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**Datasheet for the decision
of 11 November 2008**

Case Number: T 1482/07 - 3.2.06

Application Number: 01938900.6

Publication Number: 1292258

IPC: A61F 13/42

Language of the proceedings: EN

Title of invention:

Absorbent article

Patentee:

SCA Hygiene Products AB

Opponent:

Paul Hartmann AG

Headword:

-

Relevant legal provisions:

EPC Art. 54, 56

RPBA Art. 13(1)

Relevant legal provisions (EPC 1973):

-

Keyword:

"Main Request: Novelty (no)"

"Auxiliary Requests 1, 3, 4: Inventive step (no)"

"Auxiliary Request 2: Late-filed - not admitted"

Decisions cited:

-

Catchword:

-



Case Number: T 1482/07 - 3.2.06

D E C I S I O N
of the Technical Board of Appeal 3.2.06
of 11 November 2008

(Opponent)

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Decision under appeal:

Interlocutory decision of the Opposition
Division of the European Patent Office posted
17 July 2007 concerning maintenance of European
patent No. 1292258 in amended form.

Composition of the Board:

Chairman: P. Alting Van Geusau
Members: G. L. de Crignis
W. Sekretaruk

Summary of Facts and Submissions

I. European Patent Nr. 1 292 258, granted on application No. 01 938 900.6, was maintained in amended form by the decision of the opposition division posted on 17 July 2007.

II. The opposition division held that the patent in suit disclosed the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art (Article 100(b) EPC 1973), but found that the subject-matter of claim 1 in accordance with the patent proprietor's main request and first auxiliary request was not novel (Article 54 EPC 1973) over the disclosure in

E6 WO-A-95/00099.

Concerning the second auxiliary request, the opposition division came to the conclusion that the subject-matter of its claim 1 was novel (Article 54 EPC 1973) over E6 and also involved an inventive step (Article 56 EPC 1973) with regard to the disclosure of E6 alone or taken in combination with

E1 EP-A-0 211 524.

III. With its letter dated 14 September 2007 the appellant (patent proprietor) filed an appeal against the decision of the opposition division and on the same day paid the appeal fee. With its letter of 12 November 2007 the statement of grounds of appeal was filed, together with a main request to maintain the

patent as granted and sets of claims representing first to fourth auxiliary request.

IV. With its letter dated 31 August 2007 appellant II (opponent) also filed an appeal against the decision of the opposition division and on the same day paid the appeal fee. With its letter of 22 November 2007 the statement of grounds of appeal was filed, together with the request to revoke the patent for reasons of insufficiency (Article 83 EPC 1973), lack of novelty (Article 54 EPC 1973) over E6 or over

E2: US-A-4 231 370 or

E3: FR-A-2 711 317

or over the filed prior use. At least it also lacked an inventive step (Article 56 EPC 1973) when considering the prior art disclosed in either E1;

E4: EP-A-0 925 769 alone or in combination with E3;

E5: US-A-4 022 211; or

E7: US-A-3 952 746.

V. In a communication in preparation for the oral proceedings dated 9 June 2008, the Board indicated that it concurred with the findings of the opposition division in that the terms which were objected to under Article 83 EPC ("having a colour or tint different from the rest of the backsheet material") did not appear to raise a problem in respect of sufficiency, and that the subject-matter of claim 1 of the main request and of the first auxiliary request was not considered to be novel over the disclosure in E6. With regard to the subject-matter claimed in claim 1 of the second to

fourth auxiliary request, the problem to be solved should be identified in order to assess inventive step. The relevance of the product of the alleged late-filed public prior use did not appear to be established.

VI. Oral proceedings were held before the Board on 11 November 2008, during which appellant I requested that the decision under appeal be set aside and the patent be maintained on the basis of the main request, or alternatively on the basis of the auxiliary request 1, both these requests being filed with letter dated 7 October 2008 or on the basis of one of the new auxiliary requests 2 or 3 filed during the oral proceedings or on the basis of auxiliary request 4 filed with letter dated 7 October 2008.

Appellant II requested to revoke the patent.

