

Internal distribution code:

- (A) Publication in OJ
(B) To Chairmen and Members
(C) To Chairmen
(D) No distribution

**Datasheet for the decision
of 15 September 2006**

Case Number: T 1120/04 - 3.2.06

Application Number: 95930985.7

Publication Number: 0847263

IPC: A61F 13/15

Language of the proceedings: EN

Title of invention:

Thermoplastics fibrous nonwoven webs for use as core wraps in absorbent articles

Patentee:

KIMBERLY-CLARK WORLDWIDE, INC.

Opponent:

The Procter & Gamble Company

Headword:

-

Relevant legal provisions:

EPC Art. 100(b), 114(1), 111(1), 104(1)

Keyword:

"Document filed late shortly before oral proceedings (admitted)"

"Remittal (yes)"

"Apportionment of costs (no)"

Decisions cited:

T 1002/92

Catchword:

-



Case Number: T 1120/04 - 3.2.06

D E C I S I O N
of the Technical Board of Appeal 3.2.06
of 15 September 2006

Appellant:
(Opponent)

The Procter & Gamble Company
One Procter & Gamble Plaza
Cincinnati, OH 45202 (US)

Representative:

Boon, Graham Anthony
Elkington and Fife LLP
Prospect House
8 Pembroke Road
Sevenoaks,
Kent TN13 1XR (GB)

Respondent:
(Patent Proprietor)

KIMBERLY-CLARK WORLDWIDE, INC.
401 North Lake Street
Neenah, WI 54956 (US)

Representative:

Diehl, Hermann O. Th.
Diehl & Partner
Augustenstrasse 46
D-80333 München (DE)

Decision under appeal:

Decision of the Opposition Division of the
European Patent Office posted 30 July 2004
rejecting the opposition filed against European
patent No. 0847263 pursuant to Article 102(2)
EPC.

Composition of the Board:

Chairman: P. Alting van Geusau
Members: G. Pricolo
W. Sekretaruk

Summary of Facts and Submissions

- I. The appeal is from the decision of the Opposition Division posted on 30 July 2004 to reject the opposition filed against European patent No. 0 847 263, granted in respect of European patent application No. 95 930 985.7.

Claim 1 of the patent as granted reads as follows:

"1. An absorbent article (10) comprising: an absorbent core (12) including particulate superabsorbent and a fibrous nonwoven web core wrap (14) for containing said particulate, said core wrap (14) comprising a plurality of thermoplastic fibers, said core wrap (14) having a plurality of pores, wherein no more than five percent of said plurality of pores have a pore size greater than 50 microns, characterized in that the plurality of pores have a mean flow pore size less than 30 microns and, said core wrap (14) having a wet to dry tensile strength at peak load ratio in the machine direction or the cross-machine direction of 0.5 or greater, said core wrap (14) further having a Frazier air permeability of at least $6100 \text{ cm}^3\text{cm}^{-2}\text{min}^{-1}$ (200 cubic feet per square foot per minute) and in that the fibrous nonwoven core wrap (14) is sealed around the absorbent core (12) to envelope said particulate superabsorbent."

- II. The Opposition Division came to the conclusion that the grounds of opposition under Article 100(a), (b) and (c) EPC did not prejudice the maintenance of the European patent, without taking into account (Article 114(2) EPC) the late-filed documents

D4: EP-A-1 073 390;

D5: ASTM Standard Test Method F316-03;

D6: Operator's Handbook of the Coulter Porometer II
(Software Level 3B).

These documents were not *prima facie* relevant. In particular, D5 was a modified version of the ASTM test F316-86 mentioned in the patent in suit and D6, for which it was not possible to ascertain a publication date, could not be regarded as relating to the same porometer as that mentioned in the patent in suit. Concerning sufficiency of disclosure (Article 100(b) EPC) the Opposition Division held that even if the patent in suit provided only one example of suitable thermoplastic fibers for use in the claimed absorbent article, namely polypropylene meltblown fibers, also other fibers could be used. As regards the mean pore size, it could be measured by means of the porometer specified in the description, which was available at the time of drafting the patent application. Anyway, the measurement was made in accordance with the ASTM Standard Test Method F316-86, which method was not bound to a specific porometer. Moreover, the opponent failed to prove that by using a different porometer different values of mean pore size were obtained. Finally, regarding the absence of an indication of the size of the superabsorbent material in claim 1, the Opposition Division considered that this objection was related to Article 84 EPC, which was not a ground of opposition.

