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**D E C I S I O N**  
**of 9 June 2005**

**Case Number:** T 0203/03 - 3.2.06

**Application Number:** 89122695.3

**Publication Number:** 0376022

**IPC:** A61F 13/15

**Language of the proceedings:** EN

**Title of invention:**

Absorbent article having unitary waistcap and waistband

**Patentee:**

THE PROCTER & GAMBLE COMPANY

**Opponent:**

Kimberly-Clark Corporation

**Headword:**

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**Relevant legal provisions:**

EPC Art. 111(2), 56

**Keyword:**

"Binding effect on the Board of Appeal of its earlier decision  
(yes)"

"Inventive step (yes)"

**Decisions cited:**

T 0324/98, T 0153/93, T 0934/91

**Catchword:**

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**Case Number:** T 0203/03 - 3.2.06

**D E C I S I O N**  
**of the Technical Board of Appeal 3.2.06**  
**of 9 June 2005**

**Appellant:** Kimberly-Clark Corporation  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 26 November 2002  
revoking European patent No. 0376022 pursuant  
to Article 102(1) EPC.

**Composition of the Board:**

**Chairman:** G. Pricolo  
**Members:** G. L. De Crignis  
J. H. Van Moer

## Summary of Facts and Submissions

- I. The appeal is from the interlocutory decision of the Opposition Division posted on 26 November 2002 concerning the maintenance in amended form of European patent No. 0 376 022, granted in respect of European patent application No. 89 122 695.3.

Independent claim 1 in the form as maintained by the Opposition Division reads as follows:

"An integral disposable absorbent article (20) having longitudinal edges (30) and end edges (32), the absorbent article comprising an absorbent core (44) having a garment surface and a body surface; a liquid impervious backsheet (42) positioned adjacent said garment surface of said absorbent core; a liquid pervious topsheet (38) positioned adjacent said body surface of said absorbent core; a waistcap/waistband (78) disposed adjacent at least one of the end edges (32) of the absorbent article, said waistcap/waistband (78) having an outward portion (80) associated with the absorbent article adjacent said end edge and inward portion (82) contiguous with said outward portion, said inward portion having a proximal edge (84), a distal edge (86), and ends (92) being joined to the absorbent article and said distal edge (86) being spaced inboard from said proximal edge, at least a portion of said distal edge (86) being unsecured to the underlying portion of the absorbent article between said ends (92) so that said distal edge is spaced away from the liquid-receiving surface of the absorbent article, wherein the waistcap/waistband (78) is formed of a single piece of elastomeric material serving both as

the waistband and as the waistcap characterized in that the outward portion (80) is operatively associated in an elastically contractible condition with the absorbent article adjacent said end edge (32), and the distal edge (86) of the inward portion (82) is operatively associated in an elastically contractible condition with the absorbent article adjacent said ends (92) of the inward portion (82), and wherein the single piece of elastomeric material provides all the said elastic contractibility."

- II. The claims under consideration in the decision under appeal, in which the Opposition Division considered that the claimed subject-matter involved an inventive step, were identical to the claims on which Board of Appeal 3.2.06 (in a different composition) based its earlier decision T 324/98 in respect of the patent in suit. In this decision the Board considered that the amendments made to the patent in suit met the requirements of Articles 123(2) and (3) EPC and that the claimed subject-matter was novel, and remitted the case to the first instance for further prosecution pursuant to Article 111(1) EPC.
- III. The appellant (opponent) filed on 6 February 2003 a notice of appeal against the decision of the Opposition Division following the remittal and simultaneously paid the appeal fee. With the statement setting out the grounds of appeal, received on 3 April 2003, the appellant raised fresh objections based on lack of clarity (Article 84 EPC) and argued on lack of inventive step (Article 56 EPC) on the basis of the prior art disclosed by documents:

D1: EP-A-0 264 238;

D2: US-A-4 685 916;

D3: US-A-4 681 880.

IV. In an annex to the summons to oral proceedings pursuant to Article 11(1) of the Rules of Procedure of the Boards of Appeal dated 25 January 2005 the Board referred to reasons of the previous decision T 324/98 in respect of the manner in which the claim was to be construed and stated that inventive step was to be discussed.

V. Oral proceedings were held on 9 June 2005.

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

The respondent (patentee) requested that the appeal be dismissed and that the patent be maintained as upheld by the opposition division.

VI. In support of its request the appellant essentially relied upon the following submissions:

According to the reasoning of the Opposition Division, the prior art did not suggest the concept underlying the patent in suit of providing a waistcap/waistband having three edges associated with the absorbent article which, in unrestrained conditions, contracted themselves in two directions, i.e. transversely along the waistband edges and along the longitudinal dimension of the absorbent article, thereby directly

building up pockets at the waistband regions. However, the claim did not specify whether the elastic contractibility provided by the waistcap/waistband consisting of a single piece of elastomeric material was in the longitudinal direction, in the lateral direction, or in both and was therefore unclear in this respect.

