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D E C I S I O N
of 25 February 1999

Case Number: T 0959/95 - 3.2.2

Application Number: 90908711.6

Publication Number: 0472633

IPC: A61F 13/46

Language of the proceedings: EN

Title of invention:

A disposable absorbent article which comprises a hose-like absorption body

Applicant/Patentee:

Mölnlycke AB

Opponent:

The Procter & Gamble Company

Headword:

-

Relevant legal provisions:

EPC Art. 54, 56, 123

Keyword:

"Novelty and inventive step (yes)"

Decisions cited:

-

Catchword:

-



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Boards of Appeal

Chambres de recours

Case Number: T 0959/95 - 3.2.2

D E C I S I O N
of the Technical Board of Appeal 3.2.2
of 25 February 1999

Appellant: The Procter & Gamble Company
(Opponent) One Procter & Gamble Plaza
Cincinnati
Ohio 45202 (US)

Representative: Kohol, Sonia
Procter & Gamble
European Service GmbH
Sulzbacher Strasse 40-50
65824 Schwalbach am Taunus (DE)

Respondent: Mölnlycke AB
(Proprietor of the patent) Fabriksvägen 1
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Representative: Kierkegaard, Lars-Olov
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Decision under appeal: Interlocutory decision of the Opposition Division
of the European Patent Office posted 4 October
1995 concerning maintenance of European patent
No. 0 472 633 in amended form.

Composition of the Board:

Chairman: W. D. Weiß
Members: D. Valle
J. G. M. De Preter

Summary of Facts and Submissions

- I. The appellant (opponent) lodged an appeal received on 1 December 1995 against the decision of the Opposition Division of 4 October 1995 on the maintenance of the patent No. 472 633 in amended form and paid the fee for appeal on the same day. The statement setting out the grounds of appeal was received on 14 February 1996.

The Opposition Division held that the grounds for opposition raised by the opponent, namely lack of novelty and of inventive step and insufficient disclosure, did not prejudice the maintenance of the patent in amended form.

- II. In its grounds of appeal, the appellant maintained its objections of lack of novelty and inventive step and relied in this respect on

(D2) US-A-4 795 453

already cited during the opposition proceedings. Moreover, it objected that claim 1 as amended did not meet the requirements of Article 123(2) EPC.

- III. Together with the summons for oral proceedings to be held on 25 February 1999, the Board issued a communication expressing doubts whether claim 1 met the requirements of Article 123(2) EPC because claim 1 did not contain the feature that the hose-like body had a concave lower part as required by the embodiments of Figures 2 and 3 from which the new features of the claim had been taken.

By letter of 4 November 1998, the appellant communicated that it would not attend the oral proceedings on 25 February 1999.

- IV. In its written submissions, the appellant requested that the decision under appeal be set aside and the patent be revoked in its entirety.

At the end of the oral proceedings, the respondent requested that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of the following documents:

- claim 1 as specified in the decision under appeal,
- claims 2 to 8 according to the patent as granted,
- description and figures as specified in the decision under appeal.

- III. The independent claim 1 as specified in the decision under appeal reads as follows:

"A disposable absorbent article, such as a diaper or an incontinence guard, which comprises an inner liquid-permeable casing sheet (1), which is intended to lie nearest the body of the wearer when the article is worn, an outer liquid-impermeable casing sheet (2), and an absorbent pad (3) enclosed between said two casing sheets, the absorbent pad, at least within the region thereof which forms the crotch part when the article is worn, includes a body (5) of a hose-like form comprising a shape-stable material of very high liquid-permeability, the body being centrally positioned and

extending in the longitudinal direction of the article bordering on the inner casing sheet (1) and being surrounded by absorbent material (4) on at least the side thereof remote from the inner casing sheet, characterized in that the part of the hose-like body (5) intended to face the wearer during use of the article has an outwardly convex shape intended to abut the body of the wearer in the region of the wetting location, when the article is worn."

IV. The appellant argued as follows.

Regarding Article 123 EPC:

The feature "the part of the hose-like body intended to face the wearer during use of the article has an outwardly convex shape" was only disclosed in column 4, line 7, where it was referred to the diaper when worn, as shown in Figure 3, whereby in the claim was referred to the diaper before being worn. However, the extremely flat curvature shown in Figure 2 could not be taken as a basis for the feature that the hose-like body had an outwardly convex shape before being worn.

Regarding the novelty and the inventive step:

A hose-like body was always tubular and outwardly convex, therefore, since "hose-like" was a feature of the preamble, the first feature of the characterizing part did not add anything to the claim. Furthermore such feature was obvious in view of document (D2). The further feature of the characterizing part, that the part of hose-like body intended to face the wearer during use of the article was intended to abut the body

of the wearer in the region of the wetting location, when the article was worn, was neither a technical nor a functional feature and it did not add anything to the claim. The way of forming the tubular member of Figures 7, 11 and 12 of document (D2) was the same as that of Figure 2 of the patent in suit, see column 5, last line, to column 6, line 6. Also the pad according to document (D2) was intended to abut the body of the wearer when the article was worn, see column 5, lines 24 to 31.

V. The respondent argued as follows.

Regarding Article 123(2) EPC:

The hose-like body had a convex shape before and during the article being worn, see column 3, last 2 lines (...will remain tubular).

