



PATENTS ACT 1977

APPLICANT	Dr Kartar Singh Lalvani
ISSUE	Whether patent application number GB0813704.4 complies with Section 1(1)(b)
HEARING OFFICER	Peter Slater

DECISION

Introduction

- 1 Patent application GB0813704.4 (“the application”) entitled “Low fat probiotic yoghurt food manufacture” was filed on 26 July 2008 including a description and claims. On 5 August 2008 a preliminary examination report was issued identifying that the application did not meet the requirements of the Patent Rules as a search fee was required by 27 July 2009. A form 9 and search fee was duly received on 13 November 2008 and the search report issued on 11 March 2009. On the 15 June 2009 a form 10 requesting substantive examination was filed together with the appropriate fee and new description and claims. The application was then published as GB2462248 on 3 February 2010 with the original description and both the original and new claims. The first examination report was issued on 9 March 2012
- 2 The examiner has maintained throughout the examination process that the invention as claimed does not involve an inventive step over recipes found on the internet. Despite numerous rounds of correspondence, the applicant has not been able to overcome this objection. There are a number of other outstanding issues which have been deferred pending the outcome of this decision and which may need to be returned to should I find in favour of the applicant.
- 3 The matter therefore came before me at a hearing on 30 July 2013 where the applicant was represented by Mr Keith Bridgeman and Mr Robert Taylor of Vitabiotics Ltd. The hearing assistant Mr Nikki Dowell was also present. At the hearing Mr Bridgeman presented a set of amended claims upon which the applicant wished the issue of inventive step to be decided; I will turn to these first.

The Application

- 4 The invention relates to a method of producing a foodstuff in which low fat probiotic yogurt is used during a process in the manufacture of Murgh Makhani without butter, cream, or saturated fats. The specification includes a recipe for a 1kg batch of Murgh

Makhani including a process beginning on page 4 of the specification. At the hearing it was clarified that Murgh means chicken and Makhani means buttery and that Murgh Makhani is one of a broad range of dishes referred to as butter chicken.

Amended claims

- 5 The amended claims presented at the hearing sought to introduce additional ingredients in the form of “pumpkin that has been boiled and then pulped” into the method of preparing Murgh Makhani as claimed in claim 1. At the hearing I questioned where in the application support for this feature was found and Mr Bridgeman duly pointed to a reference on page 6 of his copy of the description. This appeared inconsistent with that which appeared on the file where there was no such reference.
- 6 After the hearing I inspected the application file and determined that the feature which the applicant was now seeking to add to claim 1 was not present in the original disclosure filed on 26 July 2008. I instructed the hearings clerk to write to the applicant on 6 October 2015 requesting additional submissions or arguments regarding the proposed amendment. In that letter, I highlighted that the reference to pumpkin and lentils was not present in the specification as filed at the filing date but had been added to the list of ingredients on page 6 of the description on 15 June 2009, and as such the description and the amended claims presented at the hearing appeared to add matter to the application contrary to Section 76(2) of the Patents Act 1977. I also pointed out, that should the case be allowed to proceed, the applicant would require the Comptroller’s discretion to delete the offending matter as the compliance period had expired on 11 March 2013.
- 7 Mr Taylor submitted a response on 4 November 2015 which presented some arguments that the additional matter on page 6 of the description filed on 15 June 2009 amounted to a correction or the filing of a missing part. However page 14 of that letter, which appeared as if it would include much of the argument in this regard, was missing from the letter so I instructed the hearings clerk to write to Mr Taylor on 12 November 2015 then again on 7 January 2016 and 30 August 2016 to request the missing page. The missing page was filed by email on 31 August 2016.

The law – amended claims

- 8 Section 76 of The Patents Act 1977 prohibits the introduction of new matter when amending an application or a patent. Section 76(2) reads:

No amendment of an application for a patent shall be allowed under section 15A(6), 18(3) or 19(1) if it results in the application disclosing matter extending beyond that disclosed in the application as filed.

