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**Datasheet for the decision
of 25 March 2021**

Case Number: T 1372/17 - 3.2.06

Application Number: 08829799.9

Publication Number: 2186495

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A61F13/49

Language of the proceedings: EN

Title of invention:
ABSORPTIVE ARTICLE

Patent Proprietor:
Unicharm Corporation

Opponent:
Paul Hartmann AG

Headword:

Relevant legal provisions:
EPC Art. 123(2), 123(3)
RPBA 2020 Art. 13(1)

Keyword:

Amendments - added subject-matter - main request (yes) -
broadening of claim - auxiliary request 1 (yes)
Late-filed auxiliary requests - auxiliary requests 10,11 -
admitted (no)

Decisions cited:

Catchword:



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Case Number: T 1372/17 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 25 March 2021

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 20 April 2017
rejecting the opposition filed against European
patent No. 2186495 pursuant to Article 101(2)
EPC.**

Composition of the Board:

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

Summary of Facts and Submissions

- I. An appeal was filed by the appellant (opponent) against the decision of the opposition division rejecting the opposition to European patent No. 2 186 495. It requested that the decision under appeal be set aside and the patent be revoked.
- II. In its letter of response, the respondent (patent proprietor) requested that the appeal be dismissed or, in the alternative, that the patent be maintained according to one of auxiliary requests 1 to 9.
- III. The Board issued a summons to oral proceedings and a subsequent communication containing its provisional opinion, in which it indicated *inter alia* that the ground for opposition under Article 100(c) EPC prejudiced the maintenance of the patent as granted. It further indicated that the auxiliary requests appeared not to overcome this objection.
- IV. With letter of 24 February 2021 the respondent filed additional auxiliary requests as follows:
- Main request A;
Auxiliary request 1A to auxiliary request 9A;
Auxiliary request 10; and
Auxiliary request 11.
- V. Oral proceedings by video conference were held before the Board on 25 March 2021. During the oral proceedings the following auxiliary requests were withdrawn:
- Main request A;
Auxiliary request 2 to auxiliary request 9; and

Auxiliary request 1A to auxiliary request 9A.

The final requests of the parties were consequently as follows:

The appellant requested that the decision under appeal be set aside and the European patent No. 2 186 495 be revoked.

The respondent requested that the appeal be dismissed (main request), alternatively that the patent be maintained in amended form on the basis of one of auxiliary requests 1, 10 or 11.

VI. Claim 1 of the main request reads as follows (with paragraph annotation added by the Board for ease of reference):

1.1 "An absorbent article comprising a chassis having a longitudinal direction and a transverse direction, an inner side facing the wearer's skin and an outer side facing the wearer's garment, a front waist region (1), a rear waist region (2) and a crotch region (3) extending between said front and rear waist regions, said absorbent article being characterized in that:

1.2 said chassis (A) includes a peripheral edge of a waist-opening (19) composed of two segments associated with said front and rear waist regions and spaced from and opposed to each other in said longitudinal direction and

1.3 see-through regions in said front and rear waist regions (1, 2) in which wearer's skin can be seen through the article;

1.4 said see-through regions are defined by sheets (14, 15, 16, 17) of fibrous nonwoven fabric having a

total light transmittance of about 55% or higher when measured in accordance with JIS-K7105 and

1.5 respectively occupy about 40% or more of said front and rear waist regions;

1.6 reinforcing means (35) against tear of said chassis is attached to the article along said peripheral edge of said waist-opening so as to extend in said transverse direction; and

1.7 said reinforcing means (35) comprises elastic members adapted to bias the front and rear waist regions (1, 2) to contract in the transverse direction and attached under tension between the inner sheet and the outer sheet."

Claim 1 of auxiliary request 1 reads as for claim 1 of the main request save for the following features which read as follows:

Feature 1.4 "said see-through regions are defined by inner and outer sheets (14, 15, 16, 17) in the front and rear waist regions (1, 2) of fibrous nonwoven fabric having a total light transmittance of 55% or higher when measured in accordance with JIS-K7105 and";

Feature 1.5 "respectively occupy 40% or more of said front and rear waist regions"; and

Feature 1.7 "said reinforcing means (35) comprises an elastic member adapted to bias the front and rear waist regions (1, 2) to contract in the transverse direction and attached under tension between the inner sheet and the outer sheet."

