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Datasheet for the decision of 17 October 2006

Case Number: T 0581/05 - 3.2.06

Application Number: 97932086.8

Publication Number: 0929279

IPC: A61F 13/15

Language of the proceedings: EN

Title of invention:
Absorbent bodies in absorbent articles having improved liquid acquisition properties

Patentee:
SCA Hygiene Products AB

Opponent:
The Procter & Gamble Company

Headword:
-

Relevant legal provisions:
EPC Art. 54(3)

Keyword:
"Novelty (yes)"

Decisions cited:
-

Catchword:
-

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0581/05 - 3.2.06

D E C I S I O N
of the Technical Board of Appeal 3.2.06
of 17 October 2006

Appellant: (Opponent)	The Procter & Gamble Company One Procter & Gamble Plaza Cincinnati, OH 45202 (US)
Representative:	Borbach, Markus Procter & Gamble Service GmbH Sulzbacher Straße 40-50 D-65823 Schwalbach am Taunus (DE)
Respondent: (Patent Proprietor)	SCA Hygiene Products AB S-405 03 Göteborg (SE)
Representative:	HOFFMAN EITLE, Patent- und Rechtsanwälte Arabellastraße 4 D-81925 München (DE)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted 10 March 2005 rejecting the opposition filed against European patent No. 0929279 pursuant to Article 102(2) EPC.**

Composition of the Board:

Chairman: P. Alting van Geusau
Members: G. Pricolo
K. Garnett

Summary of Facts and Submissions

I. The appeal is from the decision of the Opposition Division posted on 10 March 2005 to reject the opposition filed against European patent No. 0 929 279, granted in respect of European patent application No. 97 932 086.8.

Claim 1 of the patent as granted reads as follows:

"1. An absorbent article that includes a liquid-permeable outer casing sheet (1) disposed at a first surface on the article, a liquid-impermeable casing sheet (2) disposed at a second surface on the article, and an absorbent body (3) enclosed between the two casing sheets and including a liquid-acquisition layer (19), and located essentially in the same plane thereas, a liquid acquisition space (24) that comprises at least one cavity or at least one region of lower density than the liquid-acquisition layer (19) adjacent said space (24), and wherein the acquisition layer (19) includes a material which when wetted increases in size in a direction (z-direction) generally perpendicular to the first surface of said article, characterized in that the material in the acquisition layer (19) has, when wetted, relatively low expansion in a direction (xy-direction) generally parallel with the first surface of the article, such that the volume of the liquid-acquisition space (24) will increase by at least 100% when wetted to saturation with a 0.9%-NaCl solution."

II. In coming to its decision the Opposition Division considered that the claimed subject-matter was novel over the absorbent article disclosed by document:

D1: WO-A-97/34557;

which was state of the art according to Article 54(3) EPC. The absorbent article of D1 comprised fluid storage components whose role was to store liquid and which consequently did not form a liquid-acquisition layer whose role was to get hold of liquid rapidly. The claimed subject-matter was novel and also involved an inventive step over the other relevant prior art.

III. The appellant (opponent) lodged an appeal against this decision, received at the EPO on 4 May 2005, and simultaneously paid the appeal fee. With the statement setting out the grounds of appeal, received at the EPO on 19 July 2005, the appellant only questioned novelty in relation to D1.

IV. In an annex to the summons for oral proceedings pursuant to Article 11(1) Rules of Procedure of the boards of appeal the Board raised the question why the liquid-acquisition layer in accordance with the patent in suit could not be regarded as a fluid storage layer, since it was disclosed in the description that it could comprise absorbent material and optionally superabsorbent material.

V. With letter dated 13 September 2006, the respondent (patentee) filed document:

D5: extract of the course notes of a training course on absorbent hygiene products, October 2000 Edition, organized by Edana (European Disposables and Nonwovens Association);

as evidence that the generally accepted meaning of the term "acquisition layer" was that of a layer which was capable of absorbing but which was also capable of releasing absorbed liquid.

VI. Oral proceedings took place on 17 October 2006.

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

The respondent (patentee) requested that the appeal be dismissed (main request) or alternatively that the patent be maintained on the basis of one of auxiliary requests I to IX presented before the Opposition Division.

VII. The arguments of the appellant can be summarized as follows:

The only requirement in claim 1 as granted with respect to the liquid-acquisition layer was that it should be located essentially in the same plane as the liquid-acquisition space, and that it had a defined expansion behaviour. Since claim 1 did not require the presence of a storage layer, there was no requirement for the liquid-acquisition layer to quickly wick liquid toward

a storage layer, but only to store a certain amount of liquid. In fact, the description of the patent in suit disclosed that the liquid-acquisition layer was absorbent and that it could even comprise superabsorbent material. Therefore, the fluid storage components of the absorbent article according to D1 could be regarded as forming a liquid-acquisition layer in the sense of the patent in suit. As a consequence, the subject-matter of claim 1 was not novel over the disclosure of D1. In any event, assuming that the liquid-acquisition layer ought to be capable of releasing liquid, this function was ensured in the absorbent article of D1 by the liquid acquisition space, which space, together with the fluid storage components, formed a liquid-acquisition layer.

