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**Datasheet for the decision
of 21 January 2020**

Case Number: T 2306/18 - 3 February 2006

Application Number: 13713055.5

Publication Number: 2830557

IPC: A61F13/15

Language of the proceedings: EN

Title of invention:

APPARATUSES AND METHODS FOR MAKING ABSORBENT ARTICLES

Patent Proprietor:

The Procter & Gamble Company

Opponents:

Kimberly-Clark Worldwide, Inc.
Essity Hygiene and Health Aktiebolag

Headword:

Relevant legal provisions:

EPC Art. 84, 123(2)
RPBA Art. 13(1)
RPBA 2020 Art. 13(1), 25(1), 25(3)

Keyword:

Claims - clarity - main request (no)

Late-filed auxiliary request - request clearly allowable (no)

Decisions cited:

T 0634/16

Catchword:



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Case Number: T 2306/18 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 21 January 2020

Appellant: The Procter & Gamble Company
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Respondent: Kimberly-Clark Worldwide, Inc.
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Respondent: Essity Hygiene and Health Aktiebolag
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 16 July 2018
revoking European patent No. 2830557 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman	M. Harrison
Members:	P. Cipriano
	C. Brandt

Summary of Facts and Submissions

- I. The appellant (patent proprietor) filed an appeal against the decision of the opposition division revoking European Patent No. 2 830 557, in which the opposition division found that claim 1 of auxiliary request 1 was unclear and thus did not fulfill the requirements of Article 84 EPC. No other requirement of the Convention regarding auxiliary request 1 was decided upon by the opposition division.
- II. The appellant requested that the decision under appeal be set aside and that the case be remitted to the opposition division for further prosecution with respect to Articles 54 and 56 EPC on the basis of the main request filed with the statement of grounds of appeal (corresponding to the first auxiliary request before the opposition division).
- III. The respondents I and II (opponents 1 and 2) requested that the appeal be dismissed. Respondent I also requested that the case be remitted to the opposition division for further prosecution should the requirements of Articles 54 and 56 EPC need to be examined. Respondent II requested that the case not be remitted to the opposition division for further prosecution.
- IV. The Board issued a summons to oral proceedings with a subsequent communication containing its provisional opinion, in which the Board stated *inter alia* that the subject-matter of claim 3 of the main request seemed to lack clarity.
- V. With its letter dated 10 January 2020 the appellant filed an auxiliary request.

VI. Oral proceedings were held before the Board on 21 January 2020, during which respondent II withdrew its request not to remit the case to the opposition division for further prosecution. The final requests were:

The appellant requested that the decision under appeal be set aside and that the case be remitted to the opposition division for further prosecution under Articles 54 and 56 EPC on the basis of the main request filed with the statement of grounds of appeal (corresponding to the first auxiliary request before the opposition division), or, alternatively, on the basis of the auxiliary request filed with letter dated 10 January 2020.

The respondents I and II (opponents 1 and 2) requested that the appeal be dismissed. Respondent I also requested that the case be remitted to the opposition division for further prosecution under Articles 54 and 56 EPC.

VII. Claims 1 and 3 of the main request and claims 1 and 2 of the auxiliary request are annexed at the end of the decision.

VIII. The appellant's arguments can be summarised as follows:

Claim 3 of the main request - Article 84 EPC

Claim 3 was clear. The list of steps in claim 3 did not define a sequence of method steps.

Even if the list of features defined a sequence, the wording "further comprising" should not be interpreted

as "subsequently" (defining a further step at the end of a defined sequence of steps). The skilled person reading the specific step of claim 3 interpreted it as being an additional feature to the method and slotted it inevitably between the features originally coming from granted claims 3 and 11.

Auxiliary request - admittance

The auxiliary request should be admitted into the proceedings. Its dependence from claim 10 was a non-intended typo and the skilled person would recognize that the true intention was for claim 12 to be dependent of claim 11.

- IX. The respondents' arguments can be summarised as follows:

Claim 3 of the main request - Article 84 EPC

Claim 3 was not clear.

