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**Datasheet for the decision
of 12 May 2016**

Case Number: T 2182/11 - 3.2.06

Application Number: 00117538.9

Publication Number: 1077052

IPC: A61F13/15

Language of the proceedings: EN

Title of invention:

Thin sanitary napkin allowing for controlled deformation when
in use

Patent Proprietor:

JOHNSON & JOHNSON INC.

Opponents:

The Procter & Gamble Company
KIMBERLY-CLARK WORLDWIDE, INC.
Paul Hartmann AG

Headword:

Relevant legal provisions:

EPC Art. 83, 56

Keyword:

Sufficiency of disclosure - (yes)

Inventive step - (yes)

Decisions cited:

Catchword:



Beschwerdekammern
Boards of Appeal
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Case Number: T 2182/11 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 12 May 2016

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
24 August 2011 concerning maintenance of the
European Patent No. 1077052 in amended form.**

Composition of the Board:

Chairman M. Harrison
Members: T. Rosenblatt
E. Kossonakou

Summary of Facts and Submissions

- I. The appellant (opponent 1) filed an appeal against the interlocutory decision of the opposition division, posted 24 August 2011, in which the opposition division found that European patent No. 1 077 052, in an amended form, met the requirements of the EPC.
- II. Another appeal had been filed by opponent 2 but was subsequently withdrawn.
- III. The parties were summoned to oral proceedings before the Board. In a communication pursuant to Article 15(1) of the Rules of Procedure of the Boards of Appeal (RPBA), the Board informed the parties of its preliminary opinion on the case.
- IV. With letters dated 16 March 2016, 23 February 2016 and 21 December 2015 respectively, the appellant and the parties as of right, opponent 2 and opponent 3, declared that they would not attend the oral proceedings.

None of these parties submitted any comments on the issues addressed in the Board's communication.
- V. Oral proceedings, attended only by the respondent (proprietor), were held before the Board of Appeal on 12 May 2016.
- VI. The appellant requested (in writing) that the decision under appeal be set aside and that the European patent No. 1 077 052 be revoked.
- VII. The respondent (proprietor) requested that the appeal be dismissed.

VIII. The other parties did not file any requests.

IX. The prior art relied upon by the appellant is:

D4: WO-A-92/04000,
D6: WO-A-95/07674,
D9: EP-A-0 687 453,
D11: US-A-5 300 055,
D13: US-A-4 950 264.

X. Claim 1, as found allowable by the opposition division, has the following wording:

"A sanitary napkin adapted to be worn in a crotch portion of an undergarment, said sanitary napkin having opposed longitudinally extending side edges and a longitudinal axis and comprising:

- a) a fluid-pervious cover layer;
- b) an absorbent system under said cover layer, said absorbent system having an absorbent width of at least 64 mm;
- c) a liquid-impervious barrier layer under said absorbent system;
- d) said sanitary napkin having a thickness less than about 5 mm;
- e) said liquid-impervious barrier layer including a pair of linear adhesive zones that extend along said longitudinal axis and are adjacent to respective side edges of the sanitary napkin, said linear adhesive zones bonding said sanitary napkin to the undergarment;
- f) said absorbent system including at least a pair of preferential bending zones that extend along said longitudinal axis and are adjacent to respective side edges of the sanitary napkin, said preferential bending zones register with respective linear, longitudinally

extending adhesive zones, this construction allowing said sanitary napkin to fold at said preferential bending zone in response to lateral compression applied to said napkin and permitting said napkin to acquire a three-dimensional deformation profile, wherein said sanitary napkin is characterised by a flexural resistance of not less than about 400 g, wherein said sanitary napkin has two opposite longitudinal side areas, said sanitary napkin including a preferential bending line extending obliquely in relation to said longitudinal axis, said preferential bending line extending from one longitudinal side area of the sanitary napkin to an opposite longitudinal side area, crossing the longitudinal axis of the sanitary napkin, and wherein said sanitary napkin includes a plurality of preferential bending lines crossing one another and defining an array of crossing points."

- XI. The appellant objected that the invention was not disclosed in a manner sufficiently clear and complete for it to be carried out by the person skilled in the art and the subject-matter of the claims lacked an inventive step.

