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**D E C I S I O N**  
of 21 July 2005

**Case Number:** T 0225/04 - 3.2.6

**Application Number:** 95933832.8

**Publication Number:** 0782424

**IPC:** A61 F13/15

**Language of the proceedings:** EN

**Title of invention:**

Absorbent article with improved elasticized waistband

**Patentee:**

The Procter & Gamble Company

**Opponent:**

Paul Hartmann AG

**Headword:**

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**Relevant legal provisions:**

EPC Art. 54, 123(2)

**Keyword:**

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**Decisions cited:**

-

**Catchword:**

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Case Number: T 0225/04 - 3.2.6

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.6  
of 21 July 2005

**Appellant:** The Procter & Gamble Company  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 14 January 2004  
revoking European patent No. 0782424 pursuant  
to Article 102(1) EPC.

**Composition of the Board:**

**Chairman:** P. Alting van Geusau  
**Members:** G. L. de Crignis  
J. H. Van Moer

## Summary of Facts and Submissions

I. European Patent No. 0 782 424, granted on application No. 95 933 832.8, was revoked by the opposition division by decision posted on 14 January 2004. It based the revocation on the finding that the subject-matter of claim 1 of the main request, as well as that of claim 1 of the first and of the second auxiliary request was not novel (Article 54 EPC), in view of the prior art disclosed in:

E1 EP-A-0 532 035 or

E4 EP-A-0 491 347 or

E7 EP-A-0 323 040.

II. The appellant (patentee) filed a notice of appeal against this decision and paid the appeal fee, both on 30 January 2004. On 13 May 2004 the statement of grounds of appeal was filed in facsimile, accompanied by a set of claims in accordance with a main request and an auxiliary request.

With letter of 15 September 2004 the respondent replied to the appeal and submitted

E8 JP 4-4744

in order to demonstrate that separate elastic side panels were well-known at the priority date of the patent in suit.

III. With a communication dated 24 February 2005, accompanying the summons to oral proceedings, the Board set out its preliminary opinion. Novelty of claim 1 of

the main request was to be acknowledged in view of the fact that documents E1, E4 did not disclose clearly and unambiguously elastically extensible side panels in the second waist region and E7 lacked an elastic extensibility of the landing component.

IV. Oral proceedings were held on 21 July 2005.

The appellant requested to set aside the decision under appeal and to maintain the patent on the basis of the claims in accordance with the main request filed during the oral proceedings or, in the alternative, on the basis of the claims in accordance with the auxiliary request filed with letter of 21 June 2005.

The respondent (opponent) requested that the appeal be dismissed.

Claims 1 and 2 according to the main request read as follows:

Claim 1:

"An absorbent article (20) to be fitted to a wearer, said absorbent article comprising:

a) a containment assembly (21) having a longitudinal centreline (100), a longitudinal direction which is the direction parallel to said longitudinal centreline, a lateral centreline (110), a lateral direction which is the direction parallel to said lateral centreline, a first waist region (36), a second waist region (38) longitudinally opposed to said first waist region, a first end edge (56), a second end edge (58), an inner surface (52), an outer surface (50) and a pair of longitudinal edges (46),

said containment assembly comprising a first waist feature (32) positioned in said first waist region and being elastically extensible in said lateral direction, said containment assembly (21) comprising a liquid pervious topsheet (22), a liquid impervious backsheet (24) joined with said topsheet, and an absorbent core (26) positioned between said topsheet and said backsheet,

b) a fastening system (40) comprising.

a pair of engaging components (42) disposed in said second waist region; and

a continuous landing component (44), said landing component being engageable with said engaging components,

and wherein said landing component (44) comprises the loop component of a hook and loop fastener and said engaging components comprise the hook components of a hook and loop fastener,

said landing component is disposed on said outer surface of the absorbent article in said first waist region coincident with said first waist feature, at least a portion of said landing component being intermediate said engaging components when said engaging components are engaged with said landing component such that said first waist feature and said landing component are activated when the absorbent article is fitted to said wearer;

characterized in that

said landing component is elastically extensible at least in said lateral direction,

and in that the absorbent article (20) further comprises a pair of elastically extensible side panels (30) disposed in said second waist region (38), one of said side panels extending laterally outwardly from

each of said longitudinal edges (46) of said containment assembly (21), said side panels being elastically extensible in at least said lateral direction, wherein one of said engaging components (42) is disposed on each of said side panels (30)."

Claim 2:

"The absorbent article (20) of Claim 1, further comprising a second waist feature (34) disposed in said second waist region (38), at least a portion of said second waist feature being elastically extensible in at least said lateral direction."

