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D E C I S I O N
of 16 June 2003

Case Number: T 0920/00 - 3.2.6

Application Number: 93115848.9

Publication Number: 0590675

IPC: A61F 13/15

Language of the proceedings: EN

Title of invention:

Curved sanitary napkin with garment attachment panels

Patentee:

KIMBERLY-CLARK WORLDWIDE, INC.

Opponent:

McNeill-PPC, Inc.
SCA Hygiene Products AB
Paul Hartmann Aktiengesellschaft

Headword:

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Relevant legal provisions:

EPC Art. 52(1), 54(1), 56, 83, 84, 100(a), 100(b)

Keyword:

"Clarity of claims - yes"
"Novelty and inventive step - yes"

Decisions cited:

T 0190/99

Catchword:

-



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D E C I S I O N
of the Technical Board of Appeal 3.2.6
of 16 June 2003

Appellants:
(Opponent 01)

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Decision under appeal:

**Interlocutory decision of the Opposition
Division of the European Patent Office posted
19 July 2000 concerning maintenance of European
patent No. 0590675 in amended form.**

Composition of the Board:

Chairman: P. Alting van Geusau
Members: G. C. Kadner
M. B. Tardo-Dino

Summary of Facts and Submissions

- I. The mention of the grant of European patent No. 590 675 in respect of European patent application No. 93 115 848.9 filed 30 September 1993 and claiming a US-priority from 30 September 1992 was published on 21 May 1997.
- II. Three notices of opposition were filed against this granted patent by the Appellants (Opponent 01 and 02) and other party (Opponent 03), on the grounds of Articles 100(a) and (b) EPC.
- III. By decision of the Opposition Division announced during the oral proceedings on 3 May 2000 and posted on 19 July 2000 the patent was maintained as amended according to the first auxiliary request filed during the oral proceedings.

Claim 1 as upheld by the Opposition Division reads as follows:

"A sanitary napkin (19 for mounting onto the bodyside of a crotch portion (130) of an undergarment, and, during use, absorbing bodily excretions, comprising:

an elongated absorbent pad (12) having a longitudinal axis, a longitudinally central portion and opposite longitudinal elasticized raised side edges (50, 52), said side edges (50, 52) being deflectable with respect to said central portion, and including an absorbent (18) having longitudinal side edges (44) and (46) and being contained between a bodyside, liquid-permeable cover (24) and a garment side, liquid-impermeable

baffle (26), said absorbent pad (12) being normally curved upward with respect to its longitudinal axis; and

control means for selectively controlling deflection of at least one of said side edges (50, 52) during use, said control means being anchorable under said crotch portion (130) of said undergarment, said anchoring establishing a generally downward pull on said side edge (50, 52) and preventing said side edge from folding in towards said absorbent (18),

wherein said control means comprises two garment attachment panels (14, 16), normally extending generally downward and inward from said absorbent pad (12) adjacent to said side edges and wherein said garment attachment panels (14, 16) include a fixed portion (70) attached to the underside of said absorbent pad (12) towards said side edges and defining an effective attachment point (76) and a free portion (72) diverging from the underside of said absorbent pad (12) for, during use, extending under said crotch portion (130) of said undergarment, and including means for anchoring said free portions of said garment attachment panels (14, 16) to establish a predetermined deflection of said side edges (50, 52) and to facilitate accurate mounting of said sanitary napkin (10) on said undergarment, wherein said means for anchoring said free ends of said garment attachment panels (14, 16) comprises mating fastener elements (78, 80), one on each garment attachment panel (14, 16), so configured as to provide substantially only a single, predetermined lateral relationship of one garment attachment panel (14, 16) to the other and

wherein the effective attachment point (76) is spaced from the absorbent side edges (44, 46) with a spacing (D) in the range of one-third to three-quarters of the width of the elasticized raised side edges (50, 52), further including tension means included in said deflectable side edges (50, 52) of said pad (12), said tension means contributing to said upward curving of said absorbent pad (12) and wherein said side edges (50, 52) normally extend generally laterally outward and upward with respect to said absorbent (18) and said control means tends to pull said side edge outward and downward and prevent said side edge (50, 52) from being folded in over said absorbent (18) by said tension means when the curvature of said pad (12) is altered during use, wherein said tension means comprises an elastic member extending longitudinally in said raised side edges (50, 52)."

