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D E C I S I O N
of 24 May 2004

Case Number: T 1035/01 - 3.2.6

Application Number: 93913782.4

Publication Number: 0641185

IPC: A61F 13/15

Language of the proceedings: EN

Title of invention:

Disposable training pant having improved stretchable side panels

Patentee:

THE PROCTER & GAMBLE COMPANY

Opponent:

SCA Hygiene Products AB

Headword:

-

Relevant legal provisions:

EPC Art. 52(1), 54, 56, 123(2)

EPC R. 29(3)

Keyword:

"Inventive step (main request) - no"

"Admissibility of amendments (auxiliary request) - yes"

"Novelty and inventive step (auxiliary request) - yes"

Decisions cited:

-

Catchword:

-



Case Number: T 1035/01 - 3.2.6

D E C I S I O N
of the Technical Board of Appeal 3.2.6
of 24 May 2004

Appellant: SCA Hygiene Products AB
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Representative: Hammond, Andrew
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Respondent: THE PROCTER & GAMBLE COMPANY
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 16 July 2001
rejecting the opposition filed against European
patent No. 0641185 pursuant to Article 102(2)
EPC.

Composition of the Board:

Chairman: P. Alting van Geusau
Members: G. C. Kadner
J. H. Van Moer

Summary of Facts and Submissions

I. The mention of the grant of European patent No. 641 185 in respect of European patent application No. 93 913 782.4 filed on 29 April 1993 and claiming a JP-priority from 22 May 1992 was published on 16 December 1998.

II. Notice of opposition was filed on 13 September 1999 by the Appellant (Opponent), on the grounds of Article 100(a) and (c) EPC relying in respect of an alleged lack of inventive step upon the prior art disclosed in:

D1: EP-A-0 320 991

D2: US-A-4 525 407

D3: US-A-4 834 741

III. By decision announced on 12 June 2001 and posted on 16 July 2001 the Opposition Division rejected the opposition.

The Opposition Division was of the opinion that the objection under Article 100(c) against the claim 2 as granted was not justified because, when compared to the originally filed claim 2 the deleted features related to process steps which had no relevance for the article claimed. The subject-matter of granted claim 1 met the requirements of Article 52(1), 54 and 56 EPC and could be maintained unamended together with the dependent claims 2 to 5.

IV. On 17 September 2001 notice of appeal was lodged against the decision together with payment of the appeal fee.

The statement of grounds of appeal was filed on 12 November 2001.

V. In a communication dated 19 February 2004 the Board informed the parties that in addition to whether the application as originally filed contained adequate support for the wording of claim 2 it had to be discussed during oral proceedings which combination of features of claim 1 was known from D1 and what problem was solved by the subject-matter of claim 1. As regards the requirement of inventive step the teachings provided by D2 would have to be assessed, and whether the solution to the problem underlying the subject-matter of claim 1 was arrived at in an obvious manner when combining the teachings of D1 and D2.

VI. Oral proceedings were held on 24 May 2004.

The Appellant (Opponent) requested that the decision under appeal be set aside and that the European patent No 641 185 be revoked.

The Respondent (Patentee) requested that the appeal be dismissed and that the patent be maintained as granted (Main Request) or, as an auxiliary request, on the basis of claims 1 to 4 filed at the oral proceedings.

Claim 1 according to the main request reads as follows:

"A disposable training pant (1) comprising:

1) an absorbent chassis (30) having side edges and a front waist area (40) and a back waist area (41) comprising:

- a liquid pervious topsheet (33);

a liquid-impervious backsheet (32) and

an absorbent core (31) positioned between said topsheet (33) and said backsheet (32); and

2) an elasticised side panel attached to and joining said front waist area (40) and said back waist area (41) along each longitudinal side of the absorbent chassis (30), said side panel being laterally stretchable, comprising:

- a front elasticised member (10) and a back elasticised member (10), each comprising a non-elasticised outboard edge portion (51) and an elasticised laminate portion (15);

- a side seam (50) joining said (*) outboard edge portions (51) of said front elasticised member (10) and said back elasticised member (10);

characterised in that

said non-elasticised outboard edge portions (51) comprise

a non-elasticised laminate material (20) comprising at least one non-woven layer (12) and at least one elastic layer (13)."

The preamble of claim 1 according to the auxiliary request corresponds to that of the main request with the insertion in its last paragraph (*) of "non-elasticised" before "outboard edge portions (51)". The characterizing portion reads as follows:

"... characterised in that

each elasticised member (10) is formed of a laminate material (20) comprising at least one elongatable non-elastic non-woven layer (12) and at least one elastic layer (13) wherein the elasticised laminate portion (15) is a portion of the laminate material which has been elasticised by mechanically stretching the laminate material to impart elasticity thereto in the direction of stretching, at least up to the point of initial stretching, and the non elasticised edge portion (51) is a non-stretched portion of the laminate material."

