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**Datasheet for the decision
of 28 March 2024**

Case Number: T 1293/22 - 3.3.09

Application Number: 12764524.0

Publication Number: 2690961

IPC: A23L3/3463, A23B4/20,
A23L29/238, A23L29/256,
A23L29/269, A23L13/00,
A23L13/40, A23L23/00, A23B4/10

Language of the proceedings: EN

Title of invention:

METHODS AND COMPOSITIONS SUITABLE FOR PRESERVING THE FRESHNESS
OF LOAF-TYPE FOOD PRODUCTS

Patent Proprietor:

Société des Produits Nestlé S.A.

Opponent:

Mars, Incorporated

Headword:

Preserving freshness of loaf-type food products/NESTLÉ

Relevant legal provisions:

EPC Art. 56, 111(1)
RPBA 2020 Art. 11

Keyword:

Inventive step - main request and auxiliary requests (no)
Appeal decision - remittal to the department of first instance
(no)

Decisions cited:

T 1135/22



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Case Number: T 1293/22 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 28 March 2024

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
17 February 2022 concerning maintenance of the
European Patent No. 2690961 in amended form.**

Composition of the Board:

Chairman A. Haderlein
Members: C. Meiners
R. Romandini

Summary of Facts and Submissions

- I. This decision concerns the appeal filed by the opponent (appellant) against the opposition division's interlocutory decision finding that, on the basis of auxiliary request 13 then on file, the patent in suit ("the patent") met the requirements of the EPC.
- II. In its decision, the opposition division decided, *inter alia*, that the subject-matter of claim 6 as granted and of auxiliary requests 2 to 4 and 6 then on file was not novel. Moreover, the subject-matter of claims 1 and 6 of auxiliary request 1 then on file was held to lack an inventive step in view of, *inter alia*, document D5 as the closest prior art. This applied equally in respect of claim 1 of auxiliary requests 2 to 5 and 7 to 12 pending at that time. However, the opposition division admitted auxiliary request 13 into the proceedings and held that its claimed subject-matter was novel and also involved an inventive step.
- III. In its notice of opposition, the opponent had requested revocation of the patent on the basis of, *inter alia*, Article 100(a) EPC for lack of inventive step.
- IV. The following documents, filed in the opposition proceedings, are relevant to this decision:
- D4 WO 95/12323 A1
D5 US 2004/0166205 A1
D8 "Hydrocolloids in Food Processing" (Wiley; Ed. Thomas R. Laaman; pub. 2 September 2010),
extracts from Chapter 3
D16 US 3,395,024

V. *Wording of the relevant claims*

Claim 1 of the main request (auxiliary request 13 before the opposition division) reads:

"A composition suitable for preserving the freshness of a loaf-type food product comprising a sauce comprising: from 0.1 to 3% kappa carrageenan, preferably from 0.15 to 2%; from 0.1 to 2% locust bean gum, preferably from 0.15% to 1.5%; and from 0.2 to 3% guar gum, preferably from 0.2 to 2%, wherein the remainder of the sauce comprises water, wherein the sauce is capable of maintaining the freshness of a loaf-type food product for at least 3 hours."

Claim 1 of auxiliary request 1 differs from that of the main request in that the expression "maintaining the freshness" has been replaced with "maintaining the original condition".

Claim 1 of auxiliary request 2 differs from that of the main request on account of the insertion of the additional feature "[,] wherein the maintenance of the freshness is characterized by the retention of the original color, fresh wet appearance and no crust formation on the loaf-type food product".

Claim 1 of auxiliary request 3 is identical to that of the main request.

Compared with claim 1 of the main request, claim 1 of auxiliary request 4 is restricted to preferred levels of gellants/thickening agents:

"from 0.15 to 2% kappa carrageenan; from 0.15% to 1.5% locust bean gum; and from 0.2 to 2% guar gum, [...]".

Claim 1 of auxiliary request 5 is identical to claim 1 of auxiliary request 4.

