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**Datasheet for the decision
of 18 December 2023**

Case Number: T 2147/21 - 3.3.09

Application Number: 14875059.9

Publication Number: 3087846

IPC: A23G1/00, A23D9/00, A23G1/30

Language of the proceedings: EN

Title of invention:
CHOCOLATE-LIKE FOOD PRODUCT FOR BAKING

Patent Proprietor:
Fuji Oil Holdings Inc.

Opponent:
Rupp, Christian

Headword:
Chocolate-like food product for baking/FUJI OIL

Relevant legal provisions:
EPC Art. 56, 83, 123(2)

Keyword:
Amendments - added subject-matter (no)
Sufficiency of disclosure - (yes)
Inventive step - (yes)

Decisions cited:

G 0003/14, T 0466/05, T 0608/07, T 2403/11, T 0787/17



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Case Number: T 2147/21 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 18 December 2023

Appellant: Rupp, Christian
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
11 October 2021 concerning maintenance of the
European Patent No. 3087846 in amended form.**

Composition of the Board:

Chairman A. Haderlein
Members: C. Meiners
A. Jimenez

Summary of Facts and Submissions

- I. This decision concerns the appeal filed by the opponent (appellant) against the opposition division's interlocutory decision that, on the basis of auxiliary request 4 filed during oral proceedings before the opposition division, the patent in suit (hereinafter "the patent") met the requirements of the EPC.
- II. In its notice of opposition, the appellant had requested that the patent be revoked in its entirety, among other things on the ground for opposition under Article 100(a) in conjunction with Article 56 EPC (lack of inventive step), Article 100(b) EPC (insufficiency of disclosure) and Article 100(c) EPC (added matter).
- III. In its decision, the opposition division found that the subject-matter of the then auxiliary request 4 did not extend beyond the content of the application as filed, was novel and involved an inventive step in view of document D7 as the closest prior art. Furthermore, the patent, on the basis of the then auxiliary request 3, disclosed the invention in a manner sufficiently clear and complete for it to be carried out by a skilled person.
- IV. The following documents, submitted by the parties, are relevant to the present decision:
- D7 G. Hogenbirk, The Manufacturing Confectioner, October 1985, 27-34
- D14 S.T. Beckett, "Industrial Chocolate, Manufacture and Use", fourth edition, 2009, 224-246

- D16 EP 0 566 428 B1
- D18 B.W. Minifie, "Chocolate, Cocoa, and Confectionary: Science and Technology", 1989, Chapter IV, pages 116-123
- D20 Instruction Manual for a BM-type viscometer
- D20a Translation of D20 into English
- D22 Y. G. Moharram *et al.*, Food Chemistry, 1982, 8, 269-276

V. With its reply to the opponent's statement of grounds of appeal the patent proprietor (respondent) submitted auxiliary requests 1 to 18.

VI. Claim 1 of the main request (auxiliary request 4 filed during oral proceedings before the opposition division) reads as follows:

"A chocolate-like food product for baking, having a water content of less than 5 wt%, containing 1 to 30 wt% of at least one saccharide selected from the group consisting of glucose, trehalose and palatinose, and having viscosity of 2000 cp or less at 45°C,

wherein the chocolate-like food product contains, as the saccharides, anhydrous glucose and/or glucose monohydrate as an essential component, wherein a content of anhydrous glucose or glucose monohydrate or a mixture of both is 1 to 30 wt%,

wherein an oil and fat content in the chocolate-like food product is 35 to 55 wt%,
and

wherein the chocolate-like food product contains 0.1 to 0.4 wt% of lecithin, and 0.1 to 0.5 wt% of polyglycerin-condensed ricinoleate."

VII. The appellant's arguments, where relevant to the present decision, can be summarised as follows.

(a) The subject-matter of claim 1 of the main request did not meet the requirement of Article 123(2) EPC. The amendment "wherein a content of anhydrous glucose or glucose monohydrate or a mixture of both is 1 to 30 wt%" (underlining by the appellant) was not disclosed in the original application documents.

Moreover, the omission of "in proper combination" from claim 1 gave rise to an inadmissible intermediate generalisation.