- 9 The Patents Act 1977 affords the applicant the right to correct errors in patents or applications by way of Section 117(1) which reads:

The comptroller may, subject to any provision of rules, correct any error of translation or transcription, clerical error or mistake in any specification of a patent or application for a patent or any document filed in connection with a patent or such an application.

- 10 Rule 105(1)-(3) of The Patent Rules 2007 (as amended) makes provision for such corrections to the specification. Rule 105 read:

105. (1) A request to the comptroller to correct an error or mistake under section 117 must be made in writing and identify the proposed correction.

(2) The comptroller may, if he thinks fit, require the person requesting a correction to produce a copy of the document indicating the correction.

(3) Where the request is to correct a specification of a patent or application, the request shall not be granted unless the correction is obvious (meaning that it is immediately evident that nothing else could have been intended in the original specification).

....

- 11 Section 15(5)-(8) of the Patents Act 1977 provides for the filing of missing parts of an application; these Sections read:

Section 15(5)

Subsection (6) below applies where-

(a) an application has a date of filing by virtue of subsection (1) above;

(b) within the prescribed period the applicant files at the Patent Office-

(i) a drawing, or

(ii) part of the description of the invention for which a patent is sought, and

(c) that drawing or that part of the description was missing from the application at the date of filing.

Section 15(6)

Unless the applicant withdraws the drawing or the part of the description filed under subsection (5)(b) above ("the missing part") before the end of the prescribed period-

(a) the missing part shall be treated as included in the application; and

(b) the date of filing the application shall be the date on which the missing part is filed at the Patent Office.

Section 15(7)

Subsection (6)(b) above does not apply if-

(a) on or before the date which is the date of filing the application by virtue of subsection (1) above a declaration is made under section 5(2)

above in or in connection with the application;

(b) the applicant makes a request for subsection (6)(b) above not to apply; and

(c) the request complies with the relevant requirements of rules and is made within the prescribed period.

Section 15(8)

Subsections (6) and (7) above do not affect the power of the comptroller under section 117(1) below to correct an error or mistake.

- 12 Rule 18 of The Patent Rules 2007 (as amended) sets out the requirements for the filing of missing parts. Rule 18 reads:

18.— (1) *The period prescribed for the purposes of section 15(5)(b) and (6) is the period beginning with the date of filing of the application for a patent and ending with the date of the preliminary examination.*

(2) *But where the applicant is notified under section 15A(9) that a drawing or part of the description of the invention has been found to be missing, the period prescribed for the purposes of section 15(5)(b) and (6) shall be the period of two months beginning immediately after the date of the notification.*

(3) *An applicant may only withdraw a missing part by giving written notice to the comptroller.*

(4) *A request made under section 15(7)(b) must—*

(a) be made in writing;

(b) include sufficient information to identify where in the priority application the contents of the document filed under section 15(5)(b) were included; and

(c) be made before the end of the period prescribed for the purpose of section 15(5)(b).

(5) *Any request under section 15(7)(b) shall be considered never to have been made where—*

(a) the priority application does not contain every missing part filed under section 15(5); or

(b) the applicant fails, before the end of the relevant period, to furnish to the comptroller copies of all earlier relevant applications—

(i) duly certified by the authority with which they were filed, or

(ii) otherwise verified to the satisfaction of the comptroller.

(6) *But paragraph (5)(b) does not apply in respect of an earlier relevant application where that application or a copy of the application is available to the comptroller.*

(7) *For the purposes of paragraph 5(b) the relevant period is—*

(a) sixteen months beginning immediately after the declared priority date; or

(b) if it expires earlier, the period of four months beginning immediately after the date on which the request was made under section 15(7)(b).

