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**Datasheet for the decision
of 10 June 2015**

Case Number: T 2023/12 - 3.2.06

Application Number: 04757105.4

Publication Number: 1641416

IPC: A61F13/15

Language of the proceedings: EN

Title of invention:

SANITARY NAPKIN FOR DYNAMIC BODY FIT

Patent Proprietor:

THE PROCTER & GAMBLE COMPANY

Opponent:

Uni-Charm Corporation

Headword:

Relevant legal provisions:

EPC Art. 100(c), 123(2)
EPC 1973 Art. 83, 54, 56

Keyword:

Amendments - added subject-matter (yes) - main request

Decisions cited:

Catchword:



**Beschwerdekammern
Boards of Appeal
Chambres de recours**

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Case Number: T 2023/12 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 10 June 2015

Appellant: Uni-Charm Corporation
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 6 July 2012
rejecting the opposition filed against European
patent No. 1641416 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman M. Harrison
Members: M. Hannam
W. Ungler

Summary of Facts and Submissions

- I. An appeal was filed by the appellant (opponent) against the decision of the opposition division to reject the opposition to European patent No. 1 641 416. It requested that the decision be set aside and the patent be revoked.
- II. In its letter of response, the respondent (patentee) requested that the appeal be dismissed.
- III. The Board issued a summons to oral proceedings including a communication containing its provisional opinion, in which it indicated *inter alia* that the appellant's objections under Article 100(c) EPC appeared to have some merit and would require discussion at oral proceedings. In regard to the objections under Article 100(b) EPC, the Board indicated that the entire facing layer constituting a (single) zone of enhanced extensibility was seemingly not compatible with the claimed 'zones' of extensibility. Further, as regards Article 100(a) EPC, it indicated that none of the cited documents D1, D3 or D4 appeared to deprive the subject-matter of claim 1 of novelty, nor would the skilled person find it obvious when starting from the closest prior art to reach the subject-matter of claim 1 when trying to solve the objective technical problem.
- IV. With letter of 8 May 2015 the respondent filed an auxiliary request.
- V. With letter of 28 May 2015 the appellant indicated that it would not attend the scheduled oral proceedings. It furthermore requested that 'a decision should be made on the basis of the current status of the file'.

VI. Oral proceedings were held before the Board on 10 June 2015 in which, as previously notified, the appellant did not participate.

The appellant's requests, as submitted in its written submissions, were that the decision under appeal be set aside and that the European patent be revoked. The request in the letter of 28 May 2015 was interpreted by the Board to mean that the appellant relied on its written submissions.

The respondent requested that the appeal be dismissed, auxiliarily that the patent be maintained in amended form in the following version:

Claims: Nos. 1 to 6 filed with letter dated 8 May 2015;

Description: Page 2 filed during the oral proceedings of 10 June 2015; pages 3,4,5 as granted; page 6 filed during the oral proceedings of 10 June 2015; page 7 as granted;

Drawings: Figures 1 to 6 as granted.

VII. Claim 1 of the main request (patent as granted) reads as follows:

"An absorbent article (20) having a longitudinal axis (L) and a periphery (27), the absorbent article (20) comprising,

a. a fluid permeable facing layer (21), at least portions of which having facing layer zones of enhanced extensibility (43) that have been rendered relatively more extensible than adjacent, non-rendered regions;

b. a first absorbent layer (24) joined to the facing layer;

c. a liquid impermeable backsheet (22) joined to the facing layer at the periphery (27), the liquid impermeable backsheet having a garment facing surface;

d. fastening means (36) disposed on at least a portion of the garment facing surface of the liquid impermeable backsheet (22), the fastening means (36) defining attachment zones;

wherein the first absorbent layer comprising first absorbent layer zones of extensibility (33), each said first absorbent layer zone of extensibility (33) being a region of the first absorbent layer of relatively higher extensibility than regions of the first absorbent layer adjacent to the zone of extensibility, and at least a portion of the first absorbent layer (24) is decoupled from the attachment zones of the fluid impermeable backsheet,

characterized in that the facing layer (21) and first absorbent layer (24) are joined such that the zones of enhanced extensibility (43) of the facing layer (21) are in registry with and unbounded to the zones of extensibility (33) of the first absorbent layer (24)."

Claim 1 of the auxiliary request reads as per claim 1 of the main request with the exception of feature 'a' which reads:

"a. an extensible fluid permeable facing layer (21), at least portions of which having facing layer zones of enhanced extensibility (43) that have been rendered relatively more extensible than adjacent, non-rendered regions;"

VIII. The appellant's arguments may be summarised as follows:

Claim 1 met with objections under Article 100(c) EPC since the features added in part 'a' of claim 1 during prosecution of the application were not directly and unambiguously disclosed in the application as originally filed. The features allegedly had basis from passages on pages 7 and 11, yet did not provide the

required basis for the claimed facing layer.

