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**Datasheet for the decision
of 23 March 2023**

Case Number: T 1872/19 - 3.2.06

Application Number: 03764387.1

Publication Number: 1531773

IPC: A61F13/475, A61F13/513,
A61F13/514, A61F13/84,
A61F13/472

Language of the proceedings: EN

Title of invention:

ABSORBENT ARTICLE HAVING A GRAPHIC VISIBLE THROUGH BODY
CONTACTING SURFACE

Patent Proprietor:

THE PROCTER & GAMBLE COMPANY

Opponent:

Johnson & Johnson Consumer Inc.

Headword:

Relevant legal provisions:

EPC Art. 54, 56, 111(1)

Keyword:

Novelty - main request (yes)

Inventive step - main request (yes)

Decisions cited:

Catchword:



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Case Number: T 1872/19 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 23 March 2023

Appellant: Johnson & Johnson Consumer Inc.
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 30 April 2019
rejecting the opposition filed against European
patent No. 1531773 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman M. Harrison
Members: P. Cipriano
R. Romandini

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. 1 531 773. It requested that the decision under appeal be set aside and the patent be revoked.
- II. In its letter of reply, the respondent (patent proprietor) requested that the appeal be dismissed (main request) or, as an auxiliary measure, that the patent be maintained according to one of auxiliary requests 1 to 8.
- III. The following documents are relevant to the present decision:
- D1 WO 91/19471
 - D2 US 4 022 211
 - D3 US 4 231 370
 - D4 US 2001/0044611 A1
 - D5 EP 1 138 293 A1
- IV. The Board issued a summons to oral proceedings and a subsequent communication containing its provisional opinion.
- V. Oral proceedings were held before the Board on 23 March 2023, during which the main request and auxiliary requests 1 to 3 were withdrawn.
- VI. Claim 1 of "auxiliary request 4" (now the main request) reads as follows:
"An absorbent article (20), which is a sanitary napkin or a pantiliner, comprising:

a body contacting layer (30);
a garment contacting layer (40); and
an absorbent core (50) disposed between the body contacting layer and the garment contacting layer, the absorbent core having a core edge (51);

the core edge defining a core region (25) within the core edge and an outer region (26) outside the core region;

the body contacting layer and the garment contacting layer extending outward into the outer region and joined together in the outer region;

the garment contacting layer having a graphic (65) printed on the body facing surface at least in a portion of the outer region;

the body contacting layer having a first light transmittance so that the graphic printed on the body facing surface of the garment contacting layer can be seen through the body contacting layer in the outer region, wherein the first light transmittance is at least about 10%,

wherein the garment contacting layer has a second light transmittance so that the graphic on the body facing surface can be seen through the garment contacting layer, wherein the second light transmittance is at least about 10%."

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

Auxiliary request 4 - novelty

The sanitary napkin embodiment of D1 disclosed all the features of claim 1. D1 disclosed implicitly a first light transmittance of 10%, since page 6, lines 18-20, stated that the indicia must be "visually discernible" through the topsheet.

D1, page 15, lines 13-17, explicitly disclosed that the indicia 46 on the right side of Figure 4 could be printed onto the backsheet. This option was not presented as disadvantageous and was explicitly linked to the sanitary napkin of Figure 4.

D1 disclosed the feature "a second light transmittance of at least 10%", since it described, in the paragraph bridging pages 8 and 9, a backsheet made of the same material as the preferred embodiment of the patent. In the absence of any indication whatsoever in the patent or in D1 of any difference between the respective backsheets, they had to be considered as both having the same properties, such as having a light transmittance of at least 10%.

Auxiliary request 4 - Inventive step

D1

Assuming that the sanitary napkin of the right part of Figure 4 of D1 differed from the subject-matter of claim in that

- the first light transmittance was at least about 10%,
- the garment contacting layer had a graphic (65) printed on the body facing surface at least in a portion of the outer region,
- the garment contacting layer had a second light transmittance so that the graphic on the body facing

surface can be seen through the garment contacting layer, the second light transmittance is at least about 10%,

then these three features did not provide a synergistic effect and should be considered separately.

A light transmittance of at least 10% was an obvious suitable value to provide for the body contacting layer.

