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**Datasheet for the decision
of 10 September 2010**

Case Number: T 0262/10 - 3.2.06

Application Number: 01935338.2

Publication Number: 1289459

IPC: A61F 13/15

Language of the proceedings: EN

Title of invention:

Process for making an absorbent garment with refastenable sides and butt seams

Patentee:

KIMBERLY-CLARK WORLDWIDE, INC.

Opponent:

The Procter & Gamble Company

Headword:

Notification, re-establishment of rights/KIMBERLY-CLARK

Relevant legal provisions:

EPC Art. 122

EPC R. 82, 103, 126

Relevant legal provisions (EPC 1973):

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Keyword:

"Communication never duly notified - legal basis for re-establishment of rights (no)"

Decisions cited:

J 0001/80, J 0007/90

Catchword:

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Case Number: T 0262/10 - 3.2.06

D E C I S I O N
of the Technical Board of Appeal 3.2.06
of 10 September 2010

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

Representative: Davies, Christopher Robert
Dehns
St Bride's House
10 Salisbury Square
London EC4Y 8JD (GB)

Respondents: The Procter & Gamble Company
(Opponent) One Procter & Gamble Plaza
Cincinnati
Ohio 45202 (US)

Representative: Greene, Simon Kenneth
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 8 December 2009
revoking European patent No. 1289459 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: P. Alting van Geusau
Members: M. Harrison
R. Menapace

Summary of Facts and Submissions

- I. On 4 February 2010 the patent proprietor, henceforth "the appellant",
- filed a notice of appeal against the decision of the opposition division dated 8 December 2009 revoking the European patent No. 1289459 for failure to comply with the requirements under Rule 82(2) and (3) EPC, in that the appellant had not reacted to the communication pursuant Rule 82(2) EPC dated 17 April 2009 and the communication pursuant to Rule 82(3) EPC dated 4 September 2009,
 - filed, as a precautionary measure, a request for re-establishment of rights in relation to failure to respond to the above communication under Rule 82(2) EPC either within the initial deadline or within the deadline pursuant to the above communication pursuant to Rule 82(3) EPC. In the grounds for the request it was submitted *inter alia* that only the communication pursuant to Rule 82(3) EPC, and not the preceding one pursuant to Rule 82(2) EPC, had been received by the appellant's representative,
 - paid the appeal fee, the fee for re-establishment, the fee for printing of a new specification (Rule 82(2) EPC) and the surcharge payable under Rule 82(3) EPC, and

- filed the translation of the amended claims in accordance with the invitation in the aforementioned communication pursuant to Rule 82(2) EPC.
- II. By communication dated 17 March 2010, sent to the parties also by telecopy on 12 March 2010, the parties were informed that upon inquiry by the Board as to whether on 17 April 2009 a registered letter concerning EP 1289459 had been sent to the office of the appellant's representative, the head of the mail room of the EPO in Munich had made the following statement: "I can confirm the communication was not sent via registered post, as we have no record of it in our system".
- III. The statement setting out the grounds of appeal was filed on 18 March 2010, in which it was put forward, with reference to the Board's communication, that under these circumstances the communication in question must be deemed not to have been notified to the appellant, so that the three-month period for reply never commenced. This must also be true for the extra two-month period under Rule 82(3) EPC, since that cannot apply to a decision [apparently meant: to an invitation pursuant to Rule 82(2) EPC] which had never been notified. It was requested that the decision under appeal be set aside and the case be remitted to the relevant department such that a new communication pursuant to Rule 82(2) should issue and that the appeal fee be reimbursed because the decision under appeal was issued on an incorrect legal basis; furthermore, the fee for re-establishment should be reimbursed on the basis that it was incurred as a result of an

administration error at the EPO, namely the failure to notify the Rule 82(2) communication.

- IV. The opponent (respondent) was duly notified with a copy of the notice of appeal, of the Board's communication and of the statement setting out the grounds of appeal, and has not replied to any of them.

Reasons for the decision

1. The appeal is admissible; in particular, the statement setting out the grounds of appeal was filed in time.
2. Where notification is (to be) effected by registered letter, it is incumbent on the Office to establish that the letter has reached its destination (Rule 126(1) and (2) EPC). As the Office is unable to do so in respect of the communication pursuant Rule 82(2) EPC in question (see section II above), that communication is to be considered as never having been (duly) notified, with the consequence that, in the case at hand, the period of three months provided for in that provision never started to run. It follows that the subsequent communication pursuant to Rule 82(3) EPC was of no effect, it being logically conditional upon the non-respect of a (valid) period under Rule 82(2) EPC.
3. Hence, the impugned decision cannot stand, because it was based on wrong assumptions as to the relevant facts, namely concerning the required notification of the communication giving rise to the period pursuant to Rule 82(2) EPC, which had not been made due to a mistake attributable to the Office.

4. As this amounts to a substantial procedural violation, reimbursement of the appeal fee is equitable (Rule 103(1)(a) EPC).

5. It follows that the appellant's parallel request for re-establishment - whilst it was an understandable reaction, also in view of the invalid communication pursuant to Rule 82(3) EPC - was unnecessary from the very beginning, because there was never a legal basis for such request. Article 122, paragraph 1, EPC, is so worded as to be applicable only where there is a loss of a right or of a means of redress. In consequence, the fee paid for re-establishment of rights was wrongly accepted by the European Patent Office and must be refunded to the appellant (J 1/80, J 7/93).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for further prosecution.
3. Reimbursement of the appeal fee is ordered.
4. Reimbursement of the fee for re-establishment of rights is ordered.

The Registrar:

The Chairman:

E. Goergmaier

P. Alting van Geusau