(b) The subject-matter of claim 1 was also insufficiently disclosed. It was an essential feature that the chocolate-like food product had a fat or oil that formed a continuous phase; however, a corresponding feature was missing from the claim.

Furthermore, different methods existed for determining the water content of a chocolate composition. Depending on the very method employed, the crystal water content was either determined or not determined. For this reason, the measurement method had to be explicitly indicated. The patent thus did not disclose the alleged invention in a manner sufficiently clear and complete in that regard.

The patent did not mention the shear rate at which the viscosity had to be measured; however, the apparent viscosity depended heavily on the shear rate for a typical milk chocolate. Likewise, a skilled person knew that the measured shear

viscosity also depended on the temperature. Hence, a skilled person wishing to reduce the claimed subject-matter to practice was unduly burdened.

- (c) Moreover, the subject-matter of claim 1 was obvious in view of D7 as the closest prior art. Starting from one of the glucose embodiments in D7, the only distinguishing feature could be considered to be the presence of 0.1 to 0.5 wt% polyglycerin-condensed ricinoleate (PGPR). The property of heat resistance was inherently fulfilled by these embodiments and thus did not have to be considered in the problem-solution approach. No technical effect had been proven to be causally associated with the distinguishing feature. Hence, the objective technical problem to be solved was merely to provide an alternative chocolate composition. The solution to that problem was, however, obvious in view of the supplemental teaching of documents D14 or D18.

VIII. The respondent's arguments, where relevant to the present decision, can be summarised as follows:

- (a) The subject-matter of claim 1 of the main request was directly and unambiguously disclosed in the originally filed application documents. In particular, the amendment "wherein a content of anhydrous glucose or glucose monohydrate or a mixture of both is 1 to 30 wt%" resulted from paragraph [0016] and the omission of "in proper combination" from claim 1 did not constitute an intermediate generalisation.
- (b) The subject-matter of claim 1 of the main request was sufficiently disclosed. The opponent had

failed, both in the first-instance proceedings as well as on appeal, to raise serious doubts substantiated by verifiable facts that a skilled person would not be capable of reducing the claimed invention to practice. In particular, the presence of a continuous fat phase was not an essential feature missing from claim 1.

Similarly, the absence of a test method for determining the water content in claim 1 did not give rise to insufficiency of disclosure. This objection constituted another hidden clarity objection that was not open to examination in opposition proceedings (G 3/14). A skilled person would have been aware of the existence of methods for testing free or chemically bound water and would have adopted such methods as a matter of routine.

- (c) The subject-matter of claim 1 also involved an inventive step in view of document D7 as the closest prior art. The property of heat resistance after baking was "hidden" and was only apparent after exposing the claimed chocolate composition to a specific interaction with external conditions, in this case a baking step. Document D7, however, did not address this problem of providing heat resistance. Hence, a skilled person wishing to provide a low-viscosity chocolate composition for baking would have substituted sucrose with lactose or galactose and would not have arrived at the claimed invention: lactose and galactose were demonstrated in D7 to provide lower viscosity than dextrose and not to be cariogenic.

IX. Final requests

The appellant requested that the opposition division's decision be set aside and that the patent be revoked.

The respondent requested that the appeal be dismissed as its main request. As an auxiliary measure, it requested that the patent be maintained on the basis of one of auxiliary requests 1 to 18, filed with the reply to the statement setting out the grounds of appeal.

Reasons for the Decision

1. *Amendments (Article 123(2) EPC) - main request*

1.1 The appellant took the view that the feature "... wherein a content of anhydrous glucose or glucose monohydrate or a mixture of both is 1 to 30 wt%" (underlining added by the board) in claim 1 is not directly and unambiguously derivable from the application documents as filed.

1.2 According to the established case law, the skilled person should try, taking into account the whole disclosure of the patent and with synthetic propensity, i.e. building up rather than tearing down, to arrive at an interpretation of the claim which is technically sensible.

The wording of the claims should be given its broadest technically sensible meaning by a skilled reader, who should rule out interpretations which are illogical or which do not make technical sense (Case Law of the Boards of Appeal, tenth edition, 2022, II.A.6.1).

