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D E C I S I O N
of 16 July 2001

Case Number: T 0192/99 - 3.2.6

Application Number: 92916389.7

Publication Number: 0549781

IPC: A61F 13/15

Language of the proceedings: EN

Title of invention:

Absorbent articles, especially catamenials, having improved fluid directionality

Patentee:

The PROCTER & GAMBLE COMPANY

Opponent:

SCA MOLNLYCKE AB

Headword:

-

Relevant legal provisions:

EPC Art. 56, 123(2)

Keyword:

"Amendments - added subject-matter - yes (main request and first auxiliary request)"

"Inventive step - no (second auxiliary request)"

Decisions cited:

T 0608/96

Catchword:

-



Case Number: T 0192/99 - 3.2.6

D E C I S I O N
of the Technical Board of Appeal 3.2.6
of 16 July 2001

Appellant: THE PROCTER & GAMBLE COMPANY
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Ohio 45202 (US)

Representative: Kohol, Sonia
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D-65823 Schwalbach am Taunus (DE)

Respondent: SCA MOLNLYCKE AB
(Opponent) SE-405 03 Goteborg (SE)

Representative: O'Reilly, Peter Andrew
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 22 December 1998
revoking European patent No. 0 549 781 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: P. Alting Van Geusau
Members: T. Kriner
R. T. Menapace

Summary of Facts and Submissions

I. The Appellant (Patent Proprietor) lodged an appeal, received at the EPO on 12 February 1999, against the decision of the Opposition Division posted on 22 December 1998 and revoking the European patent No. 0 549 781. The appeal fee was paid simultaneously and the statement setting out the grounds of appeal was received at the EPO on 10 April 1999.

II. Opposition was filed against the patent as a whole and based on Article 100(a) EPC in conjunction with Articles 52(1), 54 and 56 EPC.

In its decision the Opposition Division held that the grounds for opposition mentioned in these articles prejudiced the maintenance of the patent and that therefore the patent was to be revoked.

III. From the documents considered by the Opposition Division, the following documents played a role during the appeal proceedings:

D1: EP-A-0 343 941

D2: WO-A-85/03218

D3: US-A-3 993 820

D4: EP-A-0 391 814.

IV. The Appellant requested that the Opposition Division's decision be set aside and the patent be maintained in amended form on the basis of a main request or a first or second auxiliary request filed with letter of

8 April 1999, and in the event that any of the submitted requests was not considered to provide the basis for the patent to be upheld, to be heard at oral proceedings according to Article 116 EPC.

With letter of 19 December 2000 the Appellant withdrew its request for oral proceedings and requested that the decision be issued on the basis of the current file.

The Respondent (Opponent) requested dismissal of the appeal and revocation the patent in its entirety.

V. Claim 1 of the main request reads as follows:

"An absorbent article having a longitudinal direction, a transverse direction, and a z-direction, said absorbent article comprising:

- (a) a liquid pervious topsheet; (22)
- (b) a liquid impervious backsheets; (23)
- (c) an absorbent core (24) positioned between said topsheet and said backsheets, said core having an uppermost surface facing said topsheet and a lowermost surface facing said backsheets; and
- (d) a transport layer (21) characterised in that said transport layer has a lower portion and an upper portion where the lower portion of said transport layer is below the uppermost surface of said core and is oriented substantially in the longitudinal direction and the upper portion of said transport layer extends at least to the uppermost surface of said absorbent core toward said topsheet and contains elements oriented substantially in the z-direction, wherein said elements are not densified in said z-direction".

Claim 1 of the first auxiliary request comprises an additional feature according to which "said transport layer comprises fibers having external capillary channels".

Claim 1 of the second auxiliary request differs from claim 1 of the main request in that the feature according to which "said elements are not densified in the z-direction" has been deleted, and a feature according to which "said transport layer extends above the uppermost surface of said absorbent core" has been added to the claim.

VI. In support of its requests the Appellant relied essentially on the following submissions:

Claim 1 according to the main request and claim 1 according to the first auxiliary request explicitly excluded a densification of the elements oriented substantially in the z-direction so that the subject-matter of these claims was novel over D3.

Since neither D3 nor D2 or D4 suggested the provision of a transport layer without densified portions which had an upper and a lower portion and which contained elements oriented in the z-direction, the subject-matter of these claims also involved an inventive step.

With respect to claim 1 of the second auxiliary request D2, D3 and D4 did not suggest the provision of a transport layer comprising a portion which extended above the uppermost surface of the core and which had z-oriented elements. Consequently the subject-matter of this claim was also new and based on an inventive step when compared with the absorbent articles disclosed in

D2, D3 and D4.

VII. The Respondent contested the Appellant's views. His arguments can be summarized as follows:

The feature of claim 1 of the main request and of claim 1 of the first auxiliary request, according to which the elements oriented substantially in the z-direction are not densified in the z-direction, had not been disclosed in the application of the patent in suit. Since the originally filed description was totally silent as to whether or not these elements were densified and if so in which direction, claim 1 of the main request and claim 1 of the first auxiliary request did not meet the requirements of Article 123(2) EPC.

