

Compliance date issues

- 5 The compliance date pursuant to Section 20(1) and Rule 30 had expired on 1 September 2016. The applicant had applied for an “as-of-right” retrospective extension of two months on 1 November pursuant to Rule 108(2). In official letters it was emphasised that in the event that I found that there were saving amendments I would only be able to remit the case back to the examiner for further processing if the deadline for extending the compliance period had not expired, pursuant to Rules 108(3) and 108(7). Following the hearing the applicant filed a further Form 52 and fee which extends the compliance period to 1 January 2017.

The invention

- 6 The specification on page 1, lines 1-4, summarises the invention and its purpose. It says “*This invention concerns a method of manufacturing high fibre Chapati and South Asian Naan in which wheat flour and white flour are replaced by a blend of wheat flour or white flour plus barley flour, oat flour, and inulin prebiotic fibre in order to produce healthier and better textured breads*”.

The Law

- 7 This decision concerns the issues of inventive step and clarity which are provided for by Section 1(1)(b), Section 3 and Section 14(5) of the Act respectively.
- 8 Section 1(1) of the Act sets out the requirements which need to be met for an invention to be granted. The relevant parts read as follows:

A patent may be granted only for an invention in respect of which the following conditions are satisfied, that is to say –

(a)....

(b) it involves an inventive step

(c)....

(d)....

- 9 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).”

Section 2(2) of the Act reads:

“The state of the art in the case of an invention shall be taken to comprise all matter (whether a product, a process, information about either, or anything else) which has at any time before the priority date of that invention been made available to the public (whether in the United Kingdom or elsewhere) by written or oral description, by use or in any other way”.

- 10 Whether an invention defined by the claims involves an inventive step is assessed using the four-step test first formulated by the Court of Appeal in *Windsurfing International Inc. v Tabur Marine (Great Britain) Ltd*¹ and restated by the court in *Pozzoli SPA v BDMO SA*². This test is as follows:

“(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?”

- 11 Section 14(5) of the Act specifies a number of requirements that the claims must fulfil for a patent to be granted. It states, as is relevant to this decision:

“14(5) The claim or claims shall –

(a)....

(b) be clear and concise;

(c)....

(d)....

Claims

- 12 The latest version of the claims was formally filed on 22 August 2016 and consists of five claims. Claims 2 and 3 are at issue here; claim 3 is dependent on claim 1. Claims 1-3 read:

1. A method of manufacturing Chapati and South Asian Naan, in which, according to weight, the percentages of the carbohydrate constituents of the dough are : 40% wheat flour, 25% barley flour, 25% oat flour, and 10% inulin prebiotic fibre.

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

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

2. A method of manufacturing Chapati and South Asian Naan in which, according to weight, the percentages of the carbohydrate constituents of the dough come within the following ranges 5% to 87% wheat flour, 5% to 50% barley flour, 5% to 50% oat flour, and 3% to 30% inulin prebiotic fibre

3. A method according to claims 1 or 2, that includes any additional cereals in the preparation of the dough, corn, rice or rye, as partial substitutes for some of what is used in Claims 1 and 2.

- 13 I note the method relates to the manufacture of chapati and South Asian bread and construe the claim as applying to the manufacture of either a chapati or naan bread.

Inventive step

- 14 In making his original inventive step objection to claim 2 the examiner cited the Vegininspiration's article (below) and three patent documents (CN101564162, AU2005101057, EP2279673). However, he did not refer to the patent documents in subsequent reports but cited three articles on the "Bakery and Snacks" website. In his final letter of 5 October 2016 summarising his inventive step objection the examiner cited the following documents:

Vegininspirations, "Oat Barley Roti / Indian Flat Bread", dated 15 February 2009, accessed via <http://www.Vegininspirations.com/2009/02/oat-barley-roti-indian-flat-bread.html> on 17/11/2010;

Bakeryandsnacks.com "Inulin could speed up baking time for breads, study" by Jane Byrne, dated 26 January 2010, accessed via <http://www.bakeryandsnacks.com/R-D/Inulin-could-speed-up-baking-time-for-breads-study-on-the-23/11/2015>

Bakeryandsnacks.com "Study supports potential of inulin for fibre boost in bread", dated 03 April 2009, accessed via http://www.bakeryandsnacks.com/R-D/Study-supports-potential-of-inulin-for-fibre-boost-in-bread?utm_source=copyright&utm_medium=OnSite&utm_campaign=copyright on the 08/08/2016

Bakeryandsnacks.com "Bread, gut-health claim approved", dated 19 February 2003, accessed via <http://www.bakeryandsnacks.com/Ingredients/Bread-gut-health-claim-approved-on-the-08/08/2016> (hereinafter referred to as "Vitaalbrood" for convenience)

- 15 The thrust of the examiner's argument was that the Vegininspirations article represented the state of the art and that the Bakery and Snacks articles represented the common general knowledge.