Added matter and amended claims

- 13 The arguments presented with Mr Taylor's letter of 4 November 2015 refer to problems associated with printing of Lotus Word Pro files as a PDF document and propose that the original description included an error as a result, and the version of the description filed on 15 June 2009 was intended to correct that error. It is said that this problem can occur when printing PDF documents from a variety of sources and four internet links are provided: the first link does not work, the second refers to an issue concerning printing from Internet Explorer 9 (IE9) to the Adobe PDF Printer, the third refers to an issue concerning converting or combining documents in Acrobat 9 and the fourth to creating PDFs in Windows/Office 7. However, I note that none of these links refer to issues encountered when printing from or otherwise using Lotus Word Pro, and there is no additional evidence to suggest that this is what has

happened in this case other than the applicant's assertion to the fact. The arguments also refer to the re-dating of applications when missing parts are filed.

14 Rule 18(1) prescribes that the period for filing missing parts for this application ended on 5 August 2008 with the issuing of the preliminary examination report. In any event since the amended description was filed on 15 June 2009 the matter added to page 6 cannot be considered to be a missing part by virtue of Section 15(5). However Section 15(8) states that Sections 15(6) and (7) do not affect the comptroller's discretion under Section 117(1) to correct an error or mistake (without re-dating).

15 So, can the amendments of 15 June 2009 be considered a bone fide attempt to correct an error within the meaning of Section 117(1) and Rule 105(3). As noted in Mr Taylor's submissions, the requirement of Rule 105(3) that the correction is obvious (meaning that it is immediately evident that nothing else could have been intended in the original specification) is construed as imposing a two-fold test:

- (a) is it clear that there is an error, and
- (b) if so, is it clear what is now offered is what was originally intended?

16 In relation to the allowability of a correction under Section 117(1) in light of the test above Mr Taylor's submissions also state that:

We showed to the hearing officer the original document from which we printed out the original specification as a pdf document. Two lines of the patent specification had clearly not printed out as they should have done. So there was clearly (1) an error, and (2) what was offered is what was originally intended.

17 The suggestion that "there was clearly (1) an error" overlooks the requirement of Rule 105(3) that this is with regard to the original specification and that nothing else could have been intended. The reader need not be able to correct the error unaided but regard must be had to the view they would take of the original specification, any difficulties apparent to them from that and likely solutions.

18 The original specification makes no other reference to pumpkin or lentils being part of the recipe and otherwise makes culinary and linguistic sense so it would not be immediately evident to a skilled reader that any ingredients were missing from the list given on page 6. Nor can it be said of the proposed correction that nothing else than what is offered could have been intended in the original specification not least because the proposed correction does not refer to the required amount of ingredients added. The evidence provided by the applicant establishes that problems can occur when printing PDF documents from a variety of sources but not that such a problem did occur in this case. As such the requirements of Rule 105(3) are not met and I cannot regard the amended description as a correction of an error under Section 117(1).

19 In the light of my findings above, I conclude that the amended description filed on 15 June 2009 and the amended claims presented at the hearing include matter extending beyond that which was disclosed in the application as filed contrary to the requirements of Section 76(2). In order for the application to proceed, this matter would need to be deleted, which as I have said previously would require the

Comptroller's discretion to extend the compliance period to allow such an amendment to be made. Prima facie, I can see no reason to do this at this stage which would mean that the application as it stands could be refused on these grounds alone.

- 20 However, for completeness, I will now proceed to consider the issue of inventive step based on the claims filed with Mr Taylor's letter of 11 April 2012. In the event that I find that these claims provide the required inventive step, I will need to consider fully whether to excise the Comptroller's discretion to extend the compliance period to allow the applicant to delete the added matter from the specification before remitting the application to the examiner to complete the examination.