VII. In support of its requests the Appellant essentially relied upon the following submissions:

Since the scope of claim 1 also covered embodiments having several seams joining the portions of the side panels, the objective problem solved by the patent in suit was to provide an alternative suitable material for these side panels.

When looking for a solution to that problem the skilled person was led to select any suitable material usually applied in the waist region of such disposable diapers or undergarments such as laminates of a non-woven layer and an elastic layer. These laminates were known from D1 or D2. Therefore no inventive activity was necessary to arrive at the subject-matter of granted claim 1.

The amended claim 1 did not meet the requirements of Article 123(2) EPC because the new features were missing from the disclosed combination. In this respect at least the feature of laminating into a laminate one elongatable, non-elastic non-woven layer and one elastic layer in their relaxed state (WO-A-93/24085 page 4, lines 24 to 26) was missing in the claim, and therefore the combination now claimed was not disclosed in the application as originally filed.

VIII. The submissions of the Respondent are summarised as follows:

Claim 1 was to be interpreted as starting from a disposable training pant having side panels composed of an elastic portion and an non-elastic portion as was derivable from the examples given in the patent in suit. The problem to be solved consisted in avoiding joins which weakened the material of the side panels. D1 did not lead to the subject-matter claimed because the elastic portion and the non-elastic portions of the side panels were joined by seams. The skilled person would not consider D2 as providing a suitable material because the laminate disclosed there could be extended during bandaging and remained in partly extended condition thus not being able to maintain sufficient

elasticity which was required for an improved conformability of the panty.

The amendments to claim 1 according to the auxiliary request were clearly supported by the application as originally filed. The feature of joining the elongatable, non-elastic non-woven layer and the elastic layer in their relaxed state was a process step which could not be determined in the finished product and for this reason could be omitted in a product claim. Moreover, it nevertheless was implicitly comprised in the new characterising portion of claim 1 since the non-elasticised edge portion being a non-stretched portion of the laminate material could only be achieved when joining the layers in their relaxed state.

The subject-matter of the amended claim 1 was novel and inventive when compared with the teachings of the prior art documents. The skilled person had no reason to try a combination of D1 with D2 because D2 disclosed several different types of elasticised substrates, all of which were not suitable to solve the problem of the patent, in particular to strengthen the seams. Since also D1 did not mention that problem, a combination of these two documents was not obvious and the argumentation relied upon by the appellant was based on hindsight.

Reasons for the Decision

1. The appeal is admissible.
2. *Main request*
- 2.1 Interpretation of the scope of claim 1

There are no features specified in claim 1 that restrict its subject-matter to embodiments having only one side seam but rather its scope also covers disposable panties having more than one side seam, such as shown in the embodiments disclosed in D1 (Figure 1). Therefore, when considering inventive step, the Board agrees with the Appellant that the subject-matter claimed has to be considered to include also the possibility of side panels having multiple longitudinal side seams. The respondent's argument according to which the claim should be interpreted in a limited manner because the examples disclosed showed single seam configurations only is not convincing.

It is true that, in accordance with Article 69 EPC, second sentence, the description and drawings shall be used to interpret the claim and, because the extent of protection conferred shall be determined by the terms of the claim (Article 69 EPC, first sentence) a different interpretation of these terms might have consequences with regard to the subject-matter claimed.

However, generally speaking, as long as the features of the claim are not in conflict with the embodiments disclosed, the terms of the claim - indeed **intended** to cover not only the specific embodiments disclosed in

the patent - should be interpreted in the most wide technically reasonable manner. As mentioned above in the present case the terms of the claim do not necessarily exclude a configuration with multiple side seams.

2.2 Novelty

D1 discloses a disposable training pant having the features of the preamble of claim 1. The subject-matter of claim 1 is distinguished from that known panty by the features of the characterising portion because D1 does not explicitly disclose that the non-stretchable portions of the side panels are a laminate material and comprise a non-elasticised laminate material comprising at least one non-woven layer and at least one elastic layer.

D2 and D3 do not deal with training pants but disclose elastic composites or a diaper with a waist band elastic, respectively.

2.3 Inventive step

2.3.1 When interpreting claim 1 as stated above, the objective problem starting from D1 is to provide an alternative material for the non-elasticised outboard edge portions.

2.3.2 This problem is solved by a disposable training pant having the features of claim 1, in particular by non-elasticised outboard edge portions (51) comprising a non-elasticised laminate material (20) comprising at

least one non-woven layer (12) and at least one elastic layer (13).