Independent claim 1 of auxiliary request 6 contains the following additional restriction compared with the main request: "[,] further comprising a loaf-type food product associated with the sauce".

Lastly, the subject-matter of claim 1 of auxiliary request 7 is identical to that of auxiliary request 6.

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

(a) The subject-matter of claim 1 of the main request did not involve an inventive step in view of D5 as the closest prior art. The capability of preserving the freshness of a loaf-type food product for at least three hours was an inherent feature that was satisfied by all the embodiments of claim 1. It followed from the disclosure of paragraphs [0020] to [0022] and example 11 that D5 also envisaged moisture barrier properties and the preservation of freshness for longer periods, such as for at least three hours. Hence, this feature did not constitute a further distinguishing feature over D5.

No comparative examples were on file vis-à-vis the closest prior art embodiments disclosed in D5.

Consequently, the *objective* technical problem could only be considered to be providing alternative compositions.

D5 generically disclosed the components of claim 1 in a composition for preserving the freshness of a food product. Therefore, selecting the specific combinations of ingredients called for in claim 1 from lists disclosed in D5, in amounts pointed to in the prior art, did not confer an inventive step. In this context, it was common general knowledge that kappa carrageenan was a typical representative of the class of carrageenans. The subject-matter of claim 1 was thus obvious to a skilled person. The subject-matter of auxiliary requests 1 to 7 did not meet the requirement of Article 56 EPC either.

VII. The respondent's (patent proprietor's) arguments relevant to the present decision can be summarised as follows:

(a) The subject-matter of the claims of the main request involved an inventive step in view of document D5 as a starting point for the assessment of inventive step.

Among other things, D5 was concerned with moisture loss during refrigeration, which had to be distinguished from moisture loss upon exposure to the atmosphere.

The sauce's ability to maintain the freshness for at least three hours was not inherent; it constituted a further distinguishing feature over D5. The ability to obtain this functional feature had been demonstrated in the patent.

Hence, the *objective technical* problem addressed by claim 1 was to provide a composition that is

capable of maintaining the freshness of a loaf-type food product for at least three hours.

There was nothing in the cited prior art to indicate that a composition having the aforementioned property could be obtained by using the claimed ingredients in the amounts claimed in the main request. Even if the problem to be solved were providing an alternative, the claimed subject-matter was not obvious.

The specific examples in D5 only disclosed gelatine as a thickening/gelling agent. Furthermore, this agent was used alone in a concentration of 4 wt.% in these examples. There was no mention of the individual amounts of thickening/gelling agents that would have to be used to achieve the aforementioned effect of maintaining the freshness for at least three hours.

D5 disclosed the suitability of the enrobing coatings for preserving freshness for a short time during a refrigeration process (see step d) of claim 1). By contrast, packaging and transport took place after step d) of claim 1. Thus, D5 did not reveal any longer-lasting preservation of freshness of food products. However, any alternative to be provided in D5 would also have to satisfy the claimed functional feature of maintaining freshness for at least three hours. Consequently, the subject-matter of claim 1 of the main request was not obvious to a skilled person in view of D5 as the closest prior art. This conclusion applied equally to the subject-matter of auxiliary requests 1 to 7.

(b) If the board were to conclude that the main request was not allowable, the case should be remitted to the opposition division for further assessment.

VIII. Final requests

The appellant (opponent) requested that the decision under appeal be set aside and that the patent be revoked.

The respondent (patent proprietor) requested as its main request that the appeal be dismissed and, as an auxiliary measure, that the patent be remitted to the opposition division for further prosecution. As a further auxiliary measure, the respondent requested that the patent be maintained on the basis of one of auxiliary requests 1 to 7 filed with the reply to the statement of grounds of appeal.

Reasons for the Decision

Main request

1. *Inventive step*

1.1 The patent

The patent is directed to methods and compositions useful for preserving the freshness of loaf-type food products (see paragraph [0001] of the patent).