Regarding the "printed" feature, page 15, lines 27-30 disclosed printing the indicia on the sanitary napkin of Figure 4 of D1, such that the skilled person would adapt the embodiment of the right side of Figure 4 to this teaching without any difficulty.

Making the graphic visible through the garment contacting layer with a second light transmittance of 10% was an obvious way to provide additional visibility of the indicia, since in addition to being visible from the topsheet only the backsheets could be added. D2, D3, D4 and D5 already disclosed light transmitting backsheets in absorbent articles, such as sanitary napkins.

The subject-matter of claim 1 did not involve an inventive step.

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

Auxiliary request 4 - novelty

D1 did not disclose all the features of claim 1.

D1 did not disclose the feature of a body contacting layer "having a first light transmittance of at least 10%". The passage on page 8, lines 5-12 only disclosed that the apertures were optional.

D1 did not disclose the feature "the garment contacting layer having a graphic (65) printed on the body facing surface at least in a portion of the outer region". This was also only disclosed as a (less preferred) possibility on page 15, lines 14-17. The skilled person would therefore have to make several selections to arrive at the subject-matter of claim 1.

D1 did not disclose the feature "second light transmittance is at least about 10%". The material disclosed for the backsheet in the paragraph bridging pages 8 and 9 of D1 did not necessarily need to be transparent since it could comprise a colouring additive as was typically the case, such as a filler to provide a white appearance.

Auxiliary request 4 - inventive step

The features "the garment contacting layer had a graphic (65) printed on the body facing surface at least in a portion of the outer region" and "the garment contacting layer had a second light transmittance so that the graphic on the body facing surface could be seen through the garment contacting layer, wherein the second light transmittance was at least about 10%" provided a combined synergistic effect, since both facilitated the visibility of the graphics.

The feature "the garment contacting layer had a graphic (65) printed on the body facing surface at least in a

portion of the outer region" was not compatible with the starting point embodiment of the right side of Figure 4, since the indicia here could not be printed on the backsheet without becoming obscured by the core.

No arguments regarding the feature "a first light transmittance of at least 10%" were made.

The feature "the garment contacting layer had a second light transmittance so that the graphic on the body facing surface could be seen through the garment contacting layer, wherein the second light transmittance was at least about 10%" was not obvious. The obvious solution to providing visibility from the backsheet side was to print the graphics on the outer side of the backsheet.

Further, there would be no motivation to make the graphics visible through the backsheet of the sanitary napkin as in D1, since a sanitary napkin was placed on an undergarment when in use and was thus invisible. D2, D3, D4 and D5 were not relevant since they related to diapers.

The subject-matter of claim 1 involved an inventive step.

Reasons for the Decision

1. Fourth auxiliary request - novelty
 - 1.1 The appellant argued that D1 disclosed a sanitary napkin comprising all the features of claim 1.

1.2 It was only disputed that the embodiment of Figures 3 and (right side of) 4 of D1 disclosed:

1) that the body contacting layer (corresponding to the topsheet 22 in D1) had a first light transmittance of at least about 10%, and

2) that the graphic (corresponding to the indicia 46 in D1) of the garment contacting layer (corresponding to the backsheet 24 in D1) was printed on the body facing surface thereof at least in a portion of the outer region, and

3) that the garment contacting layer had a second light transmittance so that the graphic on the body facing surface thereof could be seen through the garment contacting layer, wherein the second light transmittance was at least about 10%.

1.3 As regards feature 2), the right side of Figure 4 discloses an indicia 46 arranged between the topsheet 22 and the backsheet 24 in the region of the flap 28 and between the topsheet 22 and the core 26 in the central portion.

1.3.1 The appellant argued that page 15, lines 13-17 disclosed that the indicia may be integral with the backsheet 24 and that this may be accomplished by printing the indicia 46 onto the inwardly facing surface of the backsheet. Therefore it was specifically disclosed that the indicia 46 on the right side of Figure 4 could be printed onto the backsheet.