16 The applicant disputed both of these points and, in particular, submitted that the Veginspirations article was not relevant as it was published after the filing date of the application. I will deal with that point first before considering the documents in light of the test for inventive step established in *Windsurfer/Pozzoli*.

Validity of the date of an Internet citation

- 17 The 'Veginspirations' article's URL is "<http://www.Veginspirations.com>". The date at the header of the article and on its webpage is 15 February 2009. The article is entitled "*Oat Barley Roti/Indian Flat Bread*". 'Roti' and 'chapati' are used interchangeably in the field of Indian breads and therefore I read this article as a recipe for a chapati.
- 18 There was considerable disagreement between the applicant and the examiner in correspondence about the publication date of this article. At the hearing Mr Bridgeman expanded on the applicant's arguments at some length. Among the applicant's arguments was that this web domain was only founded on 25 December 2009. The examiner's argument was that it had been present on an earlier domain, <http://veginspiration.blogspot.com>.
- 19 It remains the fact that December 25 2009 pre-dates the filing date of the application. The applicant had also submitted that the only true date is the one on the search report. To my mind that argument cannot hold water as the search report inevitably post-dates the filing date of the application. If that logic were to be applied then the default would be that an Internet citation does not form state of the art. That cannot be right.
- 20 My *prima facie* view in reviewing all of evidence and arguments on this point is that it is reasonable to take the date of 15 February 2009 as the publication date of the Veginspirations article. However, to decide the point definitely it would be necessary for me to consider in detail previous decisions of the IPO and case law which have considered the issue of publication dates of Internet citations together with guidelines of the European Patent Office which the courts and IPO hearing officers have regarded as being relevant to this issue. I am also minded that not all of the authorities have been put to the applicant.
- 21 I propose to treat this issue pragmatically. If I take 15 February 2009 as the notional date of the Veginspirations article and I find that claim 2 is inventive then the actual date of the article becomes a non-issue. If, however, I find that claim 2 is obvious then it will be necessary to return to the question of date of the Veginspirations article in light of the case law and to give the applicant an opportunity to comment on it.
- 22 I will proceed on the basis that the Veginspirations article notionally forms the state of the art.
- 23 I will now consider the documents cited by the examiner under the *Windsurfer/Pozzoli* test.

Identify the notional “person skilled in the art” and identify the common general knowledge of that person

- 24 The examiner said in his final letter (paragraph 3) *“I believe that the person skilled in the art should be considered to be someone involved with product development in a manufacturing context and I believe they would be aware of major industry trends in a very closely related area”*.
- 25 It is clear from the applicant’s correspondence that they regard the skilled person as a chef of Indian and South Asian food - ‘a chef of Indian food’ for convenience.
- 26 The examiner’s construction of the skilled person is broader than the applicant’s and therefore this issue requires some consideration.
- 27 The applicant went to some lengths to distinguish British bread makers from chefs of Indian food. Mr Bridgeman submitted that there are many thousands of different types of bread. While he did not cite a reference to substantiate this point, it is apparent from visiting a contemporary supermarket that the range of dough-based products is extensive and quite diverse. Further, Mr Bridgeman submitted that contemporary British bread makers are specifically trained for the purpose, for example in universities. In contrast, he said, the chapati is very widely made by untrained people, even children. He went on to say *“there are two completely different traditions here (bread making and chapati making) - they have nothing to do with each other... there are two totally different people skilled in the art here - different in training practice and what they make is entirely different”*.
- 28 I would agree with the applicant’s argument here that a distinction is valid to some extent between bakers of British breads and a person with an interest in Indian breads. However, I would not characterise the skilled person solely as a chef of Indian food. Rather, I consider that such a person could include bakers tasked with preparing Indian breads for food retailers in the UK, supermarkets for example - an Indian bread manufacturer, as the examiner suggests.
- 29 In these circumstances, I consider it is reasonable to proceed on the basis that the notional skilled person is a baker or manufacturer of Indian breads, or part of a team of such bread makers.
- 30 The case law demands that I consider what the common general knowledge is. The applicant cited *Raychem Corp’s Patent [1998] PRC 31* in this regard. In this judgment the late Laddie J said:

“The common general knowledge is the technical background of the notional man in the art against which the prior art must be considered. This is not limited to material he has memorized and has at the front of his mind. It includes all that material in the field he is working in which he knows exists, which he would refer to as a matter of course if he cannot remember it and which he understands is generally regarded as sufficiently reliable to use as a foundation for further work or to help understand the pleaded prior art...In many cases common general knowledge will include or be reflected in readily available trade literature which a man in the art would be expected to have at his elbow and regard as basic reliable information”

- 31 The examiner's final report reiterates his point that the Bakery and Snacks articles represent evidence that the use of inulin in bread was well known in the "industry" and therefore represents the common general knowledge. Inulin is a fructo-oligosaccharide.
- 32 The applicant argued both in correspondence and at the hearing that the Veginspirations article is not common general knowledge. This was not the examiner's point however. Rather, it is clear from the examiner's final letter, paragraphs 7-11, that his inventive step objection is based on the premise that the three "Bakery and Snacks" articles are considered to represent the common general knowledge - that inulin was widely known in the baking industry - and that Veginspirations forms the state of art. This is an important point which the examiner confirmed at the hearing. I will now proceed to consider whether the articles on that website do, in fact, represent the common general knowledge.
- 33 In their correspondence the applicant made some statements about the Bakery and Snacks website which I asked them to clarify after the hearing. In an email dated 24 November 2016 the applicant stated: "*Bakeryandsnacks.com receives about 3 unique visitors and 3 (1.00 per visitor) page views per day which should earn about \$0.01/day from advertising revenue. Estimated site value is \$3.65. According to Alexa Traffic Rank bakeryandsnacks.com is ranked number 14,644,662 in the world. Site is hosted in France*"...*The date of the webpage, which is 25 May 2011 with an HTTP address*³ *near the bottom of the webpage*". One element of the applicant's arguments in correspondence and at the hearing was because the Bakery and Snacks website had little traffic it could not form common general knowledge.
- 34 A question that arises is how much weight I should give to the exposure of the website in determining whether it represents common general knowledge to bakers of Indian breads in the UK. I believe the answer lies in a multifactorial analysis of the website, the content of its pages and data relating to it. The web-traffic data itself is not straightforward and has inherent limitations. For example, I reviewed data relating to traffic to the Bakery and Snacks website traffic from two sources⁴ after the hearing. This shows a much higher volume of web-traffic and estimated value - but that concerns the past year and therefore is of no value in determining the common general knowledge at the filing date of the application. Thus, it is not clear to me what the extent of the traffic to this website was before August 2010. Even if it was, Arnold J in *Re. Generics v Warner Lambert*⁵ made it clear that the alleged common general knowledge needs to be common general knowledge in the UK. Web-traffic is necessarily global (although some web data provide statistics about the country of origin of the 'IP' addresses that access websites). I do not think the fact that the website is hosted in France makes a difference either way.
- 35 Having considered the information about the Bakery and Snacks website traffic I do not think this, of itself, helps to answer the question about whether the articles on it

³ <http://bakeryandsnacks.com.hypestat.com/>

⁴ [http://domainsitestats.com/ratings-reviews/bakeryandsnacks.com/;](http://domainsitestats.com/ratings-reviews/bakeryandsnacks.com/)
<https://www.domaintally.com/www/bakeryandsnacks.com>

⁵ *Generics (UK) Ltd (t/a Mylan) v Warner-Lambert Company LLC* [2015] EWHC 2548

are common general knowledge to bakers of Indian breads in the UK. I think the question to be addressed is whether the skilled person would visit this website.

