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**Datasheet for the decision
of 15 September 2006**

Case Number: T 1354/04 - 3.2.06

Application Number: 96936947.9

Publication Number: 0863734

IPC: A61F 13/15

Language of the proceedings: EN

Title of invention:

Absorbent article having a cellulosic transfer layer

Patentee:

KIMBERLY-CLARK WORLDWIDE, INC.

Opponent:

The Procter & Gamble Company

Headword:

Cellulosic transfer layer

Relevant legal provisions:

EPC Art. 123(2)

Keyword:

"Combination of claimed features not disclosed in application
as originally filed"

Decisions cited:

-

Catchword:

-



Case Number: T 1354/04 - 3.2.06

D E C I S I O N
of the Technical Board of Appeal 3.2.06
of 15 September 2006

Appellant: The Procter & Gamble Company
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Respondent: KIMBERLY-CLARK WORLDWIDE, INC.
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Representative: Diehl & Partner
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
28 September 2004 concerning maintenance of the
European patent No. 0863734 in amended form.

Composition of the Board:

Chairman: P. Alting Van Geusau
Members: M. Harrison
W. Sekretaruk

Summary of Facts and Submissions

- I. In the opposition division's interlocutory decision dated 28 September 2004, European patent EP-B-0 863 734 (based on application 96936947.9) in its amended form was found to meet the requirements of the European Patent Convention.
- II. The opponent (appellant) filed an appeal against the opposition division's decision, requesting revocation of the patent in its entirety based on Articles 54, 56 and 83 EPC. Further documents were cited *inter alia* to support the appellant's objections of lack of novelty and lack of inventive step.
- III. In response to the appeal, the proprietor (respondent) requested maintenance of the patent in an amended form according to a new main request or alternatively based on one of three auxiliary requests.

Claim 1 of the new main request reads as follows:

"An absorbent article (10) comprising an absorbent (16) having a bodyfacing surface and a transfer layer (18) substantially comprising a cellulosic material, said transfer layer (18) being superposed over at least a portion of said bodyfacing surface and in liquid communication with said absorbent (16), characterized in that said transfer layer is an uncreped through air dried sheet (UCTAD) having a basis weight of 30 g/m² to 120 g/m², and that said transfer layer has a mean free path within the range of 50 microns to 200 microns."

Claim 1 of the first auxiliary request differs from claim 1 of the main request only in that the expression "and a transfer layer (18) substantially comprising a cellulosic material" is replaced by the expression "and a cellulosic transfer layer (18)".

Claim 1 of the second auxiliary request differs from claim 1 of the main request only in that the mean free path of the transfer layer is defined as being "within the range of 50 microns to 100 microns".

Claim 1 of the third auxiliary request differs from claim 1 of the second auxiliary request only in that the expression "and a transfer layer (18) substantially comprising a cellulosic material" is replaced by the expression "and a cellulosic transfer layer (18)".

Dependent claims specifying *inter alia* a more limited mean free path (MFP) range and/or a mean pore size (MPS) range follow claim 1 of each request. The dependent claims of each request substantially correspond to certain dependent claims in the patent as granted.

IV. In regard to Article 123(2) EPC, the respondent's arguments can be summarized as follows:

Claim 1 of the main request is based on claim 1 (a combination of granted claims 1 and 2) considered allowable by the opposition division, further amended to specify the material and basis weight of a UCTAD material used for the transfer layer. The amendment is supported by page 7, first paragraph of the application as filed, corresponding to paragraph [0023] of the

patent as granted. Claims 2 to 10 of the main request correspond to granted claims 3 to 11.

Claim 1 of the first auxiliary request differs from claim 1 of the main request by defining that the transfer layer is a cellulosic transfer layer. The amendment is supported by e.g. paragraph [0006] of the patent as granted. Dependent claims 2 to 10 correspond to the respective claims of the main request, with a minor editorial amendment made to claim 2.

Claim 1 of the second auxiliary request is a combination of claims 1 and 5 of the main request, while the dependent claims 2 to 6 correspond to dependent claims 2, 3, 6, 7 and 8 of the main request.

Claim 1 of the third auxiliary request is a combination of claims 1 and 5 of the first auxiliary request, while dependent claims 2 to 6 correspond to claims 2, 3, 6, 7 and 8 of the first auxiliary request.

- V. Oral proceedings were requested by both the appellant and the respondent on an auxiliary basis.

- VI. The Board issued a summons to oral proceedings including an annex containing a provisional opinion and comments. In respect of Article 123(2) EPC, attention was drawn to the terminology in the independent and dependent claims of the main and auxiliary requests.

In particular, the matter was addressed as to whether there was a disclosure in the application as filed of a UCTAD sheet "substantially comprising" a cellulosic material, since the application as filed seemingly

disclosed a UCTAD sheet as an example only of a "cellulosic material" and did not apparently disclose the possibility of fibrous material other than cellulosic fibres being present in the transfer layer.

Additionally, attention was drawn to the matter of certain dependent claims which defined a restricted range of values of MFP and/or a restricted range of MPS in combination with the UCTAD sheet as defined in claim 1, and to the issue of whether the subject matter of such claims therefore defined combinations of features which were not disclosed in the application as filed.

- VII. In its submission of 2 August 2006, the respondent withdrew its request for oral proceedings and requested that a decision be issued in writing.
- VIII. In its submission of 11 August 2006, the appellant filed its observations, noting that the matters raised by the Board would be dealt with at the oral proceedings to the extent that this was necessary and appropriate.
- IX. By the communication of 18 August 2006, the oral proceedings scheduled for September 2006 were cancelled.