The Board does not accept this argument and finds that the printing onto the backsheet as referred to on page 15 cannot refer to the arrangement of the indicia shown

on the right hand side of Figure 4, since the indicia 46 cannot be printed on the backsheet and at the same time be arranged between the core and the topsheet. The skilled person reading the description and interpreting the drawings understands that in the arrangement shown on the right hand side of Figure 4 the indicia 46 can only be integral by printing on the topsheet. Indeed, this is the only layer in contact with an entire side of the indicia 46.

The appellant also argued that the skilled person would recognise that indicia printed on the backsheet "would not be identical" to those shown in Figure 4, because they would no longer overlie the absorbent core. Furthermore the appellant argued that "the whole point of describing alternative embodiments in the description is that not all embodiments are individually illustrated" and straightforward structural modifications were required to print the indicia on the backsheet as explicitly suggested. This argument however relies on the need to make alterations to the embodiment shown, for which there is no basis. As will be explained in the next paragraph, such an argument also relies on combining separate statements in D1 to arrive at the required feature.

1.3.2 Even if printing on the specific surface to arrive at the embodiment shown in Figure 4 or at another embodiment were somehow technically feasible, page 15, lines 13-17 nevertheless states that the indicia "may" be integral with the backsheet, the topsheet or the absorbent core. Furthermore, according to the same passage, this result "may be accomplished" by printing the indicia "onto either of the topsheet 22, of the backsheet 24, or upon either major surface of the absorbent core 26". Therefore, in order to conclude

that the indicia are printed on the inwardly facing surface of the backsheet as being as disclosure to the person skilled in the art, it is necessary to make at least two selections - the selection that the indicia be integral with the backsheet (as opposed to being joined as disclosed in the paragraph immediately before) and the selection that they be made integral through printing which is also disclosed as something that the skilled person might possibly do. Being integral, and at the same time printed, as well as being at a position in the outer region (i.e. outside the absorbent core) is even a further selection if this feature of claim 1 were to be met, such a combination of features not being disclosed.

D1 therefore does not disclose a graphic printed on the body facing surface of the garment contacting layer at least in a portion of the outer region as defined in feature 2).

- 1.4 As regards feature 3), the appellant argued that D1 disclosed the feature "a second light transmittance of at least 10%". According to the appellant, D1 disclosed in the paragraph bridging pages 8 and 9 a backsheet made of the same material (a polyethylene film with the same or thinner thickness, approximately 0.01 mm to 0.05 mm) as the preferred embodiment of the patent. In the absence of any indication whatsoever in the patent or in D1 of any difference between the respective backsheets, both had to be considered as having the same properties, such as having a light transmittance of at least 10%.

This argument is, however, not persuasive. D1 discloses in the paragraph bridging pages 8 and 9 that "a low density polyethylene backsheet 24 about 0.01 to about

0.08 millimeters in thickness, preferably about 0.05 millimeters in thickness, has been found to work well". Nothing is stated with regard to the light transmittance of the backsheet.

However, it cannot be ruled out that the polyethylene films used in diapers contain some kind of filler to make them white to some degree. Indeed, this is common in the art. Since D1 is silent on the light transmittance of the backsheet material, it cannot be directly and unambiguously inferred from the absence of any information on a filler that one is not present. Therefore, it cannot be concluded that the light transmittance of the backsheet material in D1 is at least about 10%.

- 1.4.1 Even if a light transmittance of at least 10% were somehow implicit from a low density polyethylene backsheet as described in the paragraph bridging pages 8 and 9, according to the same paragraph the backsheet "may" be impervious to malodourous gases and, in that case, a polyethylene backsheet of about 0.01 to about 0.08 millimeters in thickness "has been found to work well". In the following paragraph it is also stated that polyester or polyolefinic fiber backsheets have also been found to work well, too.

It would then be necessary for the skilled person to perform a selection from a list of possible backsheet materials in order to arrive at the feature of a garment contacting layer having "a second light transmittance so that the graphic on the body facing surface could be seen through the garment contacting layer, wherein the second light transmittance was at least about 10%".

1.5 The appellant further argued that the passage on page 16, lines 22-27, according to which the loading of the sanitary napkin could also be controlled by a caretaker, implied that the backsheet material had to be such that the graphic on the body facing surface could be seen through the backsheet.