- 36 Overall, I think Mr Bridgeman's point about the distinction between bakers of 'British' breads, as he refers to bakers of conventional white breads, and bakers of Indian breads has some force. I am content to accept that Indian breads may not generally be of interest to British bread makers. Equally, while bakers of Indian breads may have a passing interest in British bread making, I have not seen any evidence or a sufficiently compelling argument that would lead me to believe that a baker of Indian breads would be minded to visit the Bakery and Snacks website. I note that no reference to Indian breads was identified on that website by the examiner.
- 37 I therefore have some doubt that the Bakery and Snacks website itself would be part of the common general knowledge of the skilled person to which this application relates, namely a baker of Indian bread in the UK. However, I will now consider each of the articles on that website, in turn, before reaching a conclusion on this point.
- 38 Mr Bridgeman submitted that the article by Jane Byrne is about using inulin to speed up the process of baking bread. The opening passage reads "*adding inulin to white breads increases its nutritional quality but also accelerates the baking process and the crucial Maillard reaction...*" The article also says "*according to researchers the addition of fibres, and more particular the soluble ones, like inulin and oligofructose, to foods might help to prevent diseases like intestinal infections, colorectal cancer, obesity, cardiovascular diseases and type II diabetes*". In my view, this article teaches the reader two main points: (i) that inulin speeds up the baking process of white bread and (ii) alludes to, in general terms, the potential health benefits of inulin.
- 39 In the article dated 3 April 2009 the header reads "*replacing 5 per cent of the flour in bread with inulin could boost the nutritional content of white bread without detrimental effects on the sensorial profile, says a new study*". This short article, approximately eleven lines, says "*the present study has indicated that breads made with about 5% inulin ST and HP had high sensory acceptance... Therefore, the addition of inulin could be an effective way to produce functional white bread flour without changing negatively its desirable physical properties*". Overall, this article refers to the nutritional value of inulin and seems to be focussed on its sensory (taste) properties.
- 40 The third article, the "Vitaalbrood" article, is entitled "*Bread, gut-health claim approved*". It says, *inter alia*, that a panel of Dutch scientists found "*there is sufficient scientific evidence to state that the consumption of three slices of bread (with at least 5g of Frutafit inulin) supports a well-balanced gut flora composition and colonic function*". The article goes on to say that these findings were a result of collaboration between the company providing the range of bread products containing inulin "Vitaalbrood" and the company providing inulin, "Sensus". Later the article mentions that the case dossier was assessed in accordance with the Code of Practice Health Benefits 1998, which is supported by the Dutch health Ministry.
- 41 The applicant had made submissions along the lines that the articles referring to white bread are not relevant as they involved yeast and because of the biochemistry of yeast-inulin interaction, the Maillard reaction, the presence of yeast creates a manifestly different outcome in white bread when compared to the presence of inulin

in their invention. On reviewing the specification I find that while yeast is not part of the chapati recipes in the specification it is present in the ingredients for Naan bread. The description on page 8 under the header of “method of preparation” (of Naan) says “*The dough is prepared by mixing together: the white flour, barley flour, oat flour, and inulin prebiotic fibre, with (or without) salt, yeast...*” Thus, I do not consider the applicant’s submissions in relation to the yeast-inulin reaction support their case that inulin is behaving differently in Naan compared to white bread, although I am content to accept that it would be behaving differently in unleavened bread - a chapati.

- 42 The article by Byrne and the Vitaalbrood article support the notion that inulin offers health benefits. However, those benefits are mentioned in the context of white bread containing white flour, not Indian breads. Similarly the article of 3 April 2003 specifically refers to white bread. With the Vitaalbrood article, there is also the issue of whether the findings of a Dutch scientific panel are common general knowledge in the UK, even if they were common general knowledge in the Netherlands. Overall, these documents paint the picture that inulin offers benefits in white (sliced) bread.
- 43 The applicant cited *General Tire & Rubber Co v Firestone Tire & Rubber Co Ltd [1972] RPC 47* to support their case. Notably, in this judgment, Sachs LJ referred to the judgment of Luxmore J in *British Acoustic Films [1953] RPC 221* where the relevance of scientific articles was at issue. Luxmore J said:

“In my judgment it is not sufficient to prove common general knowledge that a particular disclosure is made in an article, or series of articles, in a scientific journal, no matter how wide the circulation of that journal may be, in the absence of any evidence that the disclosure is accepted generally by those who are engaged in the art to which the disclosure relates. A piece of particular knowledge as disclosed in a scientific paper does not become common general knowledge merely because it is widely read, and still less because it is widely circulated. Such a piece of knowledge only becomes general knowledge when it is generally known and accepted without question by the bulk of those who are engaged in the particular art; in other words, when it becomes part of their common stock of knowledge relating to the art.”