Claims

- 21 The claims filed with Mr Taylor's letter of 11 April 2012 are directed to a process of preparing Murgh Makhani or Butter Chicken; a selection of which read as follows:

1. *A method of preparing Murgh Makhani that uses low fat probiotic yoghurt to marinate chicken, and which then uses low fat probiotic yoghurt in a sauce in which to cook the chicken, after the marinated food has been baked at a high temperature, and that does not use butter, cream or saturated fat.*
2. *A claim according to claim 1 which does not use butter or cream rather than butter, cream or saturated fat.*
3. *A claim according to claim 1 which does not use butter rather than butter, cream or saturated fat.*

.....

11. *A claim according to any one of claims 1 to 3, in which yoghurt that is not low fat probiotic is not used in the preparation of the marinade.*
12. *A claim according to any one of claims 1 to 3, in which yoghurt that is not low fat is not used in the preparation of the marinade.*
13. *A claim according to any one of claims 1 to 3, in which yoghurt that is not probiotic is not used in the preparation of the marinade.*
14. *A claim according to claim 1 that is for Butter Chicken instead of being specifically Murgh Makhani.*
15. *A claim according to claim 2 that is for Butter Chicken instead of being specifically Murgh Makhani.*
16. *A claim according to claim 3 that is for Butter Chicken instead of being specifically Murgh Makhani.*

The Law

- 22 The examiner has raised an objection under Section 1(1)(b) of the Patents Act 1977 that the invention does not involve an inventive step. The relevant parts of Section 1 read as follows:

1(1) A patent may be granted only for an invention in respect of which the following conditions are satisfied:

- (a);*
- (b) It involves an inventive step;*
- (c);*
- (d)*

23 Section 3 of the Act reads:

An invention shall be taken to involve an inventive step if it is not obvious to a person skilled in the art, having regard to any matter which forms part of the state of the art by virtue only of Section 2(2) above and disregarding Section 2(3) above).

24 I do not propose to quote sections 2(2) and 2(3) here, but it follows from these that the state of the art comprises all matter which has at any time before the priority date of the application been made available to the public, whether in the UK or elsewhere.

25 The responses to examination reports submit that, in the applicant's view, the decisions of the EPO are binding. I disagree, whilst I must have due regard to EPO decisions they are not binding upon me.

26 The UK courts have consistently assessed inventive step on the basis of the well-known *Windsurfing*¹ approach reformulated by Jacob LJ in *Pozzoli*² (see paragraph 23 of the Court of Appeal's judgment). The four steps of the approach are now:

(1)(a) Identify the notional "person skilled in the art"

(1)(b) Identify the relevant common general knowledge of that person;

(2) Identify the inventive concept of the claim in question or if that cannot readily be done, construe it;

(3) Identify what, if any, differences exist between the matter cited as forming part of the "state of the art" and the inventive concept of the claim or the claim as construed;

(4) Viewed without any knowledge of the alleged invention as claimed, do those differences constitute steps which would have been obvious to the person skilled in the art or do they require any degree of invention?

Applying the Windsurfing/Pozzoli test

Step 1: Identification of the notional "person skilled in the art" and the relevant common general knowledge of that person

27 The examiner proposes in their report of 11 September 2012 that the notional person skilled in the art is a cook who is familiar with Asian cooking and preparing curry recipes but would also have knowledge of dishes with different ethnic origins. They would have the ability to modify recipes and would be open-minded to making such alterations. The examiner also suggests that the skilled person would be aware of the principles of healthy eating, preparing lower fat dishes and would know that the fat content of a sauce could be reduced by replacing cream with low-fat yogurt. Also that standard yoghurt and probiotic yoghurt are interchangeable ingredients, with regard to their overall taste and physical characteristics.