Concerning the objection of sufficiency of disclosure the appellant argued that, contrary to the consistent case law of the Boards of Appeal, the application as filed did not indicate at least one way of carrying out the invention and also did not contain sufficient information allowing it to be carried out over the whole range claimed. In regard to the first aspect, the reference numerals mentioned in the specification of the application as filed but missing in the Figures led to inconsistencies between the specification and the Figures, so that the specification did not indicate one

way enabling a skilled person to carry out the invention. In regard to the second aspect, the appellant disagreed with the opposition division's interpretation of the expression "register with" used in claim 1 and stated that the effect to be achieved defined in the claim in relation to this expression was not obtained over the whole range claimed. The appellant referred to decision T 63/06 as support for having discharged its burden of proof for the contention that common general knowledge would not enable the skilled person to carry out the invention. In a third line of argument in regard to the requirement of sufficiency of disclosure, the appellant contested that the feature "absorbent width" could be determined in a reproducible manner based on the method indicated in paragraph 25 of the patent specification.

Concerning inventive step, the appellant argued that the subject-matter of claim 1 was obvious starting from D6 as closest prior art in combination with the common general knowledge of the skilled person, supported by D4, D11 and D13, or starting from D9 as closest prior art in combination with common general knowledge and D6.

XII. In reply to the appellant's objection concerning sufficiency of disclosure, the respondent indicated passages in the patent specification which would allow the skilled person to carry out the invention and to achieve the desired effects. The respondent also argued during the oral proceedings before the Board that as far as the feature "absorbent width of at least 64 mm" was concerned, the skilled person knew how to measure a width of an absorbent system and all that the invention required was that the measured value was equal or greater than 64 mm. The disclosure in the patent was

not a definition, but merely one way of establishing the width.

Concerning inventive step, neither D6 nor D9 disclosed, *inter alia*, a plurality of preferential bending lines crossing one another and defining an array of crossing points. The skilled person was not guided only by common general knowledge or mere routine practice to arrive at the claimed invention.

Reasons for the Decision

Article 83 EPC

1. In its preliminary opinion, the Board stated, in regard to the first aspect of the appellant's objection under Article 83 EPC relating to an alleged lack of at least one way of carrying out the invention due to inconsistencies between the description and the Figures (due to missing reference numerals in the latter), that this was not considered convincing because it was based only on a rather general allegation.

Since no further arguments were received in reply to this preliminary opinion, the Board sees no reason to alter its provisional opinion, which is thus confirmed herewith. In particular, the appellant had not stated which specific inconsistency was meant, nor why such inconsistency would be of a nature such that the invention could not be carried out.

2. Concerning the second aspect of the appellant's objection relating to the alleged impossibility of carrying out the claimed invention over the whole range claimed because of the vague claim language, in

particular of the expression "register with", the Board also had opined in its communication that, to the extent that this objection could be considered as an objection under Article 83 EPC, it was not prejudicial to the maintenance of the patent.

The Board had in particular stated in its preliminary opinion that the expression "register with" was very broad, as also admitted by the appellant. The breadth of an expression was really a matter concerning the clarity requirement of Article 84 EPC rather than a ground for opposition. In as far as the objection was to be considered under Article 83 EPC, the mere fact that a term is broad does not prevent a skilled person from carrying out the invention.

As to the appellant's argument based on the decision T 63/06, the Board was also not persuaded. The appellant referred in particular to the head note thereof, which reads:

"The burden of proof generally lies upon an opponent to establish insufficiency of disclosure.

When the patent does not give any information of how a feature of the invention can be put into practice, only a weak presumption exists that the invention is sufficiently disclosed (see Reasons 3.3). In such case, the opponent can discharge his burden by plausibly arguing that common general knowledge would not enable the skilled person to put this feature into practice.

The patent proprietor then has the burden of proof for contrary assertion that common general

knowledge would indeed enable the skilled person to carry out the invention."

The Board nevertheless stated in its communication that in the present case a plausible argument according to which common general knowledge would not enable the skilled person to put the critical feature into practice, i.e. the feature based on the expression "register with", had not been provided by the appellant.

Absent any comments or counter-arguments also on this part of its preliminary opinion, the Board again sees no reason to come to a different conclusion and again confirms its preliminary opinion herewith.

3. In regard to the third argument submitted in support of its objection under Article 83 EPC, relating to the feature "absorbent width", the Board had questioned in its communication whether this expression was not readily understandable *per se* in a broad sense, or whether it referred to an uncommon or unknown parameter in the field of sanitary napkins and whether the skilled person is faced with particular difficulties when determining it. The Board stated further, that if the parameter and its determination would indeed be considered to be unknown to the skilled person, then the method described in paragraph 25 of the patent might need further consideration.

