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**Datasheet for the decision
of 20 March 2020**

Case Number: T 1375/16 - 3.2.06

Application Number: 10724174.7

Publication Number: 2432439

IPC: A61F13/49, A61F13/514,
A61F13/539

Language of the proceedings: EN

Title of invention:

ATTACHMENT AREAS FOR WEARABLE ABSORBENT ARTICLES

Patent Proprietor:

The Procter & Gamble Company

Opponent:

Essity Hygiene and Health Aktiebolag

Headword:

Relevant legal provisions:

EPC Art. 123(2)

Keyword:

Amendments - added subject-matter - auxiliary requests 5 to 7
(yes)

Decisions cited:

G 0002/10, G 0001/99

Catchword:



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Case Number: T 1375/16 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 20 March 2020

Appellant: Essity Hygiene and Health Aktiebolag
(Opponent) 405 03 Göteborg (SE)

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Respondent: The Procter & Gamble Company
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
19 April 2016 concerning maintenance of the
European Patent No. 2432439 in amended form.**

Composition of the Board:

Chairman M. Harrison
Members: M. Dorfstätter
E. Kossonakou

Summary of Facts and Submissions

- I. Appeals were filed by both the patent proprietor and the opponent against the interlocutory decision of the opposition division in which it found that European patent No. 2 432 439 in an amended form met the requirements of the EPC.
- II. With its appeal, the opponent requested that the interlocutory decision be set aside and the patent be revoked in its entirety.
- III. With its appeal, the patent proprietor requested that the decision under appeal be set aside and the patent be maintained as granted, or as an auxiliary measure that the patent be maintained in an amended form according to one of the first to sixth auxiliary requests included with its grounds of appeal.
- IV. In reply to the appeal of the opponent the patent proprietor submitted a seventh auxiliary request.
- V. Both parties requested that oral proceedings be held as an auxiliary measure.
- VI. The Board issued a summons to oral proceedings followed by a communication containing its provisional opinion, in which it indicated *inter alia* that the subject-matter defined in claim 1 according to the fifth to seventh auxiliary requests might well constitute an unallowable intermediate generalisation of the content of the application as filed and hence not fulfil the requirement of Article 123(2) EPC (see communication of the Board, 5.2) and stated its doubts about the clarity of particular expressions in regard to Article 84 EPC

in the context of the independent claim of each of these requests.

- VII. With letter of 28 February 2020 the patent proprietor withdrew its appeal (and, as a result, its higher-ranking requests to the fifth auxiliary request, which the opposition division found as meeting the requirements of the EPC, are no longer to be considered; s. infra, Reasons 1).

Remaining a party as of right under Article 107, second sentence, EPC, it will henceforth be referred to as "the respondent". The opponent hence became the sole appellant (henceforth "the appellant").

- VIII. In the same letter, the respondent withdrew its request for oral proceedings and informed the Board that it would also not attend the scheduled oral proceedings.

The oral proceedings were then duly cancelled.

- IX. Claim 1 of the fifth auxiliary request (in the form found as meeting the requirements of the EPC by the opposition division) reads as follows:

- (a) "A wearable absorbent article comprising an outer cover and an absorbent core assembly, wherein the absorbent article is characterized in that at least a portion of the outer cover is joined to the absorbent core assembly over at least:
- (b) a first attachment area disposed adjacent to a waist edge of the article, having a first area overall lateral width that is from 75% to 95% of the overall lateral width of the absorbent core assembly and an overall longitudinal length that is

- from 1% to 15% of the overall longitudinal length of the wearable absorbent article; and
- (c) a second attachment area, wherein at least a portion of the second attachment area is disposed in a first hip region of the article;
 - (d) wherein the portion of the second attachment area that is disposed in the first hip region has a second area overall lateral width that is less than the first area overall lateral width;
 - (e) wherein the outer cover includes laterally stretchable areas disposed directly laterally outboard from the second attachment area;
 - (f) wherein the first hip region has an overall longitudinal length that is less than or equal to 30% of an overall pitch of the article; and
 - (g) wherein the first attachment area is disposed longitudinally outboard from the second attachment area,
 - (h) wherein the absorbent core assembly has an overall longitudinal length equal to the overall longitudinal length of the wearable absorbent article and the first end of the absorbent core assembly coincides with the waist edge, and
 - (i) wherein the longitudinally outboard end of the first attachment area coincides with the first end of the absorbent core assembly."

The features marked as (a) to (i) above by the Board, conform to the feature-by-feature analysis in the contested decision. Emphasis in the form of underlining has been added by the Board merely to identify the differences compared to the sixth auxiliary request.

- X. Claim 1 of the sixth auxiliary request differs from claim 1 of the fifth auxiliary request in that it uses

the indefinite article "a" when referring for the first time to "a first end" and "a longitudinally outboard end".