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

The skilled person would read the claim to imply that the elasticity of all features was distinct from each other. Claim 1 was now restricted and should be seen in light of the description and the drawings as referring to a distinct and separate landing component on the outer side of the absorbent article, which landing component was elastically extensible at least in said lateral direction as well as to side panels disposed in the second waist region which had to be elastically extensible themselves in at least the lateral direction. The elastically extensible, form fitting waistband (column 3, lines 3/4) was independent on these features, this independency had already always been expressed insofar that this waistband was referred to in claim 1 under item a). Item a) of claim 1 set out the necessity of a containment assembly with an absorbent core positioned between a backsheet and a

topsheet and two waist regions. The continuous landing component specified under item b) of claim 1 was a feature separate from the items specified under a) and it represented a distinct member of the absorbent article. Its characteristics and namely its elastic extensibility had to be present in itself. The side panels were only referred to in the characterizing portion and thus they had also to be seen independent on the general requirements for the containment assembly as set out under item a) of claim 1. Therefore, the side panels should themselves be elastically extensible throughout. All amendments of the description necessary in view of this interpretation should be carried out accordingly.

Consistent with this interpretation, claim 1 was novel over the prior art disclosed by documents E1, E4 and E7.

E1 did not disclose that either the side panels themselves or that the landing component itself should be elastically extensible. The fact that there were elastic threads 62 and 50, respectively, in the related regions did not lead to side panels or a landing component which were elastically extensible as defined by claim 1 of the patent in suit because nothing was disclosed or directly derivable about the actual size and properties of the regions where the elastic threads were present.

E4 referred to two different embodiments, a first embodiment shown in figures 1 to 9 and a second embodiment shown in figures 10 and 11. There was no suggestion whatsoever for any embodiment to provide the diaper with side panels themselves being elastically

extensible. There was also no disclosure or suggestion that the landing member 22 itself should be elastically extensible. In the second embodiment elasticity was referred to with respect to the hook tabs or strips and the loop member being folded. However, these hook tabs did not represent side flaps in the sense of the patent in suit.

E7 essentially concerned adhesive fastening. E7 gave no exact teaching as to where in case the adhesive fastener would be replaced by hook-and-loop fasteners the landing component comprising the loop components of a hook-and-loop fastener should be positioned. The patent in suit referred to the landing component as being distinguished from the waist feature and therefore to a separate and distinct feature of the absorbent article. E7 - not teaching such a landing component - could also not teach to render the loop component elastically extensible.

With respect to the objection under Article 123(2) EPC the subject-matter of claim 2 had to be seen in view of the whole description. The skilled person had no difficulty in realizing that the second waist feature being elastically extensible was corresponding to the first waist feature and the disclosure available for the first waist feature should accordingly be appropriate for the second waist feature, as shown in figures 1 and 4, as well. Paragraph 0001 of the B-publication of the patent in suit already referred to absorbent articles "having [an] elastically extensible waistbands".



VI. The submissions of the respondent are summarized as follows:

The subject-matter of claim 1 of the main request was not novel. According to column 13, lines 2 to 5 of the patent in suit, the "landing component" was not limited to a single member. The side panels were defined in the patent in suit (column 11, lines 5 to 8) such that they "may be formed from extensions of the topsheet 22, the backsheet 24, or both, or may be separate members joined to the diaper 20." Thus they could be represented by any structure or material extending on the longitudinal edges of the absorbent structure.

E1 referred to an absorbent article comprising a hook and loop fastener (column 3, line 57 to column 4, line 6). The landing component was continuous (figure 4) and elastically extensible by the provision of elastic threads (figures 1 and 4) between the absorbent panel and backsheet. Particularly from figure 4 of E1, it could be seen that the loop surfaces 40 and 42 were on a separate landing component and on the outer surface of the article. E1 provided a pair of ear members and those could be considered as representing elastically extensible side panels via the elastic threads 62 whose elastic effect unavoidably extended into the side panel area.

E4 referred to an absorbent article with a separate landing component 22 (56 and 58 in figure 10) comprising the loop member. With respect to the elastically extensible side panels, their definition in the patent in suit was not sufficiently specific to exclude the hook tabs of E4 and particularly the

intermediate strip of stretchable or elastic material that joined these hook tabs to the ear portions (column 6, lines 15 to 19).

