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D E C I S I O N
of 28 July 2005

Case Number: T 0523/03 - 3.2.6

Application Number: 95912629.3

Publication Number: 0750483

IPC: A61F 13/15

Language of the proceedings: EN

Title of invention:
Capillary laminate material

Patentee:
The Procter & Gamble Company

Opponents:
(I) Kimberly-Clark Corporation
(II) SCA Hygiene Products AB

Headword:
-

Relevant legal provisions:
EPC Art. 83, 100(b)

Keyword:
"Enabling disclosure - no"

Decisions cited:
-

Catchword:
-

Case Number: T 0523/03 - 3.2.6

D E C I S I O N
of the Technical Board of Appeal 3.2.6
of 28 July 2005

Appellant: The Procter & Gamble Company
(Proprietor of the patent)

Representative: Boon, G. A.

Respondent: Kimberly-Clark Corporation
(Opponent I)

Representative: Davies, C. R.

Respondent: SCA Hygiene Products AB
(Opponent II)

Representative: Amery, M. J.

Decision under appeal: Decision of the Opposition Division of the European Patent Office posted 7 April 2003 revoking European patent No. 0750483 pursuant to Article 102(1) EPC.

Composition of the Board:

Chairman: P. Alting van Geusau
Members: G. Kadner
C. Heath

Summary of Facts and Submissions

I. The mention of grant of European patent No. 0 750 483 with 13 claims in respect of European patent application No. 95 912 629.3 claiming a US-priority from 14 March 1994 and filed on 27 February 1995 was published on 14 June 2000.

II. Two notices of opposition were filed against this patent with requests for revocation based on the grounds of Article 100(a) (Opponent 01 and 02) and 100(b) (Opponent 01) EPC.

By decision posted on 7 April 2003, the Opposition Division revoked European patent 0 750 483.

The Opposition Division was of the opinion that although the requirements of Articles 83, 84, 100(b), (c), 123(2) and (3) EPC were met, the subject matter of claim 1 according to the main request, first and second auxiliary requests lacked novelty when compared with the prior art disclosed in:

D3: US-A-4 573 986 or

D21: WO-A-94/01 069.

III. Notice of appeal was lodged against this decision by the Appellant (Patentee) on 29 April 2003 together with payment of the appeal fee.

The statement of grounds of appeal was filed on 30 July 2003.

IV. In a communication pursuant to Article 11(1) of the Rules of Procedure of the Boards of Appeal dated 22 April 2005 sent together with the summons to oral proceedings, the Board expressed its preliminary opinion. Although the patent appeared to meet the requirements of Article 100(b) EPC and neither D3 or D21 appeared to disclose that the first and second sheet were spaced apart from one another thus defining a capillary zone therebetween, claim 1 of the main and first auxiliary request filed together with the statement of grounds of appeal appeared to lack novelty when compared to the disclosure of D22: WO 95/17 868.

In respect of inventive step it would have to be discussed whether the prior art provided or led towards a capillary space between the first and second sheet in an absorbent core.

V. Oral proceedings were held on 28 July 2005.

The Appellant requested that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of the claims in accordance with:

1. Main request as filed by letter of 24 July 2003;
2. Auxiliary requests 1 to 3 as filed during the oral proceedings;
3. Auxiliary requests 4 to 6, filed as auxiliary requests 1 to 3 by letter of 24 July 2003, the first insertion in claim 1 of auxiliary request 6 being amended as follows: "<said first sheet (42)

and said second sheet (46) being films or microporous membranes>".

The Respondents (Opponents) requested that the appeal be dismissed.

Claim 1 of the main request reads as follows:

"An absorbent article comprising

- (a) a liquid pervious topsheet (22),
- (b) a liquid impervious backsheet (23) joined with the topsheet (22)
- (c) an absorbent core (24) positioned between the topsheet (22) and the backsheet (23), and
- (d) an acquisition layer (25) positioned between the topsheet (22) and the absorbent core (24), wherein the absorbent core (24) comprises a laminate material (40) which comprises

a first sheet (42) and a second sheet (46), (*) said first sheet being fluid pervious, said first sheet and said second sheet being spaced apart from one another by a plurality of spacers (4), said spacers (48) defining a capillary zone (50) therebetween for the capillary movement of fluid, said spacers being formed from hot melt adhesive or pressure sensitive adhesive and connecting said first sheet and said second sheet together to form said laminate material, said spacers maintaining said first sheet and said second sheet (**) at a dimensional spacing sufficient to impart capillary forces to a fluid entering said capillary zone and move said fluid within said capillary zone via capillary pressure (***) ."

Claim 1 of the **first** auxiliary request corresponds with that of the main request with the insertion of "**, in use,**" (**).

Claim 1 of the **second** auxiliary request corresponds with that of the main request with the insertion of "**said first sheet (42) and said second sheet (46) being films or microporous membranes,**" (*).

Claim 1 of the **third** auxiliary request corresponds with that of the main request with both insertions according to the **first** and **second** auxiliary request.

Claim 1 of the **fourth** auxiliary request corresponds with that of the main request with the insertion of "**said first sheet (42) and said second sheet (46) being nonwoven webs, films, microporous sheets, porous sheets, microporous membranes or foam and**" (*).

Claim 1 of the **fifth** auxiliary request corresponds with that of the main request with the addition of "**wherein said capillary zone (50) is divided into a plurality of capillary channels (60) by spacers (48), said channels (60) having a substantially uniform shape along their length.**" (***)).

Claim 1 of the **sixth** auxiliary request corresponds with that of claim 1 of the main request having the insertion of the **second** and of the **fifth** auxiliary request.