- 44 Sachs LJ then went on to comment on the threshold of acceptance of a general knowledge. He said:

“Those passages have often been quoted, and there has not been cited to us any case in which they have been criticised. We accept them as correctly stating in general the law on this point, though reserving for further consideration whether the words ‘accepted without question’ may not be putting the position rather high: for the purposes of this case we are disposed, without wishing to put forward any full definition, to substitute the words ‘generally regarded as a good basis for further action’.”

- 45 While the Bakery and Snacks website and the articles on it might not be considered as true scientific articles, I think Luxmore J’s comments, with Sach LJ’s caveat, are

particularly applicable to the question at issue here - whether inulin was part of the common general knowledge of bakers and manufacturers of Indian bread.

- 46 In my view that question involves two main factors; evidence relating to the Bakery and Snacks website itself and the content of the three articles cited. Taking these factors together, I do not think that the three articles on this website provide evidence of a major industry trend that inulin is widely used in the baking field, as the examiner contends. In my view, those articles are confined to a niche area of the Internet.
- 47 I mentioned that the examiner had referred to three patent documents (EP2279673⁶ AU2005101057; CN101564162) in his first report but did not refer to these in his subsequent four reports, nor in particular, in his final letter in preparation for the hearing. From this one assumes that the examiner considered those documents were no longer relevant to his inventive step argument and he did not raise them at the hearing. However, for the avoidance of doubt I have reviewed the disclosures of these documents and do not consider that they support the case that the use of inulin represents a major industry trend in bread industry.
- 48 In light of Luxmore J's comments in *Re. British Acoustic films*, I have some doubt whether the disclosures of the three articles I have referred to above on the Bakery and Snacks website provide sufficient grounds to conclude that use and benefits of inulin was well known to bakers or manufacturers of Indian breads in the UK at the filing date of this application, 17 August 2010. On the basis of all material before me I cannot safely reach the conclusion that inulin was part of the common general knowledge of the skilled person to whom I consider this application relates.
- 49 Consequently, the examiner's contention that claim 2 lacks inventive step fails. Nonetheless, for completeness I will run through the remainder of the Windsurfer/Pozzoli test.

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

- 50 The examiner construed the inventive concept "*in the particular weight percentage combinations of wheat flour, barley flour, oat flour and inulin which make up the dough*". I agree with this construction and note, in particular, that inulin is required to be in an amount of 3-30% of the dough preparation.

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

- 51 As mentioned above, for the purposes of this test I will take the Veginspirations article as the state of the art. The difference between that and the inventive concept underlying claim 2 is the range of percentages of the three flours, wheat, barley and oats and, most importantly, the absence of inulin. In addition, in the case of naan bread the Veginspirations recipe does not include yeast, whereas the specification in

⁶ The publication date of EP2279673 is 2 February 2011 and therefore post-dates the filing date of the present application. This patent document cannot of itself form prior art by virtue of section 2(2) of the Act. However, it is derived from a WIPO application, WO020829292 which was published on 24 October 2002 and would qualify as relevant prior art.

suit, particularly the worked examples, teaches that the naan bread of the invention includes yeast.

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?

- 52 A question that arises in this sort of situation with regard to inventive step is whether the component at issue was “lying in the road” of the skilled person or obvious to try. I would not disagree with the examiner’s general supposition that a person with an interest in making Indian breads would be interested in supplementing chapatis or Naan with ingredients that offer health benefits. However, today there are a myriad of ingredients that are known to promote health - nuts, raisins, seeds, probiotic yoghurts etc. which may be at the disposal of bakers of Indian breads. I do not see any evidence to suggest that inulin would be “*lying on the shelf*” or “*at the elbow*”, as per Laddie J in the *Raychem* case, of a baker or manufacturer of Indian bread.
- 53 Neither do I find evidence that such a baker would be motivated to try inulin, in particular, to supplement the “three-flour” chapati recipe described in the Veginspirations article. That recipe proposes the use of two flours, oat and barley, in addition to wheat to make a chapati healthier. A passage in it reads “*I always try to make my everyday food a little healthier if possible. With this end in mind I made this oat barley roti as a way to include all three of these important grains in our diet effortlessly*”. I think that the Veginspirations recipe is quite self-contained and that the person skilled in that art would regard this three-flour recipe as already offering some benefits over a conventional chapati recipe in which the single flour is wheat.
- 54 There is even less of a basis for an objection on the grounds of lack of inventive step when comparing the Veginspirations article with the naan bread of the invention in suit as the Veginspirations recipe would require the addition of both inulin and yeast.
- 55 I hold that the invention of claim 2 is not obvious in respect of the documents cited by the examiner. In this event I do not need to consider the issue of the publication date of the Veginspirations article.

