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**Datasheet for the decision
of 17 January 2023**

Case Number: T 0056/19 - 3.2.06

Application Number: 09852111.5

Publication Number: 2509553

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A61L15/18, B01J20/04, B01J20/28

Language of the proceedings: EN

Title of invention:
ABSORBENT ARTICLES AS CARBON SINKS

Patent Proprietor:
Essity Hygiene and Health Aktiebolag

Opponent:
Aechter, Bernd

Headword:

Relevant legal provisions:
EPC Art. 100(c), 123(2)

Keyword:
Grounds for opposition - extension of subject-matter (yes)
Amendments - added subject-matter (yes)

Decisions cited:

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 0056/19 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 17 January 2023

Appellant:

(Opponent)

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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted on 18 October 2018
rejecting the opposition filed against European
patent No. 2509553 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman

M. Hannam

Members:

M. Dorfstätter

J. Hoppe

Summary of Facts and Submissions

- I. An appeal was filed by the appellant (opponent) against the decision of the opposition division to reject the opposition against European patent No. 2 509 553.
- II. With its grounds of appeal the appellant requested that the decision under appeal be set aside and that the European patent be revoked.
- III. With its reply the respondent (patent proprietor) requested that the appeal be dismissed (main request) or, as an auxiliary measure, that the patent be maintained in amended form based on one of auxiliary requests 1 to 6 filed with the reply to the appeal of 12 June 2019.
- IV. The Board issued a summons to oral proceedings and a subsequent communication in which it indicated *inter alia* that the ground for opposition under Article 100(c) EPC seemingly prejudiced maintenance of the patent and that none of the auxiliary requests seemed to fulfill the requirement of Article 123(2) EPC.
- V. With letter dated 12 December 2022 the respondent submitted amended auxiliary requests 4 to 6 to replace auxiliary requests 4 to 6 on file.
- VI. The appellant indicated that it would not attend the oral proceedings and requested that a decision be taken according to the state of the file.
- VII. Oral proceedings took place in the absence of the appellant.

VIII. The final request of the appellant was thus as in writing, i.e. that the decision under appeal be set aside and the European patent be revoked.

The final requests of the respondent were that the appeal be dismissed (main request), or as an auxiliary measure that the patent be maintained in amended form based on one of auxiliary requests 1 to 3, filed with the reply to the appeal of 12 June 2019, or based on auxiliary requests 4 to 6, filed with letter dated 12 December 2022.

IX. Claim 1 of the main request (patent as granted) reads as follows:

"A disposable absorbent article (10) such as a diaper, a sanitary napkin, a panty liner or a male or female incontinence article,
said article (10) comprising a plastic film and/or synthetic fibres,
said plastic film and/or said synthetic fibres comprising inorganic material,
characterized in that
said inorganic material comprises carbon being derived from atmospheric carbon dioxide (CO₂)
and having a ¹⁴C/¹²C ratio of 1×10^{-13} or greater,
preferably 3×10^{-13} or greater, more preferably 5×10^{-13} or greater
and wherein said inorganic material is a carbonate salt of an alkali metal (Group 1) selected among lithium (Li), sodium (Na) and potassium (K) or a carbonate salt of an alkaline earth metal (Group 2) selected among magnesium (Mg) and calcium (Ca), and mixtures thereof."

X. Claim 1 of auxiliary request 1 reads as for the main request but with the feature

"said plastic film and/or said synthetic fibres comprising inorganic material"

being substituted by

"said plastic film and/or said synthetic fibres ~~comprising~~ having inorganic material located therein" (amendments emphasised by the Board, wherein deletions are struck through and additions are underlined).

XI. Claim 1 of auxiliary request 2 reads as for the main request but with the references to synthetic fibres being deleted, and with the features

"said article (10) comprising a plastic film and/or synthetic fibres,
said plastic film and/or said synthetic fibres comprising inorganic material"

being substituted by

"said article (10) comprising a plastic film ~~and/or synthetic fibres,~~
said plastic film ~~and/or said synthetic fibres~~ comprising inorganic material".

XII. Claim 1 of auxiliary request 3 reads as for auxiliary request 2 but with the following feature appended:

"and wherein said inorganic material is present in said plastic film an amount [sic] of from 50 to 70 weight %."

XIII. Claim 1 of auxiliary request 4 reads as for auxiliary request 3 but with the appended feature in auxiliary request 3 being amended to:

"and wherein said inorganic material is present in said plastic film in an amount of 50 weight %."

