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D E C I S I O N
of 22 January 1997

Case Number: T 0048/95 - 3.2.2

Application Number: 89302553.6

Publication Number: 0336578

IPC: A61F 13/16

Language of the proceedings: EN

Title of invention:
Thin, flexible sanitary napkin

Patentee:
THE PROCTER & GAMBLE COMPANY

Opponent:
-

Headword:
-

Relevant legal provisions:
EPC Art. 83, 84, 111(1)

Keyword:
"Disclosure - Sufficiency - (yes)"
"Decision re appeals - Remittal - (yes)"

Decisions cited:
T 0212/88, T 0218/94

Catchword:
-



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Boards of Appeal

Chambres de recours

Case Number: T 0048/95 - 3.2.2

D E C I S I O N
of the Technical Board of Appeal 3.2.2
of 22 January 1997

Appellant:

THE PROCTER & GAMBLE COMPANY
One Procter & Gamble Plaza
US-Cincinnati, OH 45202 (US)

Representative:

Boon, Graham Anthony
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Decision under appeal:

Decision of the Examining Division of the
European Patent Office posted 3 August 1994
refusing European patent application
No. 89 302 553.6 pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: H. Seidenschwarz
Members: M. Bidet
J-C. De Preter

Summary of Facts and Submissions

- I. On 29 August 1994 the appellant (applicant) lodged an appeal against the decision of the examining division dispatched on 3 August 1994 refusing European patent application No. 89 302 553.6. The appeal fee was paid on 30 August 1994 and the statement of grounds of appeal received on 7 December 1994.

According to the examining division, the application did not meet the requirements of Article 83 EPC since it did not disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art.

- II. Following a communication dated 23 September 1996 in which the Board expressed its provisional opinion that inter alia:

- (a) the claimed invention according to Claim 1 considered by the decision of the examining division appeared to be supported by the description of the application as filed, and
- (b) the invention did not comply with the requirements of Article 84 EPC,

the appellant submitted with letter of 11 October 1996 an amended Claim 1 which reads as follows:

"A thin sanitary napkin (10), said napkin being of generally elongate form and having opposed body and garment surfaces (26,17) defining the plan area of the napkin, said sanitary napkin having a caliper of less than 5.0 mm as measured under a load of 17,44 g/cm², said sanitary napkin comprising a liquid impermeable barrier means (16) forming said garment surface (17),

and an absorbent means (13) having a first major surface (19) and a second major surface (22), said second major surface (22) being disposed adjacent said liquid impermeable barrier means (16), said absorbent means (13) optionally including a liquid permeable topsheet (25) overlying the first major surface (19) and forming the body surface (26) of the sanitary napkin (10), and

- (i) said absorbent means (13) comprises an absorbent core (34) containing from 5,0% to 85% by weight of hydrogel-forming polymeric material, and
- (ii) said sanitary napkin (10) being characterised by having
 - (a) a flexure resistance of less than 400 g as measured by a modified form of ASTM-D-4032-82;
 - (b) a test absorbent capacity of at least 8,0 g sterile saline solution, measured on a sample of the napkin having a plan area of 66,5 cm², said sample being centred on the intersection of the longitudinally and laterally extending centre lines (58,61) of the napkin; and
 - (c) a total absorbent capacity of at least 14,0 g sterile saline solution, as measured in the entire napkin.

III. The appellant requested that the decision under appeal be set aside and that the application be remitted to the examining division for examination of novelty and inventive step on the basis of above Claim 1 and of Claims 2 to 9 which were on file at the time of the decision under appeal.

Reasons for the Decision

1. The appeal is admissible.
2. Sufficiency of disclosure.
 - 2.1 The examining division held that the essential features of the invention in the light of the application as originally filed, due to an almost endless number of devices, combinations and reference to other patent documents, did not render it obvious to the skilled person how to put the invention into practice, more especially as there was not even one example of a particular combination of the parameters mentioned in Claim 1 and there was no reference to tests results of a specific sanitary napkin resulting from such a particular choice.
 - 2.2 According to the claimed invention a sanitary napkin, which comprises a liquid impermeable barrier means and an absorbent means, and which satisfies all the parameters cited in Claim 1 allows the object of the patent application in suit to be achieved, namely, to provide a sanitary napkin which is thin, flexible and absorbent enough to absorb and contain medium to high menstrual flows.
 - 2.3 A preferred sanitary napkin shown in Figure 2 is described in the application as filed, in which, as absorbent means a superabsorbent laminate product available under the name Water-Lock L-535, and as a liquid impermeable barrier a polyethylene film manufactured by Monsanto Chemical Corporation under the trademark Film n°8020 are used (see page 11, first full paragraph and page 16, first full paragraph). In the opinion of the Board, the skilled reader of the patent application in suit knows that the above available

starting products are appropriate for the manufacture of a sanitary napkin according to the claimed invention. Therefore, a preferred **choice** of individual elements for the manufacture of the claimed sanitary is disclosed in the application as originally filed.