Clarity

- 56 At the hearing I invited Mr Bridgeman to comment on the examiner’s objection that claim 3 is not clear when dependent on claim 1 because the percentages of claim 1 amount to 100%. As I understood them, Mr Bridgeman’s submissions were that while the dough of claim 1 would necessarily consist of 100% of ingredients, the cereals of claim 3 could then be added to that dough - i.e. the cereals were not part of the 100%.
- 57 Mr Bridgeman submitted that this point had not been raised before. However, I think this objection had been made clear by the examiner. In his letter of 10 August 2016, at paragraph 16 the examiner says “*Claim 1 requires that 100% of the carbohydrate constituents of the dough to be formed from wheat flour, barley flour, oat flour and inulin prebiotic fibre. Claim 3 introduces the feature that the dough can have*

additional cereals which would be carbohydrate constituents". The examiner reiterates this point at paragraph 19 of his final letter.

- 58 The examiner said at the hearing that each of the features of claim 1 are essential (namely, the four ingredients at the percentages detailed) and therefore they cannot be substituted. I note that claim 3 uses the limiting phrase "*consisting of*" which means that only the ingredients listed in that claim make up the invention. I agree with the examiner on this point.
- 59 I also noted at the hearing that claim 3 includes the phrase "partial" which in my view necessarily renders this claim unclear even when it is dependent on claim 2 as it is not clear what "partial" means. To my mind, it means anything from one grain of cereal to a maximum of 72% (the minimum quantities of the ingredients being 5% wheat flour, 5% barley flour, 5% oat flour and 3% inulin. Mr Bridgeman said this point had not been made before. I acknowledge that and note that the applicant has not had the full opportunity to argue it.
- 60 Nonetheless, Mr Bridgeman acknowledged the lack of clarity of claim 3 as it stood and said the applicant had found it a challenge to reflect the concept of being able to substitute the ingredients of the claim 1 with corn, rice or rye. He said the applicant was open to some alternative wording by saying "*we don't mind which wording is used*". I explained, with respect, that it was not my role to find solutions in terms of alternative wording.
- 61 After the hearing Mr Bridgeman advanced an alternative version of claim 3 in a letter of 16 November 2016. I am content to accept this version of claim 3 in place of the version of claim 3 given in paragraph 12 above. It reads:

"A method according to claims 1 or 2, that includes corn, rice or rye as additional cereals in the preparation of the dough".

- 62 I construe this version of claim 3 as being that either corn, rice or rye are included in and therefore become part of the dough of claim 1. Claim 1 refers to "*...the percentages of the carbohydrates...*" which amount to 100%. Corn, rice and rye are carbohydrates. The minimum quantities of each of the ingredients in claim 1 is therefore already total 100% "*in the preparation of the dough*". Consequently, it is not possible to add more carbohydrate, namely corn, rice or rye, to the ingredients of claim 1.
- 63 I hold that insofar as the most recent version of claim 3 given above is dependent on claim 1 it is unclear. I do not consider that this version of claim 3 is unclear insofar as it is dependent on claim 2.

Conclusion

- 64 I find the objection that claim 2 lacks an inventive step as required by section 1(1)(b) on account of the documents cited by the examiner is unfounded (I therefore do not need to consider further the issue of the date of the Veginspirations article).

- 65 I hold that the latest version claim 3 filed on 16 November 2016 insofar as it is dependent on claim 1 is not clear and therefore this claim is refused.
- 66 As have found that the objection to claim 2 is not valid, I do not need to consider the auxiliary versions of claim 2. In any case, the applicant submitted more versions of claim 2 than I said I would consider.
- 67 I note that the examiner had raised a general objection in successive examination reports that the description contains passages which are inconsistent with and outside the scope of the claims which therefore render the claims unclear.
- 68 I remit the application to examiner in order that claim 3 is either deleted or amended to remove its dependency on claim 1 and to address the inconsistencies between the description and the claims.
- 69 In the event that the applicant requests a further discretionary extension of the compliance period, pursuant to Rule 108(3), I allow such a request to extend the period to 1 March 2017. Any further discretionary extensions will be need to be subject to further consideration and I hope in any case that this situation would not arise.

Appeal

- 70 Any appeal must be lodged within 28 days.

Jim Houlihan

Deputy Director, acting for the Comptroller