The addition of the features of granted claim 11 to claim 1 gave rise to a problem of clarity in claim 3 which was now dependent on granted claim 11. Independent claim 1 now defined the step of advancing a first elastic laminate before its formation, which as such was a feature of dependent claim 3.

Auxiliary request - admittance

The request should not be admitted into the proceedings.

Reasons for the Decision

1. Claim 3 of the main request - Article 84 EPC
- 1.1 Claim 1 of the main request results from the combination of claims 1, 3 and 11 as granted. The features of claim 3 of the main request correspond *verbatim* to the way in which they are defined in claim 5 as granted; these define a method according to any of the preceding claims, further comprising the step of cutting the elastic laminate along the machine direction to form a first continuous elastic laminate and a second continuous elastic laminate, each of the first continuous elastic laminate and the second continuous elastic laminate including first regions and second regions.
- 1.2 The Board finds that the method defined by claim 3 of the main request has however been amended as a result of the change in its dependency (i.e. it is made dependent on claim 1 which however now includes granted claim 11) such that it does not correspond to the method of claim 5 as granted. Claim 3 with its current wording "further comprising" and "forming" a first elastic laminate was only clear with regard to claims 1 to 4 as granted (and indeed clarity is not even a ground of opposition, such that any examination is not required). However, as a result of the amendment to claim 1, it is no longer clear due to the step starting with "further comprising the step of cutting the elastic laminate...to form a first elastic laminate", since that step should not occur after already having the step of advancing the first elastic laminate, which

came from claim 11 as granted but which is now defined in claim 1.

The addition of the features from granted claim 11 ("further comprising the step of advancing...") at the end of claim 1 followed by the features of claim 3 ("further comprising the step of cutting...") thus results in an inversion of the order of the method steps, whereby "the" first elastic laminate is advanced before "a" first elastic laminate is even formed and renders the method of the claim unclear.

1.3 Contrary to the argument of the appellant, it is clear for the skilled person reading the claim that the claimed steps are in chronological order and define a sequence. For example, the adhesive is applied before the elastic strands are stretched for the formation of the laminate and the definition of its first and second regions, and only afterwards comes the step of the elastic strands being severed and retracting from these first to these second regions.

1.4 In addition, the appellant argued that "further comprising" should not be interpreted as "subsequently" (defining further step at the end of a defined sequence of steps) and that the skilled person reading the specific step defined claim 3 interpreted it as being an additional feature to the method and inevitably slotted it between the features coming from granted claims 3 and 11.

1.4.1 The Board does not concur. Dependent claim 3 has to be read in the same way as if it had been written in full. The skilled person reading the claim would thus append the specific features of claim 3 to the end of the text of claim 1 at the bottom of the list of steps comprised

in the method and not slot them in any other position. There is no reason to understand that the skilled person would inevitably place the features of claim 3 between the features of claim 1 which originated from granted claims 3 and 11.

1.5 Although the appellant had originally argued that the granted claims which were combined (i.e. 1, 5 and 11) could not be examined for lack of clarity under Article 84 EPC, in accordance with G3/14, this was however an argument made with reference to the opposition division's decision in respect of claim 1 of the main request. No such argument was raised in the appellant's response of 10 January 2020 to the present objection of lack of clarity to claim 3. Nevertheless the conditions of G3/14 apply equally. However, with respect to claim 3 of the main request, the lack of clarity objected to is one which results from the amendments made to the claims (in that claim 3 as granted was not dependent on granted claim 11, even though granted claim 11 was dependent on claim 3), in particular in this context where the claims are directed to a method of assembly.

1.6 Claim 3 therefore does not fulfill the requirement of clarity of Article 84 EPC, such that the main request is not allowable.

2. Auxiliary request - admittance

2.1 The auxiliary request was filed in reply to the preliminary opinion of the Board with letter dated 10 January 2020, i.e. after the time limit for filing the response to the appeal grounds of the appellant-opponent and therefore constitutes an amendment to the appellant's complete appeal case.