- XI. Claim 1 of the seventh auxiliary request builds on claim 1 of the sixth auxiliary request, with the following features appended:

"wherein at least a portion of the absorbent core assembly is joined to the outer cover by at least a third attachment area, having a third area overall lateral width that differs from the second area overall lateral width; wherein the third attachment area is longitudinally inboard to the second attachment area."

- XII. The arguments of the appellant relevant to this decision may be summarised as follows:

The fifth auxiliary request (referred to as the fourth auxiliary request in the opposition proceedings) should not have been admitted into the proceedings.

The introduction of the features (h) and (i) in claim 1 of the fifth auxiliary request led to an unallowable intermediate generalisation. The paragraphs on page 13 and 15 from which they were taken referred to Figure 3A, where all drawings showed three attachment areas, which was not reflected in claim 1.

The arguments in respect of the fifth auxiliary request also applied to the sixth auxiliary request.

- XIII. The arguments of the respondent relevant for this decision may be summarised as follows:

The opposition division correctly exercised its discretion to admit the fifth auxiliary request.

There was no unallowable intermediate generalisation in claim 1 of the fifth auxiliary request. The wording for the amendment was taken from page 13, lines 18 to 21, of the application as filed. The features were explained while referring to Figure 3A by way of example, but they were discussed as general possibilities. No features described with reference to Figure 3A were structurally or functionally inextricably linked to the feature of the first attachment area coinciding with the waist edge. In particular, there was no link between this feature and the presence of a third attachment area.

Claim 1 according to the sixth auxiliary request merely provided an antecedent basis for the terminology used; otherwise it was the same as the fifth auxiliary request.

Claim 1 according to the seventh auxiliary request incorporated the features of granted claim 9. It recited a third attachment area longitudinally inboard of the second attachment area and hence addressed the opponent's objection under Article 123(2) EPC to the fifth auxiliary request.

Reasons for the Decision

1. Main request and first to fourth auxiliary requests

By withdrawing its appeal, the respondent (proprietor) became a party as of right under Article 107, second

sentence, EPC, whereas the appellant (opponent) keeps its legal position as the (now sole) appealing party. For the appellant, the principle of the prohibition of *reformatio in peius* (see e.g. G1/99) is applicable, such that the respondent's rights here are limited to defending the position in which it was placed by the decision of the opposition division. A request of a party as of right that, if granted, deteriorates the position of the appealing party cannot be allowed apart from in the particular circumstances described in G1/99.

In the present case, the main request and each of the first to the fourth auxiliary requests include an independent claim 1 that is broader in scope than claim 1 of the fifth auxiliary request which represents the position in which the appellant was before filing its appeal. Maintenance of the patent in any of these forms would hence put the appellant in a worse position than it was before filing its appeal. The respondent has not argued that any particular circumstances according to G1/99 apply in the present case and the Board could not reach any different conclusion either.

The main request and the first to fourth auxiliary requests are therefore not admissible.

2. *Fifth auxiliary request*

2.1 *Admittance*

The Board understands the appellant's objection that the opposition division should not have admitted the fifth auxiliary request into the proceedings as a request to hold this request inadmissible under Article 12(4) RPBA. However, since the interlocutory decision

was based on a request which was admitted and was fully reasoned in regard to that admitted request, the Board sees no legal provision under which it can re-examine whether the request should have been admitted or not. Further reasoning is however not required on this matter in the present decision, since the fifth auxiliary request is anyway not allowable (see below).

2.2 *Article 123(2) EPC*

Claim 1 according to the fifth auxiliary request defines subject-matter that extends beyond the content of the application as filed contrary to Article 123(2) EPC.

- 2.2.1 In its communication (see point 5.2), the Board stated that the only basis for the subject-matter claimed in *inter alia* auxiliary requests 5 to 7 was to be found on description pages 13 and 15 which refer to Figure 3A. It noted that this Figure showed *inter alia* a step-like configuration of three attachment areas. The Board further remarked that whilst three were shown, overall there were seemingly five when including those mirrored on the lower non-shown end. The Board noted that this configuration was not reflected in claim 1.

No arguments were presented by the respondent in reply to the preliminary opinion on this matter. The Board thus concludes that an unallowable intermediate generalisation of the disclosed subject-matter has indeed occurred as further explained below.

- 2.2.2 The basic principle when assessing whether the claimed subject-matter extends beyond the content of the application as originally filed can be found in the case law of the Enlarged Board of Appeal as summarised

in G 2/10 (see Reasons 4.3). The question to be answered is hence what a skilled person can derive directly and unambiguously, using common general knowledge, and seen objectively and relative to the date of filing, from the whole of the documents as filed. The Enlarged Board referred to this as the "gold standard". In order to be allowable under Article 123(2) EPC, any amendment must hence meet this standard.

2.2.3 According to established case law of the Boards of Appeal and as summarised in the Case Law Book of the Boards of Appeal (CLBA), 9th edition, II.E.1.9, page 482ff, it is normally not allowable to base an amended claim on the extraction of isolated features from a set of features originally disclosed only in combination.

