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D E C I S I O N
of 25 September 2003

Case Number: T 1106/00 - 3.2.6

Application Number: 93117507.9

Publication Number: 0597331

IPC: A61F 5/44

Language of the proceedings: EN

Title of invention:

A garment for absorbing human discharge

Patentee:

KIMBERLY-CLARK WORLDWIDE, INC.

Opponent:

SCA Hygiene Products AB
The Procter & Gamble Company

Headword:

-

Relevant legal provisions:

EPC Art. 52(1), 54(1), 56

Keyword:

"Novelty - yes"
"Inventive Step - yes"

Decisions cited:

T 0177/98

Catchword:

-



Case Number: T 1106/00 - 3.2.6

D E C I S I O N
of the Technical Board of Appeal 3.2.6
of 25 September 2003

Appellant: SCA Hygiene Products AB
(Opponent 1) SE-405 03 Göteborg (SE)

Representative: Hyltner, Jan-Olof
Albihns Stockholm AB
Box 5581
SE-114 85 Stockholm (SE)

Respondent: KIMBERLY-CLARK WORLDWIDE, INC.
(Proprietor of the patent) 401 North Lake Street
Neenah, Wisconsin 54956 (US)

Representative: Davies, Christopher Robert
Frank B. Dehn & Co.
European Patent Attorneys
179 Queen Victoria Street
London EC4V 4EL (GB)

Other Party: The Procter & Gamble Company
(Opponent 2) One Procter & Gamble Plaza
Cincinnati, OHIO 45202 (US)

Representative: Lawrence, Peter Robin Broughton
GILL JENNINGS & EVERY
Broadgate House
7 Eldon Street
London EC2M 7LH (GB)

Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 8 September 2000
rejecting the opposition filed against European
patent No. 0597331 pursuant to Article 102(2)
EPC.

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. 597 331 in respect of European divisional application No. 93 117 507.9 based on earlier application 88 121 163.5 filed 16 December 1988 and claiming two US-priorities from 16 December 1987 was published on 19 November 1997.

Claim 1 reads as follows:

"A disposable pant-like garment (2) for absorbing human discharge, comprising:

an absorbent assembly comprising a liquid-impervious outer cover (90), a liquid-pervious liner (88) and an absorbent medium (92); said absorbent assembly further comprising generally opposite side edges and generally opposite end edges; and

gathering means (46) providing elasticity along at least portions (76), 78) of a pair of leg openings (12, 14) of said garment (2) to prevent leakage thereat,

characterized by

elastic stretchable side panels (6, 8) joined to said edges to form with said absorbent assembly a child's training pant having a waist opening (10) and said leg openings (12, 14) whereby said elastic stretchable side panels (6, 8) maintain said training pant (2) snugly against the wearer's body (16)".

- II. Two notices of opposition were filed on 17 and 19 August 1998 by the Appellant (Opponent 01) and other party (Opponent 02), on the grounds of Article 100(a), (b) and (c) EPC.
- III. By decision of the Opposition Division announced during the oral proceedings on 1 August 2000 and posted on 8 September 2000 the oppositions were rejected.

The Opposition Division was of the opinion that the subject-matter claimed complied with the requirements of the EPC. In particular, the subject-matter of claim 1 did not extend beyond the content of the application as filed and was disclosed in a manner so sufficient as to be able to be carried out by a skilled person. Furthermore it was novel and inventive when compared in particular with the prior art documents

- D1: EP-A-0 213 642
- D2: US-A-4 205 679
- D3: US-A-4 690 681
- D4: WO-A-85/05 254
- D5: GB-A-1 520 740
- D6: EP-A-0 187 728
- D7: Dupont: "Weft Knitted Fabrics with Lycra Elastane Fibre", August 1976
- D8: Dupont: "Manufacturing of Apparel from Woven Elastic Fabrics containing Lycra", October 1976
- D9: US-A-3 368 563

relied upon by the Opponents during the opposition proceedings.

IV. On 7 November 2000 notice of appeal was lodged against this decision by the Appellant together with payment of the appeal fee. The statement of grounds of appeal was filed on 21 December 2000. The objections in respect of novelty and inventive step under Article 100(a) EPC were maintained.

V. In a communication dated 27 June 2003 the Board raised the question whether the decision T 177/98 relied upon by the Appellant (a prior decision concerning the parent application) was pertinent in this case.

As regards the issues of novelty and inventive step it would appear that mainly D2, D5 and D6 would have to be discussed at the oral proceedings.

VI. Oral proceedings were held on 25 September 2003 in which the Appellant was not present as it had announced in its letter dated 16 September 2003.

The Appellant in its written submissions as did the other party during the oral proceedings, requested that the decision under appeal be set aside and that the European patent 597 331 be revoked.

The Respondent (Patentee) requested that the appeal be dismissed and that the patent be maintained as granted or alternatively, be maintained in an amended form according to the auxiliary requests filed with letter dated 22 August 2003.

VII. In support of their requests the Appellant and the other party essentially relied upon the following submissions:

The Board was not bound by decision T 177/98 concerning the parent application of the present patent because the subject-matter of the earlier patent differed by several features from that what was now claimed. Anyhow the present case concerned an independent appeal and should therefore be considered on its own merits.