1.3 Third glucose species

1.3.1 The appellant argued that the passage on page 8 of the description as filed, lines 3 to 5, "anhydrous glucose and glucose monohydrate can also be used in proper combination with glucose in a range of 1 to 30 wt%", disclosed that a *third* glucose species was used together with glucose and glucose monohydrate. This third glucose species was amorphous glucose, and it was generally just referred to as "glucose". This third glucose species, however, was missing from claim 1.

1.3.2 The board notes that claim 1 and paragraph [0015] of the description as filed stipulate that the chocolate-like food product contains from 1 to 30 wt% of *at least one* (saccharide) selected from the group consisting of glucose, trehalose and palatinose. Any glucose can thus be employed in amounts from 1 to 30 wt% saccharide(s). Furthermore, paragraph [0016] sets out that *preferably* said product contains, *as the saccharides*, glucose as an essential component. *As the glucose* that can be used in the invention, *both* anhydrous glucose and glucose monohydrate can be used (emphasis added by the board; see second sentence of paragraph [0016] on page 7). No reference is made to a third glucose species.

1.3.3 In the board's view, it is thus clear that the more generic term "glucose" as used in the application is employed in the context of anhydrous glucose and glucose monohydrate. It already follows from these considerations that all three alternatives encompassed by claim 1 are disclosed in the application as filed, i.e. 1 to 30 wt% anhydrous glucose or glucose monohydrate or their combination ("*both*" in view of line 4 of paragraph [0015] and line 3 of paragraph [0016]).

As stated above, the first sentence of paragraph [0015] already makes it clear that, as the saccharides, more than one of said saccharides can be used in amounts of 1 to 30 wt%. The appellant argued in the oral proceedings before the board that this passage did not refer to glucose and glucose monohydrate and was not specific and thus not applicable. Whilst this indication in paragraph [0015] is not specific in the sense that it does not mention glucose and glucose monohydrate, it makes it clear in general terms that mixtures of "the saccharides", and hence also a combination of them, can be used in the indicated amounts.

The appellant's argument that paragraph [0016] only separately disclosed 1 to 30 wt% of glucose or glucose monohydrate but not their combination, such as in amounts of 0.5 wt% each, is thus not convincing. Such a combination of 0.5 wt% of each of glucose and glucose monohydrate is clearly in line with the general teaching of the application as filed. The lower end point for both anhydrous glucose and glucose monohydrate is merely preferably 1 wt% in paragraph [0016], and the combined amount of 0.5 wt% each would add up to the lowest amount for the saccharides referred to in e.g. line 4 of paragraph [0015], i.e. 1 wt%.

The aforementioned amendment to claim 1 thus meets the requirement of Article 123(2) EPC in view of these reasons alone.

- 1.3.4 In the application, a further, i.e. *third*, glucose species, such as amorphous glucose, is not associated with the term "glucose" as disclosed in line 4 on page

8 of the description as filed. The appellant's interpretation of the first full sentence, lines 2 to 5 on page 8, is thus not reasonable and is not supported by the preceding text in paragraphs [0015] and [0016].

- 1.3.5 By contrast, the respondent's interpretation of said last sentence of paragraph [0016] is convincing: "in proper combination with glucose in a range of 1 to 30 wt%" merely reflects that both glucose species can be used in a range of 1 to 30 wt% as a *proper* combination (rather than using them outside this range).
- 1.3.6 It follows from the preceding text that both anhydrous glucose and glucose monohydrate can be used as the saccharide glucose. At the same time, the amount of the specific saccharides called for in claim 1 as originally filed (see also the preceding text in paragraph [0015]) is limited to levels of 1 to 30 wt%.
- 1.3.7 By contrast, in view of the teaching of the application, in particular lines 5 to 12 of paragraph [0015], working outside this range does not seem pertinent ("unfavorable") in view of the requirements of heat resistance of 40°C of higher and viscosity adjustment. A "proper combination", referred to in line 4 on page 8, thus reflects the preceding warning not to work outside the specified range when using the aforementioned saccharides. This teaching is repeated in the expression "with glucose in a range of 1 to 30 wt%". It clearly signals that it is the glucose content that has to be determined, or, as the opposition division concluded in its decision, "on a glucose basis". Hence, omitting the term "proper combination" from claim 1 does not give rise to an intermediate generalisation.