Claim 1 of auxiliary request 10 reads as follows:

"An absorbent article comprising a chassis having a longitudinal direction and a transverse direction, an inner side facing the wearer's skin and an outer side

facing the wearer's garment, a front waist region (1), a rear waist region (2) and a crotch region (3) extending between said front and rear waist regions, said absorbent article being characterized in that: said absorbent article is a disposable diaper in which said chassis (A) includes a peripheral edge of a waist-opening composed of two segments associated with said front and rear waist regions and spaced from and opposed to each other in said longitudinal direction and see-through regions in said front and rear waist regions (1, 2) in which wearer's skin can be seen through the article;

said front and rear waist regions (1, 2) are defined by a belt member (4) composed of a front belt section (6) defining the front waist region (1) and a rear belt section (7) defining the rear waist region (2), said front belt section (6) comprises an inner sheet (14) defining an inner side (12) facing the wearer's skin and an outer sheet (15) defining an outer side (13) facing the wearer's garment while the rear belt section (7) comprises an inner sheet (16) defining the inner side (12) facing the wearer's skin and an outer sheet (17) defining the outer side (13) facing the wearer's garment;

said see-through regions are defined by the inner and outer sheets (14, 15, 16, 17) in the front and rear waist regions (1, 2) of fibrous nonwoven fabric having a total light transmittance of 55% or higher when measured in accordance with JIS-K7105 and respectively occupy 40% or more of said front and rear waist regions;

reinforcing means (35) against tear of said chassis is attached to the article along said peripheral edge of said waist-opening so as to extend in said transverse direction; and

the reinforcing means (35) is in tight contact with the

inner and outer sheets (14, 15) of the front belt section (6) as well as with the inner and outer sheets (16, 17) of the rear belt section (7) defining the peripheral edge (19) and without leaving any substantial clearance gap between the reinforcing means (35) and the peripheral edge, said reinforcing means (35) comprises two elastic members one of each attached to the article along the peripheral edge of each of the front and rear waist regions and the two elastic members being adapted to bias the front and rear waist regions (1, 2) to contract in the transverse direction and attached under tension between the inner sheet and the outer sheet."

Claim 1 of auxiliary request 11 reads as for claim 1 of auxiliary request 10 except for immediately before the recitation "said see-through regions ...", where the following feature is inserted:

"the inner and outer sheets (14, 15) of the front belt section (6) as well as the inner and outer sheets (16, 17) of the rear belt section (7) are respectively formed by folding a single fibrous nonwoven fabric in two along a fold line (34)".

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

The subject-matter of claim 1 of the main request extended beyond the content of the application as filed. Feature 1.7 of claim 1 recited plural 'elastic members' yet this was not originally disclosed, rather the singular 'elastic member' being used even when reference was being made, as in paragraph [0057], to both the front and the rear waist regions. As regards paragraph [0064] of the application as filed, even if this were to suggest the presence of plural reinforcing

elastic members, this was only in the context of a specific embodiment which at least additionally included waist elastic members 18, which were not included in claim 1. Through reciting plural elastic members in claim 1, this covered embodiments for which there was no basis in the application as filed e.g. the presence of two or more elastic members at the peripheral edge of the waist-opening in the front or the rear waist region, the elastic members being arranged end-to-end and having different elastic properties. The claimed biasing did not have to be constant in the transverse direction. This was thus a technically reasonable arrangement, offering varying elasticity around the waist of the article, which fell within the scope of claim 1 yet was not originally disclosed.

The limitation to recite that the reinforcing means 'comprises an elastic member' in claim 1 of auxiliary request 1 extended the protection conferred relative to claim 1 as granted, contrary to the requirement of Article 123(3) EPC.

Auxiliary request 10 should not be admitted. The subject-matter of claim 1 was an intermediate generalisation of the disclosure in paragraphs [0044] and [0045], since these at least additionally disclosed waist elastics 18 which were not included in claim 1. The same objection held for auxiliary request 11.

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

The subject-matter of claim 1 of the main request did not extend beyond the content of the application as filed. A basis for the plural 'elastic members' was in

the general disclosure of the embodiments in which the reinforcing means 35 were provided both in the front and rear waist regions. As found by the opposition division, paragraphs [0014] and [0044] linked the reinforcing means to the inner and outer sheets of the waist regions, which would be understood by the skilled person to the effect that at least two elastic members were present. Paragraph [0057] also specifically disclosed an elastic member in each of the front and rear waist regions. Paragraph [0064] further explicitly disclosed plural 'reinforcing elastic members 35'. Paragraph [0058] disclosed that alternatives to an elastic member were foreseen for the reinforcing means. The skilled person would thus see two elastic members being unambiguously disclosed in the application as a whole. The skilled person would further interpret the expression 'comprises elastic members' as being limited to two, since there could only be a single elastic member along the peripheral edge of each of the front and rear waist regions.