1.2 Closest prior art

The appellant attacked inventive step on the basis of, *inter alia*, document D5 as the closest prior art. D5 is

concerned with providing coating materials for the preservation/freshness of food products (D5: paragraph [0007]). It thus relates to the same purpose as the patent (see paragraph [0001]). Consequently, document D5 constitutes a suitable starting point for the assessment of inventive step. The respondent argued that the patent was concerned with preserving the freshness of food at room temperature in air, rather than in a refrigerator as taught in D5. However, food is stored in a refrigerator under an air atmosphere as well, and the patent does not indicate specific temperature conditions to be implemented. Moreover, the maintenance/preservation of the freshness of a food product is not limited to storage under air in claim 1. As set out below, the board concludes that the claimed subject-matter does not involve an inventive step in view of D5. Therefore, the question of whether D16 constitutes an alternative starting point which would be even more suitable for assessing inventive step, as submitted by the respondent, can be left unanswered.

1.3 Distinguishing features

1.3.1 The following are distinguishing features of the subject-matter of claim 1 over D5, and in particular the working examples in that document:

- i) the specific combination of gelling agents
- ii) the selection of kappa carrageenan from the generic disclosure of carrageenans
- iii) the specific concentration ranges for each gelling agent

1.3.2 According to the respondent the feature "[...] is capable of maintaining the freshness of a loaf-type food product for at least 3 hours" was a further distinguishing feature.

This functional feature is, however, fulfilled in D5. The coating compositions of D5 are also used to preserve food products and to avoid the loss of moisture (see paragraphs [0007], [0020] and [0086] of D5). The water-based fluid coating compositions are referred to as "gelsols", "gel sauces" and "gels" in paragraphs [0025] and [0026] of D5. As described in paragraphs [0025] and [0031] of the patent, the "gel sauces" or gels of D5 enrobe food products and slow their drying rate. The sauces or gels retain or lock the moisture inside the food products for an extended period of time, thereby preserving the freshness of the food products.

The respondent argued that D5 only pointed to preserving the freshness of food products during specific, short cooling steps, as was derivable from paragraphs [0007] and [0086] to which the appellant had referred. Like step d) of claim 1 of D5, these passages were concerned with refrigeration. The moisture loss was only reported in this context and not for a longer time, such as for at least three hours. Yet the packaging and transport steps as recited in claim 8 of D5 only occurred after the freezing step d) of claim 1. Similarly, paragraph [0087] of D5 referred to food preparation processes lasting only two minutes or less.

However, this line of argument is not convincing, in particular in view of the passages of D5 relied on by the appellant at the oral proceedings before the board. While paragraph [0020] of D5, which deals with the subject of the invention, refers to reduced moisture loss during refrigeration of the coated food products, the next paragraph states that "[t]he aesthetics, such as *color* and *plumpness*, of gelled foods are improved

over *extended periods of frozen storage* [...]” (emphasis by the board). In this regard, the colour change of such products referred to in this passage clearly relates to moisture loss. The next paragraph [0022] of D5 states: “[f]rozen vegetables *stored for months* will exhibit *fresh picked color* and frozen foods stored for months will taste freshly cooked” (emphasis by the board). Thus, D5 clearly refers to the preservation of food freshness over extended periods of time.

Furthermore, example 11 of D5 teaches that enrobing a food product (in a gel sauce) prevents a filled bread from experiencing the moisture of the food filling, and so the bread does not become soggy during production, distribution and storage. This disclosure clearly points to locking moisture in food by enrobing the food in a gel, as described in paragraphs [0025] and [0031] of the patent.

It follows that D5 also discloses the aforementioned functional feature.

1.4 Technical effect and objective technical problem in view of D5

There are no comparative examples on file that would allow a technical effect to be causally ascribed to the distinguishing features over the disclosure of D5, in particular over the worked examples in that document. Consequently, the objective technical problem addressed by the subject-matter of claim 1 is to provide *further/alternative* compositions suitable for preserving the freshness of food products. Considering that D5 discloses the functional feature relating to the

freshness, there is no reason to integrate it into the objective technical problem.