1.4 Weight ranges for the glucose species

1.4.1 In view of the above, the amounts referred to in paragraph [0016] of the application to be employed when using anhydrous or hydrous glucose, respectively, refer to the glucose content of it *per se*. Any other interpretation would seem to be unreasonable, as glucose is encompassed by "the saccharides", referred to in paragraph [0015] and in claim 1 as originally filed in the general context of their concentration in the product (1 to 30 wt% in total). A skilled person is aware that more glucose monohydrate is needed to provide the same glucose amount compared with anhydrous glucose. Yet, the preferred ranges for the anhydrous and hydrous glucose levels, namely from 1 to 30 wt%, are identical in paragraph [0016]. This fact is in line with the preceding general teaching in paragraph [0015], defining the total level of the specified *saccharides* in the product. Assuming that glucose hydrate would be expressed in paragraph [0016] in terms of the mass of the glucose hydrate including water, the minimum amount of 1 wt% would not be in line with a minimum saccharide content of 1 wt% as required in line 4 of paragraph [0015] either. These additional considerations thus support the conclusions under point 1.3.3.

1.4.2 Whether different, more preferred, ranges are indicated in paragraph [0016] for the two glucose species has no bearing on this conclusion in the board's view. In this context, the respondent pointed to document D7, which demonstrates that higher amounts of anhydrous glucose can advantageously be incorporated into chocolate formulations. The appellant's view that said different, more preferred, weight ranges would contradict the

opposition division's interpretation that the amounts indicated in paragraph [0016] made reference to "on a glucose basis" is thus not persuasive.

1.4.3 Similarly, the amount of anhydrous glucose from 1 to 30 wt% as a separate option in claim 1 implies that the indicated amount has to be determined "on a glucose basis", as no further ingredient is present in the anhydrous glucose.

1.4.4 Depending on the alternative used, there is thus no different meaning of the weight range indications provided in paragraph [0016] for the glucose species, mirroring the corresponding indication in line 4 of paragraph [0015]. As held in the decision under appeal, the restriction that the amounts are to be considered "on a glucose basis" is an implicit feature of claim 1 in view of the preamble "containing 1 to 30 wt% of at least one saccharide selected from the group consisting of *glucose*, *trehalose* and *palatinose*" in lines 2 to 3 of claim 1.

1.5 Hence, the board concludes that the aforementioned amendment is directly and unambiguously derivable from the original application documents. The appellant did not raise additional objections under Article 123(2) EPC to claim 1, and the board does not have any, either. The board endorses the corresponding findings by the opposition division in its decision.

1.6 Consequently, the subject-matter of claim 1 of the main request complies with the requirement of Article 123(2) EPC.

2. *Sufficiency of disclosure - main request*

2.1 Continuous oil/fat phase

2.1.1 The appellant argued that it followed from paragraph [0012] of the patent, the examples and common general knowledge that the presence of oil or fat as a continuous phase was an essential feature that was missing from claim 1.

2.1.2 The board, however, notes that the appellant has not demonstrated that the presence of a continuous lipid phase is essential for carrying out the invention. Assuming that it were common general knowledge that this feature is essential for obtaining the sought viscosity, a skilled person would *a fortiori* be in a position to reduce the subject-matter of claim 1 to practice using said alleged common general knowledge.

2.1.3 What is more, the formulations in claim 1 contain rather high amounts of lipids, similar to those used in the examples of the patent. The appellant thus has not demonstrated that the allegedly missing essential feature is not implicitly obtained in claim 1 in view of the rather high lipid contents stipulated. The appellant relied on document D16 to demonstrate that the presence of a continuous oil/fat phase was not an inherent feature of a chocolate-like food product; however, document D16 relates to low-fat chocolate confection products that contain a continuous aqueous gel phase, which are remote from the subject-matter of claim 1 and thus cannot serve to prove the contrary.

2.2 Water content

2.2.1 According to the appellant, the lack of a test method for determining the water content in claim 1 gives rise to a further objection under Article 83 EPC. Different methods were available to determine the water content in a chocolate-like food product. The appellant stated that the methods could be classified into methods that only took into account the free moisture, including thermogravimetry, and methods that also quantified chemically bound water, i.e. crystal water (such as the Karl-Fischer method). In this context, the board observes that claim 1 does not call for "free" water, but stipulates a water content of less than 5 wt%.