Claim 1 according to the main request reads:

"Absorbent article such as a diaper and incontinence guard having a longitudinal and a transverse direction, comprising a liquid pervious topsheet (2), a liquid impervious backsheet (3) and an absorbent body (4) enclosed therebetween, at which on the inside of the liquid impervious backsheet (3), i.e. on the side adjacent the absorbent body, there is arranged a wetness indicator (9) in a certain pattern, which is visible through the backsheet material, characterized in, that the wetness indicator (9) is applied on or adjacent at least one strip (10) having a width and having a colour or tint different from the rest of the backsheet material (3) and wherein the colour or tint

of the strip (10) is an indication of the product type, size or absorption capacity of the article."

Claim 1 according to auxiliary request 1 differs from claim 1 of the main request in that in the characterising portion the wording "or adjacent" is deleted.

Claim 1 according to auxiliary request 2 is based on claim 1 of the main request and additionally includes in the pre-characterising portion

... *"said wetness indicator consists of a dyestuff which dissolves or changes colour or tint when brought into contact with liquid,"* while the characterising portion now reads:

"that the wetness indicator (9) is printed on at least one strip (10) having a width and having a colour or tint different from the rest of the backsheet material (3), said strip (10) is separate from the backsheet material (3) and is fastened on the inside thereof or said strip (10) is a part of the backside material (3) which is coloured in another colour or tint than the rest of the backsheet material."

(changed or additional features with respect to the main request in italics)

The preamble of claim 1 according to auxiliary request 3 is identical to the preamble of claim 1 of the main request and the characterising portion reads:

"that the wetness indicator (9) is applied on at least one continuous strip (10) having a width between 1 and 8 cm and having a colour or tint different from the rest of the backsheet material (3), wherein the colour or tint of the strip (10) is an indication of the

product type, size or absorption capacity of the article, and the strip (10) is a part of the backside material (3) which is coloured in another colour or tint than the rest of the backsheet material."

Claim 1 according to auxiliary request 4 differs from claim 1 of auxiliary request 1 in that in the characterising portion reads:

"that the wetness indicator (9) is applied on at least one continuous strip (10) having a width between 1 and 8 cm and having a colour or tint different from the rest of the backsheet material (3), that the colour or tint of the strip (10) is an indication of the product type, size or absorption capacity of the article and that on or adjacent the strip (10) there is further printed symbols (11), codes or the like which indicate the product type, size or absorption capacity of the article."

VII. In support of its requests Appellant I mainly relied upon the following submissions:

The feature of the colour or tint of the strip being an indication of the product type, size or absorption capacity represented an additional and clearly identifiable feature of the article when taking account of the fact that the claimed article was only put on the market as a packaged unit of a number of absorbent articles. Of course the package contained the information to identify the product type, size or absorption capacity of the article in relation to the colour or tint of the strip.

The subject-matter of claim 1 of the main request was novel over the disclosure in Figure 3d of E6. The row of rings shown in this Figure did not correspond to the claimed strip.

The subject-matter of claim 1 of auxiliary request 1 was novel over the disclosure in E6. The disclosure and Figures of E6 did not refer to a wetness indicator applied on a strip. The subject-matter of claim 1 of auxiliary request 1 was also novel over the disclosure in E7. E7 did not disclose to apply the wetness indicator in a certain pattern on a strip.

The subject-matter of claim 1 of auxiliary request 1 involved an inventive step over the disclosure in E7. E7 referred to the impregnation of the whole indicator strip. No suggestion to print the wetness indicator in a certain pattern on the strip could be found.

Auxiliary request 2 should be admitted into the proceedings. The subject-matter of its claim 1 was limited to the wetness indicator being printed on the strip and thus specified the application technique. The deletion of the subject-matter of granted claim 4 was due to the considerations concerning the previous requests that this feature could not be recognized on the article itself. The insertion of the alternatives set out in granted claims 2 and 3 specified the strip further.

Auxiliary request 3 should be admitted as well. Its subject-matter was based upon granted claims and the reference to a continuous strip was clear and consistent with all the figures.