E7 disclosed a disposable diaper and hook and loop fasteners representing an alternative to the pressure-sensitive adhesive fasteners disclosed. E7 disclosed in figure 5 that the fastening tabs could land within the shirred area which represented an elastically extensible part of the backsheet. The whole backsheet of the diaper of E7 could represent a landing component as claimed since according to column 16, lines 31 to 35 of the patent in suit, the fastening components could be integral with any element of the diaper, such as the backsheet. Backsheets made of materials suitable as landing component for hook fasteners were well-known in the form of nonwoven materials. Therefore, the shirred area of the backsheet could be considered as representing the elastically extensible landing component. The elastically extensible side panels were represented in E7 by the ear flaps 20/21 with elastically extensible portions 34/35 as disclosed in figures 1 to 5. Therefore, the landing component as well as the elasticized side panels as claimed were present in E7.

Considering the requirements of Article 123(2) EPC, it should be acknowledged that the subject-matter of present claim 2 had never been disclosed in combination with the features of claim 1. The wording of present claim 2 was based on claim 5 as originally filed and on claim 5 as granted. In both cases the dependency of the claim had been limited to claims not claiming the hook and loop components of a hook and loop fastener.

Furthermore, in the description of the patent in suit, paragraph 0033 referred to the second waist features only in combination with a diaper. Therefore, the extension of this feature to an absorbent article comprising a hook and loop fastener represented added subject-matter.

### **Reasons for the Decision**

1. The appeal is admissible.
2. *Interpretation of claim 1*

In the discussion with respect to novelty it became apparent that the parties relied on different interpretations concerning the required elastic extensibility of the landing component and concerning the side panels. With reference to E1 the respondent was of the view that the elasticity imparted by the elastically extensible waistband to both the landing component and the side panel would be an embodiment embraced by the claim language. Furthermore, the elastically extensible side panels could also be represented by a tab member joined to each side panel since no direct connection or attachment was claimed. Such alternative was disclosed in E4.

Even accepting that part of the elasticity of the elastically extensible waistband shown in E1 could extend into both the landing component and the side panels, there is no basis in the patent in suit that such arrangement would represent the "elastically extensible landing component" and the "elastically

extensible side panels" defined in claim 1. It is considered to be apparent from the claim that by stating properties of the components the component themselves should have these properties otherwise different language would have been chosen. Therefore, the skilled person immediately and unambiguously derives from the individual reference to elastic extensibility for each of the waistband, the landing component and the side panels, that each of these components, independently and separately, should have the claimed characteristic.

3. *Novelty (Article 54 EPC)*

E1 relied upon by the respondent in its argumentation for lack of novelty discloses a growth adjustable diaper comprising a containment assembly with first and second waist features (figures 1, 2, 4, 5). The assembly comprises a topsheet, a backsheet, an absorbent core and a fastening system (figure 4). The fastening system comprises a pair of hook tabs (32) in the second waist region which are engageable with the landing components (40, 42) (figures 2, 4) on the outer surface of the first waist section. The loop surface (40, 42) representing the landing component is attached to the backsheet (column 10, line 19, 20). The side panels (14, 16) in the second waist region extend beyond the absorbent structure (figure 1, 4, 5). Various materials are mentioned with respect to the topsheet and the backsheet which form the side panels (figure 1 and 4), however, no reference to elastic extensibility is present. The loop surfaces are identified by trademark names (column 10, lines 10 to

14) but no reference to elastic extensibility is present either.

In E4 an absorbent article like a diaper comprising backsheet, topsheet and absorbent member is disclosed which includes a tensioning system for joining portions of the article together. This system includes hook tabs (40, 42) in the second waist region and a landing member (22) which is disclosed with a loop surface (44) in the first waist region (figure 1). The tensioning system is verified by the attachment of the loop panel being intermittently or discretely attached to the backsheet (column 5, line 51 to 55). No elasticity of this loop panel is disclosed. In this respect a second embodiment is disclosed in figure 10 which refers to a tensioning system being verified via hook tabs or intermediate strips made of stretchable or elastomeric material. These hook tabs or intermediate strips are attached to the side panels. The side panels themselves are not particularly specified and, as far as can be seen from the figures, are represented by extensions of the top sheet and the backsheet which are not addressed specifically in the description.

Therefore, the subject-matter of claim 1, requiring distinct elastically extensible waist feature, elastically extensible landing component and elastically extensible side panels, is distinguished from the absorbent articles disclosed in E1 and E4 by the features of the characterising portion.

E7 discloses a disposable diaper comprising a topsheet, a backsheet, an absorbent core and further having shirred side panel portions and shirred waist portions

(figures 1 and 5). An improved fit is achieved but no additional stretching elements are needed (column 3, lines 29 to 42). The elastic shirring is provided by adhering to the backsheet or topsheet, or both, a heat elasticizable material (column 4, lines 5 to 10). Hook-and-loop-fasteners are disclosed in column 8, lines 10 as a suitable alternative to the described pressure-sensitive adhesive fastener system.