XIV. Claim 1 of auxiliary request 5 reads as for auxiliary request 4 but with the inorganic material and the list from which it is to be selected being substituted by calcium carbonate.

XV. Claim 1 of auxiliary request 6 reads as for auxiliary request 5 but with the plastic film being substituted by a polyethylene film.

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

Claim 1 of the main request contained subject-matter which extended beyond the content of the application as filed. Due to the and/or combinations, claim 1 covered the possibility that both the plastic film and the synthetic fibres included inorganic material, something which was not derivable from the application as filed. This applied also to claim 1 of auxiliary request 1.

Furthermore, claim 1 of the main request defined that the film or the fibres comprised the inorganic material, whereas in the application as filed there was only a basis for the inorganic material being located within the film or the fibres. This amendment amounted to an inadmissible generalisation. This also applied to claim 1 of auxiliary requests 2 to 6.

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

Claim 1 did not contain subject-matter extending beyond the content of the application as filed. The possibility that both the plastic film and the synthetic fibres included inorganic material was derivable not only from page 7, lines 25-28 of the

application as filed, but was implicit throughout the description.

The change from the wording that the inorganic material was located within the film or the fibres to the definition that the film or the fibres comprised inorganic material did not constitute an inadmissible intermediate generalisation. The terms "comprising" and "located within" were used synonymously in the application. Used in connection with the synthetic fibres, the term "comprising" implied that the synthetic fibres had inorganic material located within the synthetic fibres.

Furthermore, claim 1 of auxiliary requests 3 to 6 included a definition that said inorganic material was present in said plastic (or polyethylene) film in a certain amount. The wording "present in said plastic film" implied that the inorganic material was located within the film.

Reasons for the Decision

1. *Main request - patent as granted - Article 100(c) EPC*

Claim 1 contains subject-matter which extends beyond the content of the application as filed (Article 100(c) EPC). There is no disclosure in the application as filed of a disposable absorbent article that comprises a plastic film and synthetic fibres, in which both the plastic film and the synthetic fibres comprise an inorganic material, for two reasons: Firstly, in the application as filed, the inorganic material is described as being part of either a plastic film or, alternatively but not additionally, synthetic fibres. Secondly, in all related statements in the description

as filed, the inorganic material is described as being "located within" the synthetic fibres or the plastic film, rather than these "comprising" inorganic material.

1.1 *Plastic film and/or synthetic fibres*

- 1.1.1 The inclusion of inorganic material in the film and the fibres are claimed as alternatives in claims 5 and 6 as filed. These claims are not dependent on one another such that the claims cannot serve as a basis for the claimed combination. The subject-matter of claims 5 and 6 as filed is also presented separately in the description. The description thus supports claims 5 and 6, but likewise merely as mutually exclusive alternatives.

The respondent argued that on page 2, lines 26-28, of the application as filed, it was described that the inorganic material might be in the film or it might be in the fibres. It further argued that these options were mentioned in the same paragraph, which made it clear that they were not true (in the sense of mutually exclusive) alternatives. A skilled person would thus understand that either or both can be provided.

This is not accepted. The passage in the description referred to by the respondent gives the necessary support for claims 5 and 6 as filed. This passage thus fulfils one of the requirements of Article 84 EPC. The fact that the two alternatives are mentioned in a single paragraph is however of no consequence as regards these alternatives being disclosed in combination. Grouping together the support in the description for two alternatives in a single paragraph can therefore not, at least in the present case,

provide for a clear and unambiguous disclosure for their combination.

- 1.1.2 The respondent argued that the paragraphs bridging pages 7 to 9 constituted separate disclosures for inorganic material in a plastic film (page 7, line 30 to page 8, line 13), inorganic material in synthetic fibres (page 8, lines 15-30), and inorganic material in a nonwoven layer (page 8, line 32 to page 9, line 5). The respondent further referred to page 7, lines 25-28, of the application as filed with the argument that the inorganic material "may be located in the topsheet 11, the absorbent body 12 or the backsheet 13, or more than one of these components" such that the inorganic material was clearly not disclosed to be present in only one of the synthetic fibres or plastic film or even only as alternatives in different products.

This argument is not persuasive. The cited passage on page 7, lines 25-28 does not refer to the materials used to produce the different layers of an absorbent article (i.e. a plastic film or synthetic fibres) but rather refers to the components of the article itself (i.e. the backsheet, the absorbent body and the topsheet). It is self-evident that a disposable absorbent article such as a diaper usually comprises several layers, such as a backsheet including a plastic film and an absorbent layer comprising synthetic fibres. This however does not constitute a disclosure for inorganic material both in the film of the backsheet and the fibres of the absorbent layer. Hence, even if it were considered that the combination of a topsheet and a backsheet were disclosed in the cited passage, these would not necessarily contain both synthetic fibres and a plastic film, let alone both of which comprising an inorganic material.