28 In his submissions Mr Taylor proposes that the notional person skilled in the art is a chef of Punjabi cookery whose knowledge would be based on teachings in Punjabi restaurants and from reading Punjabi cookery books. Such a person, it is proposed,

¹ *Windsurfing International Inc v Tabur Marine (Great Britain) Ltd* [1985] RPC 59

² *Pozzoli SpA v BDMO SA* [2007] EWCA Civ 588

would be unlikely to dispense with their training to consider internet articles. I cannot agree with this proposal; the notional person skilled in the art is not a real worker but a legal construct of a person to whom the patent in question is addressed. On balance, I consider the notional person skilled in the art to be a fully-competent chef with an interest in Asian cookery including the preparation of curry like dishes, and I agree with the examiner when he says that he would have been aware of the principles of healthy eating, preparing lower fat dishes and would know that the fat content of a sauce could be reduced by replacing butter or cream with low-fat yogurt, and that different forms of yoghurt exist which could potentially be substituted for one another.

- 29 As to their common general knowledge the submissions accompanying Mr Taylor's letter refer me to excerpts from *General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd* [1972] RPC 457, *Sandoz Ltd (Frei's Application)* [1976] RPC 449 and *Raychem Corp's Patents* [1998] RPC 31 in proposing the skilled persons common general knowledge is limited.
- 30 I have already concluded that the notional person skilled in the art is not restricted to a chef of Punjabi cookery and I see no reason to believe that their common general knowledge would be limited to Punjabi cookery training and books but would extend to other forms of Asian cookery. Their common general knowledge would comprise a vast array of information including recipes, preparation techniques, healthy eating and healthier ingredients.

Step 2: Identify the inventive concept of the claim in question or if that cannot readily be done, construe it

- 31 Claim 1 begins "A method of preparing Murgh Makhani..." and so relates to a process of preparing a foodstuff called Murgh Makhani. This process also involves marinating, baking at a high temperature and cooking although no durations or temperatures are specified. In other regards the claim is characterised by culinary features of the Murgh Makhani; namely (i) the inclusion of probiotic yoghurt in the marinade and cooking sauce, and (ii) the preclusion of butter, cream or saturated fat. Claims 2 and 3 alter the list of precluded items and claims 14 to 16 are drawn to the same process applied to the production of "Butter Chicken" instead of "Murgh Makhani". Claims 11 to 13 alter the type of yoghurt which is required.
- 32 *So what is meant by "Murgh Makhani" and "Butter Chicken"? Are the claims very broad, very narrow or somewhere in between?* The examiner proposes that as *"...the application relates to a chicken recipe that does not contain butter, it is clear that the term "Murgh Makhani" cannot be interpreted narrowly to a specific dish having a specific set of ingredients. A broader interpretation of the claim must therefore be made. The skilled person would interpret the claim as relating to a Murgh Makhani-like mildly spiced dish..."*
- 33 The applicant disagrees instead asserting that a *"...buttery texture...is the distinguishing and essential feature of Murgh Makhani"* rather than the inclusion of butter per se. They also propose that the *"specifically chosen constituents enable (1) the buttery texture essential to Murgh Makhani, (2) a healthy rather than an inherently healthy version, and (3) without affecting the taste or characteristics of Murgh Makhani"*. On the last of these points I doubt that using low-fat probiotic

yoghurt to replace all of the butter, cream or saturated fat normally used would not affect the taste or other characteristics of the dish. Elsewhere in the submissions accompanying the letter of 4 November 2015 it is asserted that "...traditionally, *Murgh Makhani does not marinade in yoghurt at all*" highlighting that the recipe is different from other recipes for Murgh Makhani.

34 The application refers, on page 4, to "*The aims of the method are to produce a far healthier method of manufacturing a foodstuff that is free from saturated fats, that is smoother in consistency, and that is not prone to the formation of harmful bacteria, or liable to a subsequent firming of the fat element of the sauce*". The application also says that Murgh Makhani is "...in some ways similar to *Chicken Tikka Masala*" and that "*Chicken tikka masala is chicken tikka, chunks of chicken marinated in spices and yoghurt then baked in a tandoor oven, in a masala ("mixture of spices") sauce. There is no standard recipe for chicken tikka masala. A survey found that of 48 different recipes the only common ingredient was chicken*". I suspect that the same could be said of different recipes for Murgh Makhani or any other dish.

