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**Datasheet for the decision
of 18 April 2023**

Case Number: T 2265/19 - 3.2.06

Application Number: 11792417.5

Publication Number: 2581067

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A61F13/53, B29C53/04,
A61F13/533

Language of the proceedings: EN

Title of invention:
PROCESS FOR PRODUCTION OF ABSORBER

Patent Proprietor:
Kao Corporation

Opponent:
Ontex BV

Headword:

Relevant legal provisions:
EPC Art. 56, 123(2)

Keyword:
Inventive step - main request and auxiliary request 4 - (no)
Added subject-matter - auxiliary requests 1 to 3 - (yes)

Decisions cited:

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 2265/19 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 18 April 2023

Appellant: Ontex BV
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 6 June 2019
rejecting the opposition filed against European
patent No. 2581067 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman M. Harrison
Members: M. Hannam
W. Ungler

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. 2 581 067. It requested that the decision under appeal be set aside and the patent be revoked.
- II. In its reply to the appeal, the respondent (patent proprietor) requested that the appeal be dismissed (main request), or that the patent be maintained in amended form on the basis of one of auxiliary requests 1 to 4.
- III. The following documents are relevant to the present decision:

D1 US-A-2010/0032858
- IV. The Board issued a summons to oral proceedings and a subsequent communication containing its provisional opinion, in which it indicated *inter alia* that the subject-matter of claim 1 of the main request seemed not to involve an inventive step whilst the subject-matter of the respective claim 1 of auxiliary requests 1 to 3 appeared not to meet the requirement of Article 123(2) EPC. With respect to auxiliary request 4 the Board indicated that the respondent appeared not to have substantiated why the claims were allowable.
- V. With letter of 4 October 2022, the respondent indicated that it would not attend the scheduled oral proceedings.

VI. Oral proceedings were held before the Board on 18 April 2023 in the presence of solely the appellant. At the close of the oral proceedings the requests of the parties were as indicated in points I. and II. above.

VII. Claim 1 of the main request reads as follows, with paragraph annotation as used in the decision of the opposition division:

"A method of producing an absorbent member, comprising:
1: a depositing step of depositing raw material of the absorbent member fed along with an air stream to a recess portion which is arranged at an outer circumferential face of a rotatable drum by suctioning;
and
2: a pressing step of pressing and compressing a deposited aggregate released from an inside of the recess portion,
3: wherein the recess portion includes a suction portion which is formed of a porous plate to perform suctioning from a bottom face and a non-suction portion having an air-impermeable bottom face not to perform suctioning from the bottom face,
4: while depth of the non-suction portion from the outer circumferential face of the rotatable drum is shallower than depth of the suction portion from the outer circumferential face of the rotatable drum;
5: the deposited aggregate is obtained in the depositing step by depositing the raw material into the recess portion; and
6: the absorbent member having a high density portion and a low density portion with mutually different density is obtained in the pressing step by pressing the deposited aggregate released from the recess portion;

7: wherein the low density portion is interposed between the high density portions whereby the high density portions are mutually separated in the absorbent member."

Claim 1 of auxiliary request 1 reads as for claim 1 of the main request with the following feature appended:

"when viewed in a planar view of the absorbent member".

Claim 1 of auxiliary request 2 reads as for claim 1 of the main request with the following features appended:

"wherein the deposited aggregate is transferred onto a core wrap sheet; and
wherein in the pressing step, pressing of the deposited aggregate is performed before folding of the core wrap sheet".

Claim 1 of auxiliary request 3 reads as for claim 1 of the main request with the following features appended:

"wherein a core wrap sheet is introduced onto a vacuum conveyor before the deposited aggregate is placed and the deposited aggregate is transferred onto a core wrap sheet; and
wherein in the pressing step, pressing of the deposited aggregate is performed before folding of the core wrap sheet".

Claim 6 of auxiliary request 4 reads as for claim 1 of the main request with the following features appended:

"wherein the recess portion adopts a structure in which the suction portion and the non-suction portion are formed respectively into an elongated shape in the

width direction of the rotatable drum, the non-suction portions are plurally formed, and the suction portion and the non-suction portion are formed alternately in the circumferential direction of the rotatable drum".

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

Main request

The subject-matter of claim 1 did not involve an inventive step. If feature 7 were found not to be known from D1, the objective problem to be solved could be seen as providing a method of producing an alternative absorbent member. The claimed arrangement of the low density portion being interposed between the high density portions and the high density portions being mutually separated in the absorbent member lacked a technical advantage over the arrangement in D1, such that the claimed arrangement was arbitrary and unable to support the presence of an inventive step.