The subject-matter of claim 1 according to the second auxiliary request was not new with respect to the disclosure of each of the documents D1, D2, D3 and D4. Furthermore, even if the subject-matter of this claim was considered to be novel, it would not involve an inventive step. The subject-matter of claim 1 according to the second auxiliary request differed from that which was disclosed in each of these documents at best by the feature that the transport layer extended above the uppermost surface of the absorbent layer without specifying how far it extended or the effect to be achieved by the extension. Since the purpose to the upper portion of a transport layer was to transport liquid into an absorbent layer it almost went without saying that the skilled person would start the transport layer above the uppermost surface of the absorbent core. Such an arrangement was moreover clearly disclosed in, for instance, D2. The skilled person would therefore arrive at the subject-matter of

claim 1 according to the second auxiliary request without exercising inventive skill.

Reasons for the Decision

1. The appeal is admissible.
2. *Main request and first auxiliary request*
 - 2.1 Claim 1 according to the main request and claim 1 according to the first auxiliary request both comprise a feature according to which the elements oriented substantially in the z-direction are not densified in the z-direction. As explained by the Appellant, this feature has been added to the claim in order to achieve novelty of the claimed absorbent article over the subject-matter disclosed in D3.

There is however no disclosure in the originally filed documents of the patent in suit, on which an exclusion of densified elements within the transport layer of the claimed absorbent article could be based. These documents are silent about the density of the elements oriented substantially in the z-direction, in particular they do not mention a densification in the z-direction. Consequently claim 1 according to the main request and claim 1 according to the first auxiliary request refer to subject-matter which extends beyond the content of the application as filed.

- 2.2 Although it is true that the addition of the features that the elements oriented substantially in the z-direction distinguishes the claimed absorbent article from the subject-matter disclosed in D3, said addition

cannot be accepted as a disclaimer. According to the case law of the Boards of Appeal (see for example T 608/96) a disclaimer may only be used by way of exception for avoiding anticipation by a specific disclosure in the state of the art, if this disclosure is novelty destroying purely by coincidence. This requires that the disclosure is not relevant for the evaluation of inventive step of the claimed invention.

As in the patent in suit, D3 also refers to the provision of a transport layer in an absorbent article for a rapid transportation of fluid to an absorbent core. Therefore it cannot be said that this document is not relevant for the evaluation of inventive step of the claimed subject-matter. Consequently the requirement that the disclosure is not relevant for the evaluation of inventive step of the claimed invention is not met in the present case.

2.3 Therefore it has to be concluded that the amended claims of the main request and of the first auxiliary request do not meet the requirements of Article 123(2) EPC.

3. *Second auxiliary request*

3.1 Novelty and inventive step

3.1.1 The most relevant state of the art is disclosed in D3. This document discloses, in particular in its Figures 16 and 17, an absorbent article (210) having a longitudinal direction, a transverse direction, and a z-direction, said absorbent article comprising a liquid pervious topsheet and a liquid impervious backsheet (these two elements are implicitly disclosed in D3,

because column 9, lines 36 to 39 states that the absorbent article may be used in disposable diapers which usually have such a top- and backsheet); an absorbent core (214) positioned between said topsheet and said backsheet, said core inevitably having an uppermost surface facing said topsheet and a lowermost surface facing said backsheet; and a transport layer (218, 219) having a lower portion and an upper portion where the lower portion of said transport layer is below the uppermost surface of said core and is oriented substantially in the longitudinal direction and the upper portion of said transport layer extends at least to the uppermost surface of said absorbent core toward said topsheet and contains elements (219) oriented substantially in the z-direction.

However, when compared with the subject-matter of claim 1 of the second auxiliary request D3 does not show that the transport layer extends above the uppermost surface of said absorbent core.

3.1.2 All further documents cited during the opposition proceedings disclose less than D3. Consequently the subject-matter of claim 1 according to the second auxiliary request is new.

3.1.3 Starting from the state of the art disclosed in D3, the objective underlying the claimed subject-matter may be regarded as to improve the intake of fluids into the absorbent article.

This objective is achieved by such an arrangement of the transport layer within the absorbent article such that it extends above the uppermost surface of the absorbent core.

Such an arrangement of a transport layer is however well known. Each of the documents D1, D2 and D4 shows an absorbent article comprising a transport layer (D1: 50, 60; with respect to 60 see column 21, lines 48 to 65 / D2: 3 / D4: upper and lower tow of invention) which extends above the uppermost surface of an absorbent core (D1: 52 / D2: 1 / D4: absorbent core). Since it is obvious that this arrangement of a transport layer inevitably results in an improved intake of fluid compared to the arrangement of the transport layer shown in D3, the skilled person looking to reach the objective mentioned above would use the arrangement according to D1, D2 or D4 in an absorbent article according to D3 to improve the intake of fluids without the exercise of inventive skill.

- 3.1.4 The Appellant's argumentation that the subject-matter of claim 1 involves an inventive step, because none of the documents D2, D3 and D4 suggested the provision of a transport layer comprising a portion which extended above the uppermost surface of the core and which had z-oriented elements is not convincing.

It is true that none of these document discloses a transport layer which extends above the uppermost surface of the absorbent core and has z-oriented elements. This is however not essential for the evaluation of inventive step. As explained above, D3 shows already a transport layer comprising z-oriented elements (219). Therefore the question arises only as to whether or not a suggestion exists to enlarge the transport layer so that it extends above the uppermost surface of the absorbent core (214). Since such a suggestion is derivable from each of the documents D1, D2 and D4 which all disclose a transport layer

extending above an absorbent core, the question has to be answered to the affirmative.

3.1.5 In view of these assessments the Board reaches the conclusion that the subject-matter of claim 1 according to the second auxiliary request does not involve an inventive step.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

M. Patin

P. Alting van Geusau