Furthermore, the feature added to claim 1 as granted, according to which the single piece of elastomeric material provided all the elastic contractibility, was in contradiction with all the embodiments of the patent in suit, where elastic contractibility of the waistcap/waistband was clearly due also to the leg elastics which extended into the region of the waistcap/waistband and, in unrestrained condition, contracted the whole absorbent article. Hence, this feature, which inclusion in claim 1 was in fact contrary to the requirements of Article 123(2) EPC, could not be taken into consideration in the assessment of inventive step over the prior art.

The skilled person was unambiguously taught by D1 that the waist barrier cuff could itself be formed of an elastic foam material, which was a material of which the waistband/waistcap could be formed in the patent in suit. Hence, as in the patent in suit, the waistcap/waistband portion tended to be lifted away from the topsheet by virtue of cooperation with the longitudinally extending barrier cuffs thereby forming a containment pocket. Although D1 disclosed that the leg elastics provided the elastic contractibility necessary for lifting the waist barrier cuffs, a contribution of the leg elastics in lifting the

waistcap/waistband was also present in the absorbent article of the patent in suit. Therefore, the skilled person would directly arrive at an absorbent article according to claim 1 of the patent in suit.

If the feature of claim 1 according to which the single piece of elastomeric material provided all the elastic contractibility were taken into consideration, the skilled person would still arrive at the subject-matter of claim 1 without inventive activity since he would immediately recognise that no further elastic member would be required in order to contract the waist barrier cuff. On the contrary, the most obvious solution would be to exploit the natural elasticity of the barrier cuff member itself. The teachings of D2 and D3 supported this argument because they both described integrally formed elastomeric members providing all the waist elasticity.

VII. The submissions of the respondent can be summarized as follows:

In its earlier decision T 324/98 in respect of the patent in suit the Board already decided that the amendments made to claim 1 of the pending request met the requirements of Article 123(2) EPC. The Board further found in that decision that the subject-matter of claim 1 was distinguished from the absorbent article of D1 principally in that a single piece of elastomeric material serving as the waistcap/waistband provided all the elastic contractibility. The Board responsible for the present appeal proceedings was bound by the *ratio decidendi* of this earlier decision and therefore these matters were not open to discussion.

Starting from the closest prior art disclosed by D1, the technical problem solved by the patent in suit was to provide a simpler structure which yet gave improved containment. There was nothing in D1 to suggest using a waistcap/waistband formed of a single elastomeric element providing all the elastic contractibility to lift the distal edge of the waistcap/waistband. In contrast, whenever D1 required elastication, it merely used inserts as elastic members. The reference in D1 to elastic foam was merely an indication of the possibility of using such material as a relatively non-loadbearing "flexible" material. There was nothing in D1 to suggest that the elastic foam should be applied in an elastically contractible condition, and indeed there was nothing even to suggest that the material would have sufficient strength to be capable of having useful elastic contractibility. Therefore, the claimed solution to the technical problem was not obvious.

### **Reasons for the Decision**

1. The appeal is admissible.
2. *The earlier decision of the Board of Appeal*
  - 2.1 According to the established case law of the boards of appeal, an earlier board of appeal decision where a case is remitted to an opposition division has the binding effect referred to in Article 111(2) EPC also on the subsequent appeal against the ensuing decision of the opposition division (see e.g. T 153/93). Accordingly, in the present appeal proceedings the



Board is bound by the *ratio decidendi* of earlier decision T 324/98 of Board of Appeal 3.2.06 in respect of the patent in suit in so far as the facts are the same. This latter condition being satisfied, it follows that the questions of allowability of the amendments (Article 123 EPC) and of novelty (Article 54 EPC) cannot be the subject of the present decision as they were already finally adjudicated by the earlier decision.

- 2.2 The essential point in determining the judgment of the Board that the subject-matter of claim 1 is novel over D1 i.e. the *ratio decidendi* as regards novelty (see T 934/91, OJ 1994, 184), is (see point 3.2 of T 324/98) that the subject-matter of claim 1 differs from the disclosure in D1 "**principally** [emphasis added] in that the single piece of elastomeric material serving as the waistcap and as the waistband provides all the elastic contractibility as defined in the claim, namely that of the outward portion as associated with the absorbent article adjacent its end edge and of the distal edge of the inward portion as associated with the absorbent article adjacent the ends of the inward portion. As opposed to the subject-matter of claim 1, the outward portion of the waistcap discussed in D1 needs the addition of an elastic member 60 to be operatively associated in an elastically contractible condition with the waistflap to form a waist gasketing cuff (see column 11, line 50 to column 13, line 24). The distal edge of the inward portion of the waist barrier cuff further needs the elastic member 77 to provide the operative association in an elastically contractable condition with the absorbent Article (see column 6, lines 10 to 24 and column 14, lines 1 to 8)."

Accordingly, in the present appeal proceedings the Board is bound by this finding and is not empowered to modify it.