The elastically shirred region 18 in the waist region is represented by a contractible strip. This element is responsible for the elasticity of the waist region. According to figure 5 when joined to each other, the fastening tabs 26, 27 are landing partly on this elastically shirred region, although, according to figure 1, such a corresponding landing does not appear to be intended. Both figures only representing diagrammatic drawings, thus no clear and unambiguous teaching regarding the landing component of the tabs 26, 27 can be derived from these figures.

Therefore, even with the acknowledgement that elastically extensible side panels 20/21 are disclosed in E7, the whole backsheet in the first waist region of the diaper of E7 has to be considered as the landing region and therefore, no distinct member representing an elastically extensible landing component as claimed in the patent in suit is disclosed. Therefore the subject-matter of claim 1 is distinguished from the absorbent article of E7 by this feature specified in the characterising portion.

Hence, none of the cited documents E1, E4 or E7 discloses the entire combination of features of claim 1 of the main request. Since the respondent did not rely

on other prior art in support of their submissions in respect of an alleged lack of novelty and the Board does not see on what basis the other documents on file would put novelty of the subject-matter of the main request in question, the subject-matter of claim 1 of the main request is considered to be novel.

4. *Article 123(2) - Claim 2*

4.1 Although the respondent correctly pointed out that because of the specific dependency of claim 9 in the application as originally filed support for a combination of its subject-matter with that of originally filed claim 5 could not be based on these claims, the issue to be decided is whether there is support or not for such a combination in the application documents when considered in their entirety.

4.2 The subject-matter of claim 5 as originally filed and as granted, now claim 2, refers to at least a portion of the second waist feature being elastically extensible in at least the lateral direction. Basis for this feature can be found in the description of the patent in suit, paragraph 0033 which corresponds to page 13, second paragraph of the originally filed application. This paragraph refers to figures 1 and 4 and to the embodiment of a diaper shown therein, where upon the respondent's further point of view was based that such an elastically extensible second waist feature was only disclosed with respect to a diaper and not in relation to an absorbent article in general.

4.3 As to the latter point it is to be noted that the application as filed is directed to an absorbent

article with an improved elasticized waistband and that the details of the invention are explained with respect to a preferred embodiment in the form of a diaper. This implies, in the Board's opinion, that what is disclosed in relation to the diaper and is not specifically suitable for diapers only, should be seen and read as applicable to the absorbent articles mentioned in the introduction to the description - with the exception of the diaper holder which should be deleted - because these further absorbent articles all contain the claimed waist features in combination with attachment features. Therefore, all claimed subject-matter has to be considered as being disclosed for diapers and the mentioned closely related absorbent articles as well.

- 4.4 With respect to the argument that the landing component comprising the loop component had not been combined with the second waist feature being elastically extensible, it should be acknowledged that originally filed claim 1 already encompassed the fastening system comprising a pair of engaging components disposed in the second waist region and a continuous landing component disposed on the outer surface of the absorbent article, the landing component being engageable with the engaging components. The restriction of the landing component comprising the loop component of a hook and loop fastener and the engaging component comprising the hook components represents a limitation of originally filed claim 1 to hook and loop fasteners and the further limitation to one out of two possibilities for their location.

Accordingly, the combination disclosed by present claims 1 and 2 does not contain subject-matter



extending beyond the content of the application as filed and the requirements of Article 123(2) EPC are met.

5. *Referral to the First Instance*

Having found that the claims of the main request now meet the requirements of Articles 123(2) and 54 EPC and considering that no examination in respect of inventive step has been carried out yet by the first instance and that the patent proprietor requested remittal to the first instance, the Board considers it appropriate under these circumstances to remit the case to the first instance for further prosecution.

It is to be noted that the current description has not yet been amended correctly to be consistent with the subject-matter of claim 1. The reference in paragraph 0001 to diaper holders and the like does not appear to be appropriate since it is not conceivable that such articles comprise an absorbent core as claimed in claim 1. Claim 1 now refers to a separate landing component 44 on the outer surface of the absorbent article and to side panels 30 which have to be elastically extensible themselves. The part of the description, column 16, lines 23 to 35, which disclose features of the landing component, should be rendered consistent thereto. The appellant also considered the side panels themselves being elastically extensible in view of the overall description and the subject-matter as now claimed as not being consistent with only a portion of them being elastically extensible and accordingly suggested deletion of the corresponding

passage on column 11, lines 15/16. Further amendments may be necessary.

## **Order**

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

1. The decision under appeal is set aside.
2. The case is remitted to the First Instance for continuation of the opposition proceedings.

The Registrar:

The Chairman:

M. Patin

P. Alting van Geusau