Claim 1 of auxiliary request 1 did not offend Article 123(3) EPC. Since a reinforcing means was present on both the front and rear waist regions, each of these could have an elastic member; the protection was thus not extended.

Since claim 1 of auxiliary requests 10 and 11 respectively overcame the added subject-matter objection, these should be admitted. The skilled person understood from the disclosure as a whole that only two elastic members were present.

Reasons for the Decision

1. *Main request*

1.1 *Article 100(c) EPC*

The ground for opposition under Article 100(c) EPC prejudices the maintenance of the patent as granted.

1.1.1 Compared to claim 1 as filed, claim 1 as granted *inter alia* additionally includes feature 1.7 which recites that:

'said reinforcing means (35) comprises elastic members adapted to bias the front and rear waist regions (1, 2) to contract in the transverse direction and attached under tension between the inner sheet and the outer sheet'.

1.1.2 The expression 'said reinforcing means comprises elastic members' in feature 1.7 implies that at least two elastic members are present in the reinforcing means, but does not exclude more than two elastic members being present. There is however no direct and unambiguous disclosure in the application as filed of any more than precisely two elastic members being comprised in the reinforcing means.

1.1.3 The embodiments of Figures 1 and 4 of the application as filed depict the claimed absorbent article in the form of a diaper with a front (1) and a rear (2) waist region (see paragraphs [0039] to [0040] and [0062]). From Figures 3 and 6 in conjunction with paragraph [0040], it is clear to the skilled person that each of the front and rear waist regions must include its own reinforcing elastic member, which remains the case even

after the front and rear waist regions are joined together by side edge joints (10). There is therefore no unambiguous teaching in the application as filed of any more than precisely two elastic members defining the reinforcing means, one at the peripheral edge (19) of each of the front and rear waist regions (1, 2).

1.1.4 The respondent's reference to paragraph [0057] in fact supports the above conclusion of precisely two elastic members rather than providing a basis for the claimed generality of 'elastic members'. In this paragraph, the following is disclosed: 'In addition to the reinforcing elastic member 35, the front and rear waist regions 1, 2 are provided with a plurality of the waist elastic members 18' i.e. the front waist region 1 is provided with a reinforcing elastic member 35 and a plurality of waist elastic members, as is the rear waist region 2. Thus, precisely two reinforcing elastic members 35 are disclosed here.

1.1.5 The respondent's reference to paragraph [0064] fails to disclose 'reinforcing elastic members 35' in a context to allow 'elastic members' to be claimed in such generality. The disclosure of paragraph [0064] relates to Figure 4, specifically concerning through holes 36 distributed over the waist regions of the article. However, the Figure 4 embodiment is similar in detail to that of Figure 1 save for the through hole details (see statement in paragraph [0062] to this effect) such that the skilled person would see nothing but a single reinforcing elastic member 35 being located at the peripheral edge of both the front and the rear waist portion (see reference signs 35 in Fig. 4), i.e. precisely two elastic members rather than the claimed undefined number of 'elastic members'.

- 1.1.6 The respondent's argument that paragraph [0058] discloses a plurality of elastic members is also not accepted. This discloses the possibility of the reinforcing elastic member being replaced by an elasticized sheet, yet this fails to suggest that more than a single elastic member would consequently be located at the peripheral edge of either the front or rear waist regions. Even if the elasticized sheet were to include a plurality of elastic members embedded in it, which is anyway not disclosed, it is not evident how this would result in more than a single elastic member unambiguously being located at the peripheral edge of each of the front or rear waist regions.
- 1.1.7 The respondent's further argument that the skilled person would interpret the expression 'comprises elastic members' as being limited to two, since there could only be a single elastic member along the peripheral edge of each of the front and rear waist region, is also not accepted. A claim must be interpreted in its broadest technically reasonable scope, such that the embodiments describing solely two elastic members are not restrictive on the scope of the claim. In the context of a diaper, where fit around the waist is very important for comfort and leak resistance performance, it is technically reasonable for elastic members of different elasticity to be distributed around the peripheral waist edge e.g. a greater elasticity at the sides where the circumferential change in curvature is greatest due to the contour of the wearer's hips at this point. This difference in elasticity would necessitate more than one elastic member being arranged at the peripheral waist edge of each of the front and rear waist regions. The undefined number of 'elastic members' in claim 1, i.e. including at least two but also more than two, is thus supported

by a technically reasonable interpretation of the claimed article, yet this interpretation is not supported by the application as filed, which discloses precisely two elastic members in the article (see points 1.1.3 to 1.1.5 above). Claim 1 including within its scope more than two elastic members thus lacks basis in the application as filed.

