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Aktenzeichen / Case Number / N° du recours : T 72/86 - 3.3.1

Anmeldenummer / Filing No / N° de la demande : 81 106 048.2

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Bezeichnung der Erfindung: Frying oil composition and process of production
Title of invention:
Titre de l'invention :

Klassifikation / Classification / Classement : A23D 5/00

ENTSCHEIDUNG / DECISION

vom / of / du 10 December 1987

Anmelder / Applicant / Demandeur :

Patentinhaber / Proprietor of the patent /
Titulaire du brevet :

N.V. SAFINCO

Einsprechender / Opponent / Opposant :

Unilever N.V.

Stichwort / Headword / Référence :

EPO / EPC / CBE Article 56

Kennwort / Keyword / Mot clé :

"Inventive step"; "no incentive from documents concerned with a different technical problem".

Leitsatz / Headnote / Sommaire



Case Number : T 72/86 - 3.3.1

D E C I S I O N
of the Technical Board of Appeal 3.3.1
of 10 December 1987

Appellant : UNILEVER N.V.
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Decision under appeal : Decision of the Opposition Division of the European Patent Office dated 14 October 1985, posted on 21 January 1986, rejecting the opposition filed against European patent No. 0 045 504 pursuant to Article 102(2) EPC

Composition of the Board :

Chairman : K. Jahn
Members : J. Arbouw
G.D. Paterson

Summary of Facts and Submissions

- I. European patent No. 45 504 incorporating seven claims was granted on 7 December 1983 on the basis of European patent application No. 81 106 048.2, filed on 1 August 1981 and claiming a priority of 5 August 1980 (GB 8 025 519). Independent Claims 1 and 5 read as follows:

"1. An edible oil composition suitable for frying uses comprising:

- (a) a liquid oil
- (b) an emulsifier
- (c) a browning substance
- (d) an effective amount of stabilizing material, forming 1% or less of the total weight of the composition, said stabilizing material being selected from fully or partly hardened fats or oils with a slip melting point of at least 45°C.

5. A process for preparing a composition according to any one of Claims 1 to 4 in which emulsifier and stabilizing material are dissolved in at least a portion of edible oil, browning substances and any other ingredients are blended therein and the composition is rapidly cooled with agitation."

- II. The Appellants filed an opposition to the grant on 31 August 1984, and later submissions with additional arguments, based on the documents:

- (1) JP-A-49 129 701 (in English translation)
- (2) FR-A-2 285 077
- (3) US-A-3 563 766
- (4) US-A-2 815 286.

They requested that the patent be revoked in its entirety on grounds of lack of novelty and inventive step.

- III. By its decision of 14 October 1985, posted on 21 January 1986 the Opposition Division rejected the Opposition.

It held that the subject-matter of the patent was regarded as novel with respect to document (1) in that 1% or less hardened fats or oils are used as stabilizing material.

It was further held that the patent-in-suit involved an inventive step in the light of the existing technical problem which was to provide a stabilized liquid edible oil composition which contains a browning substance. The Opposition Division considered that the density of the suspended agent according to (1) - i.e. flavour capsules - is much less than that of the suspended browning agent according to the patent-in-suit. The man skilled in the art therefore should have expected that in the edible oil according to the invention the browning agent would precipitate.

- IV. A Notice of Appeal was filed by the Appellant against this decision on 25 February 1986, and the appeal fee was also paid in due time. A Statement of Grounds was filed on 20 May 1986.

The Appellants submitted in their statement of grounds that the subject-matter of the patent is obvious over U.K. patent application 1 092 236 (5), a document already discussed in the patent-in-suit, since this document relates to a liquid edible oil emulsion which only differs from the frying oil according to the patent-in-suit in that it also comprises water. The technical problem vis-à-vis this prior document is to avoid spattering during frying.

The Appellants argued that it is obvious for a skilled man to solve this problem by reducing the water content, since it is common general knowledge that spattering is caused by the water present in frying oil.