2.2 Article 13(1) RPBA 2020 (which also applies to this case - see e.g. T 634/16, Reasons 7 to 14) stipulates that any amendment to the case may be admitted only at the Board's discretion. This discretion shall be exercised in view of, *inter alia*, the current state of the proceedings, the suitability of the amendment to resolve the issues which were admissibly raised and whether the party has demonstrated that any such amendment, *prima facie*, overcomes the issues raised by another party in the appeal proceedings or by the Board and does not give rise to new objections.

2.3 The specific features of claim 2 of the auxiliary request correspond to the features of claim 12 as originally filed. However, claim 2 of the auxiliary request is dependent on claim 1 (which itself is now a combination of originally filed claims 1, 3, 5 and 11), whereas claim 12 as originally filed was dependent on claim 10 but not on claim 11.

Thus, the combination of features of claim 2 (originally filed claims 1, 3, 5, 11 and 12) does not correspond to a combination of claims as originally filed. The Board notes that the appellant has not provided any other basis for the combination of features of claim 2, such that this combination of features cannot, at least *prima facie*, be directly and unambiguously derived by the skilled person from the content of the application as originally filed.

2.4 The Board's conclusion is not altered by the appellant's argument that the dependence from claim 10 was a non-intended typo. The Board finds that a skilled person cannot unambiguously recognize that there is a typo in claim 12 being stated as dependent on claim 10

when using common general knowledge, since claim 10 defines applying pressure with the distal edge of the blade which can lead to bending (of the blade) and which thus makes technical sense. The appellant's argument as to the possible intentions the applicant may have had on the date of filing, are considered to be purely speculative when considering the application as filed and the Board therefore finds these wholly unpersuasive.

- 2.5 Since the amendments according to the first auxiliary request at least give rise *prima facie* to a new objection under Article 123(2) EPC, noting additionally that the appellant had also failed even to demonstrate that the amendments *prima facie* overcame the previous objections and did not give rise to a new objection, they were found not *prima facie* allowable in the sense set out above (point 2.4). The Board thus exercised its discretion according to Article 13(1) RPBA 2020 not to admit the first auxiliary request into the proceedings.
3. Although the appellant had asked whether it could not simply discuss a different request where the Board could simply regard dependent claim 2 as not being present, no such request was presented before the Board. The Board thus refrained from discussing such a hypothetical request, since it cannot give tactical advice or opinions to the parties, it can only make decisions on requests once filed.
4. Upon questioning from the Board, the appellant had no further comments or requests.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



M. H. A. Patin

M. Harrison

Decision electronically authenticated

Claims 1 and 3 of the main request

1. A method for assembling disposable diapers (100), each diaper comprising a chassis (102) having a first end region (116) and an opposing second end region (118) separated from each other by a central region (119), and having a longitudinal axis (124) and a lateral axis (126), the chassis (102) comprising: a topsheet (138), a backsheet (136), and an absorbent core (142) disposed between the topsheet (138) and the backsheet (136), the method comprising the steps of:

advancing a first continuous substrate layer (162) having a first surface and an opposing second surface in a machine direction, and defining a width in a cross direction;

advancing a second continuous substrate layer (164) having a first surface and an opposing second surface in a machine direction, and defining a width in a cross direction;

applying a first adhesive (504A) continuously along the machine direction to the first surface of the first continuous substrate layer (162);

advancing elastic strands (168) in the machine direction in a stretched state;

applying a second adhesive (504B) intermittently along the machine direction to at least one of the elastic strands (168), the first surface of the first continuous substrate layer (162), and the first surface of the second continuous substrate layer (164);

placing the elastic strands (168) in the stretched state between the first surface of the first substrate layer (162) and the first surface of the second substrate layer (164) to form an elastic laminate (402), the elastic laminate including first regions (403) that include the first adhesive (504A) and not the second adhesive (504B), and second regions (405) including both the first adhesive (504A) and the second adhesive (504B), the second regions intermittently spaced along the machine direction; and

