decision below.

VI. Requests

The proprietor requested that the decision be set aside and that the patent be maintained on the basis of the main request or the first auxiliary request, both filed with its grounds of appeal.

Opponents 1 and 2 requested that the decision be set aside and that the patent be revoked.

Reasons for the Decision

MAIN REQUEST AND FIRST AUXILIARY REQUEST

1. Inventive step

1.1 While numerous inventive-step objections were raised by the opponents, including an objection in view of D7 as the closest prior art, the proprietor argued that D7 is to be taken as the starting document in the current case. The board does not see any reason to disagree.

1.2 When taking D7 as the closest prior-art document, for the following reasons, the claimed subject-matter does, however, not involve an inventive step.

1.3 D7 relates to a method for the treatment of a meat product using a nitrite containing aqueous liquid. This liquid is prepared before treating the meat product with the liquid. The process for producing the liquid

includes the steps of selecting a vegetable material that contains nitrate and converting nitrate to nitrite until the ratio between nitrate and nitrite is less than 9/1 (see claim 1 of D7a, an English translation of D7). This conversion can be achieved by natural enzymatic and/or a microbiological conversion, optionally by adding an extra microorganism as a starter culture (see page 4, lines 1 to 3 from the bottom of D7a). After the conversion of nitrate to nitrite and before preparing the liquid and contacting it with a meat product, the nitrite-containing product can be refrigerated, frozen or kept under sterile conditions after sterilisation (see page 5, lines 19 to 25 of D7a).

- 1.4 The proprietor submitted that the claimed process differed from D7 in that the "organism is inactivated or removed from the curing agent after the predetermined amount of nitrite is produced" (distinguishing feature). The opponents did not agree that this was a distinguishing feature and questioned the novelty of the claimed process. The proprietor did not contest that all other features of claim 1 were disclosed in D7 in combination.
- 1.5 In the following, it is assumed that D7 does not disclose the aforementioned distinguishing feature in combination with the other features required in claim 1.
- 1.6 In the proprietor's view, the effects resulting from the single difference over D7 are that:
- a more consistent curing agent can be produced, enabling a more consistent curing of meat (first effect)

- contamination of the meat with organisms, such as an organism capable of converting nitrate to nitrite, can be prevented (second effect)

- 1.7 For the following reasons, at least the first effect cannot be acknowledged over D7.
 - 1.7.1 In this context, the proprietor argued that it is credible that the first and second effects are achieved over D7. Reference was made to paragraphs [0003] and [0005] and examples 6 and 7 of the patent.
 - 1.7.2 The board is not convinced. There is no example in the patent demonstrating that there is an improvement over the process described in D7 which originates from the single distinguishing feature over D7. Paragraphs [0003] and [0005] of the patent are not suited to prove an effect over D7 either.
 - 1.7.3 Even when assuming that a more consistent curing agent is an advantage which could be associated with the process of claim 1, it is not credible that this improvement exists over the process of D7.
 - 1.7.4 In the same way as the patent, D7 makes the conversion of nitrate to nitrite outside the meat curing process, i.e. before contacting the curing agent with a meat product, since it does not take place in contact with the meat product. Thus, in the same way as in the patent, in D7, nitrite is already formed before contacting the curing agent with meat.
 - 1.7.5 Consequently, it is evident that also in D7 a curing agent is obtained leading to a consistent curing which avoids the problem of variable curing of the meat

resulting from the formation of nitrite by an *in situ* conversion on the meat. There is simply no evidence in the patent that the single difference over D7 might lead to an even more consistent curing.

- 1.7.6 The proprietor repeatedly stressed that in D7 there is no sterilisation after a predetermined amount of nitrite is produced. However, D7 unambiguously discloses that the conversion of nitrate to nitrite is carried out until the ratio is less than 9/1 (see claim 1), and it is preferred to allow as much nitrate as possible to be converted into nitrite before introducing the liquid into the meat product (see page 6, lines 10 and 11 of D7a). In this way, an immediate effect on colour formation is achieved, and the meat product no longer needs to be left to mature before the cooking process (see page 6, lines 12 to 14 of D7a). This teaching further supports the view that a curing agent is obtained in D7 which also enables a consistent curing of meat, i.e. a "consistent curing agent" within the meaning of the patent.

Thus, the first effect cannot be acknowledged in view of D7.

- 1.8 It can be left open whether the second effect is credibly shown over D7 or whether it can be derived from the patent at all (which was questioned by the opponents). As shown in the following, even when assuming to the benefit of the proprietor that the second effect is shown over D7, the claimed subject-matter is still obvious in light of D7.
- 1.9 In the following, it is assumed, for the sake of argument, that the objective technical problem to be solved is the provision of a process for preparing a

curing agent lowering the risk of contamination with organisms, such as the organism capable of converting nitrate to nitrite.

- 1.10 With respect to obviousness, the board shares the opponents' view that the step of inactivating the organism from the curing agent after the predetermined amount of nitrite is produced is taught in D7.

It is obvious for a skilled person that the sterilisation step taught in D7 on page 5, lines 19 to 25 of D7a necessarily inactivates organisms, including those capable of converting nitrate to nitrite. This is also within the common knowledge of a skilled person in the technical field. Contemplating a typical sterilisation step for inactivating organisms is a routine measure for a skilled person who would expect that the objective technical problem could be solved in this way. Thus, a skilled person would contemplate the distinguishing feature without requiring inventive effort when starting from D7 in combination with their common general knowledge.

- 1.11 The board does not agree with the proprietor that the sterilisation mentioned on page 5, lines 19 to 25 of D7a is meant to be only a partial sterilisation as described in the context of the conversion of nitrate to nitrite at the top of page 5 of D7a. "Sterile conditions after sterilisation" as described on page 5, lines 19 to 25 of D7a is disclosure for a typical sterilisation and not only a partial sterilisation as referred to elsewhere in D7a.

In view of the above, the subject-matter of claim 1 of the main request and claim 1 of the first auxiliary request does not involve an inventive step in view of

D7 as the closest prior art, so there is no allowable claim request on file.

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. Schalow

A. Haderlein

Decision electronically authenticated