Furthermore, whilst it can be accepted that there is no indication that fibres and a film comprising the inorganic material may only be present as (mutually exclusive) alternatives in different products (as argued by the respondent), the lack of such indication is no unambiguous disclosure of their combination.

- 1.1.3 The respondent's further argument that the combination of arranging inorganic material both in a plastic film and in synthetic fibres was not only to be found on page 7, lines 25-28 but was implicit throughout the description, is also not accepted. The respondent cited several passages of the description, none of which could however support the respondent's allegation.

In particular, the passage on page 2, lines 26-28, describes two different options in one and the same paragraph. As explained above, while this does not exclude their combination, it does not positively disclose their combination either.

The disclosure on page 4, lines 11-16, that an absorbent article usually comprises a topsheet, a backsheet and an absorbent body, even when taken together with the further information on page 6, lines 5-8, that the inorganic material may have different functions in the absorbent article, does also not imply that inorganic material is provided in a film and in fibres in the same article. Indeed, it is technically reasonable for the disclosure in the above reference to page 6 to relate to separate articles of different purpose, not unambiguously to both synthetic fibres and plastic film comprising inorganic material.

The respondent further referred to page 7, line 25 to page 9, line 16, in which passage suitable locations for the inorganic material were described. It argued that when reading it in full it became immediately apparent that the inorganic material could be incorporated in more than one of the topsheet, the absorbent body or the backsheet, both in form of a film and in the form of fibres. It was thus amply clear that the absorbent article could comprise both plastic films comprising inorganic material and synthetic fibres comprising inorganic material.

This line of argument is not convincing either. It heavily relies on considerations in the mind of the skilled person, which are not part of the disclosure, and the respondent's derived corollary thereof is thus not directly and unambiguously derivable from the content of the application as filed.

1.2 *Comprising versus located within*

The respondent's argument that "comprising" and "located within" were used interchangeably in the application as filed is not accepted.

- 1.2.1 On page 8, line 15, a first alternative is described as to where the inorganic material may be located. In this alternative it is "located within synthetic fibres". Later in the same paragraph on page 8, line 26, it is stated that "[t]he synthetic fibres comprising the inorganic material of the invention may be formed into a nonwoven layer ...". The Board considers this as being a mere reference back to the inorganic material that has been introduced in line 15 i.e. that where the inorganic material is located within the synthetic fibres. Despite generically referring to "the synthetic

fibres", this is seen to be a specific reference back to the inorganic material first disclosed in line 15 and being located within synthetic fibres.

1.2.2 The formulation "synthetic fibres comprising the inorganic material of the invention" on page 8, line 26 is not a stand-alone disclosure either. The definite article "the" used twice makes it clear that the formulation refers to both the synthetic fibres and the inorganic material as introduced in line 15 of the same paragraph.

1.2.3 The respondent further argued that the inorganic material applied between fibres as described on page 9, line 4 constituted an alternative embodiment in which the inorganic material was "trapped between individual fibres" and that this arrangement was clearly distinguished over fibres that comprise the inorganic material as claimed.

This argument is not persuasive. The passage referred to constitutes yet another possible alternative. The term "comprising" being very broad, it covers all manner of arrangements, such as the inorganic material being located within, trapped between, covered, coated or sprayed onto fibres, this also including being trapped between individual fibres.

1.2.4 The respondent further argued that the reference at page 8, line 22, to "the inorganic material in such fibres" signified that the material was located within the fibres.

This cannot alter the Board's finding however. The Board construes the statement "in the fibres" as a reference to the synthetic fibres comprising inorganic

material known in the art, as introduced in lines 20-22 of the same paragraph. Again, as already explained for the reference in line 25, the wording is used as a reference to the specific definition previously made, and not as an interchangeable synonym. There is thus no reason to construe "comprising" in claim 1 more narrowly than in its usual meaning.

1.2.5 The Board arrives at the same conclusion for the respondent's further argument that the statement in lines 23-25 that the inorganic material may be "present in the synthetic fibres of the invention in 2-40 weight %" which made it absolutely clear that synthetic fibres comprising inorganic material were fibres having the inorganic material located within the synthetic fibres. The Board agrees that for the example on page 8, lines 15-30, the inorganic material is located within the synthetic fibres, although it is at some junctures referred to as being comprised in the fibres or as being present in the fibres in a particular amount. The Board construes the latter definition as relating to the weight percentage only, without constituting a separate definition of its specific location or type of arrangement.