2.2.2 Nevertheless, the objection first and foremost seems to be a clarity objection. This feature formed part of claim 1 as granted and is thus not open to examination with regard to Article 84 EPC (G 3/14).

2.2.3 The question of whether or not an ambiguous feature effectively amounts to a lack of sufficiency of disclosure or whether it is an issue of clarity was the subject of many decisions, as indicated in the Case Law of the Boards of Appeal, tenth edition, 2022, II.C.8.2 and II.C.8.2.2.a; however, ambiguity of a parameter in the claims is not enough in itself to deny sufficiency of disclosure, and the question of whether said ambiguity leads to insufficiency of disclosure is to be decided on a case-by-case basis (see e.g. T 2403/11 and T 608/07 referred to in the Case Law, *supra*). Instead, with respect to sufficiency of disclosure, the relevant question is whether the patent in suit provides sufficient information which enables the skilled person, when taking into account common general knowledge, to reproduce the invention (see e.g.

decision T 466/05 referred to in the Case Law, *supra*). The board notes that the appellant has not demonstrated that any alleged fluctuations in the water content determined would impose an undue burden on the skilled person wishing to carry out the claimed subject-matter over the whole scope claimed using common general knowledge.

2.2.4 Hence, in the board's view, the aforementioned objection under Article 83 EPC is not convincing either.

2.3 Viscosity measurement

The method for determining the viscosity of the product in claim 1 is described in paragraph [0032] of the patent. This passage contains pertinent indications of which apparatus and equipment should be used for the measurement, including the rotor type and speed (expressed in revolutions per minute, rpm). These indications (from which the corresponding shear rate applied can also apparently be determined) put a skilled person in a position to reliably determine the viscosity without undue burden and to determine products falling within the ambit of claim 1. Consequently, the objection does not give rise to insufficiency of disclosure either.

2.4 To sum up, the requirement of sufficiency of disclosure is met by the subject-matter of claim 1.

3. *Inventive step - main request*

3.1 The patent

The patent is directed to a chocolate-like food product for baking. The products should exhibit low viscosity, have a low water content and suitable heat resistance after baking and organoleptic properties (see paragraphs [0001], [0006] and [0007] of the patent).

3.2 Closest prior art

Document D7 represents the closest prior art underlying the opposition division's decision. Likewise, the appellant relies on D7 as the closest prior art in the appeal proceedings. Whilst D7 does not address the *subjective* problem posed in the patent as outlined in point 3.1, it relates to a similar purpose as it is concerned with providing chocolate-based compositions which are similar to those claimed, are also suitable as coatings and comprise little or no water.

D7 discloses, *inter alia*, a chocolate formulation comprising anhydrous glucose (dextrose) and sucrose in a mass ratio of 50/50 (see left-hand column on page 31, last entry). It comprises about 25 wt% anhydrous glucose, 25 wt% sucrose, 36 wt% fat, 14 wt% cocoa powder, and 0.3 wt% lecithin. Similarly, the appellant referred to a corresponding chocolate composition comprising a 50/50 mixture of sucrose/dextrose monohydrate on page 31 in the middle of the left-hand column. As the decision under appeal is based, *inter alia*, on that embodiment as well, the board does not see any reason not to take this alternative starting point into account.

In view of this, the board's approach in relation to assessment of inventive step in the current case is thus in line with the appellant's understanding of the reasoning in point 5.1 of the Reasons for the Decision in T 787/17. The Board entrusted with examining that case held that every embodiment within a piece of prior art addressing the *same* purpose or aim as the invention under scrutiny qualified as a starting point for the assessment of inventive step.

As the board accepts the glucose-containing chocolate compositions in D7 as starting points, the question of whether D7 relates to the same purpose or instead to a similar purpose can be left unanswered.