Reasons for the Decision

1. Article 123(2) EPC
- 1.1 In the main request, the terminology "substantially comprising a cellulosic material", which is used to

define the transfer layer, does not exclude the possibility that fibres other than cellulosic fibres are present. The transfer layer in claim 1 is however defined as an "uncreped through air dried sheet (UCTAD)" which has a basis weight of between 30 g/m² and 120 g/m² and a mean free path (MFP) of between 50 microns and 200 microns.

The description on page 7, lines 1 to 3 of the application as filed, discloses a UCTAD sheet with the basis weight range as defined in claim 1. The MFP range of 50 microns to 200 microns is not disclosed explicitly in the context of the UCTAD sheet, but the disclosure on page 5, lines 28 to 31 of the filed application mentions that it is critical for the invention that the transfer layer be substantially composed of a material having a mean free path within the range of 50 microns to 200 microns. Thus, a skilled person reading further (on page 7, lines 1 to 3 of the filed application) that a suitable material for the transfer layer is the UCTAD sheet, would implicitly understand that the critical aspect of the invention must apply to the UCTAD sheet. This is also confirmed on page 8, lines 18 to 21 of the filed application which refers to a "cellulosic transfer layer" having a mean free pore size (corrected in the patent to read "mean free path") ranging from 50 microns to about 200 microns. This is stated in the context of the table of results on page 8, where the UCTAD sheet is the only material which fulfils the necessary criteria.

However, the disclosure of the UCTAD sheet on page 7, lines 1 to 3 specifically states that the UCTAD sheet of the required basis weight is an "example of a

suitable cellulosic material". The process of forming the UCTAD sheet also includes the step of forming a furnish of cellulosic fibres without further fibrous material being added.

Thus, even though the transfer layer is described generally on page 5, line 32, as only "preferably" being composed of a cellulosic material, when referring to the example of a UCTAD sheet (as disclosed on page 7, lines 1 to 3 and page 8, lines 18 to 21) there is only a specific disclosure of a cellulosic transfer layer.

Thus, the Board concludes that the application as originally filed does not provide a disclosure of the UCTAD sheet in the manner defined by the broad terminology used in claim 1 of the main request, namely "substantially comprising a cellulosic material". Instead, the application as filed only discloses a UCTAD sheet with a basis weight of between 30 g/m² and 120 g/m² together with a MFP of between 50 and 200 microns, in which all fibres must be cellulosic. As a consequence, the Board concludes that the terminology used to define the UCTAD sheet in claim 1 of the main request is a generalisation of the disclosure in the filed application and thus contrary to Article 123(2) EPC.

The main request is therefore not allowable.

- 1.2 In the first auxiliary request, the UCTAD sheet used for the transfer layer is limited to a "cellulosic transfer layer". This definition therefore overcomes

the objection under Article 123(2) EPC to the main request.

However, certain dependent claims (claims 4 to 10) contain further details of the transfer layer formed by the UCTAD sheet, in particular defining limited ranges of MFP and/or MPS values which then apply to the UCTAD sheet.

Beyond the general statement on page 7, lines 1 to 12 of the filed application (where no values of MPS are quoted), there is only one example of a UCTAD sheet, namely that which is mentioned in the table of results on page 8. This table refers to a UCTAD sheet with specific characteristics, namely a basis weight of 60 g/m^2 , a MFP of 75.9 microns and a MPS of 29.6 microns. Nowhere is there however a broad disclosure of a UCTAD sheet (as defined in claim 1) together with a limited range of MFP values (as used in the dependent claims), let alone combined with a limited range of MPS values (as present in further dependent claims). Furthermore, claims 8 and 10 of the first auxiliary request define an MPS range of 30 microns to 60 microns which, even by itself, is a range of values which lies outside the only UCTAD example on page 8. This matter is compounded when seen in combination with the further feature of the limited ranges of MFP defined in other dependent claims.

Thus, the features of dependent claims 4 to 10, when combined with the features of claim 1, together define combinations of features relating to a UCTAD sheet which were not present in the application as filed. Thus the subject matter of claims 4 to 10 extends

beyond the content of the application as filed,
contrary to Article 123(2) EPC.

The first auxiliary request is therefore not allowable.

1.3 Second auxiliary request

Since the terminology "substantially comprising a cellulosic material" is defined in claim 1 of this request in combination with the feature of a UCTAD sheet, the same conclusions as apply to claim 1 of the main request apply equally to claim 1 of this request.

The second auxiliary request is therefore not allowable as it also fails to meet the requirements of Article 123(2) EPC.

1.4 Third auxiliary request

The subject matter of each of the dependent claims 3 to 6 of this request defines, in part, the same subject matter as that referred to above with respect to the dependent claims of the first auxiliary request, i.e. combinations of features which were not disclosed in the application as filed. The same reasons, in relation to Article 123(2) EPC, as apply to the subject matter of claims 4 to 10 of the first auxiliary request thus apply equally to claims 3 to 6 of this request.

The third auxiliary request is therefore not allowable as it fails to meet the requirements of Article 123(2) EPC.

1.5 Since none of the requests are allowable in view of the requirements of Article 123(2) EPC, no decision on any of the further objections is required.

1.6 Oral proceedings are not required since the respondent's request for oral proceedings was withdrawn and the appellant's request was only auxiliary for the case that the patent would not be revoked.

Order

For these reasons it is decided that:

The decision under appeal is set aside.

The patent is revoked.

The Registrar:

The Chairman:

C. Eickhoff

P. Alting Van Geusau