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**Datasheet for the decision
of 14 May 2021**

Case Number: T 0396/17 - 3.2.06

Application Number: 13150761.8

Publication Number: 2581070

IPC: A61F13/496, A61F13/15

Language of the proceedings: EN

Title of invention:

A pant-type absorbent article

Patent Proprietor:

SCA Hygiene Products AB

Opponents:

THE PROCTER & GAMBLE COMPANY
Paul Hartmann AG
Laboratorios Indas, S.A.U.

Headword:

Relevant legal provisions:

EPC Art. 123(2)

Keyword:

Amendments - intermediate generalisation - all requests (yes)

Decisions cited:

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 0396/17 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 14 May 2021

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
14 December 2016 concerning maintenance of the
European Patent No. 2581070 in amended form.**

Composition of the Board:

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

Summary of Facts and Submissions

- I. Appeals were filed by appellant - opponent I and appellant - opponent II against the interlocutory decision of the opposition division in which it found that European patent No. 2 581 070 in an amended form met the requirements of the EPC.
- II. The appellants each requested that the decision under appeal be set aside and the patent be revoked.
- III. The respondent (patent proprietor) requested that the appeals be dismissed or, in the alternative, that the patent be maintained according to one of auxiliary requests 1 to 5. It also requested oral proceedings should its main request not be allowable.
- IV. With its communication dated 29 April 2020, the Board *inter alia* expressed doubt that the expression 'the angle of the edge of the leg opening changes most abruptly', included in claim 1 of all the requests on file, met the requirement of Article 123(2) EPC.
- V. With letter of 24 August 2020, the respondent filed further auxiliary requests numbered 1a, 1b, 1b', 2', 3', 4' and 5'. The order in which the requests now on file were to be considered was as follows:
Main request, auxiliary request 1a, auxiliary request 1b, auxiliary request 1b', auxiliary request 2, auxiliary request 2', auxiliary request 3, auxiliary request 3', auxiliary request 4, auxiliary request 4', auxiliary request 5 and auxiliary request 5'.
- VI. The Board issued a summons to oral proceedings and a subsequent communication of 26 February 2021 containing

its provisional opinion, in which it indicated *inter alia* that the subject-matter of claim 1 of the main request appeared not to meet the requirements of Articles 76(1) and 123(2) EPC and that claim 1 lacked clarity (Article 84 EPC). It also indicated that none of the auxiliary requests on file appeared to overcome these objections.

VII. With letter of 27 April 2021 the respondent informed the Board that it would not attend the scheduled oral proceedings.

VIII. The Board subsequently cancelled the scheduled oral proceedings.

IX. Claim 1 of the main request reads as follows:

"A pant-type absorbent article (1) such as a pant diaper, a sanitary pant or incontinence pant, said article having an absorbent assembly (3) comprising an absorbent core (2) and a chassis (4), said chassis (4) comprising a front portion (5) and a back portion (6), wherein the front and back portions (5;6) are joined to each other along two opposite longitudinal side edges to define a waist-opening and a pair of leg-openings, at least one of the front and back portions (5;6) comprises an elastic web material (10), said article (4) further comprising a crotch portion (7) located between the front portion (5) and the back portion (6) in the longitudinal direction of the article, said front portion (5) having a length (b1) in the longitudinal direction, said back portion (6) having a length (b3) in the longitudinal direction, and said crotch portion (7) having a length (b2) in the longitudinal direction, said absorbent assembly (3) lying at least in said crotch portion (7) and

overlapping a certain distance with both the front and back portions (5;6), said article having a maximum width (c) in the transverse direction and a maximum length (b) in the longitudinal direction, said article having a longitudinal (y) and a transverse direction (x), characterized in that said elastic web material is a laminate (10) composed of first and second layers of fibrous material (11,12) and an elastic film layer (13) located between said first and second fibrous layers and in that the ratio of the maximum width (c) to the maximum length (b) of the article is between 90% and 110%, as measured in an extended state of the article, wherein each said leg opening has a forward point at which the angle of the edge of the leg opening changes most abruptly and a rearward point at which the angle of the edge of the leg opening changes most abruptly, said front portion (5) being defined by a waist edge of the article, said longitudinal side edges of said article, part of said leg openings and a transverse line which is located at said forward point at which the angle of the edge of the leg opening changes most abruptly and said back portion (6) being defined by a waist edge of the article, said longitudinal side edges of said article, part of said leg openings and a transverse line which is located at said rearward point at which the angle of the edge of the leg opening changes most abruptly, the ratio of the length of the front portion (b1) to the maximum width (c) of the article is between 25% and 35%, preferably between 28% and 32%, as measured in an extended state of the article, and the ratio of the length of the back portion (b3) to the maximum width (c) of the article is between 38% and 52%, as measured in an extended state of the article."

Claim 1 of auxiliary request 1a reads as for claim 1 of

the main request except for the wording before 'said chassis (4)' being replaced with the following:

"A pant-type absorbent article (1) in the form of a pant diaper, said article having an absorbent assembly (3) comprising a liquid impervious backsheet layer (19), a liquid pervious topsheet layer (20) and an absorbent core (2) enclosed therebetween and a chassis (4)".