1.1.8 In its letter of 2 January 2018 the respondent argued that paragraphs [0014] and [0044] also disclosed the presence of at least two elastic members being comprised in the reinforcing means 35. This is not accepted. These paragraphs of the description not only include further features of the absorbent article disclosed which have not been included in claim 1 (e.g. inner and outer sheets in paragraph [0014]; a plurality of waist elastic members 18 in paragraph [0044]) but also only disclose 'an elastic member', albeit understood by the skilled person in this specific context as one elastic member per waist region. Thus, as already concluded with respect to the other references to the description as filed, paragraphs [0014] and [0044] also fail to provide a direct and unambiguous basis for any more than precisely two elastic members to be comprised in the reinforcing means.

1.1.9 It thus follows that the subject-matter of claim 1 extends beyond the content of the application as filed such that the ground for opposition under Article 100(c) EPC is prejudicial to maintenance of the patent as granted. The main request is therefore not allowable.

2. *Auxiliary request 1*

2.1 *Article 123(3) EPC*

Claim 1 extends the protection conferred beyond that of claim 1 as granted, contrary to the requirement of Article 123(3) EPC.

2.1.1 Feature 1.7 of claim 1 has been amended relative to claim 1 as granted ('comprises elastic members') to recite that 'said reinforcing means (35) comprises an elastic member'.

2.1.2 Whereas in claim 1 as granted, the claimed absorbent article was limited to having reinforcing means including at least two elastic members, the amended claim 1 includes the additional possibility of the reinforcing means having just a single elastic member. Claim 1 is thus of broader scope than claim 1 as granted.

2.1.3 The respondent's rebuttal of this objection that the expression 'comprises an elastic member' still included the possibility of a plurality of elastic members being included in the article does not address the objection. The respondent's contention is not denied; however, it is the broadening of the protection conferred by the amended claim to additionally cover a single elastic member that results in claim 1 failing to meet the requirement of Article 123(3) EPC.

2.1.4 Auxiliary request 1 is thus also not allowable.

3. *Auxiliary request 10*

3.1 *Admittance - Article 13(1) RPBA 2020*

3.1.1 Having been filed just one month prior to the oral proceedings, the admittance of this request is at the discretion of the Board (Article 13(1) RPBA 2020). One requirement placed on such requests filed at a late stage in the appeal procedure is that the new claims should be clearly allowable in the sense that they overcome all outstanding objections and that they do not introduce new objections.

3.1.2 The outstanding objection to the previous requests is that the application as filed discloses exactly two elastic members comprised in the reinforcing means, the possibility of more than two elastic members in the main request offending Article 123(2) EPC and the possibility of just a single elastic member in auxiliary request 1 offending Article 123(3) EPC.

3.1.3 Feature 1.7 of auxiliary request 10 has been amended to recite that 'said reinforcing means (35) comprises two elastic members'. This amendment has, however, not addressed the objection under Article 123(2) EPC since the claim is still not limited to precisely two elastic members. The reinforcing means are defined to 'comprise' two elastic members such that more than two elastic members are still encompassed by the scope of the claim. As found with respect to claim 1 of the main request, such subject-matter lacks basis in the application as filed.

3.1.4 The respondent's contention that it was clear from the feature in its entirety that only one elastic member on each of the front and rear waist regions was to be

understood is not accepted. As held in point 1.1.7 above, a claim must be interpreted in its broadest technically reasonable scope which, in the present case with the 'comprise' wording, clearly includes the possibility of more than two elastic members in total included in the reinforcing means, and this being a technically reasonable interpretation of the claim. This is however not derivable from the application as filed, such that the subject-matter of claim 1 still fails to meet the requirement of Article 123(2) EPC.

3.1.5 With claim 1 having failed to clearly overcome the Article 123(2) EPC objection prejudicing the allowability of claim 1 of the main request, the Board exercised its discretion under Article 13(1) RPBA 2020 not to admit auxiliary request 10 into the proceedings.

4. *Auxiliary request 11*

4.1 *Admittance - Article 13(1) RPBA 2020*

Claim 1 of this request corresponds to claim 1 of auxiliary request 10 as regards the feature 'said reinforcing means (35) comprises two elastic members'. The respondent offered no further arguments in defence of the objection to this under Article 123(2) EPC. The Board thus concluded that the subject-matter of claim 1 *prima facie* failed to meet the requirement of Article 123(2) EPC. As a consequence, the Board again exercised its discretion under Article 13(1) RPBA 2020 not to admit auxiliary request 11 into the proceedings.

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