severing elastic strands (168) in the first regions (403) of the elastic laminate (402), wherein the severed elastic strands retract from the first regions (403) toward the second regions (405), and wherein the step of severing the elastic strands further comprises cutting the elastic strands (168) in the first regions (403) without cutting either the first continuous substrate layer (162) or the second continuous substrate layer (164); and

further comprising the step of advancing the first elastic laminate (406) in the machine direction (MD) through a nip (603) defined between a cutting roll (600) and an anvil roll (602), the cutting roll (600) rotating around a first axis of rotation (604) and the anvil roll (602) rotating around a second axis of rotation (608), wherein the cutting roll (600) includes an outer

circumferential surface (606), and wherein the anvil roll (602) includes an outer circumferential surface (610) defining a minimum distance D between the outer circumferential surface (606) of the cutting roll (600) and the outer circumferential surface (610), wherein the cutting roll (600) includes a blade (612) having a distal edge (616) defining a maximum distance H between the distal edge (616) and the outer circumferential surface (606) of the cutting roll (600), and wherein the H is greater than D.

3. The method according to claim 1, further comprising the step of cutting the elastic laminate (402) along the machine direction to form a first continuous elastic laminate (406) and a second continuous elastic laminate (408), each of the first continuous elastic laminate and the second continuous elastic laminate including first regions (403) and second regions (405).

Claims 1 and 2 of the auxiliary request

1. A method for assembling disposable diapers (100), each diaper comprising a chassis (102) having a first end region (116) and an opposing second end region (118) separated from each other by a central region (119), and having a longitudinal axis (124) and a lateral axis (126), the chassis (102) comprising: a topsheet (138), a backsheet (136), and an absorbent core (142) disposed between the topsheet (138) and the backsheet (136), the method comprising the steps of:

advancing a first continuous substrate layer (162) having a first surface and an opposing second surface in a machine direction, and defining a width in a cross direction;

advancing a second continuous substrate layer (164) having a first surface and an opposing second surface in a machine direction, and defining a width in a cross direction;

applying a first adhesive (504A) continuously along the machine direction to the first surface of the first continuous substrate layer (162);

advancing elastic strands (168) in the machine direction in a stretched state;

applying a second adhesive (504B) intermittently along the machine direction to at least one of the elastic strands (168), the first surface of the first continuous substrate layer (162), and the first surface of the second continuous substrate layer (164);

placing the elastic strands (168) in the stretched state between the first surface of the first substrate layer (162) and the first surface of the second substrate layer (164) to form an elastic laminate (402), the elastic laminate including first regions (403) that include the first adhesive (504A) and not the second adhesive (504B), and second regions (405) including both the first adhesive (504A) and the second adhesive (504B), the second regions intermittently spaced along the machine direction; and

severing elastic strands (168) in the first regions (403) of the elastic laminate (402), wherein the severed elastic strands retract from the first regions (403) toward the second regions (405), and wherein the step of severing the elastic strands further comprises cutting the elastic strands (168) in the first regions (403) without cutting either the first continuous substrate layer (162) or the second continuous substrate layer (164); and

further comprising the step of cutting the elastic laminate (402) along the machine direction to form a first continuous elastic laminate (406) and a second continuous elastic laminate (408), each of the first continuous elastic laminate and the second continuous elastic laminate including first regions (403) and second regions (405); and

further comprising the step of advancing the first elastic laminate (406) in the machine direction (MD) through a nip (603) defined between a cutting roll (600) and an anvil roll (602), the cutting roll (600) rotating around a first axis of rotation (604) and the anvil roll (602) rotating around a second axis of rotation (608), wherein the cutting roll (600) includes an outer circumferential surface (606), and wherein the anvil roll (602) includes an outer circumferential surface (610) defining a minimum distance D between the outer circumferential surface (606) of the cutting roll (600) and the outer circumferential surface (610), wherein the cutting roll (600) includes a blade (612) having a distal edge (616) defining a maximum distance H between the distal edge (616) and the outer circumferential surface (606) of the cutting roll (600), and wherein the H is greater than D.

2. The method of claim 1, further comprising the step of: bending the blade (612).