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**Datasheet for the decision  
of 27 September 2022**

**Case Number:** T 2300/18 - 3.2.06

**Application Number:** 12795169.7

**Publication Number:** 2775978

**IPC:** A61F13/472, A61F13/534,  
A61F13/535

**Language of the proceedings:** EN

**Title of invention:**  
ABSORBENT ARTICLE WITH DUAL CORE

**Patent Proprietor:**  
The Procter & Gamble Company

**Opponent:**  
Kimberly-Clark Worldwide, Inc.

**Headword:**

**Relevant legal provisions:**  
RPBA 2020 Art. 12(1)(a), 11  
EPC Art. 111(1)

**Keyword:**  
Remittal - (yes)

**Decisions cited:**

T 0261/19, T 1742/12, T 0967/97

**Catchword:**



**Beschwerdekammern**  
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Case Number: T 2300/18 - 3.2.06

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.06**  
**of 27 September 2022**

**Appellant:** Kimberly-Clark Worldwide, Inc.  
(Opponent) 2300 Winchester Road  
Neenah WI 54956 (US)

**Representative:** Dehns  
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**Respondent:** The Procter & Gamble Company  
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**Representative:** Elkington and Fife LLP  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 19 July 2018  
rejecting the opposition filed against European  
patent No. 2775978 pursuant to Article 101(2)  
EPC.**

**Composition of the Board:**

**Chairman** M. Harrison  
**Members:** M. Dorfstätter  
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. 2 775 978.
- II. The following documents are of relevance for this decision:
- |    |                      |
|----|----------------------|
| D1 | US 6 171 291 B1      |
| D7 | US 2004 / 0193129 A1 |
| D8 | US 7 335 810 B2      |
| D9 | US 7 037 298 B2      |
- III. The appellant requested that the decision under appeal be set aside and the European patent No. 2 775 978 be revoked.
- IV. The respondent (patent proprietor) requested that the appeal be dismissed and the patent be maintained as granted (main request) or on the basis of one of auxiliary requests 1 to 9 filed with the reply to the grounds of appeal. It further requested that the decision of the opposition division to admit D8 and D9 be set aside, and that D8 and D9 be held inadmissible.
- V. The Board summoned the parties to oral proceedings and issued a communication setting out its preliminary opinion on several issues of the case.
- VI. Oral proceedings took place by videoconference, during which the respondent withdrew its main request and auxiliary requests 1 to 5.

VII. Both parties requested that the case be remitted to the opposition division for further prosecution, such that the opposition division could examine the remaining auxiliary requests 6 to 9.

VIII. Claim 1 of auxiliary request 6 reads as follows:

"An absorbent article selected from pantliners, catamenial pads, sanitary napkins, menstrual pads, said absorbent article comprising:

- (a) a topsheet having a body contacting surface and a lower surface opposite the body contacting surface,
- (b) a backsheet joined to the topsheet; and
- (c) an absorbent core disposed between the topsheet and the backsheet, wherein the absorbent core comprises an upper layer comprising an upper surface and a lower surface opposite the upper surface and a lower layer comprising an upper surface and a lower surface opposite the upper surface, the upper layer comprising an open celled foam and the lower layer comprising fibrous network;
- (d) wherein the absorbent core upper layer comprises a perimeter;
- (e) wherein the absorbent article has a transverse centerline;
- (f) wherein the absorbent core upper layer perimeter is divided by the absorbent article transverse centerline into a first section and a second section; and
- (g) wherein the first section of the absorbent article upper layer is at least about 5% larger in total surface area than the second section of the absorbent article upper layer and

- (h) wherein the upper layer of the absorbent core covers less than 95%, preferably less than 60% of the upper surface of the lower layer of the absorbent core,
- (i) wherein the upper layer perimeter comprises discontinuous portions."

IX. The appellant's arguments relevant to the decision may be summarised as follows:

The subject-matter of claim 1 of auxiliary request 6 lacked inventive step, starting from any one of D1, D8 and D9, also in combination with D7.

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

D8 and D9 should be excluded from the appeal proceedings.

## **Reasons for the Decision**

### 1. *Admittance of D8 and D9*

D8 and D9 were filed late in the proceedings before the opposition division. Both documents were admitted into the proceedings by the opposition division (see the decision under appeal, "Facts and Submissions", point 11 and Reasons 2.3.4). Indeed, the opposition division has discretion to introduce documents and or grounds of opposition of its own motion, not just to admit those supplied by the parties, should these be found relevant to the decision to be taken on the opposition.

In such circumstances the contested documents are in the proceedings and, if at all, could only be excluded if the Board considers that the opposition division did not exercise its discretion either in accordance with the right principles or in a reasonable way. Neither of these conditions is found to have occurred in the present case, none of the respondent's arguments concerning admittance of D8 or D9 and their perceived lack of relevance due to not having altered the decision of the opposition division on either novelty or inventive step having been found relevant. Indeed, the above was also expressed in the preliminary opinion of the Board (see item 1) and was not further contested by the respondent during the oral proceedings.

Furthermore, as the opposition division based its findings regarding novelty and inventive step thereon (Reasons 2.3 and 2.4), both documents form part of the decision under appeal upon which the appeal proceedings are based pursuant to Article 12(1)(a) RPBA 2020. There is no legal basis to disregard any element that forms the basis of the appealed decision, nor did the respondent state that there was.

D8 and D9 are thus not excluded from the proceedings.

