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**Datasheet for the decision
of 15 April 2021**

Case Number: T 1705/17 - 3.2.06

Application Number: 11729430.6

Publication Number: 2590608

IPC: A61F13/20

Language of the proceedings: EN

Title of invention:

PRESS AND METHOD FOR PRODUCING ABSORBENT ARTICLE

Patent Proprietor:

Ontex Hygieneartikel Deutschland GmbH

Opponent:

Kimberly-Clark Worldwide, Inc.

Headword:

Relevant legal provisions:

EPC Art. 54, 69

RPBA 2020 Art. 13(2)

Keyword:

Novelty - main request (no)

Late-filed auxiliary requests 1 and 2 - exceptional
circumstances for late filing (no)

Decisions cited:

Catchword:



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Case Number: T 1705/17 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 15 April 2021

Appellant: Kimberly-Clark Worldwide, Inc.
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 1 June 2017
rejecting the opposition filed against European
patent No. 2590608 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman W. Ungler
Members: P. Cipriano
M. Dorfstätter

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. 2 590 608. It requested that the decision under appeal be set aside and the patent be revoked.
- II. In reply, the respondent (proprietor) requested, as a main request, that the appeal be dismissed.
- III. The following document, referred to by the appellant in its grounds of appeal, is relevant to the present decision:
D1 EP 1 383 453 B1
- IV. The Board issued a summons to oral proceedings and a communication containing its provisional opinion, which stated *inter alia* that D1 disclosed all the features of claim 1 of the main request and that any auxiliary requests filed in reply to the present communication needed to fulfil the requirements of Article 13(1) and 13(2) RPBA 2020.
- V. With letter dated 21 January 2021, the respondent filed auxiliary requests 1 and 2.
- VI. Oral proceedings were held before the Board on 15 April 2021.

The final requests were as follows:

The appellant requested that the decision under appeal be set aside and that the European patent be revoked.

The respondent requested that the appeal be dismissed (main request), or that the patent be maintained on the basis of one of auxiliary requests 1 or 2, filed with letter of 21 January 2021.

VII. Claim 1 of the main request reads as follows (with the feature-by-feature analysis as used by the parties):

"1. Press (100) for manufacturing a tampon, comprising at least three press jaws (6) arranged in a star around a central longitudinal press axis (4) forming a press opening (2), whereby there is provided on a single or separate adjacent press jaws (6):

- a penetrating segment, PSLG, (13) configured to penetrate the absorbing material with a longitudinal groove, and

- penetrating segments, PSSG, (11) configured to penetrate the absorbing material with a plurality of side grooves that are arranged in the longitudinal direction,

wherein the press is configured to:

- a) load a cylindrical blank (200) in the press opening (2),

- b) move the press jaws (6) to a closed position to press the cylindrical blank (200) so forming a preform (210),

- c) move the press jaws (6) to a holding position between the closed position and open position, so that the preform can be removed,

d) remove the preform while the jaws (6) are in the holding position, and

e) move the press jaws (6) to the open position for loading of a subsequent cylindrical blank."

Claim 1 of auxiliary request 1 differs from claim 1 of the main request in that the paragraphs regarding the PSLG and PSSG read as follows:

"- a penetrating segment, PSLG, (13) configured to penetrate the absorbing material with a longitudinal groove, said longitudinal grooves extend at least partially, from the insertion end to the withdrawal end, and are parallel to the press axis (4) and
- penetrating segments, PSSG, (11) configured to penetrate the absorbing material with a plurality of side grooves that are arranged in the longitudinal direction, wherein each PSSG is in the shape essentially of a chevron (v-shaped), straight-edged slot, undulating, star, cross, diamond, circular, oval, triangle, rectangle, pentagon, hexagon (sic), septagon, octagon, noagon (sic), decagon, other polygon, or the like,"

Claim 1 of auxiliary request 2 differs from claim 1 of auxiliary request 1 in that the following feature has been added at the end of the claim:

"wherein the maximum height, HL, of the PSLG from the base (17) to the tip (15) is greater than the maximum height, HS, of the PSSG from the base (17) to the tip (15)."

VIII. The arguments of the appellant as far as relevant for the decision may be summarised as follows:

Main request - novelty

D1 disclosed all the features of claim 1.

The wording of claim 1 did not require that each press jaw had several penetrating segments PSSG (the possibility that a single press jaw comprised a single penetrating segment PSSG was also encompassed by the wording of the claim). The description of the patent also did not exclude this option. Thus, D1 which disclosed press jaws each comprising one longitudinal penetrating segment, disclosed this feature.

The side grooves defined in claim 1 were not restricted to any particular shape or size and could have the same shape as the longitudinal grooves.

It was the wording of the claim that was decisive for the interpretation of the claim and, in any case, the description also did not contradict this. Paragraph [0029] of the patent only stated broadly that the side grooves were disposed at the lateral side of the longitudinal grooves and all the other characteristics of the grooves in paragraphs [0028] and [0029] were mutually exclusive and could be characteristics of the side grooves as well.