VIII. In support of its main request the respondent relied essentially on the following submissions:

The skilled person differentiated between an acquisition layer and a storage layer and their individual functions. The function of a storage layer was to absorb and retain liquids. An acquisition layer was capable of absorbing and possibly retaining liquid, e.g. by means of superabsorbent material, but, in contrast to a storage layer, it was also capable of releasing liquid. Accordingly, the liquid-acquisition layer of claim 1, which was distinct from the liquid-acquisition space, must be capable of releasing liquid. The fluid storage components of the absorbent article according to D1 were not designed for releasing liquid, but to retain it even when the absorbent article was subjected to the pressures normally encountered in use.

Therefore, D1 did not anticipate the claimed subject-matter.

Reasons for the Decision

1. The appeal is admissible.

2. The earlier PCT application D1, published on 25 September 1997, has the priority date of 22 March 1996 and the filing date of 18 March 1997. Since the requirements of Article 158(2) EPC are fulfilled, the content of the earlier application as filed is considered as comprised in the state of the art relevant to the present patent in accordance with Articles 54(3) and 158(1) EPC.

D1 undisputedly discloses an absorbent article (see Figure 2) that includes a liquid permeable outer casing sheet (12) disposed at a first surface on the article, a liquid-impermeable casing sheet (14) disposed at a second surface on the article, and an absorbent body (18) enclosed between the two casing sheets.

The absorbent article of D1 further comprises fluid storage components (34, 36) made of a material which, when wetted, increases in size in a direction (z-direction) generally perpendicular to the first surface of the article (page 33, third paragraph), and has relatively lower expansion in a direction (xy-direction) generally parallel to the first surface of the article (see page 23, 4th paragraph). A liquid acquisition space that comprises at least one cavity (38) is located essentially in the same plane as the

fluid storage components (34, 36). Therefore, the fluid storage components are located in a position corresponding to the liquid-acquisition layer referred to in claim 1 of the patent in suit, and also have the same expanding behaviour upon wetting. A liquid-acquisition layer might thus be possibly identified in the fluid storage components, but not, however, in the combination of the fluid storage components (34, 36) and the cavity (38), as the latter corresponds to the liquid-acquisition space which is, according to the wording of claim 1 of the patent in suit, a distinct feature.

3. The appellant did not contest that the expression "acquisition layer" is ordinarily used in the art of absorbent articles to indicate a layer whose primary function is not that of retaining liquid, but that of receiving, collecting and then releasing liquids, as indeed shown by document D5 (which does not form part of the prior art but is evidence in support of common general knowledge in year 2000). Moreover, D1 also distinguishes between storage layers, which store and retain liquid (such as layer 60 which is a fluid storage compartment, see page 14, 2nd paragraph and page 33, first paragraph), and fluid acquisition layers (fluid acquisition zone, see page 25, penultimate paragraph), which serve to "handle" gushes of discharged liquid by temporarily storing and then releasing them (see also page 7, 1st paragraph).

The appellant in fact essentially contested that the specific liquid-acquisition layer in accordance with claim 1 of the patent in suit must be capable of releasing absorbed liquid.

However, the skilled reader implicitly reads the presence of the function of releasing liquid in the expression "liquid acquisition layer", because this function is implied by the ordinary meaning of this expression, as explained above. This reading is not in contradiction with the absorbing and storing properties of the liquid acquisition layer disclosed in the patent in suit (see e.g. the reference in par. [0044] to superabsorbent material). Indeed, the material of the layer may store and retain the absorbed liquid only in part, thereby releasing a substantial portion thereof. In this context it is thus irrelevant that claim 1 does not specify the presence of a liquid storage component. Moreover, the description of the patent in suit confirms the above-mentioned reading, since it discloses that the liquid storage and retaining function of the absorbent article is principally performed by the storage layer (see e.g. par. [0047]), whilst the acquisition layer is intended to "quickly receive and collect relatively large volumes of body liquid" (par. [0041]), which liquid then flows into the storage layer (see par. [0058] and [0059]).

Therefore, the liquid-acquisition layer referred to in claim 1 of the patent in suit must provide the function of releasing absorbed liquid.

4. According to D1, the function of the fluid storage components (38, 39) is to absorb and then retain discharged body fluids, even when subjected to pressures normally encountered as a result of the wearer's movements (see page 14, second paragraph). Therefore, the layer of the absorbent article of D1

consisting of the fluid storage components (38, 39) is not intended to release absorbed liquid. Accordingly, it is structurally different from the liquid-acquisition layer referred to in claim 1 of the patent in suit.

The layer consisting of the fluid storage components in D1 not being a liquid-acquisition layer, the subject-matter of granted claim 1, and likewise of granted claims 2 to 22 dependent thereon, must be regarded as novel over D1 (Article 52(1), 54(3) EPC).

5. Since the only basis of the appeal proceedings (see Article 10(a)(1) and (2) and Article 10(b)(1) of the Rules of procedure of the boards of appeal, OJ 2003, 89) is the contested lack of novelty over D1, there is no duty on the Board to consider other issues mentioned in the decision under appeal.

6. Therefore, the Opposition Division's decision to reject the opposition must, in effect, be confirmed.

Order

For these reasons it is decided that:

The appeal is dismissed

The Registrar: The Chairman:

M. Patin P. Alting van Geusau