Auxiliary requests 1 to 3

The subject-matter of claim 1 of each of these requests at least failed to meet the requirement of Article 123(2) EPC. The basis for the subject-matter of claim 1 of auxiliary request 1 was given as paragraphs [0012], [0049], [0052] and [0053], yet these related to specific embodiments of the absorbent member with particular arrangements of the high density portions that were not included in claim 1. The basis for the subject-matter of claim 1 of auxiliary requests 2 and 3 was given as paragraphs [0040], [0041] and [0043], which described a particular method of folding the wrap sheet not included in the respective claim 1. Each of these auxiliary requests thus contravened Article

123(2) EPC.

Auxiliary request 4

The subject-matter of claim 6 lacked an inventive step. Simply defining the elongated shape of the high and low density portions without defining any dimensions of the elongation would have no impact on liquid distribution. The described configuration omitted features required to achieve a technical effect. Consequently, no inventive step could be recognised.

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

Main request

The subject-matter of claim 1 involved an inventive step when starting from D1. The distribution of high and low density regions taught by D1 was a technical matter impacting both breathability and fluid handling. Simply inverting the distribution of high and low density regions known from D1 would vastly impact absorbency of the article and thus would not provide the sought for 'alternative absorbent member'. There were countless possible modifications of D1 in order to provide an alternative absorbent member, not simply provision of mutually separated high density portions or the provision of non-separated high density portions.

Auxiliary request 1

The subject-matter of claim 1 met the requirement of Article 123(2) EPC. Paragraphs [0052] and [0053] as filed disclosed the term 'in a planar view' such that

clear basis was provided.

Auxiliary requests 2 and 3

Basis for the subject-matter of claim 1 of auxiliary request 2 was provided in paragraphs [0040] and [0041] as filed. No specific feature had been extracted from these paragraphs in isolation for addition to claim 1. Similar considerations held for auxiliary request 3, claim 1 including still more features from paragraph [0040].

Auxiliary request 4

The subject-matter of claim 6 involved an inventive step.

Reasons for the Decision

1. *Main request*

Claim 1 - Inventive step

1.1 The subject-matter of claim 1 fails to meet the requirement of Article 56 EPC.

1.2 The subject-matter of claim 1 differs from D1 in that feature 7 is not known therefrom, i.e. wherein the low density portion is interposed between the high density portions whereby the high density portions are mutually separated in the absorbent member. This has not been disputed by the respondent. In fact, D1 essentially discloses the inverse of this: the high density portion being interposed between the low density portions

whereby the low density portions are mutually separated in the absorbent member.

- 1.3 The objective technical problem to be solved based on this differentiating feature 7 may be seen as 'to provide a method of producing an alternative absorbent member'.
- 1.3.1 The respondent's argument that the technical problem involved both breathability of the member and wicking in its longitudinal direction is not accepted.
- 1.3.2 The claimed arrangement of high and low density portions in the absorbent member, absent any indication of relative size of these portions, cannot be seen to offer any breathability advantage over the high and low density portions of D1 Fig. 4, for example. Low density portions would usually be expected to offer higher breathability than high density portions. However, the lack of any indication of percentage area of low density portions in claim 1 allows no conclusion of better breathability of the absorbent member relative to that of D1 to be drawn.
- 1.3.3 Feature 7 of claim 1 provides no indication of how the high density portions are distributed over the absorbent member. With high density portions usually promoting wicking of fluids relative to low density portions, it is not possible to conclude that the invention would improve wicking in a longitudinal direction since no indication is provided of the high density portions extending in this direction.
- 1.4 The claimed distribution of high and low density portions according to feature 7 fails to provide a plausible technical advantage over the arrangement of

Fig. 4 of D1. The claimed distribution is thus seen to be an arbitrary selection which, absent any plausible technical effect, cannot justify an inventive step being recognised.

- 1.4.1 The respondent's contention that inverting the distribution of high and low density regions known from D1 would vastly impact absorbency of the article and thus would not provide the sought for 'alternative absorbent member' is not accepted. The respondent's contention may be true if comparing the absorbency of the article in Fig. 4 of D1 with that in the figures of the patent. However, the difference in the figures is irrelevant for that which is defined in claim 1. In view of the generality with which the distribution of high and low density portions of the claimed absorbent member is defined in claim 1, and thus lacking any indication of e.g. relative percentage areas of the absorbent member occupied by high and low density portions, no conclusion regarding the resultant impact of the modification on absorbency of the article relative to D1 can be made.
- 1.4.2 The respondent's further argument that there were countless possible modifications of D1 in order to provide an alternative absorbent member, not simply provision of mutually separated high density portions or the provision of non-separated high density portions, does not change the above conclusion. In view of the absence of a technical effect of the claimed arrangement of high/low density portions, no technical relevance can be credited to the arrangement such that the claimed solution must be seen as arbitrary.
- 1.5 Therefore, starting from D1 and wishing to solve the posed objective technical problem, the skilled person

would reach the subject-matter of claim 1 without exercising an inventive step (Article 56 EPC). The main request is thus not allowable.