- IV. Two notices of appeal were lodged against this decision on 13 and 29 September 2000 by the Appellants I and II (Opponent 02 and 01, respectively) together with payment of the appeal fee on the same respective days. The statements of grounds of appeal were filed on 17 and 21 November 2000, respectively.
- V. In a communication dated 2 April 2003 the Board explained why the alleged lack of clarity or insufficiency of disclosure was not convincing. As regards inventive step it would have to be discussed during the oral proceedings whether the skilled person would have combined the teachings of D1 with those of D2 and if so whether this would lead in an obvious manner to the subject-matter of current claim 1.

VI. Oral proceedings were held on 16 June 2003.

Opponent 03 as further party to the proceedings did not appear as it had announced with letter dated 15 April 2003.

The Appellants requested that the decision under appeal be set aside and that the European patent No. 590 675 be revoked.

The Respondent (Patentee) requested that the appeal be dismissed and that the patent be maintained in the amended form as upheld by the Opposition Division.

VII. In support of its requests the Appellants essentially relied upon the following submissions:

Claim 1 did not comply with the requirements of Articles 100(b), 83, 84 EPC because the wording "the mating fastener elements ... so configured as to provide substantially only a single predetermined lateral relationship of one garment attachment panel (14, 16) to the other" was neither disclosed nor was it clear enough as to enable a skilled person to carry out its teaching. Contrary to the patent description the sizes of the hook and loop elements shown in table 2 did not define a single relationship because they allowed a relatively large overlap of the fastener elements. No indication was given as to how to achieve this "single predetermined lateral relationship".

Since the protection was intended for the napkin as such, the term "in use" could not contribute to any clarification.

Moreover, the subject-matter according to claim 1 was not novel when compared with the sanitary napkin disclosed D1. This known product could be used in the same manner as the sanitary napkin according to the patent. In particular the side flaps 5, 6 (D1, Figure 1) could be drawn into a mating position as claimed thus providing an effective attachment point similar to that defined in claim 1. The prior art liquid barriers 10 would work in the same manner as the side edges 50, 52 of the patent being intended to prevent the side edges of the panty being soiled.

Even if found to be novel, the sanitary napkin claimed at least lacked inventive step with respect to the combination of teachings of D1 and D2. With respect to D1 the remaining problem to be solved by the patent was to improve the positioning of a sanitary napkin when attached to a panty. The skilled person had no difficulties to recognize that the fastener elements disclosed in D2 would improve the fit, and therefore would replace the side flaps 5, 6 of D1 with the mating fastener elements 26 of D2 thus arriving at the subject-matter claimed without the involvement of inventive step.

VIII. The submissions of the Respondent are summarised as follows:

There was no inconsistency between claim 1 and the patent specification. Having regard to page 7, lines 8

to 13, it was clear that the lateral adjustment was restricted on a very small range because the fastener elements should fully overlap one another as was shown in Figure 2.

The claimed invention was novel over D1 because this document did not disclose mating fastener elements, so configured as to provide substantially only a single, predetermined lateral relationship, and any indication was lacking to use that sanitary napkin in the manner of the patent in suit.

The side flaps known from D2 had a totally different configuration and were attached to the backside of the sanitary napkin. Therefore no incentive was derivable to apply these fastener elements to the napkin of D2.

Reasons for the Decision

1. The appeal is admissible.
2. *Admissibility of claim 1*
 - 2.1 According to the case law of the Boards of Appeal the skilled person, when considering a claim, should rule out interpretations which are illogical or which do not make technical sense. The patent must be construed by a mind willing to understand, not a mind desirous of misunderstanding (see e.g. T 190/99).
 - 2.2 Applying these principles, the Board is convinced that the teaching of claim 1 can be carried out by a skilled person and is not contradictory with regard to the

description. In use the control mechanism of the patent is suitable to define the position of the absorbent pad in relation with the crotch portion of an undergarment (page 3, lines 47 to 50). The range of lateral adjustment of the fastener elements is very narrow when they are centered one on the other (page 7, lines 8 to 13; Figures 9, 10), and therefore the skilled person does not see a contradiction between the specification and the teaching of the claim "the mating fastener elements ... so configured as to provide substantially only a single, predetermined lateral relationship of one garment attachment panel to the other". Those unambiguous text passages of the description support claim 1 in such a manner that it can be understood by a skilled reader.

