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**Datasheet for the decision  
of 7 September 2006**

**Case Number:** T 0015/05 - 3.2.06

**Application Number:** 97122022.3

**Publication Number:** 0847738

**IPC:** A61F 13/15

**Language of the proceedings:** EN

**Title of invention:**

Disposable absorbent article having capacity to store  
low-viscosity fecal material

**Patentee:**

THE PROCTER & GAMBLE COMPANY

**Opponent:**

SCA Hygiene Products AB

**Headword:**

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**Relevant legal provisions:**

EPC Art. 123(2)

EPC R. 88

**Keyword:**

"Added subject-matter - (yes)"

**Decisions cited:**

G 0003/89

**Catchword:**

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Case Number: T 0015/05 - 3.2.06

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.06  
of 7 September 2006

**Appellant:** THE PROCTER & GAMBLE COMPANY  
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**Representative:** Jones, Helen M.M.  
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**Respondent:** SCA Hygiene Products AB  
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**Representative:** Görg, Klaus  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 4 November 2004  
revoking European patent No. 0847738 pursuant  
to Article 102(1) EPC.

**Composition of the Board:**

**Chairman:** W. Sekretaruk  
**Members:** G. Pricolo  
G. De Crignis

## Summary of Facts and Submissions

- I. The appeal is from the decision of the Opposition Division posted on 4 November 2004 revoking European patent No. 0 847 738, granted in respect of European patent application No. 97 122 022.3.

Claim 1 as granted reads as follows:

"A disposable absorbent article (20) for being worn by a wearer and, said disposable absorbent article comprising a liquid pervious topsheet (24); a liquid impervious backsheet (26) at least partially peripherally joined to said topsheet; and an absorbent core (28) disposed between said topsheet and said backsheet; and a fecal material storage element (25) intermediate said topsheet and said absorbent core, said fecal material storage element spacing apart at least a portion of said topsheet and said absorbent core so as to permit low viscosity fecal material deposited on the topsheet to be stored in said fecal material storage element characterized in that said fecal material storage element is non-absorbent and liquid-pervious and said fecal material storage element is provided in the form of an apertured formed film, said formed film has a caliper of at least 0,75 mm at a load of 36.1 g/cm<sup>2</sup>."

- II. In the decision under appeal the Opposition Division considered that the subject-matter of claim 1 extended beyond the content of the application as filed. It could only be inferred from the original application that the apertures in the film had a depth of at least 0.75 mm at a load of 31.6 g/cm<sup>2</sup> (the obviously erroneous

value of 36.1 g/cm<sup>2</sup> recited in claim 1 manifestly resulting from a typing error), not that the film had a caliper of at least 0.75 mm at a load of 31.6 g/cm<sup>2</sup>. There was no clear relation or equivalence between the caliper of an apertured formed film and the depth of the apertures. Even the prior art represented by

D3 : US-A-4 324 247,

distinguished between a "true" caliper, corresponding to the thickness of the film material, and an "embossed" caliper, corresponding to the distance between parallel planes passing through the remotest points at either surface of the film.

III. The appellant (patent proprietor) lodged an appeal, received at the EPO on 23 December 2004, against this decision and paid the appeal fee on the same day. With the statement setting out the grounds of appeal, received at the EPO on 21 February 2005, the appellant filed amended claims in accordance with main and first to fifth auxiliary requests. The claims according to the main request were the same of the claims as granted with the correction of the load of 36.1 g/cm<sup>2</sup> to 31.6 g/cm<sup>2</sup>.

IV. In a communication accompanying the summons to oral proceedings pursuant to Article 11(1) of the Rules of Procedure of the Boards of Appeal, the Board expressed the preliminary opinion that the amendment of the load of 36.1 g/cm<sup>2</sup> to 31.6 g/cm<sup>2</sup> in the claims appeared to be an allowable correction under Rule 88 EPC. However, since no explicit limitations were disclosed in the application as filed for the caliper of the fecal

material storage element, it had to be discussed whether the feature of claim 1 according to which the apertured formed film had a caliper of at least 0,75 mm at a load of 31.6 g/cm<sup>2</sup> could be derived from the disclosure relative to the depth of the apertures. The Board further stated that it appeared that the range for the depth of the apertures was disclosed in the application as filed only in combination with limitations for other dimensions of the apertures which were not recited in claim 1.

- V. In response to the preliminary opinion of the Board, the appellant filed with letter dated 7 August 2006 amended claims forming the basis for a new main request and a first auxiliary request of maintenance of the patent in amended form.

Claim 1 in accordance with both requests includes the feature according to which:

"said formed film has a caliper of at least 0,75 mm at a load of 31.6 g/cm<sup>2</sup>".

- VI. Oral proceedings, at the end of which the decision of the Board was announced, took place on 7 September 2006.

The appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of the main request or the first auxiliary request as filed with the letter dated 7 August 2006. Further it requested that the case be remitted to the Opposition Division to consider novelty and inventive step.