The subject-matter of claim 1 of auxiliary request 3 involved an inventive step over the disclosure in E7. In Figure 8 of E7 no continuous strip was disclosed which had the claimed width and position. E7 referred to the indicator strip as being provided behind the backsheet as a separate material. No suggestion to provide a continuous strip which was a part of the backsheet material was present.

The subject-matter of claim 1 of auxiliary request 4 involved an inventive step over the disclosure in E7. The further added feature had to be seen in combination and not independent on the other features.

VIII. Appellant II essentially argued:

The subject-matter of claim 1 of the main request was not novel over the disclosure in Figure 3d of E6. The features of granted claim 4 which were added to the wording of claim 1 did not add any technical feature to the claimed article as this subject-matter was only meaningful when further information or instructions would be available, as for example on a separate sheet or the packaging.

E6 showed in Figure 3d circles for the indicator pattern and referred in the description to alternative patterns like rectangles and informative designs. A row of rectangles constituted a strip within the meaning of the patent in suit. Marking signs in the form of non-soluble dye were deposited in such circles or rectangles or other designs. Accordingly these marking signs represented a strip which had a width and a colour different from the rest of the backsheet

material. A wetness indicator was to be applied within or adjacent to such a strip.

The subject-matter of claim 1 of auxiliary request 1 was not novel over the disclosure in Figure 3d of E6. In this Figure of E6 the whole area covered by the chosen design could be considered as a strip. In such case the wetness indicator was in the inner area of the strip and thus a certain "pattern" would be present.

The subject-matter of claim 1 of auxiliary request 1 was also not novel over the disclosure in E7. The wetness indicator was applied on the strip and the strip was arranged such that only a certain pattern was visible through the backsheet material.

The subject-matter of claim 1 of auxiliary request 1 did not involve an inventive step over the disclosure in E7. The problem when starting from the disclosure of E7 was to choose an appropriate application technique. The application of the wetness indicator was not limited to printing techniques. E7 referred to impregnation techniques and it represented common general knowledge to use for example spraying or immersion techniques. When applying colour it was favourable in view of saving material to apply it only on parts where it was visible in the finished article. The application of a pattern was possible with any technique.

Auxiliary request 2 should not be admitted as it was not clearly allowable. In particular, the subject-matter of its claim 1 was not converging as the subject-matter of granted claim 4 no longer formed part

of it. Moreover, the limitation to the wetness indicator being printed on the strip led ultimately to the situation that it was not clear whether such a process feature could be identified on the finished product. The insertion of the alternatives set out in granted claims 2 and 3 did not add any inventive details.

Auxiliary request 3 should not be admitted either. The amendment of the subject-matter of its claim 1 concerning the "continuous strip" and the "backside material" was not clear (Article 84 EPC 1973) or could be considered as being known from E7 and thus not capable of supporting an inventive step. The patent in suit did not exclude laminated backsheet materials and accordingly, it was not possible to identify whether the strip would be separate from or whether it would form part of the backsheet material.

The subject-matter of claim 1 of auxiliary request 3 did not involve an inventive step over the disclosure in E7. According to Figure 8 of E7 transparent areas were provided in the backsheet. The indicator strip was provided in connection to these areas. Figure 6 of E7 showed areas which were arranged in a row, accordingly, the indicator was arranged in a pattern. The position of the wetness indicator could easily be spotted in view of the transparent openings or material in the backsheet. Thus when desiring to save dye material, the disclosure of E7 guided the skilled person to a patterned application of the wetness indicator which had to be consistent with the transparent openings or material in the backsheet. An unrelated problem was to choose the correct width of the strip. The claimed

width of between 1 and 8 cm was the only possibility to be considered in relation to the claimed absorbent article. No inventive concept could be recognized.

The subject-matter of claim 1 of auxiliary request 4 did not involve an inventive step over the disclosure in E7 either. The additional feature related to further printed symbols and thus should be considered independent on the previously discussed features. No cumulative effect was to be considered. E1 as well as E4 and E6 referred to informative symbols. The skilled person trying to solve the problem of applying such symbols on the article would be guided to the claimed solution by the suggestions and figures in these documents.