Consequently this claim 1 meets the requirements of Articles 83, 84 EPC, and the objection under Article 100(b) EPC is therefore not justified.

3. *Novelty*

3.1 D1 discloses a sanitary napkin having flexible side flaps 5, 6 projecting outward from the absorbent pad. Regions 17, 18 of pressure-sensitive adhesive are provided on the side-flaps for the purpose of securing the napkin to the outside of the underpants (Figure 5, page 10, lines 8 to 19). The sanitary napkin comprises uplifted liquid barriers 10, 11 on both sides of the absorbent pad which in use are forced to rise by the side flaps (page 9, lines 22 to 30; Figures 3, 4, 5).

3.2 The subject-matter of claim 1 differs from that sanitary napkin at least in that it comprises control

means for selectively controlling deflection of at least one of the side edges and that the ends of these control means in the form of garment attachment panels comprise mating fastener elements.

3.3 The Appellants pointed out that the prior art napkin could be used in the same manner as the subject-matter claimed. However, any indication is lacking in D1 that the side flaps would have a control function similar to that of the garment attachment panels pulling the side edges outward and downward to prevent them from being folded in over the absorbent pad. On the contrary, as shown in figures 4 and 5, by pulling the side-flaps outward from the absorbent pad, the liquid barrier devices are raised in use and not pulled down like the side edges according to the invention. Moreover, the fastener elements formed in D1 by pressure sensitive adhesive are not in mating configuration and intended to be connected with one another since they are folded around the edges 15, 16 of the leg openings of the underpants and fastened to their outside. Neither an explicit disclosure nor an implicit disclosure is present in D1 that the fastening means would be similar in form and function to those of the patent.

3.4 Consequently, since only D1 was cited in respect of novelty, the sanitary napkin according to claim 1 meets the requirements of Article 54(1) EPC.

4. *Inventive step*

4.1 The closest prior art is represented by D1. Starting from this known absorbent product the object of the invention is to provide an improved sanitary napkin

which allows the functional characteristics and advantages of a curved sanitary napkin with functional or raised side edges to be preserved having a garment attachment panel to more reliably realize its potential for shielding and protecting the crotch portion of an undergarment, furthermore having functional raised side edges which can be controlled or pulled down, by the anchoring of garment attachment panels, to "gasket" comfortably against the thigh.

4.2 In view of the explanations given in the patent in suit it is apparent that these technical problems are solved by the sanitary napkin having the features of claim 1.

4.3 The side-flaps 5, 6 disclosed in D1 are intended to be folded around the crotch part of the wearer's underpants or the like garment and to be secured to the outside of said underpants (page 16, lines 7 to 11). Their function as "control means" is different from that of the "control means" according to the patent in suit in that they raise the edges of the sanitary pad to form liquid barriers. Since there is no "effective attachment point" which would be comparable with that of the patent, they cannot establish a generally downward pull on the side edges of the sanitary pad. Therefore the device according to D1 works in a totally different manner to that of the subject-matter claimed, in particular because there are no control means for selectively controlling deflection of at least one of the side edges. This kind of controlling is supported by the further features concerning the mating fastener elements and the attachment of the garment attachment panels at the effective attachment point.

D1 does not give any indication towards this specific combination of features of claim 1, and therefore its subject matter is non-obvious with respect to that prior art.

4.4 D2 discloses a sanitary napkin having side flaps for fixing it to the crotch portion of an undergarment. When mounted to the undergarment the fastener elements of the side-flaps are in a mating position. Since these attachment panels are fixed to the backsheet of the napkin they cannot have any control function in respect of the side edges of the sanitary napkin other than its affixation to the panty. Therefore also D2 does not give an indication towards the effect achieved by the features of claim 1. Even if the skilled person would combine the sanitary napkin according to D1 with the side flaps of D2 he would not arrive at the subject-matter of claim 1 because that combination would not have the control function of the garment attachment panels according to the invention.

4.5 Consequently the solution according to claim 1 could not be arrived at without the involvement of an inventive step (Article 56 EPC). Together with claim 1 dependent claims 2 to 6 including further embodiments of the invention can also be maintained.

Order

For these reasons it is decided that:

The appeals are dismissed.

The Registrar:

The Chairman:

M. Patin

P. Alting van Geusau