This argument is also not persuasive. Unlike a diaper, a sanitary napkin is made to be used with underwear that hides the sanitary napkin from plain sight. It is thus normally not possible for the caretaker to check the loading of a sanitary napkin from the backsheet side since this is obscured by the user's undergarment.

1.6 As regards feature 1), D1 discloses on page 6, lines 18 to 20 that the indicia should be "visually discernible through any topsheet 22". It is thus unambiguous that there must be light transmittance through the topsheet in order for the indicia to be seen.

1.6.1 The appellant argued that D1 implicitly disclosed a first light transmittance of 10%. According to the appellant, D1 disclosed on page 8, lines 5-8, that the topsheet had a plurality of apertures in the flaps. At least in the region of these apertures (i.e. without material) the topsheet had implicitly a light transmittance of 100%. Further, it argued that it was clear from the passage on page 6 of D1 that the indicia had to be clearly visually discernible through the topsheet which, in itself, was an implicit disclosure that the light transmittance of the topsheet was above 10% for the indicia to be clearly visible.

The Board is not persuaded by this argument. The passage referred to by the appellant on page 8 does disclose apertures in the flaps but only as an option

("may, but need not"). In addition, a specific light transmittance value for the topsheet cannot be unambiguously derived from D1. Although the passage on page 6 states that the indicia should be "visually discernible" through any topsheet, such a discernibility does not imply any specific value of light transmittance, but only that some unspecified amount of light must pass through.

- 1.6.2 Since no specific light transmittance value is disclosed for the material of the topsheet and a further selection is required in order to arrive at a topsheet with perforations in the flaps, the sanitary napkin embodiment of Figures 3 and 4 of D1 also does not disclose feature 1).
- 1.7 The sanitary napkin embodiment of the right side of Figure 4 upon which the appellant relies does therefore not disclose the features 1), 2) and 3) of claim 1 as stated in item 1.2 above. The subject-matter of claim 1 is thus novel over D1.
2. Fourth auxiliary request - inventive step
 - 2.1 As discussed above, the sanitary napkin embodiment of the right side of Figure 4, used as the starting point for considering inventive step, fails to disclose the features 1), 2) and 3) of claim 1.
 - 2.2 Regarding feature 1), the indicia 46 are already visible through the topsheet of D1 (see page 6, lines 18 to 20). A light transmittance of at least 10% therefore only provides a suitable level of visibility of the indicia through the topsheet.

- 2.2.1 As for feature 2), using printing for applying indicia provides a suitable method and location for applying the indicia on the backsheet.
- 2.2.2 Since feature 3) has the effect of making the indicia visible through the backsheet, there is no synergy between features 1), 2) and 3), so that these represent only an aggregation of features. Due to the presence of an aggregation of functionally independent features, a separate partial technical problem must be formulated for each of these features.
- 2.2.3 The objective partial problem of feature 2) is to provide a suitable method and location for applying the indicia on the backsheet and the objective partial problem of feature 3) is to make the indicia visible from other viewpoints.
- 2.2.4 A light transmittance as defined in feature 1) solves the objective partial problem of providing a suitable level of visibility of the indicia through the topsheet.
- 2.3 The skilled person seeking a solution to the partial problem of feature 1) is aware from common general knowledge that visibility depends on light transmittance which varies between 0% (completely opaque) and 100% (completely transparent). The Board thus finds that a value of at least about 10% is simply a suitable value to provide such visibility to the user or caretaker. Therefore, the skilled person would obviously choose a value of at least 10% when providing a suitable level of visibility for the indicia.
- 2.4 Regarding feature 2), and the partial problem to be solved, D1 already discloses on page 15, lines 14-16,

the possibility of printing indicia on the backsheet. The later passage on lines 17-23 would not prevent the skilled person from using printing since it only describes a nuance when using light or pastel coloured indicia.

- 2.5 The appellant argued that page 15, lines 27-30 explicitly disclosed printing the indicia on the sanitary napkin of Figure 4 of D1 such that the skilled person would adapt the embodiment on the right side of Figure 4 as this teaching applied to all the embodiments.