2.4 The description of the application as filed mentions that the absorbent core may be attached to the adjacent barrier sheet by spray-gluing or lines or spots of adhesive (see page 7, lines 9 to 13). A method of **manufacture** is therefore disclosed, even if it only consists in attaching the two elements.

2.5 The definition of an invention by terms of parameters is allowed in European practice. The limit in the use of this practice is specified in the Guidelines for examination in the European Patent Office which mentions: "Characterisation of a chemical product solely by its parameters should, as a general rule, not be allowed", (see Guidelines C-III, 4.7a). However, this is not the case in the application in suit since the claimed product relates to a sanitary napkin and it is usual for these products to define them with parameters (see for example the documents EP-A-0 202 125 (D1) and EP-A-0 122 042 (D2) cited by the examining division as state of the art).

The description of the application as filed includes for each parameter a clear description of the methods used to determine the parameter's value, such as the caliper, the ratio of hydrogel-forming polymeric gelling agent, the flexure resistance and the test and total absorbent capacities of the sanitary napkin (see also Guidelines C-II, 4.10).

2.6 The disclosure in the description is not addressed to the public at large, but rather to the person skilled in the art, who is presumed to be an ordinary practitioner, aware of what was common general knowledge in the art at the relevant date (see decision T 0218/94, point 3.1, not published). The appellant filed two declarations which were not available to the examining division, namely declarations I and II from Mr Persson and Mr Hood, respectively. The declaration I clearly shows that Mr Persson is such a skilled person who can set about making a sanitary napkin, which satisfies Claim 1, using only the information contained in the application as filed and his ordinary skill. The declaration II gives evidence that the results of the tested sanitary napkins made by Mr Persson fall within the claimed ranges of the parameters and were obtained by test methods which correspond to the methods mentioned in the description of the application as filed.

2.7 It results from the above that the description of the application as filed discloses one way of carrying out the invention as claimed, namely the selection of a material for each individual element, and how to make an assembly to obtain the claimed sanitary napkin. Since, according to the established case law, the requirements on sufficiency of disclosure of the description are met if at least one way is clearly indicated enabling the skilled person to carry out the invention, (see decision T 0212/88, OJ EPO 1992, 28, point 3.3), the invention as claimed is supported by the description.

2.8 The description contains information which gives some choice in the selection of the individual elements, but the fact that a choice is available, does not detract from the above acknowledged sufficiency of disclosure in the description. In the absence of evidence showing

that some of the information may cause difficulty to the skilled person seeking to perform the invention, there is no ground for alleging that multiplicity of choice amounts to a lack of sufficiency of disclosure. A consequence of this fact is, that the high level of possible individual elements for a sanitary napkin, made of two or even more than two individual elements, might enable a claim to a sanitary napkin having the claimed values of parameters to be more easily anticipated.

2.9 For the above reasons, the Board is satisfied that the patent application disclosed the invention as defined in the claims in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art, as is required under Article 83 EPC.

3. It remains to be considered whether the application in suit meets all the other conditions required by the EPC for the grant of a patent.

The decision under appeal was based only on Article 83 EPC and therefore the appellant dealt only with objection under that article in the statement of grounds. By its letter of 11 October 1996 it has also met the objections under Article 84 EPC raised by the Board in its communication. From that letter it was clear that the appellant wished the application to be remitted to the examining division for consideration of novelty and inventive step. Considering additionally that (i) the examining division did not need to deal with other grounds leading to rejection once its finding about sufficiency of description was negative, (ii) no arguments have been filed with the statement of grounds of appeal about novelty and inventive step, and (iii) the ground of lack of novelty and lack of inventive step mentioned by the third party -with the letters of 7 July 1994 and 9 June 1995- and the content

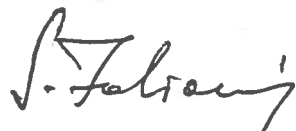
of the documents D1 and D2 have not been really discussed up to now, the Board finds it appropriate to make use of its power under Article 111(1) EPC to remit the case to the first instance for further prosecution on the basis of Claim 1 filed with letter of 11 October 1996, Claims 2 to 4 filed with letter of 5 November 1993 and Claims 5 to 9 filed with letter of 24 August 1992.

Order

For these reasons it is decided that:

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

The Registrar:



S. Fabiani

The Chairman:



H. Seidenschwarz