Claim 1 of auxiliary request 1b reads as for claim 1 of the main request except that after the recitation of 'said rearward point at which the angle of the edge of the leg opening changes most abruptly', the following is inserted:

"i.e. the point at which the rate of change of the angle of the edge of the leg opening with respect to the transverse direction is highest".

Claim 1 of auxiliary request 1b' reads as for claim 1 of auxiliary request 1a except that after the recitation of 'said rearward point at which the angle of the edge of the leg opening changes most abruptly', the following is inserted:

"i.e. the point at which the rate of change of the angle of the edge of the leg opening with respect to the transverse direction is highest".

Claim 1 of auxiliary request 2 reads as for claim 1 of the main request except that after the wording 'between said first and second fibrous layers', the following wording is inserted:

"said elastic laminate (10) being breathable and having

a Water Vapour Transmission Rate according to ASTM E96-00 Procedure D of at least $1500 \text{ g/m}^2 \text{ 24h}$, preferably at least $3000 \text{ g/m}^2 \text{ 24h}$ ".

Claim 1 of auxiliary request 2' reads as for claim 1 of auxiliary request 1a except that after the wording 'between said first and second fibrous layers', the following wording is inserted:

"said elastic laminate (10) being breathable and having a Water Vapour Transmission Rate according to ASTM E96-00 Procedure D of at least $1500 \text{ g/m}^2 \text{ 24h}$, preferably at least $3000 \text{ g/m}^2 \text{ 24h}$ ".

Claim 1 of auxiliary request 3 reads as for claim 1 of auxiliary request 2 except that after the wording 'forward point at which the angle of the edge of the leg opening changes most abruptly' and the wording 'rearward point at which the angle of the edge of the leg opening changes most abruptly', the following is inserted:

"i.e. the point at which the rate of change of the angle of the edge of the leg opening with respect to the transverse direction is highest".

Claim 1 of auxiliary request 3' reads as for claim 1 of auxiliary request 2' except that after the wording 'forward point at which the angle of the edge of the leg opening changes most abruptly' and the wording 'rearward point at which the angle of the edge of the leg opening changes most abruptly', the following is inserted:

"i.e. the point at which the rate of change of the angle of the edge of the leg opening with respect to

the transverse direction is highest".

Claim 1 of auxiliary request 4 reads as for claim 1 of auxiliary request 2 except that after the wording 'between said first and second fibrous layers', the following wording is inserted:

"said elastic laminate (10) being breathable and having a Water Vapour Transmission Rate according to ASTM E96-00 Procedure D of at least 1500 g/m² 24h, preferably at least 3000 g/m² 24h and said crotch portion (7) comprises crotch panel material (21) underlying the absorbent assembly (3) on the garment facing side thereof".

Claim 1 of auxiliary request 4' reads as for claim 1 of auxiliary request 1a except that after the wording 'between said first and second fibrous layers', the following wording is inserted:

"said elastic laminate (10) being breathable and having a Water Vapour Transmission Rate according to ASTM E96-00 Procedure D of at least 1500 g/m² 24h, preferably at least 3000 g/m² 24h and said crotch portion (7) comprises crotch panel material (21) underlying the absorbent assembly (3) on the garment facing side thereof".

Claim 1 of auxiliary request 5 reads as for claim 1 of auxiliary request 4 except that after the wording 'forward point at which the angle of the edge of the leg opening changes most abruptly' and the wording 'rearward point at which the angle of the edge of the leg opening changes most abruptly', the following is inserted:

"i.e. the point at which the rate of change of the angle of the edge of the leg opening with respect to the transverse direction is highest".

Claim 1 of auxiliary request 5' reads as for claim 1 of auxiliary request 4' except that after the wording 'forward point at which the angle of the edge of the leg opening changes most abruptly' and the wording 'rearward point at which the angle of the edge of the leg opening changes most abruptly', the following is inserted:

"i.e. the point at which the rate of change of the angle of the edge of the leg opening with respect to the transverse direction is highest".

- X. The arguments of appellant - opponent I relevant to the present decision may be summarised as follows:

The subject-matter of claim 1 of the main request failed to meet the requirement of Article 123(2) EPC. The feature added to claim 1 defining the forward and rearward points at which the angle of the edge of the leg opening changes most abruptly was originally disclosed solely in combination with further features disclosed in Figure 2. Such features included the absorbent article being divided into front, back and crotch portions along transverse lines at the forward and rearward points. Omission of at least these features from claim 1 resulted in its subject-matter extending beyond the content of both the parent and the divisional applications as filed.

For the same reasons as for claim 1 of the main request, the subject-matter of claim 1 of auxiliary requests 1 to 5 extended beyond the content of the

application as filed.