35 *So what is the inventive concept?* It is clear to me that the invention does not relate to the production of what is generally known as Murgh Makhani or butter chicken per se, in that the method specifically excludes the use of butter. At best what is being produced is a mildly spiced chicken dish, similar to Chicken tikka masala, in which the chicken is marinated, cooked and baked in a low-fat probiotic yoghurt with the aim of making a dish which is healthier, free from saturated fats and that is not prone to the formation of harmful bacteria. The invention to my mind lies in the process claimed and not in the specific culinary features of Murgh Makhani or Butter Chicken such as its taste or texture, or in other aspects of the process or ingredients which are not specifically claimed.

Step 3: Identify what, if any, differences exist between the matter cited as forming part of the "state of the art" and the inventive concept of the claim or the claim as construed

36 The examiner's objection made in the examination report of 11 September 2012 is based on a recipe from the internet but also refers to three other recipes which are also said to show that the claims lack an inventive step. These recipes were indicated to be examples only in the letter of 11 March 2009 accompanying the search report. In the event that I do not find the claimed invention to be obvious from these recipes I will need to remit the case to the examiner to complete the search. I will begin by considering the first of these recipes as disclosed in:

<http://ezinearticles.com/?Weight-Loss-Recipe:-Chicken-Tikka&id=35806>

37 The aforementioned recipe is for the preparation of a dish called Chicken Tikka which involves marinating chicken in a sauce, baking the marinated chicken for 30 minutes at 200 °C, adding the rest of sauce and baking (cooking) until tender. The sauce for marinating and cooking includes low-fat natural yoghurt and does not include butter, cream or saturated fat. The recipe is said to be low-fat to help with weight loss.

38 The examiner concludes that the difference between this and the claim as they have construed it is that it is for Chicken Tikka instead of a Murgh Makhani-like dish and

the low-fat natural yoghurt is specifically low-fat probiotic yoghurt. The applicant contends that the dish is "Murgh Makhani" rather than a "Murgh Makhani-like dish".

- 39 In my opinion, the prior-art recipe differs from that of the invention as claimed in claims 1 & 14 at least, in that it discloses the preparation of a chicken tikka based dish using low-fat natural yoghurt whilst the invention relates to the preparation of what I consider to be a "Murgh Makhani-like dish" similar to chicken tikka masala (see page 4 of the specification) using as an alternative a low-fat probiotic yoghurt. I suspect the underlying dishes are similar and it is the use of the low-fat probiotic yoghurt that constitutes the most significant difference between the two.

Step 4: Viewed without any knowledge of the alleged invention as claimed, do those differences constitute steps which would have been obvious to the person skilled in the art or do they require any degree of invention?

- 40 The examiner proposes that *"It would be obvious to a skilled person that the spices used in the ezinearticles.com recipe could be adjusted to provide a "Murgh Makhani-like" dish prepared along the same lines as the chicken tikka masala dish disclosed..."*. In his submissions Mr Taylor disagrees stating:

"...Tikka Masala is a separate dish from both Murgh Makhani and Butter Chicken : (1) its ingredients are different, (2) its cooking and manufacturing methods are different, (3) it is cooked in a different type of oven, (4) it has no intention at all of producing a buttery textured sauce, which is the distinguishing, characteristic and essential feature of Murgh Makhani, (5) and even the intentions of the ezinearticle.com are specifically different, as it is stated as being specifically for weight loss."

- 41 In each case the argument seems misplaced; the features of the claims are key to the question and not the unspecific culinary features of Murgh Makhani/Butter Chicken which are not claimed. The claims do not specify (1) the ingredients used other than chicken and low-fat probiotic yoghurt, (2) any differences between the cooking method, (3) the type of oven used, (4) the requirement for a buttery texture beyond that which is alleged to be associated with the name Murgh Makhani or (5) that the dish is specifically for something other than weight loss.