- V. The Respondents submitted that avoiding spattering is not the only problem solved by the patent. They provided a list of further technical problems solved by the patent-in-suit. They emphasised that preparing a stable suspension of solid browning substances in an edible oil according to the patent-in-suit is an entirely different problem from preparing a stable water-in-oil emulsion in which the browning substances are dissolved in the aqueous phase as is the case for the water in oil emulsion according to (5). It was submitted that (5) does not at all deal with a frying oil but with a substitute for melted margarine for use on vegetables and other food.
- VI. Two days before the day appointed for oral proceedings, the Appellant filed some evidence purporting to relate to an alleged prior public use of a product having a composition similar to that of the claimed invention. In his accompanying letter the Appellant stated that "this evidence is probably not admissible as part of the opposition", but that the European Patent Office "may wish to examine this matter of its own volition, even at this late stage".
- VII. During oral proceedings held on 10 December 1987 the matter mentioned in paragraph VI was not discussed. In relation to the novelty of the subject-matter of Claim 1 it was not disputed that soy-bean lecithin is essentially non-proteinaceous and therefore should not be considered as a browning substance as required by Claim 1 of the patent-in-suit. For this reason, the disclosure in Example 2 of document (1) is not detrimental to novelty.

The Respondents further submitted that Claim 1 should be interpreted in the light of the description. By definition, an "oil" does not contain significant amounts of water, and this is confirmed by the description, especially column 2, lines 9 to 14 and 19-21. Therefore, the oil composition defined in Claim 1 of the patent is essentially water free.

As regards inventive step the Appellants only relied on documents (1) and (5).

VIII. The Appellants request that the decision under appeal be set aside and that the patent be revoked.

The Respondents request that the appeal be dismissed.

Reasons for the Decision

1. The appeal complies with Articles 106 to 108 and Rule 64 EPC and is, therefore, admissible.
2. According to Claim 1, the invention relates to an edible oil composition suitable for frying uses. The Board agrees with the submission of the Respondents that when Claim 1 is properly construed in its context with reference to the description (see column 2, lines 9-14 and 19-21), it is clear that an "edible oil composition" is substantially water free and does not cover water in oil emulsions of the margarine-types.

According to an unchallenged statement in the description of the patent-in-suit (see column 2, lines 1-9), are liquid edible oil compositions disadvantageous in that they possess no good browning properties (when no browning

substance is added) or are not stable in preparation, storage and use (when a browning substance is added).

The technical problem underlying the patent-in-suit, with respect to this statement can be seen in providing a stable liquid low water content frying oil product which has good emulsifying and browning properties.

In order to solve this problem the Patentee proposed an edible oil composition suitable for frying uses comprising:

- (a) a liquid oil
- (b) an emulsifier
- (c) a browning substance
- (d) an effective amount of stabilizing material, forming 1% or less of the total weight of the composition, said stabilizing material being selected from fully or partly hardened fats or oils with a slip melting point of at least 45°C.

The Board is satisfied that the oil composition according to the patent-in-suit solves this technical problem. Since this point was not an issue in the appeal, it need not be further considered.

3. Examination of the cited documents has revealed that this technical teaching is not disclosed there. Consequently, the composition according to Claim 1 of the patent-in-suit is novel having regard to the prior art. As the Appellant during Oral Proceedings has no longer challenged the novelty of the claimed subject-matter, it is not necessary to enter into details.
4. It still remains to be examined whether the requirement for inventive step is met by the subject-matter claimed.

- 4.1 Document (1) discloses a liquid edible oil composition comprising a liquid oil, a hardened oil, an emulsifier and capsulated flavour dispersed therein (see Claim 1, page 1, second paragraph and Examples 2 and 3).

Apart from the browning substance the composition according to Example 2 of document (1) comprises the same ingredients as the edible oil composition according to the patent-in-suit, i.e. a liquid oil, a hardened oil and an emulsifier, however, without any indication of the purpose of these ingredients. It appears prima facie obvious for the man skilled in the art that the technical problem underlying the patent-in-suit simply can be solved by adding a browning substance to the oil composition according to (1). However, this approach does not take into consideration that (1) deals with an entirely different problem, i.e. to overcome the undesired strong odour of flavour which is added to edible oils in comparatively large amounts (see (1), page 4, second paragraph). To solve this technical problem document (1) proposes capsulating of the flavour (see page 4, third paragraph) and dispersing the capsulated flavour in the oil or fat composition. Document (1) clearly indicates that for solving this technical problem all types of oils and fats applicable for frying may be used including liquid oils as well as hydrogenated oils and fats (see page 4, last paragraph). This is also clearly demonstrated by the examples. Of the examples of (1) only Example 2 deals with an oil composition which is similar - though not identical - to that of the patent-in-suit. The question at issue therefore is whether document (1) would suggest to the man skilled in the art that the particular oil composition as defined in Claim 1 of the patent-in-suit would solve the technical problem. Having regard to the entirely different technical problem and the broad range of

compositions disclosed in (1), in the Board's view this is not the case.