Reasons for the Decision

1. The appeal is admissible.

2. *Amendments - Main request*

The subject-matter of originally filed and granted claims 1 and 4 is combined in claim 1. The requirements of Article 123(2) EPC are met.

3. *Novelty - Main request*

3.1 E6 discloses a disposable diaper having wetness indication means. Figures 3a to 3d of E6 show different arrangements of these means. In Figures 3a to 3c the wetness indication means are arranged via a plurality of parallel wetness indication strips 22 either

vertically, horizontally or in hourglass form. In Figure 3d the wetness indication means are circles arranged in a central row 26 along the longitudinal centre line and in two horizontal rows at each end of the central row. According to the patent in suit (column 4, lines 38 to 40) the strip can consist of a striped pattern or other optional pattern, therefore the strip claimed is anticipated by the row of circles. Alternatively in E6 the circles may be replaced by other geometrical forms like rectangles or symbols (page 6, l. 6 - 17). The circles or any other symbols naturally have a width. The wetness indication means comprise inner and outer areas (27 and 28). On the outer areas 28 there is applied a marking indication means in the form of a water-insoluble dye which is clearly visible even when wet (page 5, l. 12 - 15). These marking indication means are applied via a coating on the backsheet. On the inner areas 27 there is applied the wetness indication means in the form of water soluble dye. Also the wetness indication means are applied directly on the backsheet, alternatively on the garment facing side of the absorbent member (paragraph bridging from page 4 to page 5, line 2) and thus are applied adjacent to the coating established by the marking indication means. The marking indication means and the wetness indication means together are arranged in a certain pattern establishing the rows and the pattern is visible at least due to the colour of the marking indication means.

- 3.2 E6 thus discloses the combination of features claimed in claim 1. The feature of claim 1 that "the wetness indicator (9) is applied on or adjacent at least one strip (10) ... having a colour or tint different from

the rest of the backsheet material (3)" considered to be absent by Appellant I is disclosed at least in relation to the second alternative defined in this feature in the embodiment of Fig 3d since 4 wetness indicator points (two at the top and two at the bottom of the strip made up by the circles) are present "adjacent the strip".

3.3 The feature added to claim 1 relating to the indication of the product type, size or absorption capacity of the article is unsuitable for the intended limitation. In fact, the colour or tint of the strip known from E6 may be used as an indication of whatever property of the product claimed and in so far the intended purpose of the limitation cannot be derived from the product as claimed. Even acknowledging that these articles are usually sold in a package and that instructions or information could be printed there upon, such subject-matter does not form part of the claimed subject-matter.

3.4 In view of the above conclusions the subject-matter of claim 1 lacks novelty when compared to the disclosure of E6 and for this reason the main request must fail.

4. *Auxiliary request 1*

4.1 Amendments

In claim 1 of auxiliary request 1 the alternative to apply the wetness indicator "adjacent" the strip which has a width and a colour or tint different from the rest of the backsheet material is deleted. the requirements of Article 123(2) EPC are met.

4.2 Novelty

4.2.1 Novelty of the subject-matter of this claim was objected to with regard to E6 and E7.

4.2.2 E6 discloses - as set out above for the main request - that the wetness indicator is "applied adjacent" of the strip having a width and having a colour or tint different from the rest of the backsheet material. It does not disclose that the wetness indicator is "applied on" at least one strip. Accordingly, the subject-matter of claim 1 is novel over the disclosure in E6.

4.2.3 E7 refers to a wetness indicator strip for a diaper. Figure 8 shows a construction having an indicator strip between the inner surface of the impervious outer sheet and the outer surface of the absorbent inner sheet. This strip is in registry with or spanning the transparent openings so that at least a portion of the indicator strip is clearly visible through the opening from the outside of the diaper (co. 4, l. 7 - 15). The indicator strip may be a strip of paper, cloth or other fabric or sheet material which is made from or impregnated with a chemical agent adapted to change state when exposed and in contact with moisture or liquid. Litmus paper or paper impregnated with food colouring particles may be used (col. 3, l. 7 - 20).

