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**D E C I S I O N**  
**of 4 March 2005**

**Case Number:** T 1022/02 - 3.2.6

**Application Number:** 95916887.3

**Publication Number:** 0755239

**IPC:** A61F 13/56

**Language of the proceedings:** EN

**Title of invention:**

A pants-type diaper or sanitary panty

**Patentee:**

SCA Hygiene Products AB

**Opponent:**

Kimberly-Clark Worldwide, Inc.

**Headword:**

-

**Relevant legal provisions:**

EPC Art. 54(2), 56

**Keyword:**

"Novelty (yes)"

"Inventive step (yes)"

**Decisions cited:**

T 0190/99

**Catchword:**

-



Case Number: T 1022/02 - 3.2.6

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.6  
of 4 March 2005

**Appellant:** KIMBERLY-CLARK WORLDWIDE, INC.  
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**Respondent:** SCA Hygiene Products AB  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 24 July 2002  
rejecting the opposition filed against European  
patent No. 0755239 pursuant to Article 102(2)  
EPC.

**Composition of the Board:**

**Chairman:** P. Alting van Geusau  
**Members:** G. Pricolo  
R. T. Menapace

## Summary of Facts and Submissions

I. The appeal is from the decision of the Opposition Division posted on 24 July 2002 to reject the opposition filed against European patent No. 0 755 239, granted in respect of European patent application No. 95916887.3.

Claim 1 of the granted patent reads as follows:

"An absorbent article in the form of a pants-type diaper or sanitary panty, which includes an elongated absorbent body (1) enclosed between two casing sheets (2,3) which include side parts (7-10) which at front and rear end parts of the absorbent body extend laterally beyond the absorbent body on both sides thereof, wherein mutually opposing front and rear side parts (7,9 and 8,1 respectively) are joined together by means of a fastener element (11;14;18;21;24), which is attached to one of said mutually opposing side parts by a first, strong join or fastening (12;26) and releasably and refastenably fastened to the other side part by means of a second join or fastening (13;15;17;19;22;23;25) which is weaker than the first join, characterized in that the second join includes a first fastening (17;22) which is destroyed when opening the second join for the first time, and also includes a second refastenable join (15;19;23;25)."

In coming to its decision the Opposition Division considered that the claimed subject-matter was novel and involved an inventive step over the cited prior art represented by documents:

D1: GB-A-2 244 422;

D2: GB-A-2 267 024;

D3: US-A-4 699 622.

II. The appellant (opponent) lodged an appeal against this decision, received at the EPO on 3 October 2002, and simultaneously paid the appeal fee. The statement setting out the grounds of appeal was received at the EPO on 2 December 2002.

III. With letter dated 24 March 2003 the respondent (patentee) filed amended documents forming the basis for first to third auxiliary requests of maintenance of the patent in amended form.

IV. In an annex to the summons for oral proceedings pursuant to Article 11(2) Rules of Procedure of the boards of appeal the Board expressed its preliminary opinion that it would appear that novelty of the claimed subject-matter over D1 and D2 was given. In particular, this opinion was based on the finding that the element of the diaper of D1 corresponding to the fastener element of claim 1 of the patent in suit was the fastener tape, which was attached to the rear side part by a first strong join and releasably and refastenably fastened to the front side part by means of a weaker second join including only one fastening.

V. Oral proceedings took place on 4 March 2005.

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

The respondent requested that the appeal be dismissed and that the patent be maintained as granted or on the basis of one of the first to third auxiliary requests filed with the letter dated 24 March 2003.

VI. The arguments of the appellant can be summarized as follows:

D1, as shown in the embodiment in Fig. 5, disclosed an absorbent article having a fastening element comprising a fastening flap 5E secured at its base via a first, strong join to the rear portion of the article, and to the front portion of the article via a second join comprising a tape tab 6 and an attachment portion 5D. When the second join was opened for the first time, the adhesive forming the attachment portion 5D was broken. Using the wording of claim 1 of the patent in suit, in this embodiment the first join between the fastening element and the front portion of the diaper was coincident with the strong join between the fastening element and the rear portion of the diaper. However, this configuration was not excluded by the wording of claim 1 and therefore its subject-matter was not novel. Since claim 1 of the patent in suit did not exclude the fastening element being composite in nature, it was possible to arrive at this conclusion also by construing the embodiment of Fig. 5 in a slightly different way. The fastening element could in fact be regarded to comprise not only the fastening flap 5E, tape tab 6 and attachment portion 5D but also the elastic panels 14 attached to the fastening flaps. In such case, the first, strong join was to be seen in the join between the elastic panels and the rear portion of

the diaper and the second join as comprising the adhesive attachment portions and the tape tabs which constituted, respectively, the first fastening which was destroyed when opening the second join for the first time and the second refastenable join. The presence of a join between the elastic panels and the rear portion of the diaper was clearly derivable from the disclosure in D1 that the elastic panels were made of a material different from that of the casing sheets of the diaper. Also the embodiment of Fig. 10 of D1 was prejudicial to the novelty of the subject-matter of claim 1, since it was clear for the skilled person that the fastening assembly comprising the elastic side flaps, the fastening flaps, the adhesive attachment portion and the tape tabs was provided separately from, and thus was joined to, the casing sheets of the diaper.