The Board accepts the argument submitted by the respondent during the oral proceedings that the skilled person understands the expression "an absorbent width" in a broad sense and that nothing in the claim puts a further requirement on this parameter. In particular, the skilled person is not faced with any particular

difficulty as to how to measure a width of an absorbent system in order to determine whether this equals or exceeds the limit value of 64 mm defined in the claim. The method described in paragraph 25 is not definitive or limiting for the claimed subject-matter, and thus whether it might, in a certain case, yield a different result depending on, for example, the user's anatomy or how a particular sanitary napkin was worn, did not prevent a skilled person from carrying out the invention.

The appellant did not file any comments on the matters raised in this respect in the Board's communication.

Although the argument of the respondent accepted by the Board was submitted only during the oral proceedings and thus in the absence of the appellant and the two other parties as of right, the right to be heard according to Article 113(1) EPC is not infringed. Article 15(3) RPBA stipulates that the Board is not obliged to delay any step in the proceedings, including its decision, by reasons only of the absence at the oral proceedings of any party duly summoned. The parties were duly summoned in accordance with Rule 115 EPC (see point IV. above) and the argument of the respondent was submitted specifically in reply to the issue raised by the Board in its communication, such that it cannot be considered to come as a surprise.

Thus, also for the third aspect of the appellant's objection, the Board concludes that the patent as amended discloses the invention in a manner sufficiently clear and complete for it to be carried out by a skilled person.

4. The requirement of Article 83 EPC is thus met.

Article 56 EPC

5. In the communication containing its preliminary opinion, the Board had stated that the requirement of Article 56 EPC appeared to be met, irrespective of whether D6 or D9 was chosen as the closest prior art, when taking account of D4, D9, D11 or the common general knowledge of the skilled person.
6. The appellant and the two other parties as of right did not submit any comments or counter-arguments in reply to this provisional opinion. The Board has therefore no reason to reach a different conclusion, and confirms its preliminary opinion herewith.
7. Starting from D6 as closest prior art for considering inventive step of the subject-matter of claim 1, the appellant identified only the ranges for the thickness of the napkin, the absorbent width of the absorbent system and its flexural rigidity respectively as distinguishing features. In its communication, the Board however identified further features of claim 1 that were not disclosed in D6.
8. The features defined in the characterising portion of claim 1 relating to the obliquely extending bending lines and the plurality of crossing bending lines defining an array of crossing points are also not disclosed in D6. In particular, Figure 6 of D6 does not disclose four crossing points, contrary to the argument made by the appellant. This is so for the following reason: Claim 1 underlying the impugned decision defines an obliquely extending preferential bending line crossing the longitudinal axis. If the line 30 in Figure 6 of D6, extending from the bottom left side to

the bottom right side of the sanitary napkin, or the line 30' extending from the top left to the top right side of the sanitary napkin, each crossing the longitudinal axis O-O, were to be equated by the skilled person with the oblique bending line according to claim 1 and, further, if both of these lines 30 and 30' were to be considered as constituting the plurality of preferential bending lines according to claim 1, which would be at least a rather unusual interpretation of the term "plurality", these lines 30 and 30' would anyway only cross one another at two points, lying close to the axis A-A, rather than at four points as alleged by the appellant. Two crossing points would however not be considered by the skilled person as representing an array of crossing points as defined in claim 1.

Thus, in addition to the distinguishing features acknowledged by the appellant, at least the array of crossing points obtained by the plurality of crossing bending lines is also not known from D6.

9. The flexural rigidity range defined in claim 1, the obliquely extending preferential bending lines, the plurality of crossing bending lines and the resulting array of crossing points are also not disclosed in D9, as further acknowledged by the appellant.

10. Based on these differentiating structural features an objective technical problem has to be formulated. The appellant argued in the context of its inventive step objection starting from D9 as closest prior art, that no particular effect would be obtained by the plurality of crossing bending lines and the resulting array of crossing points. Even if this argument were to be accepted, an objective technical problem could then be

seen in the provision of an alternative sanitary napkin allowing for a three-dimensional deformation profile in response to lateral compression.

11. None of the documents D4, D9, D11 or D13 discloses the features relating to the plurality of crossing bending lines and the resulting array of crossing points. The appellant has not shown that these features belong to the common general knowledge of the skilled person and the Board also has no reason to believe that this would be the case.
12. Consequently, and irrespective of whether D6 or D9 is chosen as the closest prior art for considering inventive step, at least the features relating to the plurality of crossing bending lines and the resulting array of crossing points cannot be considered to be obvious for the skilled person faced with the objective technical problem.
13. Thus, considering the prior art on file, the subject-matter of claim 1 involves an inventive step (Article 56 EPC).

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



M. H. A. Patin

M. Harrison

Decision electronically authenticated