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D E C I S I O N
of 24 August 1999

Case Number: T 0401/96 - 3.2.2

Application Number: 89123131.8

Publication Number: 0374730

IPC: A61F 13/56

Language of the proceedings: EN

Title of invention:

Fastening system for disposable diaper with disposability
feature

Patentee:

Kimberly-Clark Worldwide, Inc

Opponent:

Mölnlycke AB
The Procter & Gamble Company

Headword:

-

Relevant legal provisions:

EPC Art. 54, 56

Keyword:

"Novelty and Inventive step (yes)"

Decisions cited:

-

Catchword:

-



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Boards of Appeal

Chambres de recours

Case Number: T 0401/96 - 3.2.2

D E C I S I O N
of the Technical Board of Appeal 3.2.2
of 24 August 1999

Appellant I: Mölnlycke AB
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Representative: Hyltner, Jan-Olof
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Appellant II: The Procter & Gamble Company
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Representative: Boon, Graham Anthony
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Respondent: Kimberly-Clark Worldwide, Inc
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Representative: Grünecker, Kinkeldey,
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 15 March 1996
rejecting the opposition filed against European

patent No. 0 374 730 pursuant to Article 102(2)
EPC.

Composition of the Board:

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

Summary of Facts and Submissions

- I. The appellants I and II (opponents I and II), on 13 May and 8 May 1996 respectively, lodged appeals against the written decision of the Opposition Division dated 15 March 1996 to reject the oppositions and paid the fee for appeal on the respective same days. Both statements setting out the grounds for appeal were received on 15 July 1996.
- II. The Opposition Division held that the grounds for opposition advanced by the opponents (lack of novelty and of inventive step) did not prejudice the maintenance of the patent unamended and rejected the oppositions.
- III. With letter of 11 June 1999, appellant II (Procter & Gamble) withdrew his appeal.

Oral proceedings were held on 24 August 1999 before the Board of Appeal. During the oral proceedings the remaining appellant relied on the following documents filed during the opposition proceedings:

for lack of novelty:

- (6) EP-A-0 321 234 (state of the art according to Article 54(3) EPC);

and for lack of inventive step:

- (2) GB-A-2 129 689
(3) EP-A-0 240 213
(4) EP-A-0 187 725

(5) EP-A-0 235 014

In order to support its arguments, the remaining appellant, on 19 June 1999, filed a copy of a decision issued by the Opposition Division in the opposition proceedings against the patent granted on the European patent application based on document (6).

Moreover, it relied on samples of disposable diapers, submitted together with its grounds of opposition on 10 January 1995, which were said to correspond to those described in document (2) and to have been sold under the trade mark of "Libero".

IV. At the oral proceedings before the Board on 24 August 1999 the respondent (proprietor) filed a new claim 1 which reads as follows:

"An absorbent article comprising:
superimposed backsheet (10), absorbent body (11) and topsheet (13) elements formed to a composite; opposite longitudinal end portions of said composite providing first and second waistband portions (16, 17), respectively, adapted to overlap each other near their lateral ends upon encircling the abdomen of the user; primary mechanical fastening means (27) for securing said first and second waistband portions (16, 17) to each other in said overlapping relationship, said primary mechanical fastening means (27) having a first component(28) located in a first longitudinal half-portion of said composite and attached to said composite at each lateral end of said first waistband portion (16) facing inwardly of said article and having a second component (21) attached to said composite at

said second waistband portion (17) said second component (21) constructed to cooperatively interengage said first component (28) and releasably fastened thereto;

characterized by a combination therewith of secondary mechanical fastening means for securing the composite in a disposal condition after use, said secondary mechanical fastening means including an outwardly facing third component (35) arranged as a single element and overlying said backsheet (10) in said first half-portion of said composite, said third component (35) being constructed to mechanically engage each of said laterally positioned first components (28) to secure the composite in the disposal condition with each of said first components (28) overlying said third component (35)."

V. At the end of the oral proceedings the requests of the parties were as follows:

The appellant requested that the decision under appeal be set aside and the patent be revoked.

The respondent requested that the appeal be dismissed and that the patent be maintained on the basis of claim 1 as submitted at the oral proceedings.

VI. The appellant argued as follows:

Regarding novelty, the appellant agreed that claim 1 was novel differing from document (6) by the feature that the third component was arranged as a single element.

Regarding inventive step, the subject-matter of claim 1 did not involve an inventive step having regard to the combination of the teaching of the "Libero" diaper and of document (5). The "Libero" diaper, corresponding to document (2), had adhesive tape tabs cooperating with landing members (first and second fastening means) and had been sold since 1984. Such tape tabs had been used by the public to seal such soiled diapers in a rolled-up disposal condition by sticking the adhesive tabs to the backsheet as had been demonstrated by the declarations filed on 9 January 1996. The use of such adhesive tape tabs was also described as state of the art by the intermediate document (6), see column 1, from line 26. It was common knowledge in the field that adhesive fastening means were less reliable than mechanical fastening means. It was therefore obvious to substitute the adhesive fastening means of the "Libero" diaper with mechanical fastening means as disclosed in document (5). In doing so, the person skilled in the art would maintain the function of the first fastening means to cooperate with the back of the soiled diaper for ease of disposal. In this connection it was irrelevant that the third component consisted of one or several elements. Moreover the choice of a single third component was an obvious one for the sake of simplicity.