2.3.3 According to D1 the side panels 6, 8 can be made of the same suitable material as the waist elastics 42, 44 (column 11, lines 6 to 9). D2 discloses an elastic composite suitable for use as waist elastic (column 2, lines 5 to 6) comprising a non-woven fabric and an elastic layer, such as a plastic film, which are bonded together (column 3, lines 5 to 15) providing elasticity and fit of the disposable garment. When looking for suitable materials to be used for making the panties of D1, the skilled person would be suggested to take the material of D2 simultaneously suitable for waist elastics and side panels thus arriving at the claimed solution of the patent in suit. Therefore the subject matter of claim 1 would be arrived at without the involvement of an inventive step (Article 56 EPC).

3. *Auxiliary request*

3.1 Admissibility of the amendments

Claim 1 of the auxiliary request was amended by adding features which are disclosed in the description of the patent (column 4, lines 14 to 21) corresponding with the text of the application as originally filed (WO-A-93/24085 page 4, lines 24 to 28).

The Appellant objected that the feature that the non-elastic non-woven layer and the elastic layer are laminated **while both are in their relaxed state** was removed from the combination of features and that therefore the claim violated Article 123(2) EPC.

However, the Board follows the respondent in that this feature is implicitly comprised in the last feature of claim 1 as amended. The non-elasticised edge portion of the laminate material being a non-stretched portion, and can only be achieved when joining the layers of the laminate in their relaxed state. Therefore, claim 1 at least for this reason complies with the requirements of Article 123(2) EPC.

3.2 Novelty

Novelty of the subject-matter of amended claim 1 was not contested. The board concludes that the requirement of novelty is met since the claim was further restricted with respect to claim 1 of the main request (Article 54(1) EPC).

3.3 Inventive step

3.3.1 The closest prior art is represented by D1 which discloses a disposable training pant having the features of the preamble of claim 1.

3.3.2 Starting from this known absorbent article the problem underlying the subject-matter of claim 1 is to strengthen the side seams and to avoid at least partial tearing during manufacturing and use (column 2, lines 13 to 39).

3.3.3 This technical problem is solved by a disposable training pant having the features of claim 1, in particular by side panels designed in the shape of elasticised members being formed of a laminate material

and comprising at least one elongatable non-elastic non-woven layer and at least one elastic layer wherein the elasticised laminate portion is a portion of the laminate material which has been elasticised by mechanically stretching the laminate material to impart elasticity thereto in the direction of stretching, at least up to the point of initial stretching, and the non-elasticised edge portion being a non-stretched portion of the laminate material.

3.3.4 The training pant disclosed in D1 has side panels comprising stretchable side members 18, 20, 24, 26 and non-stretchable members 22, 28 which are laterally joined by seams 34, 36, 38, 40 (Figure 1). In an alternative embodiment the side panels consist of only stretchable members which are laterally joined by side seams (Figure 2). Although it is suggested to use a suitable elastic material which may be similar to that of the waist elastic, no indication is derivable from that document to use a laminate material of the specific assembly of claim 1 with a non-woven layer and an elastic layer which has partially been elasticised by mechanically stretching, the edge portion of which is a non-stretched portion of the laminate material. Therefore, in view of the teachings of D1 the subject-matter of claim 1 is non-obvious.

3.3.5 D2 deals with elastic composites for use in disposable garments. A plastic film is intermittently bonded to a substrate such as a woven, non-woven, knitted or fusible fabric and stretched to impart elasticity to a defined region of the garment. The problem of forming seams at an edge of the elastic composite is not addressed in that document, and therefore this document

would not suggest to select the particular combination of features of claim 1 wherein the edge portion is a non-elasticised region providing improved stability when forming the side seams of a training pant. Even if the skilled person would try to combine the teachings of D2 with those of D1 the subject-matter of claim 1, this combination would not lead to a laminate material which comprises a partly elasticised member being mechanically stretched in selected areas before being joined to the garment. Since none of the other documents in the proceedings comes closer than D1 and D2, and were no longer relied upon by the appellant, it can be concluded that the claimed solution to the problem involves an inventive step (Article 56 EPC).

4. Summarizing, in the Board's judgment, the proposed solution to the technical problem underlying the patent in suit defined in the independent claim 1 is inventive and therefore this claim as well as its dependent claims 2 to 4 relating to a particular embodiment of the invention in accordance with Rule 29 (3) EPC, can form the basis for maintenance of the patent (Article 52(1) EPC).

Thus taking into account the amendments made by the Appellant, the patent and the invention to which it relates meet the requirements of the EPC and the patent as amended is maintained in this form (Article 102(3) EPC).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The main request is rejected.
3. The case is remitted to the First Instance with the order to maintain the patent with the following documents:
 - claims 1 to 4 filed as auxiliary request at the oral proceedings;
 - description, column 1 and 2, filed at the oral proceedings;
 - column 3 to 10 and Figures 1 to 6 as granted.

The Registrar:

The Chairman:

M. Patin

P. Alting van Geusau