2.2.4 As also conceded by the respondent, features (h) and (i) were explained on page 13 (lines 18 to 20) and page 15 (lines 17 to 19) while referring to Figure 3A. All drawings show *inter alia* three attachment areas. As already noted by the Board in its communication (see item 5.2), whilst three are shown, the embodiment depicted in Figure 3A actually comprises five, when including those mirrored on the lower non-shown end, noting here that the claim is to "a wearable absorbent article" and not just to one end thereof. Furthermore, these attachment areas are laid out in a step-like configuration, where the third attachment area has a smaller lateral width than the second attachment area. In the embodiment according to Figure 3A, the first attachment area adjoins the second, and the second adjoins the third.

Furthermore, there is no embodiment shown or described in the application as filed, that comprises separated

attachment areas together with feature (i). In all embodiments in which the longitudinally outboard end of the first attachment area coincides with the first end of the absorbent core assembly (feature "i") the attachment areas adjoin each other (see Figures 1B, 1D, 2B, 2D, 3A, 3C). None of these further details has however been included in claim 1.

2.2.5 In this respect, the respondent's argument put forward in the written proceedings that the information on page 13 of the application as filed was to be understood generally and not restricted to Figure 3A is not accepted. There is no indication apparent in the application that the statements on these pages should be understood more generally. They either refer explicitly to the Figures (*inter alia* by mentioning the reference signs depicted in Figure 3A, e.g. on page 13, lines 9 to 26; page 15, line 9 to 24) or refer to "various embodiments" (e.g. page 13, line 17; page 15, line 19). The skilled person would hence understand that this part of the description is not to be understood generally but refers to either the embodiment shown in Figure 3A or to some other embodiment(s), which is/are however not described in detail.

Hence, neither can form the basis for a general disclosure of an absorbent article comprising features (h) and (i) but not all of those depicted in Figure 3A.

2.2.6 In this regard, the respondent's argument that no features described with reference to Figure 3A were structurally or functionally inextricably linked to the feature of the first attachment area coinciding with the waist edge is hence not persuasive.

2.2.7 Even if it were accepted that there was no structural link between features (h) and (i) and the presence of a third attachment area, which the Board does not subscribe to, the skilled person would anyway still not have unambiguously understood the disclosure on pages 13 and 15 to be of a general nature such that singular features could be taken out of the single context in which they are disclosed.

2.2.8 The fifth auxiliary request is therefore not allowable.

3. *Sixth auxiliary request*

Claim 1 according to the sixth auxiliary request differs from claim 1 according to the fifth auxiliary request merely in the use of an indefinite article. This amendment cannot therefore change the finding of the Board in view of subject-matter extending beyond the content of the application as filed. Nor was this argued by the respondent.

The Board hence finds that claim 1 according to the sixth auxiliary request contravenes the requirement of Article 123(2) EPC for the same reason as set out for the fifth auxiliary request above and as indicated in the communication of the Board.

The sixth auxiliary request is therefore not allowable.

4. *Seventh auxiliary request*

4.1 Claim 1 lacks clarity (Article 84 EPC) as already mentioned in the Board's communication (see point 6).

4.2 In its communication, the Board stated e.g. that the term "end" in claim 1 appeared to involve an extension

in two dimensions and that the Board doubted how such a two-dimensional entity could then be understood clearly to "coincide" with an edge which is one-dimensional. Thus, it is unclear to a skilled person in the context of the claim in what way, the first "end" of the absorbent assembly should be understood to "coincide" with the waist "edge". Although these features were essentially taken from the description, they were notably used in the description of a particular Figure where this relationship could perhaps be identified and the terms be given a particular sense, but which is however not in the claim.

- 4.3 Since the appellant supplied no response to the Board's remarks in this context, the Board has no basis on which to alter its provisional opinion.
- 4.4 Additionally, by incorporating the further features taken from claim 9 as originally filed, claim 1 according to the seventh auxiliary request defines a third attachment area. Although this amendment was stated by the respondent to have addressed the objection under Article 123(2) EPC, it however fails to incorporate the other details referred to above (cf. Reasons 2.2.4). The subject-matter defined therein is hence still an unallowable intermediate generalisation of what is disclosed in the Figures, a matter which, again, the Board had referred to in its communication in item 5.3. The respondent however filed no substantive response to the Board's communication.
- 4.5 For completeness, it should be stated that the Board also cannot ascertain of its own motion how the article defined by the combination of features now in claim 1 is directly and unambiguously derivable from other parts of the application as filed.

4.6 Thus, in conclusion, the claim lacks clarity contrary to Article 84 EPC and its subject-matter contravenes Article 123(2) EPC, such that the seventh auxiliary request is also not allowable.

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:



A. Chavinier-Tomsic

M. Harrison

Decision electronically authenticated