Alternatively, the subject-matter of claim 1 was obvious to a person skilled in the art in the light of a combination of the teaching of document (3), see column 7, line 57, to column 8, line 1; column 12, line 48 to 53; column 8, lines 43 to 48 and document (4), see page 2, lines 5 to 12; page 4, lines 12 to 16; page 12, lines 10 to 28. It was obvious to substitute

the backsheet of document (4) which had a cloth-like, non-woven fabric on the outside surface provided with densified portions, with that of document (3) and thereby arriving at the invention, the third component then being the cloth-like material of document (4).

The respondent argued as follows.

The "Libero" diaper and the document (2) described fastening means corresponding to the primary fastening means of the patent, but including adhesive tape tabs. They were provided for facilitating inspection. There was no disclosure of secondary mechanical fastening means for securing the diaper in a disposable condition. Document (5) disclosed primary fastening means but no secondary fastening means. A combination of the disclosure of the "Libero" diaper with document (5) would not lead to the claimed invention because they failed to disclose a third element explicitly designed for disposal.

The same conclusion had to be reached for a combination of the teaching of the documents (3) and (4).

Reasons for the Decision

1. The appeal is admissible.
2. *Novelty*

Document (6) does not disclose a secondary mechanical fastening means for disposal including a third component arranged as a single element in combination

with the further features of claim 1. The embodiment of figure 1 of document (6), which is the most similar to the invention, discloses in fact a disposal means (68) consisting of two elements.

Certainly, document (6) contains also a general statement at column 14, lines 28 to 34, reciting that the disposal means can be a discrete separate element, see also claim 5. This possibility is however only one of a list of several possibilities which, according to the description of document (6), can be quite freely combined with the remaining features of the diaper, which also have a wide range of variability. The resulting number of theoretically possible combinations of features is so high and intricate that it cannot be reasonably accepted that each of these combinations, and in particular the one according to the claim 1, is clearly and unambiguously derivable from such document. Only dependent claim 6 of document (6) mentions a third component in the form of a single adhesive tape tab, which is, however, not a mechanical fastening means within the meaning of the patent in suit.

In view of the above, the subject-matter of claim 1 is novel with respect to the disclosure of document (6).

3. *Inventive step*

Starting from the disclosure of document (2), which has been used by the appellant as a first chain of arguments aiming to prove lack of the inventive step, the following features of claim 1 are known:

An absorbent article comprising:

superimposed backsheet, absorbent body and topsheet elements formed to a composite; opposite longitudinal end portions of said composite providing first and second waistband portions, respectively, adapted to overlap each other near their lateral ends upon encircling the abdomen of the user;

primary fastening means (4, 5, 10) for securing said first and second waistband portions to each other in said overlapping relationship, said primary fastening means having a first component(4, 5) located in a first longitudinal half-portion of said composite and attached to said composite at each lateral end of said first waistband portion facing inwardly of said article and having a second component (10) attached to said composite at said second waistband portion said second component constructed to cooperatively interengage said first component and releasably fastened thereto;

The absorbent article according to claim 1 differs therefrom in that:

- (a) the fastening means are mechanical fastening means;
- (b) it provides a combination therewith of secondary mechanical fastening means for securing the composite in a disposal condition after use, said secondary mechanical fastening means including an outwardly facing third component (35) arranged as a single element and overlying said backsheet (10) in said first half-portion of said composite, said third component (35) being constructed to mechanically engage each of said laterally

positioned first components (28) to secure the composite in the disposal condition with each of said first components (28) overlying said third component (35).

Such individuated third component on the backsheet as a target area defines a folding condition of the absorbent article in which it can be safely disposed after use.

Mechanical fastening means are known in the art, see for example document (5). However a combination of the teaching of the above cited prior art - contrary to the argument of the appellant - cannot lead in an obvious way to the invention. Even if the person skilled in the art would envisage replacing the adhesive fastening means of the "Liberio" diaper by a mechanical fastening system such as a hook-loop combination maintaining the function of the first fastening means to be used for disposal, he would be inclined to choose a non-woven backsheet as disclosed by document (4) as a third component, because this would lead to a mechanical fastening construction, the function of which corresponds to the adhesive construction disclosed in document (5).

By using a third component in the form of a specifically located single element the patent in suit adds a further step which is not derivable from the prior art and, therefore, involves an inventive step.

Also a combination of the teaching of documents (3) and (4), advanced by the appellant in a second attempt to prove the lack of inventive step of claim 1, cannot

lead to the invention for the following reasons. Document (3) corresponds to the diaper according to document (2) - as far as the invention is concerned -, with the particularity that it discloses inner mechanical fastening means (60) on the panels (62) of the second waist portion (44) designed to be engaged with the fibres of the topsheet in order to reduce shifting of the overlapping portions of the garment when the garment is worn. Document (4) discloses a non-woven fabric coated on one side and having densified and undensified portions. The non-coated side can constitute the external surface of the backsheet of a garment, whereby the fibre material is used to provide a cloth-like feel and appearance (page 12, lines 18 to 25), and the different density facilitates heat transfer (page 6, lines 29 to 35) and improves the tensile and tear strength (page 7, lines 2 to 6). These two documents are, however, completely silent about any disposal means.

As a consequence of the above, 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

following basis:

- claim 1 as submitted at the oral proceedings of
24 August 1999

- claims 2 to 19, the description and figures as
granted

The Registrar:

The Chairman:

M. Maslin

W. D. Weiß