1.3 The respondent's arguments do therefore not provide sufficient reason to construe the clear but broad term "comprising" used in claim 1 more narrowly than according to its broadest technically meaningful understanding. With this broad interpretation of the term "comprising", there is no disclosure in the application as filed for an inorganic material being comprised in the synthetic fibres or the plastic film, other than being located within the fibres or the film.

- 1.4 Claim 1 of the main request therefore contains subject-matter which extends beyond the content of the application as filed. Article 100(c) EPC prejudices maintenance of the patent.

The main request is thus not allowable.

2. *Auxiliary request 1*

Due to the and/or combination in feature "said plastic film and/or said synthetic fibres having inorganic material located therein" claim 1 still includes the possibility of inorganic material being present in both the plastic film and the synthetic fibres (albeit restricted to it being located therein). As explained above with respect to the main request, the Board sees no direct and unambiguous disclosure of this combination in the application as filed. The requirement of Article 123(2) EPC is thus not fulfilled.

Auxiliary request 1 is therefore not allowable.

3. *Auxiliary request 2*

In auxiliary request 2 (and in all further auxiliary requests), the alternative that the inorganic material is comprised in the synthetic fibres has been deleted. Due to the wording "comprising" however, claim 1 still includes the possibility of inorganic material being comprised in the plastic film without necessarily being located within it. As explained above with respect to the main request, the Board sees no direct and unambiguous disclosure of the broad definition that the inorganic material is merely comprised in the plastic

film in the application as filed. The requirement of Article 123(2) EPC is thus not fulfilled.

Auxiliary request 2 is therefore not allowable.

4. *Auxiliary requests 3 to 6*

Claim 1 of these requests still refers to a plastic film comprising inorganic material. However, claim 1 of each of these requests includes an appended feature defining that said inorganic material is present in said plastic film in a particular amount.

- 4.1 The respondent argued that the wording "present in said plastic film" was a definition by itself that limited "comprising" to "located within".

This is not accepted.

The Board sees two different interpretations possible. On the one hand, the appended feature could be interpreted as done by the respondent, namely

- that the inorganic material is present in said plastic film and that the amount thereof is 50 (to 70) weight %.

On the other hand, it could be equally construed as meaning

- that the amount of inorganic material is located as defined before with an amount of 50 (to 70) weight %.

In the latter case "is present in said plastic film" would merely be a reference to the definition that it is "comprised" in the plastic film as given in the preamble. Whilst the respondent's interpretation is comprehensible, the broader interpretation of the first option above is not excluded by the wording of claim 1.

Nor is there any other reason to construe this feature any more narrowly than in its broadest technically reasonable sense.

- 4.2 In fact, no emphasis was given to this feature prior to the oral proceedings before the Board. Even after the Board had indicated in its communication that the respondent had failed to provide reasons why the amendments in the auxiliary requests overcame the objections raised by the appellant (see communication of the Board, item 5), the respondent merely stated the following:

"With regard to AR3, the further limitation to a plastic film comprising inorganic material being present in the plastic film in an amount of 50 to 70 weight % was made with the purpose of further distinguishing over the prior art."

This statement clearly referred to the discussion of novelty and inventive step. No indication was given that by this formulation the issue with Article 123(2) EPC could be solved, let alone that the inorganic material should be understood to be located within the plastic film. The later realisation that the added feature could be construed in a more limited way does not persuade the Board to accept that this was the only meaningful understanding. With a reasonable alternative interpretation not being ruled out (as explained above), and this alternative interpretation being that followed at least by the Board up until the beginning of the oral proceedings, claim 1 can be construed in a more general and still technically reasonable manner, i.e. with the inorganic material merely being comprised in the plastic film, but not necessarily being located within it.

4.3 Furthermore, it is noted that the claimed wording "in said plastic film" is different from the disclosed "within the plastic film" wording, making it at least uncertain whether a distinction is being made between the two prepositions "in" and "within".

4.4 For all these reasons, the Boards sees no reason to exclude the more general construction of the appended feature. Therefore, claim 1 of auxiliary requests 3 to 6 still includes the possibility of inorganic material being comprised in the plastic film but not necessarily being located within the film. The requirement of Article 123(2) EPC is thus not fulfilled in the subject-matter of claim 1 of each of auxiliary requests 3 to 6.

None of auxiliary requests 3 to 6 is therefore 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. Hannam

Decision electronically authenticated