- XI. The arguments of appellant - opponent II relevant to the present decision may be summarised as follows:

The subject-matter of claim 1 of the main request extended beyond the content of the application as filed. The forward and rearward points included in claim 1 were solely disclosed in the embodiment depicted in Figure 2 and thus in structural combination with the extent of the front, crotch and rear portions as defined in that context. The omission of these features resulted in claim 1 presenting an unallowable intermediate generalisation of the original disclosure, contrary to the requirement of Article 123(2) EPC.

The subject-matter of claim 1 of each of the auxiliary requests 1 to 5 failed to overcome the above objection.

- XII. The party as of right (opponent III) made no submissions in the appeal proceedings.

- XIII. The respondent's arguments relevant to the present decision may be summarised as follows:

The subject-matter of claim 1 of the main request met the requirement of Article 123(2) EPC. The position of the forward and rearward points on the claimed absorbent article were implicit in the disclosure of page 11 of the parent application as filed. The reference to Figure 2 on page 11, line 17 of the parent application was solely in relation to the front, back and crotch portions of the absorbent article, not the remaining features in the paragraph.

The subject-matter of claim 1 of auxiliary requests 1

to 5 did not extend beyond the content of the application as filed for the same reasons. The auxiliary requests filed with letter of 24 August 2020 limited the claimed absorbent article to a pant-type absorbent article and met the requirement of Article 123(2) EPC for the same reasons as those given for the main request.

Reasons for the Decision

1. *Respondent's request for oral proceedings*

1.1 In its response to the statements setting out the grounds of appeal, the respondent requested oral proceedings should the Board be unable to maintain the patent according to its main request. The parties were duly summoned to oral proceedings. The respondent subsequently informed the Board that it would not attend the scheduled oral proceedings.

1.2 According to established case law before the Boards of Appeal, an indication that a party will not attend oral proceedings should normally be treated as equivalent to a withdrawal of the request for oral proceedings (see e.g. T 3/90, Reasons 1). The Board saw no reason to diverge from this practice in the present case and thus cancelled the scheduled oral proceedings and bases its decision on the parties' written submissions (see also Article 15(3) RPBA 2020).

2. *Main request*

Article 123(2) EPC

2.1 The subject-matter of claim 1 extends beyond the content of the parent application as filed, contrary to the requirement of Article 123(2) EPC.

2.2 The basis provided for the features in claim 1 relating to a 'forward' point and a 'rearward' point, at which the angle of the edge of the leg opening changes most abruptly, is given as page 11, lines 16 to 29 of the parent application as filed. As indicated in the Board's preliminary opinion (see point 2.1 of the communication of 26 February 2021), the terms 'forward' and 'rearward' are not included in these passages of the application as filed. Indeed, these terms are also not implicit from the referenced passages, rather reference to Figure 2 is necessary in order to define the forward and rearward points. As a consequence of Figure 2 being a necessary source of disclosure for the forward and rearward points defined in claim 1, the features depicted in Figure 2 which are disclosed in a structural combination with those adopted into claim 1 must be included for its subject-matter not to extend beyond the content of the application as filed, since only such a combination can be directly and unambiguously derived and not merely individual features. Such features disclosed in a structural combination with the forward and rearward points of Figure 2 are at least that the forward and rearward points define the location of respective transverse lines which define part of the front portion or back portion respectively of the absorbent article.

2.3 The respondent's contention that the reference to Figure 2 on page 11, line 17 of the parent application is solely in relation to the front, back and crotch portions of the absorbent article, not the remaining features in the paragraph, is not accepted. Lines 18 to 29 on page 11 continue to describe the front, back and crotch portions in detail, yet require reference to Figure 2 not least in order to understand the difference between two recitations of 'the point' - one referring to the transverse line defining the front portion, the other referring to the transverse line defining the back portion of the absorbent article. Figure 2 is thus a necessary part of the disclosure of features included in claim 1, yet additionally discloses at least transverse lines, defining part of the front, back and crotch portions of the absorbent article, which have not been included in claim 1.

2.4 In its preliminary opinion, included in the communication of 26 February 2021, the Board considered, *inter alia* for the reasons given above, that the subject-matter of claim 1 was an unallowable intermediate generalisation of the original disclosure. To this preliminary opinion the respondent presented no counter-arguments, so that the Board herewith confirms that the subject-matter of claim 1 fails to meet the requirement of Article 123(2) EPC. The main request is thus not allowable.

3. *Auxiliary requests - Article 123(2) EPC*

3.1 The subject-matter of claim 1 of each of the auxiliary requests on file extends beyond the content of the parent application as filed, contrary to the requirement of Article 123(2) EPC.

- 3.2 Claim 1 of each of the auxiliary requests includes the 'forward point' and 'rearward point' features found in claim 1 of the main request not to be derivable in isolation. The communication of the Board of 26 February 2021 included this preliminary opinion.
- 3.3 To this preliminary opinion the respondent presented no counter-arguments, so that the Board herewith confirms that the subject-matter of claim 1 of each of the auxiliary requests on file fails to meet the requirement of Article 123(2) EPC. None of the auxiliary requests is thus 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:



D. Grundner

M. Harrison

Decision electronically authenticated