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

VII. The arguments of the appellant in support of its requests can be summarized as follows:

The skilled person knew that the term "apertured formed film" referred to films having through holes. For such films, the caliper was inevitably equivalent to the depth of the apertures. Accordingly, the disclosure in the application as filed of the depth of the apertures being at least 0.75 mm was equivalent to the disclosure of the caliper of the film being at least 0.75 mm. Moreover, in the context of the patent in suit it was clear that the term "caliper of the apertured formed film" could only mean the height of the film, defined by the distance between parallel planes passing through the remotest points at either surface of the film, and not the thickness of the material constituting the film. Indeed, a film having a thickness greater than 0.75 mm would be too rigid for being used in a disposable absorbent intended to be worn by a wearer.

VIII. The respondent essentially argued as follows:

Since, as shown in particular by D3, various interpretations of the term "caliper of an apertured formed film" were possible, and the application as filed did not specify which meaning applied, there was no basis in the application as filed to conclude that the depth of the apertures was equivalent to the caliper of the apertured formed film. Furthermore, in the application as filed it was stated, on the one hand, that the apertured film "should meet the caliper

requirements described above" and, on the other hand, that the "apertures of the formed film should meet the size and depth requirements set forth for the discrete regions". Therefore, the skilled person reading the application as filed would assume that the caliper and the depth of the apertures were two different parameters.

### **Reasons for the Decision**

1. The appeal is admissible.
2. Claim 1 in accordance with the main and the auxiliary requests under consideration includes the feature according to which the formed film has a caliper of at least 0,75 mm at a load of 31.6 g/cm<sup>2</sup>.
3. The Board agrees with the uncontested finding of the Opposition Division (page 4, last paragraph, of the decision under appeal) that the value of 36.1 g/cm<sup>2</sup> in granted claim 1 is erroneous, and that it is immediately evident that it is the value "31.6" mentioned in the description of the patent in suit which is correct (see page 9, line 50; see also page 9, line 47, of the application as filed in the published version). Indeed, this value effectively corresponds to the value of 0.45 psi mentioned within parentheses after the value of 31.6 g/cm<sup>2</sup> in the application as filed. Accordingly, the replacement of "36.1" with "31.6" in claim 1 is an allowable correction within the meaning of Rule 88 EPC. Such correction is of strictly declaratory nature and does not infringe the

prohibition of extension under Article 123(2) EPC (see G 3/89).

4. However, the range of at least 0,75 mm at a load of 31.6 g/cm<sup>2</sup> is explicitly disclosed in the application as filed (page 9, line 46, 47 of the published application) only in connection with the depth of the apertures of an embodiment of a fecal material storage which is absorbent (page 9, lines 34 ff.). Such absorbent fecal material storage element does not fall under the scope of claim 1 under consideration.

5. In the application as filed there is no explicit mention of a range for the caliper of the fecal material storage element. For the embodiment of a non-absorbent fecal material storage element in the form of an apertured formed film, the application as filed discloses that the apertured film should meet the "caliper requirements described above" (page 10, lines 1,2 of the published application) and that "the apertures ... should meet the size and depth requirements set forth for the discrete regions described above", i.e. the requirements specified in connection with a fecal material storage element which is absorbent.

Thus, the relevant question is whether the claimed range for the caliper of the non-absorbent apertured formed film can be deduced from the requirements specified in the application as filed in connection with a fecal material storage element which is absorbent.

6. In the appellant's view this question was to be answered in the affirmative because for an apertured



formed film, which necessarily had apertures in the form of through holes, the depth of the apertures corresponded to the caliper of the film.

The appellant did not dispute that for an apertured formed film the term "caliper" can be used to identify either the thickness of the material constituting the film, i.e. the thickness of the film without apertures, or the height of the film having the apertures. In fact, this is shown by D3 which uses the terms "true caliper" for identifying the thickness of the material constituting the film, and "embossed caliper" for identifying the height of the film having the apertures embossed therein (see D3, col. 4, lines 36 to 41 and 49 to 53). Accordingly, the skilled person reading the application as filed would be confronted with the question of whether the term "caliper" is used to indicate the thickness of the material constituting the film or rather the height of the apertured film.

7. Even if the skilled person might at first sight consider that the caliper is likely to designate the height of the apertured film, he would doubt this conclusion in view of the fact that the application as filed mentions on the one hand (see point 4 above), the "caliper requirements", and, on the other hand, the "depth requirements", thereby in fact differentiating between the caliper and the depth of the apertures.

It follows that the skilled person is left in doubt as to whether in the application as filed the caliper of the apertured formed film effectively corresponds to the depth of the apertures and thus to the height of the apertured film.

7.1 It must therefore be concluded that there is no basis in the application as filed to clearly and unambiguously derive from the disclosure relative to the depth of the holes in an absorbent fecal material storage element, any specific limitations relative to the caliper of the apertured formed film.

7.2 Hence, the presence of the feature according to which the apertured formed film has a caliper of at least 0,75 mm at a load of 31.6 g/cm<sup>2</sup> in claim 1 according to the main and auxiliary requests contravenes the requirements of Article 123(2) EPC.

For this reason the appellant's requests cannot be allowed.

## **Order**

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

The appeal is dismissed.

The Registrar:

The Chairman:

M. Patin

W. Sekretaruk