Any of the grooves in D1 were placed on the side of another groove and could therefore be considered a side groove to the latter. D1 therefore also disclosed side grooves as defined in claim 1.

Auxiliary requests - admittance

Auxiliary requests 1 and 2 should not be admitted into the proceedings.

It was not an exceptional circumstance that the Board's preliminary opinion did not coincide with the one of the opposition division.

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

Main request - novelty

Claim 1 of the main request was novel over D1.

D1 did not disclose penetrating segments PSSG (11) configured to penetrate the absorbing material with a plurality of side grooves that were arranged in the longitudinal direction.

Claim 1 defined that *each* of the press jaws comprised *more than one* penetrating segments creating side grooves, which plurality was arranged along the longitudinal direction. The skilled person reading the claim would understand this, not least since all the embodiments of the patent disclosed a press jaw with more than one side groove (see Figures 20A to 28C of the patent as well as paragraph [0028], which describe always more than one PSSG per press jaw). The description and the drawings should be used in the interpretation of the claims as foreseen in Article 69 EPC.

In contrast, D1 disclosed a tampon only with longitudinal grooves PSLG. None of these grooves could be considered as a side groove since all the grooves had the same shape and they did not have the same function as the side grooves of the patent described on paragraph [0029] of the patent specification. This function was different from the one of the longitudinal

grooves defined in paragraphs [0028], [0037] and [0075] which were longitudinal ribs that helped to remove the tampon axially from the press without significant damage. The skilled person reading the claim also understood that a side groove could not have the same shape as a longitudinal groove since they had different names.

Should some of the grooves in D1 be considered side grooves as defined in claim 1, they were still not arranged in the longitudinal direction as defined in claim 1.

Auxiliary requests - admittance

Auxiliary requests 1 and 2 should be admitted into the proceedings.

These auxiliary requests were submitted in reply to the Board's communication and its preliminary opinion as regards the ground for opposition under Article 100(a) in combination with Article 54 EPC, which contained a new interpretation of claim 1. The amendments did not introduce new subject-matter and did not take the appellant nor the Board by surprise.

Reasons for the Decision

1. Main request - novelty
- 1.1 It is not disputed that D1 discloses all the features of claim 1 with the exception of the feature

- [there is provided on a single or separate adjacent press jaws] penetrating segments, PSSG, (11) configured to penetrate the absorbing material with a plurality of side grooves that are arranged in the longitudinal direction.

1.2 According to the respondent claim 1 defined that each of the press jaws comprised more than one penetrating segments creating side grooves, which plurality was arranged *along* the longitudinal direction. The skilled person reading the claim would understand this, not least since all the embodiments of the patent disclosed a press jaw with more than one side groove (see Figures 20A to 28C of the patent as well as paragraph [0028], which describe always more than one PSSG per press jaw). According to the respondent, the description and the drawings should be used in the interpretation of the claims as foreseen in Article 69 EPC.

The Board does not agree. A claim should be interpreted in a technically sensible manner and be given the broadest, technically reasonable interpretation and should be construed by a mind willing to understand, not a mind desirous of misunderstanding. Thus, the skilled person should only rule out interpretations which are illogical or which do not make technical sense (see also Case Law of the Boards of Appeal 9th edition, II.A.6, Interpretation of claims).

The wording of the claim defines penetrating segments PSSG provided on separate adjacent press jaws. It does not define how many penetrating segments there should be in each of the press jaws such that it is not specifically defined in claim 1 that each press jaw must have more than one penetrating segment PSSG, as argued by the respondent. The lack of an embodiment in

the description covering this possibility is no reason to depart from the clear linguistic structure of the claim.

Furthermore, Article 69 EPC is concerned with the extent of protection conferred by a European patent, with which the Board is not concerned when analysing novelty of the claimed subject-matter. In relation to Article 54 EPC it is evidently not the aim of Article 69 EPC to provide, in the event of a discrepancy between the claim wording and the description and/or the figures, a legal basis for a re-interpretation of the clear technical meaning of a claim. In case of such a discrepancy between the claims and the description and/or the figures, the claim wording must be interpreted as it would be understood by a person skilled in the art, i.e. the description and/or figures cannot be used to interpret the claim wording in a different way. Thus, the Board does not accept the respondent's argument that Article 69 EPC should be used to interpret the features of the claim.

- 1.3 The respondent also argued that D1 disclosed a tampon only with longitudinal grooves and without side grooves. None of these grooves could be considered as a side groove since all the grooves had the same shape and they did not have the same function as the side grooves of the patent described on paragraph [0029] of the patent specification, i.e. to convey the body fluid directly to the fibre core. This function was different from the one of the longitudinal grooves defined in paragraphs [0028], [0037] and [0075] of the patent specification which were longitudinal ribs that helped removing the tampon axially from the press without significant damage.

The Board finds that the expression "side grooves" in its broadest sense is not ambiguous and has a clear meaning, i.e. it simply implies grooves arranged on the side of something, such that it does not find appropriate to resort to the description to give it a more specific interpretation than the one given by the wording of the claim itself.