4.2.4 There is no disclosure in E7 according to which the wetness indicator should be applied in a pattern on the indicator strip. Therefore, the subject-matter of claim 1 is novel over the disclosure of E7.

4.3 Inventive step

4.3.1 The closest prior art is represented by the embodiment shown in Figure 8 of E7. The feature distinguishing the claimed subject-matter from this disclosure is the application of the wetness indicator in a certain pattern, which is visible through the backsheet material as set out under point 4.2.3 above.

4.3.2 The objective technical problem to be solved can be seen in the attempt to save material and costs.

4.3.3 When regarding the figures of E7, the skilled person recognizes that there are various embodiments shown (for example Figures 6/7/8) having a coloured strip which is not completely visible. Accordingly, when trying to save material and costs, the application of food colouring particles limited to the visible parts is the immediate result of such considerations. The specific application of dye particles could and would be achieved independent of the used application technique since spraying as well as printing and to some extent also dipping represent techniques which generally allow a localised application. Hence, the application of the dye in a pattern corresponding to those parts which are visible through the backsheet represents an obvious solution when wishing to save material and costs. No inventive step (Article 56 EPC 1973) is present.

5. *Auxiliary request 2*

5.1 Claim 1 of auxiliary request 2 was filed during the oral proceedings after discussion of the main and first

auxiliary request. According to Article 13(1) of the Rules of Procedure of the Boards of Appeal (RPBA) any amendment to a party's case after it has filed its grounds of appeal may be admitted and considered at the Board's discretion. The discretion has to be exercised in view of inter alia the complexity of the new subject-matter submitted, the current state of the proceedings and the need for procedural economy.

5.2 Claim 1 of auxiliary request 2 differs from claim 1 of auxiliary request 1 in that

- (a) the wording that the wetness indicator is "applied on at least one strip" is changed to the wording that the wetness indicator is "printed on at least one strip";
- (b) the subject-matter of previous claim 4 (as originally filed and as granted) is deleted;
- (c) the wording of granted claims 2 and 3 is included;
- (d) in the preamble the wetness indicator is further defined.

5.3 With regard to feature a) the amended wording of the claim is not clear (Article 84 EPC 1973). The reference to the wetness indicator being printed on at least one strip introduces a process feature into an article claim. There is no disclosure available which would allow to identify on the claimed article whether the wetness indicator was printed or applied in another manner

Moreover, this amendment is not considered appropriate to overcome the corresponding teaching of E7 as an impregnation which is disclosed therein could possibly

also be carried out via a printing technique. This amendment therefore on the one hand adds unclear subject-matter (Article 84 EPC 1973) and on the other hand is not appropriate to distinguish the claimed subject-matter further from the closest prior art (Article 56 EPC 1973).

5.4 The new request was filed during the oral proceedings before the Board, i.e. at a very late stage. It does not take account of all the deficiencies discussed. Therefore, the need for procedural economy leads to the decision not to admit it into the proceedings. As a consequence it is not necessary, to discuss the further amendments (points b to d above) of the subject-matter of claim 1.

6. *Auxiliary request 3*

6.1 Admissibility

6.1.1 Claim 1 of auxiliary request 3 was filed during the oral proceedings after discussion of the main, first and second auxiliary request. As already set out under 5.1 above, such late-filed requests should *a priori* be clearly allowable in order to be admitted into the proceedings in accordance with Article 13(1) RPBA.

6.1.2 Claim 1 of auxiliary request 3 differs from claim 1 of auxiliary request 1 in that in the characterising portion

- (a) the term "continuous" is inserted for further definition of the strip (10);
- (b) the width of the strip (10) is specified as being between 1 and 8 cm;

(c) the strip (10) is further defined as being "a part of the backside material (3) which is coloured in another colour or tint than the rest of the backsheet material".

6.1.3 These amendments are based upon the subject-matter of originally filed and granted claims 3 and 7 and the reference to the "continuous strip" is taken from the description in paragraph [0028]. The requirements of Article 123(2) EPC are met. The objections raised by Appellant II in relation to clarity do not have to be considered in detail because the claimed subject-matter is not acceptable for lack of inventive step for the reasons explained below.