The Board is, however, not persuaded by this argument. As already dealt with above under point 1.3, in the embodiment on the right side of Figure 4 the indicia are at least partially disposed between the core and the topsheet. Since, in this area, the indicia do not contact the backsheet, they cannot be produced by printing on the backsheet. None of the passages on page 15, lines 14-16 or 27-30, disclose printing on the backsheet in combination with printing in the flap region and the skilled person has no incentive to change the witness indicating indicia 46 of Figure 4 of D1 to a location beneath the topsheet, since their function is to provide an indication to the wearer.

Hence, the skilled person would not arrive at this feature without the use of inventive skill.

- 2.6 Although the subject-matter of claim 1 would already involve an inventive step due to feature 2) above not being obvious when starting from the closest prior art, feature 3) is discussed below to show why that feature is not inventive, from which it can also be understood that feature 3) is indeed independent of considerations

for feature 2) and thus and why this does not affect the non-obviousness of feature 2).

2.7 Regarding feature 3), the skilled person would immediately recognise that the backsheet allowing light transmittance provides an obvious additional way of increasing the visibility of the indicia by making them visible from other viewpoints.

Even D1 itself discusses the use of a transparent backsheet for absorbent articles in relation to the prior art (see page 2, line 36, to page 3, line 6) and therefore already suggests to the skilled person merely applying their common general knowledge that this would be a solution. Although the passage bridging pages 2 and 3 of D1 refers to this light transmission as an "opacity limitation", the skilled person faced with the technical problem of increasing visibility would not be deterred by the light transmittance being considered a limitation to the opacity and would recognize that such a limitation corresponds to the counterbalancing of the visibility increase that they are seeking.

In addition, D2, column 6, lines 3-9, D3, column 3, lines 46-51, D4, paragraph [0031] and D5, paragraph [0024] also disclose a sanitary napkin having a translucent backsheet. The Board notes that D2, column 2, lines 22-24, column 6, lines 9-14, D4, paragraph [0044], and D5, paragraph [0001] explicitly disclose sanitary diapers as possible embodiments of the invention.

Providing the backsheet with a certain light transmittance would thus be the obvious solution for the skilled person trying to make the indicia visible from other viewpoints. The skilled person would not

place (further) indicia on the garment facing side of the backsheet in D1, since the indicia of D1 act as wetness indicators and need to be able to contact the liquid.

2.8 Therefore, starting from the embodiment of the sanitary napkin of the right side of Figure 4 of D1 and wishing to solve the partial objective technical problem posed by feature 2), the skilled person would not arrive at the claimed solution and be guided to the subject-matter of claim 1 without the exercise of an inventive step.

2.9 For completeness, it may be noted that the appellant further argued that a diaper was encompassed by the definition of sanitary napkin given in paragraph [0013] of the patent, i.e. it was to be "worn by females adjacent to the pudendal region which are intended to absorb and contain the various exudates which are discharged from the body (e.g., blood, menses, and urine)". The diaper embodiment disclosed on page 18 of D1 was therefore also the embodiment of a sanitary napkin.

The Board does not find this argument convincing either. Even if the (broad) definition of a sanitary napkin given in paragraph [0013] comprises only characteristics that would also apply to a diaper, the skilled person would not consider a diaper to be the same as a sanitary napkin. Furthermore, they would be able to associate further characteristics to a diaper (e.g shape and size) that distinguish it from a sanitary napkin. Finally, the Board notes that paragraph [0011] explicitly lists sanitary napkins and diapers as types of absorbent articles. Therefore, even

in the specific context of the patent, a diaper cannot be considered to be a sanitary napkin.

The appellant did not provide any further arguments as to why the diaper embodiment should be relevant for the assessment of inventive step of the claim to a sanitary napkin or pantiliner, to which claim 1 is limited.

- 2.10 In the absence of further attacks, the Board finds that the subject-matter of claim 1 of the fourth auxiliary request involves an inventive step (Article 56 EPC) and thereby meets the requirements of the EPC.
3. The Board avails itself of its power under Article 111(1) EPC to remit the case back to the opposition division for the description to be adapted to the amended claims.

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 with the order to maintain the patent in amended form in accordance with claims 1 to 9 of the 4th auxiliary request filed with the reply to the appeal and a description to be adapted thereto.

The Registrar:

The Chairman:



C. Spira

M. Harrison

Decision electronically authenticated