The Board is bound to say that in seeking to analyse retrospectively how a skilled person might have been able to arrive at the concept of the invention by arbitrary selection of one out of many oil compositions, the Appellant is adopting a typical ex post facto approach which fails to do justice to the objective standards by which inventive step is to be assessed. The consistent jurisprudence of the Board requires that the question of obviousness be considered from the viewpoint of the existing technical problem. The Appellant has not sought to argue from this viewpoint, nor is a technically sound line of reasoning evident to the Board from its own knowledge of the field that would enable a skilled person to solve the problem here being addressed.

- 4.2 Document (5) relates to water in oil emulsions of the margarine type (see page 1, lines 69-74). This document is concerned with the problem of stabilizing the emulsion and preventing it from breaking (see page 1, lines 81-84). This technical problem is solved by applying an emulsion-stabilising amount of a crystalline hard fat (see page 1, lines 84-89).

The Appellants argue that the stabilized emulsion according to (5) also comprises a browning agent and that it was obvious to delete water from this emulsion to avoid spattering, since it is common general knowledge that water causes spattering. Again, this line of argument is based on hindsight, and is therefore a typical ex-post-facto approach. As explained under 2 above, Claim 1 of the patent-in-suit - contrary to document (5) - is not concerned with water in oil emulsions of the margarine-type, but with substantially water-free oils. Only on the basis of this

difference the teaching of document (5) - i.e. the protection against breaking of margarine-type emulsion by certain additives - could not have suggested to the man skilled in the art that he should use the same additives for an entirely different purpose - i.e. the stabilisation of frying oil comprising a browning substance. Particularly since the browning substances according to (5), i.e. milk solids, are in the aqueous phase (see page 1, lines 84-89 and page 2, lines 62-65) which is not present in the oil according to the patent-in-suit.

The Appellants have not submitted, nor is it known to the Board on the basis of its own technical knowledge, that a relationship existed between the entirely different functions.

Therefore (5) also does not suggest the man skilled in the art a solution for the technical problem posed.

- 4.3 Documents (2), (3) and (4) are not closer to the subject-matter of the patent and provide no additional information.

Documents (2) and (4) relate to compositions comprising higher amounts of hardened oil (see (2), page 5 and (4), Claim 1). These documents do not suggest that small amounts of hardened fat solve the technical problem underlying the invention.

Document (3) is not at all concerned with the problem of stabilizing dispersions or suspensions.

- 4.4 With reference to the alleged prior use referred to in paragraph VI above, the introduction of new grounds of opposition based on new evidence at a late stage in the appeal stage of an opposition may not be allowable, in the

exercise of the Board's discretion under Article 114(2) EPC. In the present case the Board has considered the relevance of the new evidence and considers that it is not sufficiently relevant to justify either that it should be admitted into the opposition proceedings, or that it should be examined further by the EPO of its own motion. Therefore, such evidence is disregarded in the exercise of the Board's discretion under Article 114(2) EPC.

- 4.5 Therefore, in the Board's judgement, in view of the problem underlying the claimed composition, the prior art cited did not give any indication for the solution as claimed in the patent-in-suit.

Claims 2 to 4 concern particular embodiments of the oil composition according to Claim 1, and thus are supported by the patentability of that claim.

The process according to the Claims 5 to 7 is particularly developed as to enable the preparation of the oil compositions according to Claims 1 to 4 - whose inventiveness has been established - and hence are also patentable.

Order

For these reasons, it is decided that:

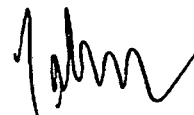
The appeal is dismissed.

The Registrar



F.Klein

The Chairman



K.Jahn