The basis for the expression 'relatively more extensible' in claim 1 allegedly came from page 7, lines 22 to 25 where, however, the first absorbent layer was stated to have been rendered 'relatively more easily extensible'. The two expressions were not the same and did not refer to the same characteristics of a component of the absorbent article.

Claim 1 met with objections under Article 100(b) EPC due to the potential of the entire facing layer constituting a (single) zone of enhanced extensibility. In this case the skilled person would be unable to carry out the characterising feature of claim 1.

IX. The respondent's arguments may be summarised as follows:

Main request

The expressions 'enhanced extensibility' and 'additional extensibility' of the facing layer were to be understood as encompassing enhanced or additional extensibility relative to adjacent regions of the facing layer which could, optionally, have no extensibility. This was supported by page 11, lines 7 to 8 which stated that 'the facing layer can be extensible', thus indicating by implication that it need not be extensible. In this respect, page 11, lines 13 to 14 also stated that zones of enhanced extensibility could be achieved by the method described for rendering zones of extensibility in the first absorbent layer which, on page 7, gave an indication that the regions not rendered extensible were not extensible (through the use of the term 'zone of

extensibility' rather than 'zone of enhanced extensibility). This would thus also be applied to the facing layer.

The expressions 'more extensible' and 'more easily extensible', whilst normally relating to different properties of a component would, in the context of the present patent, both be understood by the skilled person as referring to ease of extensibility. This was supported *inter alia* by claim 7 as originally filed which referred to the elastic modulus which clearly corresponded to an ease of extensibility. Furthermore, the link between the methods of rendering extensibility on pages 7 and 11 indicated that the expressions 'more extensible' and 'more easily extensible' were to be interpreted as the same property.

Auxiliary request

The cited documents all failed to disclose the final feature of claim 1, unamended in the auxiliary request over the main request, that 'the facing layer and first absorbent layer are joined such that the zones of enhanced extensibility of the facing layer are in registry with and unbounded to the zones of extensibility of the first absorbent layer'.

Consequently no combination of cited documents could lead the skilled person to the claimed subject-matter irrespective of what objective problem was posed.

Reasons for the Decision

1. Main request

1.1 Article 100(c) EPC

The subject-matter of claim 1 extends beyond the content of the application as filed, whereby the ground of opposition under Article 100(c) EPC is prejudicial to maintenance of the patent.

1.1.1 In claim 1, the feature 'having facing layer zones of enhanced extensibility that have been rendered relatively more extensible than adjacent, non-rendered regions' allegedly has basis on page 11 in combination with page 7. It is noted, however, that the expressions 'additional extensibility' and 'enhanced extensibility' on page 11, lines 11 to 13 of the published PCT application (corresponding to the application as originally filed) unambiguously imply that adjacent non-rendered regions must have some extensibility; the words 'additional' and 'enhanced' would otherwise be meaningless. Claim 1, however, does not reflect this disclosure of adjacent non-rendered regions having some extensibility. Indeed, the respondent itself argued that claim 1 should be understood to include both extensible and non-extensible facing layers. Claim 1 thus including a non-extensible facing layer in its scope extends the subject-matter beyond the content of the application as filed, whereby the ground of opposition under Article 100(c) EPC is prejudicial to maintenance of the patent as granted.

1.1.2 The argument of the respondent that the adjacent, non-rendered regions of claim 1 were disclosed as having extensible or non-extensible adjacent zones is not convincing. Whilst the description passage on page 11, lines 7 to 8 of the originally filed application, reading 'the facing layer can be extensible or have at least portions being extensible', leaves the

possibility open that an inextensible facing layer might have been intended, albeit without explicitly disclosing this, this passage cannot be read in isolation from the portion of the passage which concerns 'enhanced' extensibility. Page 11, line 11 mentions 'additional' extensibility of facing layer suggesting an extensibility going beyond the 'normal' extensibility of the facing layer. Thereafter, line 13 mentions 'enhanced' extensibility of certain portions of the facing layer, which again indicates an extensibility exceeding that of the adjacent regions. Furthermore, if the regions of the facing layer not provided with additional extensibility were not extensible at all, the words 'additional' and 'enhanced' in the above expressions would normally have been omitted by the patent drafter; the term extensibility alone would differentiate those regions of the facing layer being extensible from those not being extensible at all.