- 42 As to the specific requirement for "probiotic yoghurt" the examiner concludes that the *"skilled person making the recipe outlined ezinearticles.com article and having only low-fat probiotic yoghurt in his refrigerator would not hesitate to use the probiotic yoghurt in the recipe. The skilled person would conceive low-fat yoghurt and low-fat probiotic yoghurt as two interchangeable ingredients in this recipe"*. In the submissions Mr Taylor disagrees saying:

"...it would NOT be used because the bacteria in the probiotic yoghurt would be killed during the cooking process. Bacteria is killed either because of high temperatures or prolonged cooking. So 100° C would kill the bacteria within 10 minutes, and 60° C would kill bacteria within an hour. It is detailed in Stage 3 of the cooking process of this article, that it cooks most of the yoghurt and the sauce at over 200 degrees for 30 minutes. This would kill all of the bacteria, and would therefore completely nullify the thickening properties of the yoghurt."

43 I have not attempted to verify the assertion that bacteria would be killed as the argument is misdirected. The claims do not specify a temperature (or range of temperatures) or duration (or range of durations) to be used in the baking and cooking steps of the process which this assertion suggests are essential. Nor is it apparent from the application that this is an essential aspect of the invention. As such the claim as construed covers methods which kill bacteria and those which do not. They also suggest that:

“The methods used in Tikka Masala, which is the use of normal yoghurt in the marinade, could lead to the formation of bacteria and a poor texture in the marinade, and poor dissolution and the potential for subsequent firming of the fat element of the sauce.”

44 Again this argument is misdirected. The claims do not require or preclude these features and that the prior art method *“could lead”* to these things is not material.

45 The submissions also question *“why, in a culture of over one billion people has Murgh Makhani never before been prepared in the way described in this invention”*? This suggests that because the recipe is new it is inventive; that no prior art which shows the recipe to be known was identified does not dispose of the obviousness objection.

46 *Windsurfing* teaches, at page 77, that “it would be wrong to prevent a man from doing something which is merely an obvious extension of what he has been doing or of what is known in the art before the priority date”. It is an obvious extension of the ezine article Chicken Tikka recipe to make variations to the described recipe. The variations the skilled reader would routinely make include, amongst other obvious variations, changing the ingredients so as to mimic other curries, particularly Murgh Makhani/Butter Chicken and using low-fat probiotic yoghurt as the specific type of low-fat natural yoghurt specified. Indeed, it would seem an obvious step when looking to produce a dish which “is not prone to the formation of harmful bacteria” to replace natural yoghurt with probiotic yoghurt. I therefore find that claims 1 and 14 lack an inventive step over the ezine Chicken Tikka recipe.

47 I have also considered all of the dependent claims, and the features therein are either disclosed in prior-art or are considered not to be inventive as they are merely obvious extensions of the described recipe. What is more, I have considered the whole of the original specification and have not been able to identify any features which would lead me to a different conclusion. Given my findings above, I do not think it necessary to consider the other documents referred to by the examiner.

48 Notwithstanding my conclusions regarding the added matter contained within amended description filed on 15 June 2009 and the claims presented at the hearing, I have also considered whether the inclusion of the phrase “pumpkin that has been boiled and then pulped” into claim 1 would have led me to a different finding on inventive step. It would not, it too amounts to an obvious extension of what is disclosed in the ezine recipe which it would be wrong to prevent a man from doing.

Conclusion

- 49 I conclude that the amended description filed on 15 June 2009 and the amended claims presented at the hearing include matter extending beyond that which was disclosed in the application as filed contrary to the requirements of Section 76(2), and that all of the claims filed with the letter of 11 April 2012 lack an inventive step. I have read the specification in its entirety and can find nothing that could form the basis of a valid claim. I therefore refuse the application under Section 18(3).

Appeal

- 50 Any appeal must be lodged within 28 days

Peter Slater
Deputy Director, acting for the Comptroller