3.3 Distinguishing feature

3.3.1 D7 also mentions a viscosity value of 16 poise (1600 centipoise) for the chocolate-like composition comprising a 50/50 mixture of sucrose/dextrose, albeit at an unknown measurement temperature. Moreover, no test method is indicated in claim 1 of the main request for determining the viscosity values. As indicated in Figure 10.6 on page 227 of D14, the measured dynamic viscosity of a fluid milk chocolate composition depends markedly on the applied shear rate. Hence, it has to be expected that the reading value for the viscosity of a given chocolate composition heavily depends on the shear rate applied; however, a shear rate is not indicated in claim 1. For these reasons, the board agrees with the appellant that the viscosity of 2000 cp or less at 45°C as required by claim 1 does not constitute a distinguishing feature.

3.3.2 The appellant referred to D22 to argue that the oil and fat content in D7 was in the claimed range; however,

this is not contested.

- 3.3.3 However, the board agrees with the opposition division and the parties that the subject-matter of claim 1 differs from the aforementioned embodiments in D7 on account of the presence of 0.1 to 0.5 wt% polyglycerin-condensed ricinoleate (PGPR).
- 3.4 Technical effect and objective technical problem
 - 3.4.1 The board concurs with the opposition division that the compositions in Examples 1 and 2 of the patent have heat resistance after baking. This property is determined by applying the test in paragraph [0033] of the patent after a baking step at 110°C for 15 minutes.
 - 3.4.2 The appellant argued that this test was vague and subjective and involved only a "yes" or "no" evaluation by checking whether the surface of a test sample was sticky or was not sticky after it had been baked and cooled down. Nevertheless, the board sees no reason to disregard the results of this non-quantitative test as it still corroborates a technical effect that is associated with the distinguishing feature.
 - 3.4.3 The examples, however, do not show *improved* heat resistance over D7 caused by the addition of PGPR in amounts required by claim 1, i.e. the distinguishing feature. Rather, the patent teaches that the heat resistance is due to the inclusion of glucose as submitted by the appellant (cf. Examples 1 and 2 and Comparative Examples 1 and 2, see also paragraph [0026] of the patent). This feature, however, is not a distinguishing feature over D7.

3.4.4 Nevertheless, the material property "heat resistance after baking" is not mentioned in D7. The effect of glucose on heat resistance is only apparent after exposing a chocolate composition to a specific interaction with external conditions, involving a baking step as applied in the patent.

Consequently, the board concludes that the objective technical problem is not merely to provide an alternative chocolate-like food product, as argued by the appellant, but instead *to provide a chocolate-like food product for baking that has heat resistance after baking.*

3.4.5 This problem is also solved over the whole scope claimed. The appellant's allegation that the problem of providing heat resistance after baking had not been solved across the whole scope of claim 1 is speculative and not supported by any evidence. As already outlined above in point 3.4.3, the heat resistance is associated with the content in the specific saccharides, such as glucose, which is a mandatory feature of claim 1.

3.5 Obviousness

3.5.1 Starting from the glucose-containing chocolate compositions in D7, the skilled person would be at a loss as to how to provide chocolate-like compositions having heat resistance after baking. This property is (assuming inherent fulfilment of heat resistance) hidden in these embodiments and is not derivable from the teaching of D7. The skilled person would thus have to test an infinite number of compositions and would not know that they would have to adhere to glucose when modifying the glucose-containing chocolate compositions in D7.

- 3.5.2 In D7, the additional saccharide component is varied, and other saccharides tested in this document provide more favourable results in various aspects. For instance, glucose is featured in D7 as being cariogenic and hyperglycaemic in view of the highest absorption in the small intestines out of all the sweeteners displayed in Figure 1 of D7. Hence, D7 does not focus at all on glucose as an additional saccharide to be used in combination with sucrose.
- 3.5.3 D7, either taken separately or in combination with D14 or D18 as secondary sources of information, does not provide any guidance on how to arrive at compositions having heat resistance after baking, as called for in claim 1. It is thus irrelevant that D14 and D18 teach that PGPR can be used as an additive in chocolate-like food products, also in combination with lecithin.
- 3.5.4 Consequently, even when considering document D14 as a secondary source of information, the subject-matter of claim 1 is not obvious to a skilled person. It thus meets the requirement of Article 56 EPC.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



K. Götz-Wein

A. Haderlein

Decision electronically authenticated