- 2.3 The appellant objected that claim 1 was not clear because it did not specify the direction of elastic contractibility provided by the waistcap/waistband. Furthermore, the feature of claim 1 according to which the single piece of elastomeric material provided all the elastic contractibility, was in contradiction with all the embodiments of the patent in suit, where elastic contractibility of the waistcap/waistband was clearly also due to the leg elastics which extended into the region of the waistcap/waistband and, in unrestrained condition, contracted the whole absorbent article, and in fact its inclusion in claim 1 as granted was in breach of Article 123(2) EPC.

In the Board's view these objections, which were raised for the first time in the present appeal proceedings, are in fact seeking a modification of the *ratio decidendi* in respect of novelty of earlier decision T 324/98 (see point 2.2 above). As a matter of fact, the elastic contractibility in question is the elastic contractibility of the **outward portion** of the waistcap and of the **distal edge of the inward portion**, as clearly follows from the wording of claim 1 and as underlined in point 3.2 of T 324/98. Thus, claim 1 of the patent in suit refers to the elastic contractibility of portions of the waistcap/waistband which substantially extend only in one direction, namely the lateral direction of the absorbent article. It is therefore clear that in coming to its judgment in T 324/98, the Board considered the elastic

contractibility in the lateral direction of the absorbent article.

This is by no means in contradiction with the embodiments of an absorbent article in accordance with the patent in suit, as the leg elastic such as 74 extend in the longitudinal direction of the absorbent article and cannot provide elastic contractibility of the above-mentioned portions of the waistcap/waistband in the lateral direction.

Accordingly, the appellant's objections under Article 84 EPC and 123(2) EPC raised for the first time in the present appeal proceedings are in conflict with the *ratio decidendi* of earlier decision T 324/98 and must be dismissed.

3. *Inventive step (Article 56 EPC)*

3.1 The technical problem underlying the patent in suit is to provide an absorbent article with leg and waist cuffs, which can be manufactured in a simplified way but which retains good containment characteristics (see column 1, lines 42 to 51).

3.2 In the decision under appeal D1 was considered to represent the closest prior art. Since D1 relates to an absorbent article having close structural similarities with the absorbent article of the patent in suit, the Board shares this view.

3.3 D1 undisputedly discloses an absorbent article according to the preamble of claim 1 of the patent in suit. According to D1, the barrier cuff 262, which

corresponds to the waistcap/waistband referred to in the patent in suit, must be contractible (column 14, lines 3 and 4) and may be manufactured from elastic foams (column 14, lines 8 to 12). The barrier cuff may be formed by a single separate strip of material (column 17, lines 43 to 45). Furthermore, D1 discloses that the barrier cuff 262 may have a spacing means associated with it (column 7, lines 30 to 38), and that the spacing means may be in the form of a spacing elastic member 77 disposed in the barrier cuff, which may consist e.g. of elastomeric foam (column 20, line 31, column 19, line 43 and column 18, line 55 to column 19, line 2).

3.4 The absorbent article according to claim 1 of the patent in suit effectively solves the above-mentioned technical problem, since in contrast to D1 a single element is necessary for providing an elastically contractible waistcap/waistband, which distal edge can be effectively raised above the liquid-receiving surface of the absorbent article so that a channel is formed to restrain, contain and hold body exudates within the absorbent article (see column 1, last paragraph, of the patent in suit).

3.5 In accordance with the disclosure of D1 (column 7, lines 30 to 32), it is preferred to have no spacing elastic member 77 in the waistcap/waistband (barrier cuff 262). However, if a spacing elastic member is provided, then it is in the form of a spacing elastic member 77 (column 7, lines 37, 38). In fact, whenever D1 requires elastication (as in the side barrier cuffs 62 or in the gasketing cuffs 56, see Figure 1) it merely inserts an elastic member (60, 77). There is no

hint in D1 that elastics might be provided by the material itself constituting the cuffs. Although D1 refers to elastic foam as one suitable material for the barrier cuffs (column 14, lines 11, 12), there is no suggestion that the elastic properties of the foam may be useful for providing the desired elastics of the barrier cuffs. In fact, elastic foam is merely one amongst a plurality of non necessarily elastic materials (column 14, lines 9 to 12), however having the necessary properties allowing barrier cuffs (column 13, line 54 to column 14, line 1) to be compliant and readily conform to the general shape and contour of the body.

As regards documents D2 and D3, they do not disclose a waistcap/waistband with a distal end spaced from the topsheet as agreed by the appellant. D2 discloses the provision of an elastomeric strip (40) attached to the waistband section (14) of a disposable garment (see claim 1). D3 discloses the provision of an elastically expansible waistband (18) between the topsheet (12) and the backsheet (16; see claim 1 and Figure 1). D2 and D3 in fact generally teach elastics of portions of absorbent article by means of additional elastic inserts, analogously to D1.

The other documents cited during the opposition proceedings do not give any indication towards the proposed solution to the above-mentioned technical problem.

- 3.6 Hence, since it cannot be derived in an obvious manner from the available prior art, the subject-matter of

claim 1, and of claims 2 to 8 dependent therefrom,  
involves an inventive step (Article 56 EPC).

**Order**

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

The appeal is dismissed

The Registrar:

The Chairman:

M. Patin

G. Pricolo