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File No.: T 0567/91 - 3.3.2
Application No.: 86 100 821.7
Publication No.: 0 235 308
Classification: A23P 1/08
Title of invention: Coated foodstuff

D E C I S I O N
of 20 October 1993

Proprietor of the patent: Frisco-Findus AG

Opponent: Unilever N.V.

Headword: Food product/FRISCO FINDUS

EPC: Article 56 EPC

Keyword: "Inventive step (yes)" - "Non-obvious modification"

Headnote
Catchwords



Case Number: T 0567/91 - 3.3.2

D E C I S I O N
of the Technical Board of Appeal 3.3.2
of 20 October 1993

Appellant:
(Opponent)

Unilever N.V.
P.O. Box 760
3000 DK Rotterdam (NL)

Representative:

Keppels, Willem Richard Engelbertus
Gerardus, Drs.
Unilever N.V.
Patent Division
P.O. Box 137
NL - 3130 (NL)

Respondent:
(Proprietor of the patent)

Frisco-Findus
Industriestrasse
CH - 9400 Rorschach (CH)

Representative:

Decision under appeal:

Interlocutory decision of the Opposition Division
of the European Patent Office dated 23 May 1991
concerning maintenance of European patent
No. 0 235 308 in amended form.

Composition of the Board:

Chairman: P.A.M. Lançon
Members: I.A. Holliday
S.C. Perryman

Summary of facts and submissions

- I. European patent No. 0 235 308 concerning "coated foodstuff" was granted on the basis of nine claims contained in European patent application No. 86 100 821.7.
- II. The Appellant filed an opposition against the granted patent citing six documents of which the following are pertinent to the present decision:
- (1) FR-A-2 248 793.
 - (5) Frozen and Chilled Foods, January 1986, page 16 to 17.

In an interlocutory decision, the Opposition Division proposed maintenance of the patent on the basis of Claim 1 reading:

- "1. A frozen food product comprising fish or meat coated with batter and a particulate material, which is prefried before being deep-frozen characterised in that the particulate material comprises fresh root vegetables, the individual particles of which have a volume from 20 to 250 cubic millimetres and the amount of particulate fresh root vegetables applied to the fish or meat is between 10 and 70% by weight based on the total weight of the frozen food product.

Independent Claim 7 relates to a process for preparing a frozen food product and independent Claim 9, an apparatus for coating a foodstuff with a particulate material.

The Opposition Division considered the claimed subject-matter to be novel since none of the prior art cited

related to the coating of meat or fish pieces with particles including fresh frozen vegetables.

As the prior art avoided coating meat or fish with fresh vegetables, the Opposition Division held that a prejudice has been overcome as far as the problem consisted in improving the organoleptic properties as well as reducing the oil intake at the time of prefrying.

The Opposition Division also considered the apparatus and method claims to be both novel and inventive.

III. The Appellant lodged an appeal against the decision of the Opposition Division. Oral proceedings took place on 20 October 1993.

IV. The arguments of the Appellant both in the written procedure and at the oral proceedings may be summarised as follows:

The Appellant did not question the novelty of the subject-matter claimed and furthermore did not request the revocation of the apparatus claim.

According to the Appellant, document (1) disclosed fish or meat coated with batter and a particulate material which is prefried before being deep frozen. Individual particles of dimensions 20-250mm³ were known from document (5). It was also known to use fresh root vegetables as coating materials in FR-A-1 548 914(7) which is acknowledged in the patent in suit.,

The patent in suit referred to two separate unrelated problems, i.e. to improve organoleptic properties and to reduce the uptake of fat. If one wished to impart the taste of potatoes, it was known from (7) to coat food

products in general with fresh potato. The Appellant argued that there was an analogy between the coating of a wet dough with particulate potato as disclosed in (7) and coating a battered fish or meat product with particulate root vegetable as disclosed and claimed in the patent in suit.

The Appellant also considered that the reduced uptake of fat which is alleged to be an advantage of the products of the patent in suit must also have been a feature of those known from document (7).

- V. The Respondent questioned the relevance of document (7) since it was concerned with coated fully cooked vegetable snack products such as potato crisps. On the other hand, the products of the patent in suit were merely prefried prior to deep freezing and require cooking before consumption. Thus the products of (7) differ in several respect from those currently claimed. The Respondent also protested against the reintroduction of this document which had been deemed irrelevant during the examination procedure.

As an auxiliary request, the Respondent filed on 28 March 1992 amended claims 1 to 11 which contained various clarifying amendments.

- VI. The Appellant requested that the decision under appeal be set aside and that the patent be revoked to the extent of claims 1 to 4, 6 and 7.

The Respondent requested as main request that the appeal be dismissed and as auxiliary request that the decision under appeal be set aside and the patent be maintained on the basis of the claims submitted on 28 March 1992.

Reasons for the decision

1. The appeal is admissible.
2. The board see no reason to question the conclusion of the opposition Division on page 9 of the contested decision that the requirements of Article 123(2) and 123(3) are satisfied.
3. In the Statement of Appeal, the Appellant referred to document (7) which, although acknowledged in the patent in suit, had not previously been mentioned in the opposition proceedings. Having regard to its reference to coating a food product with particulate raw potatoes, the Board decided to admit it to the proceedings. The other reference works cited by the Appellant are not relevant to the present decision and are disregarded.
4. The Board is satisfied that none of the documents cited in the course of the proceedings prejudice the novelty of claims 1,7 and 9. Since novelty is not in dispute, the matter need not be considered in detail.
5. In the opinion of the board, the closest prior art is document (1) which also relates to a coated food product which may be based on fish or meat. The products, which require cooking prior to consumption, are coated in the raw state with an edible heat-settable adhesive (batter) and particulate dehydrated potato is adhered thereto. The preferred form of the particulate dehydrated potato used in the worked examples is potato flake but potato, powder, or granules or minute cubes are also mentioned (page 1 lines 82 to 86). The dimensions of the particles are not mentioned in document (1); however, it was not disputed by the parties during the Opposition and Appeal proceedings that such particles of dehydrated potato

would be considerably smaller than the particulate fresh root vegetables used in the product and process of the patent in suit. The preferred quantity of particulate potato coating is 4 to 8 grams per 100 sq cm of surface area (page 1, lines 55 to 58). It is possible that a proportion of the dehydrated potato may become hydrated from either the batter or the foodstuff itself but according to the description the majority of the coating remains substantially dehydrated. (page 1, lines 93 to 97).