According to a plurality of prior art documents a snug fit of training pants or other sanitary garments to the wearer was generally desired in order to keep the absorbent assembly in the desired position. In the light of that necessary property of these garments the term "stretchable" was understood by a skilled person to have the same meaning as "elastic" because the snug fit could be achieved only due to the elasticity and stretchability.

The child's training pant according to claim 1 was not novel when compared with the disclosures of D2. The embodiment shown in figure 17 of that document consisted of an intermediate absorbent assembly 300 to which elastic side panels 340 were connected, and comprised gathering means around the leg openings. A stretchable film could also be joined to the absorbent assembly. Since there was no difference in the features describing this training pant when compared to that of claim 1 of the patent in suit it should follow that it led to the same effects and thus that it also fitted snugly against the wearers body in the same manner as the garment claimed.

The absorbent medium 92 according to the patent (column 7, lines 27 to 31) could have a length up to 76.2 centimetres and a width of up to 50.8 centimetres. Such dimensions indicated clearly that the disposable garment was not restricted to a child's training pant, and therefore the prior art relating to adult's garments would also have to be considered with respect to inventive step.

D5 disclosed an incontinence garment for adults which due to its elastic side panels provided a snug fit to the wearer without bulkiness. The skilled person being aware of the advantage of that garment was led to replace the micropleated side panels of the garment according to D2 (figure 17) by elastic side pieces. Suitable elastic fabrics were well-known in the art, e.g. from D7 and D8 which disclosed fabrics containing LYCRA fibers. Thus the subject-matter claimed was obvious by a combination of D2 with D5.

The same result was arrived at when combining D2 with D3. D3 related to a disposable catamenial or incontinence device comprising a panty-like garment with elastic side portions 22 and 24 which provided snug fit to the body of the wearer. Applying the teaching of that document to the incontinence garment known from D2 a garment like that of claim 1 was arrived at in an obvious manner.

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

Since the facts in the present case were essentially the same as in the previous case according to the parent application the decision T 0177/98 applied in the same manner. The only difference was that the elastic side panels were composed of two side members connected by a seam. Consequently, for reasons of consistency of jurisdiction the patent had to be maintained.

The term "elastic stretchable" defined that the side panels after extension would tend to recover to their original form. This was quite different from the micropleated fabric used in D2 which was only stretchable but clearly not elastic in the sense of the patent. This was confirmed by the difference made in D2 between the "stretchable" micropleated blank and the "elastic" waistband portion and leg cutouts.

The skilled person would be kept from combining the teachings of D5 or D3 with that of D2 because of the structural differences between the garments disclosed there. The requirement on a child's training pant was that it be easily pulled on, whereas the solutions in the prior art according to D5 or D3 led in a quite different direction. D5 related to a multiple usable sanitary garment for holding a detachable absorbent pad. According to D3 a menstrual pad was fixed to the pant-like garment. Thus a combination of their teachings with that of D2 was not obvious and did not lead to a garment comprising an absorbent assembly to

the side edges of which elastic stretchable side panels were joined.

Since the subject-matter claimed was novel and not obvious with respect to the prior art the appeal should be dismissed.

Reasons for the Decision

1. The appeal is admissible.
2. *Interpretation of the term "elastic stretchable"*
 - 2.1 According to column 4, lines 12 to 17, the term "elastic stretchable" is intended to mean that the material can be stretched and, upon relaxing will tend to resume its original shape.
 - 2.2 In point 2.1 of the reasons of the decision T 0177/98 the term "elastic stretchable" has been interpreted as describing the ability of the side panels to elongate when submitted to normal forces exerted by the wearer of the training pant and to retract completely (emphasis added by the Board) so as to recover to its original dimension when the forces are no longer applied.
 - 2.3 However, fact is that in practice an "elastic stretchable" material, due to a distinct hysteresis will not in every case retract completely to its original shape. Therefore an "elastic stretchability" can also be assumed if the material does not completely recover after stretching, i.e. will tend to resume its

original shape. In this respect reference can also be made to D2 in which the term "elastic" is defined for material having a recovery of at least 90 % when elongated to within 10 % of their yield point (column 11, lines 26 to 39).

3. *Novelty*

3.1 Lack of novelty was substantiated by the Appellant with respect to the disclosures of D2, in particular the embodiment shown in figure 17. That document discloses a disposable pant-like garment 1 for absorbing human discharge, comprising an absorbent assembly comprising a liquid-impervious outer cover (the contoured blank 312), a liquid-pervious liner 300 and an absorbent panel sandwiched between these layers; said absorbent assembly further comprising generally opposite side edges and generally opposite end edges. Gathering means provide elasticity along a pair of leg cutouts 320, 322 of said garment 1 to prevent leakage thereat.

A stretchable plastic film serving as an additional moisture barrier can additionally be provided overlying the outer cover 312 such that its outer portions form stretchable side panels forming with said absorbent assembly a child's training pant having a waist opening and leg openings (see column 9, lines 17 to 50).