III. With letter dated 15 September 2004, received at the EPO on 16 September 2004, the appellant (opponent) lodged an appeal against this decision. The payment of the appeal fee was registered on 15 September 2004. With the statement setting out the grounds of appeal, received at the EPO on 26 November 2004, the appellant again filed documents D5 and D6, and further additional documents, in particular:

D5a: ASTM Designation F316-86 Standard Test Methods for Pore Size Characteristics of Membrane Filters by Bubble Point and Means Flow Pore Test.

IV. With letter dated 16 August 2006 the respondent (patent proprietor) again filed document D4 together with further additional documents obtained from the internet and referenced as D11a, D11b, D11c.

V. In an annex to the summons for oral proceedings pursuant to Article 11(1) Rules of Procedure of the Boards of Appeal the Board expressed the preliminary opinion that at least documents D5a and D6 should be admitted into the proceedings because they contained technical information relevant to the ground of opposition under Article 100(b) EPC and because the respondent did not object to that. The Board stated that it would appear that the skilled person would not have difficulties in finding suitable thermoplastic fibers other than the specifically disclosed polypropylene meltblown fibers and that the size of the superabsorbent particles was irrelevant for reproducing the invention as claimed. However, although it appeared that documents D11a-D11c filed by the respondent supported the argument that the measurement of the mean

flow pore size in accordance with the patent in suit was independent of the choice of a particular porometer, it had to be discussed whether this measurement could be reliably and accurately reproduced by a skilled person, in particular in view of the fact that it was not clear how to determine the "tortuosity factor" for nonwovens, a parameter which value had to be set in the porometer according to D6.

The Board further expressed observations in connection with Article 123(2) and 84 EPC concerning the auxiliary requests filed by the respondent.

VI. In response to the communication of the Board, the respondent filed with letter dated 14 August 2006 new first to fourth auxiliary requests of maintenance of the patent in amended form together with further additional documents.

VII. On 13 September 2006 the appellant sent by fax document

D16: "Comparative Methods for the Pore Size Distribution of Woven and Metal Filter Media" by R. Lydon et al., Proceedings of the 9th World Filtration Congress, 18-22 April 2004, New Orleans, USA;

and requested admission thereof into the proceedings as evidence that measurements of the mean flow pore size were strictly dependent on the specific porometer used.

VIII. Oral proceedings took place on 15 September 2006.

The appellant requested that the decision under appeal be set aside and that the patent be revoked. It further requested admittance of document D16.

The respondent (patentee) requested that the appeal be dismissed as a main request or the patent be maintained on the basis of one of the auxiliary requests 1 to 4 filed with the letter dated 16 August 2005. It requested to disregard the late-filed document D16. As a further auxiliary measure, in case the Board admitted the document filed by the opponent with letter of 13 September 2006, the respondent requested to remit the case to the first instance and to apportion the costs of the oral proceedings.

IX. The arguments of the appellant, as far as they are relevant to this decision, can be summarized as follows:

D16 showed that measurements made with a Coulter porometer led to results substantially different from that made with a PMI porometer. Although in D16 the measurements were made on porous woven metal filters, this conclusion clearly applied for nonwoven materials, the latter having irregular pore distributions that would provide even greater measurement differences. D16 did not provide statistical data, yet clearly disclosed consistently different measurement results. D16 thus showed that it was a necessary condition for a skilled person to be able to reliably and accurately reproduce the measurements of mean flow pore size given in the patent in suit, that the person used the same type of

porometer as that with which the measurements in the patent were carried out.

The reference in the patent in suit to a Coulter 115/60 porometer was not a reference to a specific porometer manufactured by the company Coulter Electronics, Ltd. of Luton, England, but to the voltage (115 V) and frequency (60 Hz) used in the USA. Evidently the patentee had used a Coulter porometer which had been supplied for use in the USA. In fact, Coulter Electronics had only produced two types of porometers: "Coulter I" and "Coulter II". D6 related to a Coulter II porometer and therefore, contrary to the opinion of the Opposition Division, could be regarded as being representative of the porometer used by the patentee. D6 showed that the user had to input various settings, e.g. the value of the "tortuosity factor", and decide what wetting liquid to use. Depending on the choices made by the user, different results would be obtained. The patent in suit disclosed that the determinations of mean flow pore size and pore size distribution were made in accordance with ASTM Standard Test Method F316-86, namely document D5a. However, this test method was specified for testing membrane fibers with maximum pore sizes from 0.1 to 15 microns, the pores being discrete pores extending from one side to the other of the membrane, similar to capillary tube. Although such test methods might be used for comparing relative pore sizes of nonwovens, it was not suitable for accurate measurement of pore diameters of such materials having no discrete pores of the capillary tube shape. D5a even specified that the accuracy decreased with the pore size. It was therefore not appropriate for accurately determining the pore size of the nonwoven webs of the

patent in suit, i.e. for determining pore sizes up to 50 microns. Moreover, D5a did not specify how to set a Coulter porometer for testing a nonwoven.