Finally, the subject-matter of claim 1 was also known from D2, which disclosed a diaper in which fastening elements in the form of flaps were secured to the rear portion of the diaper via strong joins and to the front portion of the diaper via a second join, which incorporated a first breakable fastening and a second refastenable join.

VII. The respondent essentially submitted that in the diaper according to D1 the elastic flaps and the fastener flaps were constituted by portions of the rear side parts of the casing sheets and could not be regarded as part of a fastener element which was necessarily a separate element. In fact, the element of the diaper of D1 corresponding to the fastener element referred to in claim 1 of the patent in suit was the tape tab, which

included a second join constituted by a refastenable join but no fastening which was destroyed when opening said second join for the first time.

The pants-type diaper of D2 included fastening flaps joined at one end to the front and rear side parts by a weld seam that also joined said front and rear side parts together. The fastening flaps carried at the outer end a refastenable join but no fastening which was destroyed when opening said refastenable join for the first time.

### **Reasons for the Decision**

1. The appeal is admissible.
2. *Novelty*
  - 2.1 Document D1
    - 2.1.1 Using the wording of claim 1 of the patent in suit, D1 discloses an absorbent article (see figures 4 and 5) in the form of a pants-type diaper or sanitary panty (see page 1, first paragraph), which includes an elongated absorbent body (4) enclosed between two casing sheets (2,3) which include side parts (5A-C) which at front and rear end parts of the absorbent body extend laterally beyond the body on both sides thereof, wherein mutually opposing front and rear side parts (5A, 5C) are joined together.

Said front and rear side parts are joined together by means of a join 5D-5D (the portions 5D of the front and

rear side parts are joined together in the finished product shown in figure 4) and a fastener tape 6 which cooperates with a pad 8 (see page 9, last paragraph to page 10, first paragraph and page 13, last paragraph). The fastener tape is provided on a fastener flap 5E (page 10, lines 8,9).

In the Board's judgment, the element of the diaper of D1 corresponding to the fastener element in accordance with the definition of claim 1 of the patent in suit is the fastener tape 6, which is attached to the rear side part by a first strong join (join between tape 6 and fastener flap 5E) and releasably and refastenably fastened to the front side part by means of a weaker second join or fastening (constituted by an adhesive, see page 9, first paragraph). Such second join or fastening includes a refastenable join, but no fastening which is destroyed when opening the second join for the first time.

2.1.2 The appellant submitted that in the embodiment of Fig. 5 the fastener flap 5E was to be regarded as a part of the fastener element, which was constituted by said fastener flap 5E and the tape fastener 6 attached thereto.

However, considering that the claim should be read in a manner which is technically sensible and takes into account the whole disclosure of the patent in suit (Article 69 EPC; see T 190/99), in the Board's view the skilled reader would consider that a "fastener element" within the meaning of claim 1 is an element separate from the front and rear side parts of the casing sheets of the pants-type diaper or sanitary panty and which



has the function of attaching said front and rear side parts together. In fact, this conclusion is not only immediately derivable from the wording of claim 1 of the patent in suit ("two casing sheets which include side parts [...] mutually opposing front and rear side parts are joined together by means of a fastener element"), but also finds clear support in all the embodiments of the patent in suit, where (see Figs. 1 to 5) the fastener element is always provided as a fastener band or strip (11,14,18,21,24) separately attached to the front and rear side parts of the diaper.

In the embodiment of Fig. 5 of D1 the fastener flap 5E serves as an extension of the rear side part of the casing sheets (see page 10, lines 5 to 9) which provides a suitable support for the attachment and for the functionality of the tape fastener 6. It is true that the rear side part and the front side part of the diaper are joined by attachment portions 5D-5D which are located at the base of the fastener flaps 5E (see page 9, last paragraph; see also Fig. 4). However, precisely because the attachment portions 5D are located at the base of the fastener flaps 5E, the fastener flaps do not contribute to the fastening function provided by said attachment portions. Furthermore, there is no disclosure in D1 of said fastener flap 5E being attached to one of said mutually opposing side parts of the diaper by a join or fastening. In fact, D1 does not disclose that the upper attachment portion 5D in Fig. 5 constitutes a join or fastening between the fastener flap 5E and the rear side part 5A of the diaper, and leaves open whether in the embodiment of figure 5 the fastener flap is

provided as a continuous extension of the casing sheets or as a separate piece of material attached thereto.

Therefore, in the embodiment of Figure 5 the fastener flaps can neither be regarded as elements separate from the front and rear side parts of the casing sheets nor as elements having the function of attaching the front and rear side parts of the pants-type diaper or sanitary panty together. Accordingly, they cannot be regarded as forming part of a fastener element within the meaning of claim 1 of the patent in suit.