2. *(Withdrawn) main request and (withdrawn) auxiliary requests 1 to 5*

In the decision under appeal, the opposition division found that D1 was not only the closest prior art for the subject-matter of claim 1 but that it was also the only suitable starting point to be used in the context of the problem-solution-approach. The Board does not agree with this finding. As a general rule, the claimed invention must be non-obvious having regard to the

prior art, which can only be understood to mean any prior art (see e.g. T261/19, Reasons 2.5, citing T1742/12, points 6.3 and 6.6 of the reasons and T967/97, point 3.2 of the reasons). Considering the broad scope of claim 1, the Board sees no reason as to why D8 or D9 should not represent a suitable starting point for considering inventive step, whether it be the absolute "closest" prior art in some sense, or not. The term "closest prior art" is simply a label given to the prior art from which the inventive step analysis is started. Starting the inventive step analysis from prior art which is (possibly) further away from the claimed invention (e.g. by having less features in common), can merely be expected to make it more difficult to arrive at the claimed subject-matter without involving an inventive step. In order to be allowable, the claim must therefore define subject-matter involving an inventive step also when considering D8 or D9 as the closest prior art starting point.

During the oral proceedings before the Board, the Board furthermore concluded that the ground for opposition under Article 100(a) and 56 EPC did prejudice maintenance of the patent (according to the now withdrawn main request) when starting from D9 as the closest prior art (for further details, see the minutes of the oral proceedings before the Board), and notably without reference to any further prior art document. Since the main request was found not to be allowable, the contested decision to reject the opposition has to be set aside.

Whether inventive step would also have been lacking when starting from D1 or D8 as being the closest prior art was not decided. The Board's decision to remit the



case (see below) should not be understood such that only D9 might now be considered as the closest prior art when considering inventive step.

The Board also concluded that the (meanwhile equally withdrawn) auxiliary requests 2 to 5 did not fulfill the criteria set forth in Articles 56 or 123(2) EPC (see the minutes of the oral proceedings before the Board), while auxiliary request 1 was withdrawn without any discussion having taken place.

As the respondent withdrew the main request and auxiliary requests 2 to 5 after the Board communicated its findings, a reasoning therefor is not needed for the present decision, sufficient information being available in the minutes.

3. *Auxiliary requests 6 to 9 - Admittance*

At the start of the oral proceedings the Chairman stated that the Board could see no reason for excluding any of the auxiliary requests and made reference to its preliminary opinion (see item 4.1), whereby in particular "convergence" of the subject-matter in the auxiliary requests and the possible lack of procedural economy resulting therefrom were not factors to be considered when applying Article 12(4) RPBA 2007. The appellant made no further statement or objection in that regard and the Board therefore had no reason to alter its provisional opinion. Auxiliary requests 6 to 9 were thus not excluded from the appeal proceedings.

4. *Remittal- Auxiliary requests 6 to 9*

Under Article 111(1) EPC the Board of Appeal may either decide on the appeal or remit the case to the

department which was responsible for the decision appealed. Under Article 11 RPBA 2020 the Board may remit the case to the department whose decision was appealed if there are special reasons for doing so.

In the present case, the opposition division decided only on the question of inventive step by taking D1 as the closest prior art starting point when applying the problem-solution-approach. It did thus not elaborate on the consequences involved, had the further inventive-step attacks starting from D8 or D9 been examined. As the Board found that the now withdrawn main request and auxiliary requests 3 to 5 lacked inventive step at least when starting from D9 (see the minutes of the oral proceedings before the Board), the features added to claim 1 of the remaining auxiliary requests, notably the definition of discontinuous portions comprised in the upper layer perimeter, introduce entirely new aspects to the case.

The Board has however concluded on several aspects of the case. During the discussion about the main request (in particular feature (c) of claim 1), the Board concluded that a suitable choice of materials is already mentioned in D9. Also, features (g) and (h) merely related to suitable dimensions for implementing the disclosure in D9. The Board also already elaborated on the contribution to inventive step of the feature "wherein the transverse centre line (T2) of the absorbent core upper layer perimeter is greater than 0 cm and less than 5 cm from the absorbent article transverse centreline (T) along a longitudinal axis". It found that it merely related to an arbitrary quantification and that no technical effect was associated with the claimed range of 0 to 5cm. Without actually deciding the matter, it also gave its opinion

that the feature that "the absorbent core upper layer perimeter is asymmetric about its transverse centre line (T2)" was derivable from D9 wherever T2 is drawn in D9.

The added feature common to auxiliary requests 6 to 9 (i.e. the discontinuous portions) however raises questions to which the opposition division had no opportunity to give its opinion. The appellant had additionally cited further prior art (see e.g. its submission of 4 December 2019 in relation to the sixth auxiliary request) which it considered relevant in this regard.

In terms of possible objections under Article 84 EPC with regard to clarity or possible objections under Article 123 or 83 EPC, no objections had been made in this regard during the written stage of the appeal proceedings in as far as concerns auxiliary request 6 at least. And, since claim 1 of that request is a combination of granted claims, no clarity objections are *prima facie* apparent under Article 84 EPC either, noting further that Articles 100(b) and 100(c) EPC were not cited as a ground for opposition. Under these circumstances, the Board considers it an undue burden to decide on at least auxiliary request 6 without having first received a decision of the opposition division on that. Also, remittal will allow both parties to be given a chance to fully develop their arguments in regard to inventive step. Thus a special reason exists for remittal of the case. The Board therefore allows the parties' requests for remittal of the case to the opposition division.

The Board thus remits the case to the opposition division for further prosecution.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division for further prosecution.

The Registrar:

The Chairman:



D. Grundner

M. Harrison

Decision electronically authenticated