3.2 The Appellant was of the opinion that the stretchability of the blank used according to D2 was identical with the elastic stretchability of the side panels according to the patent in suit. However, elasticity in the sense of recovery to almost the original shape after extension is only disclosed in D2

in connection with the waistband area and the edges of the leg cutouts (column 2, lines 44 to 60; column 11, lines 26 to 50). There is no disclosure of an elastic stretchability of the blank which would be comparable with that defined in the patent in suit (column 4, lines 12 to 17). Furthermore the blank consists of one unitary blank to which the absorbent layer and the facing layer are fastened instead of a construction of an absorbent assembly to which elastic stretchable side panels are joined. This also applies to the alternative embodiment having an additional moisture barrier in the form of a stretchable plastic film.

3.3 Therefore the subject-matter of granted claim 1 differs from the known training pant by the features that the side panels are joined to the absorbent assembly (which means the lateral connection of two preformed parts), and that the side panels have an elastic stretchability in the sense of tending to resume their original shape after extension.

3.4 Since none of the other cited documents comes closer to the claimed subject-matter than D2 claim 1 according to the main request meets the requirement of novelty (Article 54(1) EPC).

4. *Inventive step*

4.1 The problem underlying the patent in suit according to the patent specification is to provide an improved disposable pant-like garment for absorbing human discharge.

Starting from the embodiment according to figure 17 of D2 the improvement concerns in particular the fit and comformability to the body of the wearer.

These problems are solved with the disposable pant-like garment having the combination of features of claim 1. Its construction with a discrete absorbent assembly combined with elastic stretchable side panels allows a snug fit under all circumstances while keeping the absorbent assembly in the wanted position.

- 4.2 The side panels of the disposable training panty according to D2 are integral with the micropleated backing layer of the absorbent assembly. No indication is present in that document to form the panty of separate parts and to join elastic stretchable side panels to the absorbent assembly. Therefore, when starting from D2, the skilled person does not receive any indication towards a solution with the combination of features as defined in claim 1.
- 4.3 D3 concerns a panty-like garment containing an integral menstrual pad. It is composed of an impervious front panel 20 and stretchy side portions 22 and 24. The garment has an elastic waist 12 and elasticized legs 14. One of the objects of that garment is to conform to the body of the wearer. In contrast to the subject-matter claimed it is not suitable as a child's training panty which is particularly constructed to be easily pulled up. The side portions are "stretchy" which in contrast to the elastic waist and legs is not understood by the skilled person to be "elastic stretchable" in the sense of the patent. For these reasons the skilled person is not led to combine the characteristics of that garment

with D2 and if he would do so, he would not arrive at a panty-like garment with elastic stretchable side panels joined to an intermediate absorbent assembly.

4.4 The construction of the disposable garment according to D1 is similar to that of D2 in that it is composed of an outer cover, and an absorbent structure is disposed within that cover. Since any hint towards the construction of the panty with a separate absorbent structure to which the elastic stretchable side panels are joined is lacking, that embodiment also cannot lead to the subject-matter of claim 1.

4.5 The disposable training pant disclosed in D6 consists of a liquid-pervious inner bodyside liner, a liquid-impervious outer cover and an absorbent batt between the liner and the cover. Elastic means are only provided in the region of the leg openings and the waist opening. That document does not indicate any suggestion to use elastic stretchable side panels which are connected to an absorbent assembly, and can therefore not lead to the invention either.

4.6 D5 shows a sanitary garment for incontinent persons which is intended for multiple use together with a detachable absorbent pad. In order to provide a snug fit the elastic side pieces 14, 15 are connected e.g. by releasable Velcro-type fasteners. Since the requirements of an adult's garment are very different from those of a child's training pant the skilled person would not bring this embodiment into consideration when looking for a new solution, and even if he would, he would not be led to a disposable panty

having elastic stretchable side panels connected to an absorbent assembly.

- 4.7 D9 relates to a multiply usable panty formed of pliable materials. That garment consists of knit fabric which provides stretchability over its whole surface. As a consequence of that structural difference to a disposable training pant that document cannot lead to a garment having an absorbent assembly and elastic stretchable side panels connected to the absorbent body.
- 4.8 D8 shows the use of LYCRA for different applications in garments. However, there is neither an explicit nor an implicit teaching to use LYCRA particularly in connection with a child's training panty. Thus that document cannot contribute to arrive at the invention according to claim 1 without the involvement of an inventive step.
- 4.9 The teachings of D4 are still more remote from the claimed solution and therefore cannot affect inventive step of the subject-matter claimed.
- 4.10 Since no single one of the cited documents nor a combination of them leads the skilled person to the subject-matter of claim 1 in an obvious manner the claimed invention complies with the requirement of inventive step (Article 56 EPC).

5. Summarising, for the above reasons the Board has arrived at the conclusion that the subject-matter of claim 1 complies with the requirements of patentability according to Article 52(1) EPC. The same conclusion applies to the subject-matter of claims 2 to 46 which cover particular embodiments of the disposable garment according to claim 1.

Thus the main request being allowable the patent can be maintained unamended.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

M. Patin

P. Alting van Geusau