2.1.3 It follows from the above that also the elastic member 14 in the embodiment of Fig. 5 cannot be regarded as making part of a fastener element within the meaning of claim 1 of the patent in suit because the fastening flap 5E is interposed between the elastic member 14 and the tape fastener 6. In this respect, the Board follows the view of the Opposition Division that the "elastic members have nothing to do with a fastener element as mentioned in claim 1 of the patent in suit".

Similarly, in the embodiment of Fig. 10, the "fastener element" in accordance with claim 1 of the patent in suit is one of the tape fasteners 16A, 16B, which are provided onto fastening flaps 15E (page 21, last paragraph). Also in this embodiment, the elastic member 115 cannot be regarded as forming part of a fastener element within the meaning of claim 1 of the patent in suit because the fastening flap 15E is interposed between the elastic member 115 and the tape fastener 16A or 16B.

2.2 Document D2

D2 discloses a pants-type diaper (see figures 1 to 7) which includes an elongated absorbent body (13) enclosed between two casing sheets (11,12) which include side parts (3,4) which at front and rear end parts of the absorbent body extend laterally beyond the body on both sides thereof, wherein mutually opposing front and rear side parts are joined together.

The front and rear side parts (4,3) are joined together (see figures 3 and 4) by means of a bond line 8. This bond line 8 also serves as a join for bonding to the diaper a fastening flap 6 having a fastening spot 5.

The element of the diaper of D2 corresponding to the fastener element in accordance with the definition of claim 1 of the patent in suit is the fastening flap 6, which is attached to the front side part by a first strong join 8 and releasably and refastenably fastened to the front side part by means of weaker second join or fastening 5. Such second join or fastening includes a refastenable join, but no fastening which is destroyed when opening the second join for the first time.

Contrary to the appellant's opinion, the second join cannot be regarded as incorporating a breakable fastening. It is true that the diaper of D2 is provided (see Figs. 1, 4 and 5) at locations 9a adjacent the bond lines 8 with cutting lines 9b. However, these cutting lines 9b are provided in the front side part 3 and do not serve as a join or fastening but provide a weakening of the front side part so that it can be torn

off from the rear side part along the cutting lines (see page 5, last paragraph).

2.3 Document D3

D3 discloses a diaper which is not in the form of a pants-type diaper (see Fig. 1). It includes a fastener element (54) which is attached to one of said mutually opposing side parts by a first, strong join or fastening and releasably and refastenably fastened to the other side part by means of a second join or fastening (see col. 8, lines 20 to 47). The second join or fastening does not include a fastening which is destroyed when opening the second join for the first time.

2.4 Therefore, the subject-matter of claim 1 is novel (Article 54(2) EPC) over the available prior art.

3. *Inventive step*

The problem underlying the patent in suit, consisting in eliminating the drawbacks of known pants-type diapers or sanitary panties (see par. [0002] and [0004] of the patent in suit) is already solved in D1, which accordingly represents the closest prior art. In fact D1 discloses an absorbent article having front and rear side parts joined together so that the article can be delivered in pants form, wherein (see Figs. 4 and 5) said front and rear side parts can be separated from each other by breaking a first join (5D-5D) and then refastened by means of a refastenable second join (adhesive portion of tape tab 6), thereby allowing to achieve, in an absorbent article having the form of a

pants-type diaper or sanitary pant, the advantages of a conventional all-in-one diaper (see the first full paragraphs of pages 3 and 4 of D1 and paragraphs [0015] and [0016] of the patent in suit).

Therefore, the objective technical problem which is solved by the absorbent article of claim 1 can be regarded as to provide an alternative solution for achieving these advantages.

The available prior art does not disclose (see point 2 above) to provide the second join of the absorbent article, which includes a (second) refastenable join, with an additional (first) fastening which is destroyed when opening the second join for the first time. Nor is there any hint in respect of this measure, as the available prior art consistently suggests to provide, in absorbent articles in the form of a pants-type diaper or sanitary panty as disclosed by D1 or D2, a destroyable fastening (see the attachment portions 5D-5D in Fig. 4 of D1 and the cutting lines 9b in Fig. 1 of D2) at a distance from the fastening element. Therefore, the subject-matter of claim 1 is not obvious to a person skilled in the art and therefore involves an inventive step within the meaning of Article 56 EPC.

In fact, inventive step was not in dispute in the appeal proceedings.

4. Dependent claims 1 to 7 define further embodiments of the absorbent article of claim 1 and accordingly their subject-matter also is novel and involves an inventive step.

5. Since the patent can be maintained as granted, it is not necessary to consider the auxiliary requests of the respondent.

## **Order**

**For these reasons it is decided that:**

The appeal is dismissed.

The Registrar:

The Chairman:

M. Patin

P. Alting van Geusau