Even if the description were taken into account, paragraph [0029] also does not contradict this broad interpretation and states merely that the side grooves "are disposed at the lateral sides of the longitudinal grooves" (which specific disposition in relation to the longitudinal grooves is also not defined in the claim). In the same paragraph it is further explicitly stated that the side grooves "may have any shape, for example, a regular or irregular polygonal shape on the surface, or may take the form of lateral grooves" such that a side groove having the same shape along a longitudinal direction as the longitudinal grooves is not excluded, neither by the wording of the claim nor by what is stated in paragraph [0029].

The same applies to the function of the grooves. Whilst paragraphs [0028], [0029], [0037] and [0075] describe the respective functions and advantages of both the longitudinal and side grooves, the wording of the claim does not define any of these such that the functions and advantages do not further specify the claimed grooves.

- 1.4 The respondent further argued that the side grooves of D1 were not arranged in the longitudinal direction as defined in claim 1. The claim defined that a plurality (i.e. a group) of side grooves was arranged along a horizontal direction (i.e. in a single line).

As already explained above (see item 1.2), the Board does not find that the claim defines that several side grooves must be arranged on a single pressing segment. Further, the relative pronoun in the expression "that are" in the wording of this feature of the claim refers to the side grooves (and not to the plurality as argued by the respondent). The use of the third person plural of the verb "to be" makes this evident to the skilled person reading the claim, since "a plurality" is singular. Thus, it is the side grooves that are arranged in (and not "along" as argued by the respondent) the longitudinal direction. The expression "side grooves being arranged in the longitudinal direction" of claim 1 is understood by the skilled person such that each of the side grooves is oriented in the longitudinal direction (or at least this interpretation cannot be excluded) and does not necessarily imply any specific arrangement between the side grooves themselves.

- 1.4.1 The Board hence cannot see a structural difference between the "longitudinal grooves" and the "side grooves arranged in the longitudinal direction" as defined in claim 1, besides their being denominated by different terminology. Contrary to the argument of the respondent (that the skilled person reading the claim also understood that a side groove could not have the same shape as a longitudinal groove since they had different names), since the nomenclature "side" and "longitudinal" does not confer mutually exclusive features of the grooves, there is no reason for the skilled person to assume that a side groove cannot extend in the longitudinal direction simply because it is not defined as "longitudinal" in the claim. The Board notes that the so-called longitudinal grooves in the embodiments of Figures 20 to 28 of the patent are

also understood by the skilled person to be arranged next to each other and thus are also side grooves.

- 1.5 D1 thus discloses side grooves as defined by the wording of claim 1 such that the subject-matter of claim 1 is not novel over D1. The main request is not allowable.

2. Auxiliary requests - admittance
 - 2.1 The amended claims of the first and second auxiliary requests were filed with a letter dated 21 January 2021, i.e. after notification of the summons to oral proceedings.

 - 2.2 According to Article 13(2) RPBA 2020, "[a]ny amendment to a party's appeal case made ... after notification of a summons to oral proceedings shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned".

 - 2.3 The respondent argued that these requests were a reply to a new interpretation of claim 1 present in the Board's communication regarding the objections under Article 100(a) EPC and that the amendments made did not introduce new subject-matter and did not take the appellant nor the Board by surprise.

The Board does not find these arguments persuasive and cannot recognise exceptional circumstances leading to the amendment, which have been justified with cogent reasons by the respondent.

The amendments to claim 1 of auxiliary requests 1 and 2 represent *inter alia* an attempt to address the novelty

objections raised by the appellant during the opposition proceedings (see paragraphs 4 and 5 bridging page 1 and 2 of the notice of opposition) and filed with the grounds of appeal (see paragraph bridging pages 1 and 2 of the grounds of appeal). The respondent had therefore ample time to file auxiliary requests at earlier stages of the proceedings. Furthermore, it is to be noted that the interpretation of claim 1 as contained in the Board's communication was in line with the appellant's aforementioned submissions. Thus, neither were new objections raised nor was a new interpretation given by the Board which might have justified the filing of amended requests. The mere fact that the Board departed from the position taken by the Opposition Division does not constitute "exceptional circumstances" within the meaning of Article 13(2) RPBA 2020, nor does it justify the filing of new requests as a response.

That these amendments do not take the party and the Board by surprise cannot be seen as exceptional circumstances either. The surprise (or lack thereof) relates to the capacity of the other parties to deal with the amendments reasonably at this point of the proceedings, a point to be taken into account when considering procedural economy, one of the criteria under Article 13(1) RPBA 2020, which however does not form a cogent reason under Article 13(2) RPBA 2020.

- 2.4 For the above reasons, the Board, exercised its discretion under Article 13(2) RPBA 2020 not to admit the first and second auxiliary requests into the proceedings.
- 2.5 In the absence of any request which meets the requirements of the EPC, the patent has to be revoked.

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

W. Ungler

Decision electronically authenticated