Document D16 was filed only two days before the date of oral proceedings because it was found purely by chance by the representative of the appellant, following a discussion in preparation for the oral proceedings with a technical expert, during which various denominations of wetting agents used for porometer measurements were mentioned. D16 was found as a result of an internet search based on these denominations.

- X. The respondent's reply to the appellant's submissions can be summarized as follows:

It was irrelevant what porometer was used for the measurements because the skilled person would in any case assure that the results obtained complied with the ASTM standards as set out in D5a. Thus, it was the ASTM test method D5a which was determining, not the particular porometer used. Moreover, D16 did not convincingly show that different measurement results were obtained when using different porometers, as it only disclosed a limited number of measurements made with two specific porometers rather than an extensive comparison with statistical data. The Coulter I porometer mentioned in D16 was already a very old model in 2004 and it was doubtful whether it could still produce accurate results. It was surprising that such an old porometer was used: in fact, a comparison with the most modern state of the art would have been expected, since D16 aimed at comparing a new test method ("challenge test method") with existing

standards for measuring pore size distribution. Furthermore, D16 did not disclose any of the features of claim 1 of the patent in suit. Accordingly document D16 was not *prima facie* relevant and should not be admitted into the proceedings.

If D16 were admitted, then the respondent should be awarded costs for the oral proceedings. Since it was filed only two days before the date of oral proceedings, the respondent was not in a position to properly defend its case, in particular by filing further evidence in the form of test results with various porometers. Accordingly, the case could not be settled during the oral proceedings, but at a later stage. This would mean that the respondent had to incur additional costs due to the late-filing of D16.

Reasons for the Decision

The appeal is admissible.

Admissibility of D16

- 2.1 Document D16 was not cited during the nine month period allowed for opposition pursuant to Article 99(1) EPC and to this extent must be regarded as not submitted in due time under Article 114(2) EPC. Nevertheless, it is within the discretion of the Board under Article 114(1) EPC to admit and consider such a document in the proceedings in view of its relevance. As to the degree of relevance required for such a document to be admitted to the proceedings, in accordance with the established case law of the boards of appeal such

material should be *prima facie* highly relevant in the sense that it can reasonably be expected to change the eventual result and is thus highly likely to prejudice the maintenance of the European patent (see e.g. T 1002/92; OJ EPO 1995, 605; Reasons, point 3.4).

- 2.2 In the present case, D16 discloses (see Table 1 on page 4) pore size measurements made with two different porometers on a filter media (Madison Dual-TM media) under similar conditions (see points 2.2.1 and 2.2.2). In the case of the mean flow pore size (see the columns headed "X" in table 1), different results are consistently obtained for identical samples depending on the porometer used. Therefore, the Board takes the view that this document, although it is not prior art within the meaning of Article 54(2) EPC, constitutes evidence in support of the appellant's allegation that for the nonwoven material of the patent in suit pore size measurements are dependent on the porometer used.
- 2.3 The Board has considered the respondent's objections as to the probative value of document D16. The Board accepts the respondent's argument that D16 does not show an extensive comparison between a great number of porometers, and that there is no evaluation of statistical data. However, it can be derived from the cited results specified in tenth of microns that the drafters of D16 have carried out the measurements with the high degree of accuracy which is normally expected by technical experts, and therefore it is highly likely that the consistent differences in the results of the mean flow pore size measurements are not due to random measurement errors or defects in the porometers used, but are rather related to the structural differences

and/or the required settings of the porometers used. This also implies that measurement differences would be likewise obtained with the nonwoven materials referred to in the patent in suit.

- 2.4 The decision of the Opposition Division in respect of Article 83 EPC is based on the assumption that the measurement of the mean pore size is independent of the specific porometer used (see page 4 of the decision under appeal), because the ASTM test was not bound to a specific porometer and because the opponent failed to prove that by using a different porometer different values of mean pore size were obtained.