6.2 Inventive step

6.2.1 The closest prior art is represented by E7, in particular Figure 8, as set out for the auxiliary request 1 above (see point 4.2). The problem to save material and costs and its solution to apply the dye only on the visible parts of the strip is discussed under point 4.3 above.

6.2.2 Additionally the subject-matter of claim 1 is now further limited to

- (a) the strip being continuous and having a width between 1 and 8 cm; and
- (b) the strip being a part of the backside material which is coloured in another colour or tint than the rest of the backsheet material.

- 6.2.3 With regard to item a) concerning the strip being continuous, E7 discloses a continuous indicator strip extending from one end of the article to the other at least in the embodiment shown in Figure 6. Therefore, this additional feature cannot be relied upon to further distinguish the claimed subject-matter over the disclosure in E7.
- 6.2.4 With regard to item a) concerning the strip having a defined width and considering that a diaper or an incontinence guard are the concerned articles and the strip extends in the crotch region, the claimed range of 1 to 8 cm in fact includes the most probable range of width sizes possible for such an article. Therefore this feature cannot be of any inventive significance.
- 6.2.5 With regard to item b), E7 discloses the indicator strip as being attached to the outer sheet. The indicator strip is not disclosed as forming a part of the backsheet material or laminate. Accordingly, this feature distinguishes the subject-matter of the claim further from the disclosure of E7.
- 6.2.6 The objective problem to be solved by the feature b) can only be related to providing an alternative construction of the diaper incorporating the strip.
- 6.2.7 Thus, when looking for an alternative construction of the diaper incorporating the strip, the skilled person is well aware of the option that instead of using different layers of material, the layers can be combined to form a laminate in particular when this leads to a simplified construction. The choice of a laminate is considered obvious in case of the E7 diaper

because obviously the transparent openings can be satisfactorily kept in alignment with the moisture indicator on the indicator sheet. Accordingly, the subject-matter of claim 1 does not involve an inventive step (Article 56 EPC 1973).

7. *Auxiliary request 4*

7.1 Claim 1 of auxiliary request 4 includes in addition to the features already discussed above in relation to the auxiliary request 3 the subject-matter of originally filed and granted claim 8. This subject-matter refers to the article having on or adjacent to the strip further printed symbols, codes or the like which indicate the product type, size or absorption capacity of the article.

7.2 Such further printed symbols represent an independent feature without any cumulative or synergistic effect with regard to the wetness indicator. The problem to be solved by such symbols relates to the identification or quality characteristics of the product. The provision of such information lies in the genuine interest of the supplier. Therefore, when wishing to provide such information directly on the product itself a suitable position has therefore to be found.

7.3 The suggestion to provide such information on the product itself is disclosed also in

- (a) E1 (see col. 1, l. 25 - 37; col. 3, l. 20 - 26) which refers to the printing of symbols onto the backsheet in order to identify the manufacturer's

brand name, codes, lot numbers, manufacturing date or quality control markings;

- (b) E4 (see Figures 1/2) which refers to a disposable diaper having an opaque zone on the backsheet including a graduation scale indicating the degree of wetted area and thus of the remaining absorption capacity; and
- (c) E6 (see page 6, second paragraph) which refers to informative designs like numbers or nouns.

7.4 Accordingly, the skilled person could choose any such option when desired. No particular effect is demonstrated by the provision of information on the article by printing it on or adjacent the strip. No surprising or unexpected effect is achieved by such positioning of the informative design on or adjacent the strip or by the used application technique.

Firstly, the position of any information on the article has to be chosen consistently with the overall design of the article with regard to the extension of the strip (width), the folding lines of the article and the desired degree of visibility.

Secondly, there is no evidence that any other suitable technique besides printing would obtain a different result and the suggestion to apply the additional symbol, code or the like via printing is well-known in the art (see suggestions in E1 and E4). Thus, the subject-matter of claim 1 does not involve an inventive step (Article 56 EPC 1973).

Consequently, no request being allowable the patent has to be revoked.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar

The Chairman

M. Patin

P. Alting van Geusau