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Aktenzeichen / Case Number / N^o du recours : T 267/89 - 3.3.2

Anmeldenummer / Filing No / N^o de la demande : 82 303 545.6

Veröffentlichungs-Nr. / Publication No / N^o de la publication : 0 069 591

Bezeichnung der Erfindung: Food product

Title of invention:

Titre de l'invention :

Klassifikation / Classification / Classement : A23L 1/04

ENTSCHEIDUNG / DECISION

vom / of / du 28 August 1990

Anmelder / Applicant / Demandeur : Mars G.B. Limited

Patentinhaber / Proprietor of the patent /
Titulaire du brevet :

Einsprechender / Opponent / Opposant :

Stichwort / Headword / Référence :

EPÜ / EPC / CBE Art. 54

Schlagwort / Keyword / Mot clé : "Novelty (yes), new use"

Leitsatz / Headnote / Sommaire



Case Number : T 267/89 - 3.3.2

D E C I S I O N
of the Technical Board of Appeal 3.3.2
of 28 August 1990

Appellant : Mars G.B. Limited
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London EC3 (GB)

Representative : Day, Jeremy John
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Decision under appeal : Decision of Examining Division 020
of the European Patent Office dated
24 November 1988 refusing European
patent application No. 82 303 545.6
pursuant to Article 97(1) EPC

Composition of the Board :

Chairman : P. Lançon
Members : I. Holliday
R. Schulte

Summary of Facts and Submissions

I. European patent application No. 82 303 545.6 (publication No. 0 069 591) was refused by a decision of the Examining Division.

II. The decision was based on Claims 1 to 7 received on 19 March 1988. Independent Claim 1 reads as follows:

"1. The use, in an ungelled processed food product in the form of an emulsion, of at least one glucomannan as emulsion stabiliser."

III. The ground for the refusal was that Claim 1 lacked novelty in the light of the disclosure of JP-A-55-77870 (1) incorrectly referred to in the decision as JP-A-55 770 870, which relates to the manufacture of a foodstuff in which glucomannan is added to soya bean milk. In the view of the Examining Division, the foodstuff according to (1) is an ungelled processed food product, in the form of an emulsion, to which glucomannan was added. It was irrelevant whether the said glucomannan acted as an emulsion stabiliser or, as argued by the applicant, as a thickener, the disclosure of (1), in the opinion of the Examining Division, destroyed the novelty of Claim 1 of the application.

IV. An appeal was lodged against the said decision. The applicant argued that Claim 1 related to a new use of a known material and that in accordance with a decision of the Enlarged Board of Appeal G 5/83 and decisions of the Technical Boards of Appeal T 231/85 and T 59/87 such new uses are regarded as relating to patentable subject-matter within the meaning of Article 52(1) EPC.

- V. The applicant requested that the contested decision be set aside and a patent granted on the basis of the application documents currently on file.

Reasons for the Decision

1. The appeal is admissible.
2. The amended Claim 1 is formally allowable. It is based on the originally filed description from page 1, line 24 to page 2, line 1. The requirements of Article 123(2) are accordingly satisfied.
3. The present application relates to the use of glucomannan as an emulsion stabiliser in an ungelled processed food product.
4. The only prior art cited in the contested decision is document (1), which relates to the use of glucomannan as an additive to a food product based on soya bean milk. In the abstract cited in the European Search Report the function of the glucomannan is not specified. However, in the full English translation of (1) reference is made in the paragraph bridging pages 2 and 3 to various known therapeutic effects of glucomannan. On page 3, lines 17 to 31 of (1), it is suggested that a combination of soya bean milk and glucomannan overcomes flavour problems associated with both and that the product of the mixture has an acceptable flavour related to that of sour cream. Reference is made at the foot of page 4 of (1) to other additives, including carragheenan and a sucrose ester which are stated to act as stabilisers for the emulsion. There is, however, no hint in (1) of the possibility that glucomannan might act as an emulsion stabiliser.

5. Accordingly, the problem to be solved by the present application in respect of the prior art is to provide a new use for glucomannan.

Decision G 2/88 of the Enlarged Board of Appeal (OJ EPO, 1990, 93) answered a question posed by the Chemical Board of Appeal 3.3.1 in decision T 59/87 referred to by the applicant in the grounds of appeal.

The Enlarged Board decided that a claim to the use of a known compound for a particular purpose, which is based on a technical effect which is described in the patent, should be interpreted as including that technical effect as a functional technical feature and is accordingly not open to objection under Article 54(1) EPC provided that such technical feature has not previously been made available to the public (Reasons, point 10.3).

Since (1) does not refer to the use of glucomannan as a stabiliser for emulsions, Claim 1 of the application must, having regard to this decision, be regarded as relating to novel subject-matter.

The reason for refusal was lack of novelty over (1); the contested decision must accordingly be set aside.

6. The refusal of the present application by the Examining Division was based on the sole ground of lack of novelty having regard to the disclosure of (1).

~~The Examining Division has not yet indicated whether or not other matters, for example those raised in the letters dated 10 September 1985 and 13 February 1986, remain a hindrance to the granting of a patent.~~

For this reason, the Board considers it appropriate to use the powers conferred on it by Article 111(1) EPC to remit the case to the Examining Division for further prosecution.

7. Since the present decision is to remit the case to the Examining Division for further prosecution and since oral proceedings were only requested in the event of a negative decision, oral proceedings before the Board need not be appointed.

Order

For these reasons, it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the Examining Division for further prosecution.

The Registrar

The Chairman

M. Beer

P. Lançon