5.1 *Vis-à-vis* (1), it would be desirable to improve the organoleptic properties and the appearance and also to diminish the absorption of fats in the prefrying stage (patent in suit, col. 1, lines 26 to 34 and col. 5, lines 29 to 31). Taking into account the subjective character of two of these aspects, the problem could be defined as being to lower fat uptake to yield an improved product having a lower fat content without diminishing the organoleptic properties and the appearance as well as a process and apparatus adapted to prepare such a product. The problem is solved by the product, process and apparatus claimed respectively in claims 1, 7 and 9 of the patent in suit (main request). Although the Board has not been in a position objectively to assess the organoleptic properties of the product, in the light of the description of the patent in suit, there is no reason to doubt that the problem has indeed been solved.

6. It remains to consider whether the chosen solution satisfies the requirements of Article 56 EPC in respect of inventive step.

6.1 The essential difference between the products and process of the patent in suit and those of document (1)

lies in the use as coating material of particulate fresh root vegetables instead of the dehydrated potato known from (1). The essential features of (1) are that the potato remains dehydrated, is of smaller particle size than that specified in the patent in suit and furthermore is used in considerably smaller quantities in relation to the meat or fish product to be coated. Accordingly, document (1) alone contains no pointers towards the solution of the underlying problem.

- 6.2 Document (7) is concerned with coating an edible base layer with finely divided particles of potato, including raw potato (last line of the right hand column on page 1). It is, however, apparent from the preceding passage and from the Table on page 2 that the preference is for dehydrated potato. The edible substrate is generally formed of a wet dough, not of fish or meat as is the case in the patent in suit. The moisture content of the potato particles is sufficient to ensure adhesion to the wet dough. In contrast, according to the patent in suit, batter must be used to adhere the particulate vegetable to the meat or fish; i.e. a further step is required. Another essential difference between the potato particles used in (7) and those of the patent in suit lies in their particle size. According to Example 1 of (7), the dough substrate has a thickness of 0.85mm and the potato particles similar dimensions. The table at the foot of page 2 of (7) indicates potato contents of 15 to 25% giving further evidence that the potato particle size must be of the same order as that of the substrate. At the oral proceedings, the Respondent argued that the particles used in accordance with the patent in suit, i.e. having a volume of 20 to 250mm³, would be of the order of six times the size of the particles used in (7). The Appellant did not contradict this statement.

- 6.2.1 A final difference between the products of (7) and those of the patent in suit is that, immediately after coating, the product of (7) are deep fried and fully cooked ready for consumption as a snack food product. On the other hand, the fish or meat products of the patent in suit are merely prefried before deep freezing. A final cooking step is required before the products are ready for consumption.
- 6.2.2 Accordingly, in the judgement of the Board, there is no teaching in document (7) which might induce one skilled in the art to coat fish or meat with particles of fresh root vegetables in the expectation of obtaining an improved food product.
- 6.3 The Appellant argued that the illustration of page 16 of document (5) showed poultry, i.e. meat, products having coarse coatings in line with those claimed in the patent in suit. It is, however, apparent from the final paragraph of the article (top of page 17) that, although the products might appear superficially similar, a "flakey wholemeal" coating has been applied, not particulate root vegetable.
- 6.4 In the Statement of Appeal, the Appellant objected to the inclusion of frozen root vegetables under the designation "fresh". It is, however, clear from the originally filed documents (e.g. page 6, lines 20 to 26) that frozen particles were always included. The Board is satisfied that the essential feature is that the vegetable particles retain their original moisture in contradistinction to the dehydrated potato particles known from document (1).
- 6.5 Having regard to the preceding paragraphs, it is concluded that there is nothing in the documents presently cited which would render obvious the subject-

matter of claim 1; an inventive step can accordingly be recognised.

- 6.6 Analogous arguments must also apply to the inventive step of the process of preparing the frozen food product (Claim 7) by the steps discussed in detail in paragraphs 6.2 to 6.2.2 above. Dependent claims 2 to 6 and 8 derive their patentability from claims 1 and 7 respectively.
7. Since the Appellant has raised no objection to the apparatus of claim 9 together with method claims 10 and 11 associated therewith, the Board has no reason to question the findings of the Opposition Division concerning their patentability, which are set out in the paragraph bridging pages 8 and 9 of the contested decision.
8. The Board are satisfied that claims 1 to 11 of the main request relate to patentable subject-matter within the meaning of Article 52(1) EPC. It is accordingly unnecessary to consider the Appellant's auxiliary request.

Order

For these reasons, it is decided that:

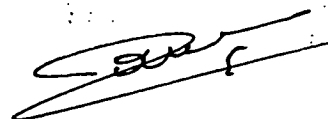
The appeal is dismissed.

The Registrar:



P. Martorana

The Chairman:



P.A.M. Lançon