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

The invention was disclosed in a manner sufficiently clear and complete that it could be carried out by a person skilled in the art. When bonding together the first and second sheet in the way as described in par. [0017] of the patent in suit it was clear that the adhesive had to be applied in a sufficient quantity to achieve the dimensional spacing between the two layers thus imparting capillary forces on the respective fluid. Further on in par. [0037] and [0058], it was indicated how the term "in use" was to be understood, namely to withstand the pressure exerted by the wearer in the respective application of the absorbent article in a way that the spacing was maintained so as to impart capillary forces on the fluid. A specific test method could not be defined because it would depend on the form in which the absorbent article was constructed and used, be it a sanitary napkin or a diaper which would require different parameters. Although no particular test was disclosed for measuring the dimensions of the gap between the sheets or the capillary forces, the skilled person was familiar with such tests and would apply them with respect to the particular application of the absorbent article. The capillary effect could then be determined when carrying out a test with a specific fluid. In the claims according to the auxiliary requests, restricted to sheets in the form of films or microporous membranes, it was still easier to establish suitable test conditions. The further restriction to the form of capillary channels according to the fifth and sixth auxiliary request provided also further clarification how the capillary forces were created.

VII. The arguments of the Respondents can be summarised as follows:

The subject-matter claimed covered a large area, part of which, even with the help of the description and figures of the patent, was not disclosed in a manner sufficiently clear and complete to be carried out.

Considering the main request, it was not clear under which circumstances the spacing between the first and second sheet should be considered "sufficient to impart capillary forces to the fluid entering said capillary zone" because any information as to the determination of the spacing distance and capillary forces was missing.

The first auxiliary request specified that the spacers held the first and second sheet at a dimensional spacing sufficient to impart capillary forces in an "in use" condition, but the "in use" conditions, which could be very different for the articles referred to in the patent, were not specified at all. This meant that the skilled person was unable to determine whether he was working within the scope of the claims or not.

The same objection of insufficiency also applied to the further auxiliary requests: none of the claims of these requests added information overcoming the objection under Article 83 EPC or was limited to a specific embodiment to which the objection did not apply. In this respect, the limitation to films and microporous membranes still did not help with the problems of determining the size of the spacing under different circumstances of use.

Reasons for the Decision

1. The appeal is admissible.
2. *Sufficiency of disclosure (Article 83, 100(b) EPC)*
 - 2.1 Article 83 EPC requires that the invention must be disclosed in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art. According to the case law of the Boards of Appeal, sufficiency of disclosure presupposes that the skilled person is able to obtain substantially all embodiments falling within the ambit of the claims (see T 19/90, OJ 1990, 476); T 242/92; T 418/91; T 548/91; T 923/92 (OJ 1996, 564). Furthermore, the disclosure of one way of performing an invention is only sufficient if it allows the invention to be performed over the whole range claimed (see T 409/91, OJ 1994, 653; T 435/91, OJ 1995, 188).
 - 2.2 Claim 1 of all requests includes the feature that "*... the first sheet and the second sheet are spaced apart from one another by a plurality of spacers, said spacers defining a capillary zone therebetween for the capillary movement of fluid, ... said spacers maintaining said first sheet and said second sheet at a dimensional spacing sufficient to impart capillary forces to a fluid entering said capillary zone and move said fluid within said capillary zone via capillary pressure.*"

That feature defines the spacing of the capillary zone by its function; the spacing must be selected so that capillary forces are imparted on a fluid entering the capillary zone.

The Board does not doubt that some embodiments of the invention could be carried out by a skilled person. However, it comes to the conclusion that the disclosure of the patent is not sufficient to determine whether or not an embodiment falls within the scope of the claims because the claims are unduly broad.

- 2.3 The Respondents submitted that the patent specification neither disclosed any reproducible process as to how the function of imparting capillary forces could be determined nor any test method for the measurement of the spacing or resulting capillary forces for the different possibilities of use of the claimed absorbent article. In view of this gap in the disclosure of the patent in suit, the Board arrives at the same result of insufficiency, since there is also no example described which would allow a restriction to an embodiment which under normal condition of use would allow conclusions in respect of clear limits for the dimensional spacing so as to distinguish between products falling within the scope of claim 1, and others which fall outside its scope.

The text passages of the patent specification [0017], [0037] and [0058] cited by the Respondent describe only qualitative properties of the subject-matter of the patent, but cannot contribute to a clear determination of the claimed absorbent article in respect of the dimensional spacing under discussion.

2.4 Although the Board has no concerns under Article 123(2) and (3) EPC, the restrictions according to the amendments made to claim 1 of the auxiliary requests, cannot overcome this defect because they all include the feature which renders the subject-matter of the claim unclear. Moreover, no reproducible parameter or defined test method is disclosed for those added features.

The insertion of "in use" does not add a clarification because it does not provide any additional information in respect of the spacing between the first and second sheet.

The same applies to the restrictions in claim 1 of the auxiliary requests to particular materials used as first and second sheet, and a particular shape of the capillary zone in the form of channels, since also for those embodiments no clear parameters or test conditions are given in order to determine the scope of the subject-matter claimed.

2.5 Consequently the skilled person is not in a position to carry out the invention in a reproducible manner over the whole range claimed. The functional feature concerning the properties of the capillary zone cannot be unambiguously determined or reliably repeated for lack of defined parameters and test methods.

In view of the above findings, the Board comes to the conclusion that the subject-matter of the patent in suit does not meet the requirements of Article 83 and 100(b) EPC.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

M. Patin

P. Alting van Geusau