It was not essential that the lowest part of the hose-like body was concave. The features of the new claim concerning the form of the hose-like body had been taken from column 4, lines 6 to 13; column 5, lines 41 to 45 and 52 to 57, and from column 6, lines 16 to 20 and not directly from the Figures 2 and 3. From the cited passages it became clear that the convex shape of the upper part was disclosed as a feature independent from the form of the lower part, having the direct effect of pressing the female genitals when the article was worn and therefore facilitating the absorption of the body fluids.

Regarding the novelty and the inventive step:

Not all the hose-like articles must have an outwardly convex shape. For example the tubular hose-like member of Figures 7, 11 and 12 of (D2) did not have an outwardly convex shape facing the wearer during use.

The hose-like body of document (D2) disclosed a flat concave upper surface (42) and concave walls (38), (40), see Figure 6, and not an outwardly convex shape. See column 3, lines 37 to 41; column 5, line 49 and Figure 12. The very thin upper projection 128 was furthermore tightly held between the absorbent members 130 and 132. The fluid transfer in the article of document (D2) was lateral and longitudinal (column 2, lines 36 to 42), whereas the invention provided a longitudinal flow (column 5, lines 18 to 23). A sideward pressure to the article of the prior art caused the central part to lower and possibly also to collapse, rather than to raise, whereas the invention achieved by the same conditions a raising of the central part.

The characterizing clause of claim 1 - in contrast to document (D2) - had the effect that the hose-like body would expand from a relatively flat form to a raised condition when it was worn, which would improve the contact of the hose-like body with the female genitals ensuring the excreted liquid to be deposited immediately into the hose-like body.

Reasons for the Decision

1. The appeal is admissible

2. *Amendments*

The feature that "the part of the hose-like body (5) intended to face the wearer during use of the article has an outwardly convex shape" is disclosed at column 4, lines 6 to 13 and column 5, lines 41 to 45.

Departing from its preliminary opinion expressed in the communication accompanying the summons, the Board agrees with the argument of the respondent that the feature regarding the upper part of the hose-like body is not only disclosed in combination with the form of the lower part, but also independently disclosed. In fact the above cited passages of the description disclose an embodiment which is different from that disclosed in Figures 2 and 3 and which does not require a concave lower part.

The argument of the appellant that the extremely flat curvature of Figure 2 cannot be taken as a basis for the amendment is not acceptable. The degree of curvature is not an issue here.

3. *Novelty*

Document (D2) discloses a disposable absorbent article which comprises an inner liquid-permeable casing sheet (92), which is intended to lie nearest the body of the wearer when the article is worn, an outer liquid-impermeable casing sheet (96), and an absorbent pad (98, 100) enclosed between said two casing sheets, the absorbent pad, at least within the region thereof which forms the crotch part when the article is worn, includes a body of a hose-like form comprising a shape-

stable material of very high liquid-permeability, the body being centrally positioned and extending in the longitudinal direction of the article bordering on the inner casing sheet and being surrounded by absorbent material on at least the side thereof remote from the inner casing sheet, see in particular Figures 7, 11 and 12. Document (D2), therefore, discloses all the features in the preamble of claim 1.

Beyond that, this document discloses the feature that the part (102) of the hose-like body intended to face the wearer during use is intended to abut (i.e. touch with a projecting part) the body of the wearer in the region of the wetting location, when the article is worn. In this respect reference is made to column 5, lines 24 to 31 where is disclosed that the pad tends to flex in the middle with the middle portion lifting upward for better contact with the labia, the fluid transfer member being then better exposed to initial contact with the fluid as it leaves the body of the wearer.

Consequently, the subject-matter of claim 1 distinguishes therefrom in that the cited part of the hose-like body has an outwardly convex shape.

Therefore, the subject-matter of claim 1 is novel.

The argument of the appellant that every hose-like body is tubular and outwardly convex cannot be followed.

A hose is, in fact, a flexible pipe whereas a tube is a long, hollow and typically cylindrical object.

4. *Inventive step*

The distinguishing feature that the part of the hose-like body (5) intended to face the wearer during use of the article has an outwardly convex shape has the effect that - when the diaper is worn and the side parts of the crotch section press the central part - the convex upper part of the body (5) increases its curvature by bending and in that manner increases its contact with the wetting parts of the wearer and thereby facilitates storing of the body liquids. This effect exclusively depends on the side pressure exerted on the hose-like body during wearing.

In contrast thereto the outwardly concave shape of the flaps (106 and 108) of the fluid transfer member (72) disclosed in Figures 11 and 12 of document D2 has the effect that the upper part of the member is pressed downwardly under the action of the lateral absorbent members (130, 132) and thus moves away from the source of the body liquids. Therefore, the part of the body facing the wearer does not have an active function in facilitating absorption. Moreover, the storing capacity for the body liquids is decreased because the free space in the transfer member is reduced. The function of the known transfer member is mainly to direct the fluid to the bulk absorbent (130, 132) at the sides of the pad rather than to direct the flow longitudinally which, according to the problem on which the patent in suit is based, enables a quick and efficient absorption of large quantities of excreted fluid.

Consequently, document (D2) does not challenge the fact that the subject-matter of claim 1 involves an

inventive step.

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 with the order to maintain the patent in amended form on the basis of the following documents:
 - claim 1 as specified in the decision under appeal,
 - claim 2 to 8 according to the patent as granted,
 - description and figures as specified in the decision under appeal.

The Registrar:

The Chairman:

S. Fabiani

W. D. Weiß