1.5 Obviousness

1.5.1 D5 already discloses carrageenans, locust bean gum and guar gum in the list of suitable gelling agents in paragraph [0024]. The concentration of gelling agents as used in the examples (about 4 wt.%) falls within the middle of the range for the total amount of gelling agents called for in claim 1 (from 0.4 wt.% to 8 wt.%).

1.5.2 Consequently, the subject-matter of claim 1 is obvious from the teaching of D5 owing to the selection of kappa carrageenan as a specific carrageenan species together with the other gellants in *arbitrary* concentration ranges - optionally in combination with the common general knowledge in the field of food technology as reflected by document D8. The last full paragraph on the third page of that excerpt discloses that kappa carrageenan is one of the main types of carrageenan. Such amounts of these gellants, to be used in thickened foodstuffs, are also known from document D4 (page 4, lines 12 to 14). The fact that D4 does not address the problem of food preservation is not decisive.

1.5.3 The solution proposed in D5 is enrobing foodstuffs with a gel, "gelsol" or "gel sauce", using gelling agents as recited in paragraph [0024] of D5. Since the respondent has failed to demonstrate that the specific combination of gelling agents and their respective amounts called for in claim 1 are critical, the solution to the objective technical problem is merely an arbitrary selection of gelling agents in arbitrary amounts. Thus, there is also no reason not to replace the gelatine

used in the examples of D5 with the claimed gelling agents in the claimed amounts.

Consequently, the subject-matter of claim 1 is obvious to a skilled person in view of D5, optionally in combination with the teaching of document D4 and/or D8 (Article 56 EPC).

2. *Request for remittal to the opposition division (Article 11 RPBA and Article 111(1) EPC)*

According to the respondent, the case should be remitted to the opposition division for further prosecution if the main request is found not to be allowable, because the auxiliary requests now on file were not dealt with by the opposition division.

The board is not convinced. Firstly, all the grounds for opposition, including inventive step starting from D5, were dealt with in the decision under appeal. Secondly, the mere fact that a claim request was not formally dealt with by the opposition division is not sufficient as a reason for remittal.

Lastly, the board shares the opinion set out in T 1135/22, Reasons 3.3, that remittal is conducive to procedural economy and legally sound only if there is at least one auxiliary request on file that has been admitted into the proceedings and to which the ground opposing maintenance of the patent as granted is not applicable. As explained below, this situation does not arise in the present case.

Thus, the board sees no special reasons within the meaning of Article 11 RPBA for remitting the case to

the opposition division for further prosecution.

Auxiliary requests

3. *Inventive step*

3.1 The amendments in claim 1 of auxiliary requests 1 and 2 were filed in the event that the board agreed with the opponent's clarity objections concerning the term "freshness". The respondent did not argue that the amendments resulted in a further restriction over the closest prior art. Thus, auxiliary requests 1 and 2 do not overcome the objections under Article 56 EPC outlined above in relation to the main request.

3.2 Claim 1 of auxiliary request 3 is identical to claim 1 of the main request and thus does not meet the requirement of Article 56 EPC for the same reasons.

3.3 In the absence of an associated technical effect, the restriction to the preferred ranges for the ingredients recited in claim 1 of each of auxiliary requests 4 and 5 does not confer inventive merit in view of D5 either, for the reasons mentioned above in relation to the main request.

3.4 Auxiliary requests 6 and 7 do not overcome the lack of inventive step either. In particular, document D5 discloses food products that can be deemed "loaf-type" food products. According to paragraph [0013] of the patent, the term "loaf-type" food product refers to a shaped or moulded mass of a food product. D5 also relates to shaped food products such as desserts, complete meals, beef steaks and chicken nuggets (see paragraph [0023]). Consequently, the amendments made in

claim 1 do not confer inventive merit either in view of D5 as the closest prior art.

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:



K. Götz-Wein

A. Haderlein

Decision electronically authenticated