- 1.1.3 The respondent's referral to the link between the description on page 11 to the facing layer and that on page 7 to the first absorbent layer is also not persuasive in providing a basis for an inextensible surface layer. The facing layer and first absorbent layer are very different components of the claimed absorbent article with different construction, materials and, due to their intended function, different physical properties. It is thus not credible from a technical viewpoint that material properties of the first absorbent layer should necessarily be extrapolated to apply also to the facing layer simply because common methods for providing a change in extensibility are disclosed to be used on both of these components. Certainly, any alleged inextensibility of the first absorbent layer cannot be transferred to be

present in the facing layer since these components are not disclosed as having, nor is there any implicit reason for them to have, any structurally common characteristics.

1.1.4 The subject-matter of claim 1 thus meets with objections under Article 100(c) EPC at least due to the extensible nature of the facing layer not having been taken-up into the claim. The request is thus not allowable.

2. Auxiliary request

2.1 Article 123(2) EPC

Claim 1 of the auxiliary request overcomes the above objection under Article 100(c) EPC by further defining that the fluid permeable facing layer is extensible, since this is disclosed on page 11 in the context of enhanced extensibility and thereby is also consistent with the definition in claim 1 that the regions adjacent to the zones of enhanced extensibility are non-rendered regions.

The appellant presented no arguments to the first auxiliary request. Nonetheless, an objection of added subject-matter raised by the appellant to the main request, and not decided upon for the main request, can be seen as applying equally to the auxiliary request and so is decided upon with respect to the auxiliary request in the following. The objection relates to the basis in the application as filed for the expression 'relatively more extensible' allegedly coming from page 7, lines 22 to 25 where, however, the first absorbent layer is stated to have been rendered 'relatively more

easily extensible'.

- 2.1.1 The Board concurs with the appellant that 'extensibility' and 'ease of extensibility' are two different characteristics of an element, the former being the ability for an element to extend, the latter being a measure of how easily an element will extend. This is clearly also the understanding given to these expressions in the patent with, for example, page 12 last paragraph differentiating between the extensibility and/or elastic modulus of components, whereby the skilled person would appreciate that elastic modulus of a component relates to its ease of extensibility.
- 2.1.2 The patent, however, directly links these two characteristics of the components in the claimed absorbent article. Paragraph 2 on page 3 refers to the term 'extensible' as being the ability to increase length in at least one dimension, yet links this characteristic to extension of at least 5% under various forces. Moreover page 7, lines 26 to 27 states that a component 'rendered more easily extensible will extend more', providing a direct link between extensibility and ease of extensibility in the context of the patent.
- 2.1.3 It follows, therefore, that the skilled person reading the patent specification and being faced with the expressions 'extensibility' and 'ease of extensibility' will understand that these two different characteristics are, in the context of components of the claimed absorbent article, not only directly related but also interchangeable. As a consequence therefore, the expression 'relatively more extensible' in claim 1 does find basis on page 11, lines 13 to 15

by back reference to the method for rendering 'relatively more easily extensible' the first absorbent layer on page 7, lines 23 to 24.

2.1.4 The subject-matter of claim 1 thus meets the requirement of Article 123(2) EPC.

2.2 Article 83 / Article 54 EPC 1973

2.2.1 No objections under Article 83 were raised by the appellant to the auxiliary request. The Board also sees no objections in this respect as justified. In regard to the appellant's objection under Article 100(b) EPC with regard to the main request, the Board had already indicated in its provisional opinion that the appellant's objection in this regard was understood as being based on the entire facing layer constituting a (single) zone of enhanced extensibility whereas the claim defined 'zones' of extensibility (thus excluding merely a single zone). The amendments made to claim 1 by way of the auxiliary request give no reason to alter this opinion.

2.2.2 No objections under Article 54 EPC 1973 were raised against the auxiliary request. In as far as the appellant's objections raised against the main request in this regard can be seen to have any direct bearing on the auxiliary request, the Board already indicated in its provisional opinion with regard to the main request that it saw no reason to question the presence of novelty in the subject-matter of claim 1. Since that request has now been further limited, and the Board has been presented with no arguments in this regard, the Board sees no reason to conclude otherwise for the auxiliary request.

2.3 Article 56 EPC 1973

No objection under Article 56 EPC 1973 was made by the appellant to the subject-matter of claim 1 of the auxiliary request. The Board itself also sees no objection to the presence of an inventive step in the subject-matter of claim 1 (Article 56 EPC 1973) based on the prior art cited, as indeed already indicated in the Board's provisional opinion in regard to the main request (which has now been further limited by way of the present request).

2.4 The description of the patent was adapted to the amended claims.

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 with the order to maintain the patent as amended in the following version:
Claims: Nos. 1 to 6 filed with letter dated 8 May 2015;
Description: Page 2 filed during the oral proceedings of 10 June 2015; pages 3,4,5 as granted; page 6 filed during the oral proceedings of 10 June 2015; page 7 as granted;
Drawings: Figures 1 to 6 as granted.

The Registrar:

The Chairman:



M. H. A. Patin

M. Harrison

Decision electronically authenticated