Since, as explained above, D16 shows that this assumption is no longer valid, if the Board's conclusion drawn from D16 proves to be correct, D16 is *prima facie* highly relevant in the sense that its introduction into the proceedings is highly likely to prejudice the maintenance of the European patent insofar the requirements of sufficiency of disclosure (Article 100(b) EPC) are concerned. Accordingly, the Board decides to introduce this document into the proceedings under Article 114(1) EPC.

Remittal

- 3.1 Having introduced D16 into the proceedings, the appellant's assertion that the mean flow pore size measurement is dependent on the porometer used can no longer be regarded as an argumentation without evidential proof and therefore the burden of proof lays now on the patent proprietor to demonstrate that this is not the case.

3.2 Since the mean flow pore size measurement appears dependent on the specific porometer used and the manner of operating it, these are relevant aspects for the question of sufficiency of disclosure. In fact, it is necessary to accurately reproduce measurements for both the percentage of pores having a pore size greater than 50 microns and the mean flow pore size in order to reproduce the invention.

The patent in suit (par. [0026]) specifies that a Coulter 115/60 porometer manufactured by the company Coulter Electronics, Ltd. of Luton, England, was used and that the measurements were made in accordance with ASTM Standard test Methods Designation F316-86 for Pore Size Characteristics of Membrane Filters by Bubble Point and Mean Flow Pore Test, which is document D5a filed in the appeal proceedings. The respondent did not dispute that the designation "Coulter 115/60" does not relate to a specific Coulter porometer (it could relate either to a Coulter I or a Coulter II porometer) and that D6 is the operator's handbook of a Coulter porometer (Coulter II) which may be used for making the measurements in accordance with the patent in suit. Therefore, since D5a and D6 are relevant to establish what porometer is used in the patent in suit and how (see also point IX above), the Board decides to introduce these documents into the proceedings also. Moreover, the respondent did not object to D5a and D6 being taken into consideration.

3.3 Following the introduction of D16, D5a and D6, it is clear that the impugned decision cannot stand insofar as the ground of opposition under Article 100(b) EPC is

concerned, as it does not take into consideration D5a and D6 and as it is based on the assumption that the measurement of the means pore size is independent of the specific porometer used. Accordingly, examination of the ground of opposition under Article 100(b) EPC needs to be resumed on a new basis. In order not to deprive the parties of their right to an examination in two instances, the Board deems it appropriate to remit the application to the Examining Division for further prosecution in accordance with Article 111(1) EPC. In fact, remittal was explicitly requested by the respondent and was not objected to by the appellant.

- 3.4 The Board has not decided whether further documents other than D5a, D6 and D16, filed after the 9 months opposition period set out in Article 99(1) EPC (in particular the additional documents filed during appeal proceedings), should be admitted into the proceedings. This is an issue that should first be dealt with by the Opposition Division.

Request for apportionment of costs

There is no suggestion that the appellant deliberately withheld D16 for tactical reasons, which would amount to an abuse of the procedure. Furthermore, since D16 does not belong to the technical field of the patent in suit, related to absorbent articles, the appellant's explanation that document D16 has been found by chance when looking for more information on the liquids used in the test methods, and not as a result of a specialized search for consistency of porometer results carried out shortly before the date of oral proceedings, is credible. Accordingly, no indication of

abuse of proceedings or negligence on behalf of the appellant is apparent from the appeal proceedings.

Nevertheless it is a fact that document D16 was filed shortly (two days) before the date of oral proceedings.

The filing of D16 can be regarded as a reaction to the communication of the Board, in particular to the statement according to which the documents D11a-D11c filed by the respondent in the appeal proceedings appeared to support the argument that the measurement of the porosity was independent of the choice of a particular porometer. Therefore, it could have been expected that D16 was filed within the time limit set by the communication (one month before the date of oral proceedings). In such case, the respondent would have had more time to consider it. However, the respondent would still not have had sufficient time to reply in substance to the introduction of D16 as this would necessitate, in accordance with the respondent's own submissions, to carry out several tests on various porometers. Therefore, the Board cannot identify any evident disadvantages for the respondent which directly result from the filing of D16 two days instead of a month before the date of oral proceedings.

In the absence of a reason of equity to decide otherwise, each party to the proceedings shall meet the costs it has incurred (Article 104(1) EPC). Accordingly, the request for apportionment of costs is rejected.

Order

For these reasons it is decided that:

The decision under appeal is set aside.

The case is remitted to the first instance for continuation of the opposition proceedings.

The request for apportionment of costs is rejected.

The Registrar:

The Chairman:

A. Counillon

P. Alting van Geusau