2. *Auxiliary request 1*

Article 123(2) EPC

2.1 Claim 1 has been amended relative to claim 1 of the main request through inclusion of the term 'in a planar view' to feature 7. Basis for this was given by the respondent as paragraphs [0052] and [0053] of the application as filed. These paragraphs relate to the Fig. 8(a) embodiment of the invention and include many specific features of the recess portion which have, however, not been included in claim 1 (e.g. the rectangular shape of the suction portion 23). The subject-matter of claim 1 thus presents an unallowable intermediate generalisation of the application as filed.

2.2 This was also stated in item 4.1 of the preliminary opinion given in the Board's communication under Article 15(1) RPBA 2020, to which the respondent provided no counter arguments. Thus, the Board has no reason to change this opinion and confirms same herewith.

2.3 The subject-matter of claim 1 of auxiliary request 1 thus fails to meet the requirement of Article 123(2) EPC. Auxiliary request 1 is therefore not allowable.

3. *Auxiliary request 2*

Article 123(2) EPC

3.1 Relative to claim 1 of the main request, claim 1 of this request includes certain features of a core wrap sheet in relation to the deposited aggregate.

3.2 The respondent argued the basis for this feature to be paragraphs [0040] and [0041] of the application as filed. As mentioned in the Board's preliminary opinion (see item 4.2), in these paragraphs the core wrap sheet is, however, disclosed in combination with the particular way in which the wrap sheet is folded i.e. both side parts folded in, such that both upper and lower faces of the aggregate are covered with the core wrap sheet. Again, no counter arguments were provided by the respondent to the Board's opinion, which is thus confirmed herewith. The subject-matter of claim 1 is thus an unallowable intermediate generalisation of the content of the application as filed.

3.3 The subject-matter of claim 1 of auxiliary request 2 thus fails to meet the requirement of Article 123(2) EPC. Auxiliary request 2 is thus not allowable.

4. *Auxiliary request 3*

Article 123(2) EPC

4.1 Relative to claim 1 of auxiliary request 2, claim 1 of this request further defines that the core wrap sheet is introduced onto a vacuum conveyer, this being originally disclosed in paragraph [0040]. This amendment however fails to overcome the objection under Article 123(2) EPC to the subject-matter of claim 1 of

auxiliary request 2 indicated in point 3.2 above. The subject-matter of claim 1 is thus still an unallowable intermediate generalisation of the content of the application as filed.

4.2 The subject-matter of claim 1 of auxiliary request 3 thus fails to meet the requirement of Article 123(2) EPC. Auxiliary request 3 is therefore also not allowable.

5. *Auxiliary request 4*

Claim 6 - Inventive step

5.1 Claim 6 is based on claim 1 of the main request and adds the features of claim 7 as granted, which further defines the shape and distribution of the suction and non-suction portions of the recess portion of the rotatable drum. In its written submissions the respondent failed to provide any reasons why the subject-matter of claim 6 involved an inventive step.

5.2 The appellant argued that the features of claim 7 added to claim 1 of the main request lacked a technical effect compared to the article disclosed in e.g. Fig. 4 of D1, and so did not allow an inventive step to be recognised. This is also found by the Board to be the case.

5.3 Absent an argument of the respondent as to the technical effect achieved by the features of claim 7, the Board concludes that the definition of shape and distribution of suction and non-suction portions of the recess portion dictates the shape and distribution of the high and low density portions of the produced absorbent member. This would impact the ability to

distribute fluid insults deposited on the absorbent member and thus the ability to prohibit leakage of liquid e.g. from the edges of the absorbent member.

- 5.4 However, as also argued by the appellant, the definition of shape and distribution of suction and non-suction portions of the recess portion fails to provide the necessary features to achieve this technical effect across the scope of the claim. For example, no dimensions or relative dimensions of the suction and non-suction portions are provided such that the resulting high and low density portions of the absorbent member might be only slightly elongated in the width direction, such that no improvement in liquid distribution compared to the non-elongated portions known from D1 can be recognised. In fact, without such dimensions or relative dimensions being defined, the effect on fluid flow is simply unknown. The claimed arrangement thus fails to achieve a technical effect across the breadth of the claim.
- 5.5 Absent a technical effect achieved by the features added to claim 6 of the present request, these cannot change the conclusion on inventive step with respect to the subject-matter of claim 1 of the main request (see points 1.1 to 1.5 above).
- 5.6 The subject-matter of claim 6 of auxiliary request 4 consequently lacks an inventive step (Article 56 EPC). Auxiliary request 4 is therefore not 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. Harrison

Decision electronically authenticated