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**Datasheet for the decision
of 20 December 2006**

Case Number: T 0698/05 - 3.2.06

Application Number: 97117055.0

Publication Number: 0838205

IPC: A61F 13/15

Language of the proceedings: EN

Title of invention:

Absorbent article

Patentee:

KIMBERLY-CLARK WORLDWIDE, INC.

Opponent:

The Procter & Gamble Company
Paul Hartmann AG

Headword:

-

Relevant legal provisions:

EPC Art. 52(1), 54, 56, 83, 84, 123(2)

Keyword:

"Admissibility of amendments - yes"
"Enabling disclosure - yes"
"Novelty and inventive step - yes"

Decisions cited:

-

Catchword:

-



Case Number: T 0698/05 - 3.2.06

D E C I S I O N
of the Technical Board of Appeal 3.2.06
of 20 December 2006

Appellant I:
(Opponent)

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Decision under appeal:

Interlocutory decision of the Opposition
Division of the European Patent Office posted
8 April 2005 concerning maintenance of European
patent No. 0838205 in amended form.

Composition of the Board:

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

Summary of Facts and Submissions

- I. The mention of grant of European patent No. 0 838 205 with 29 claims in respect of European patent application No. 97 117 055.0 claiming a US-priority from 11 September 1991 and filed on 11 September 1992 was published on 21 August 2002.
- II. Two notices of opposition were filed against this patent with requests for revocation based on the grounds of Article 100(a) EPC.

By decision posted on 8 April 2005 the Opposition Division maintained the patent as amended with claims 1 to 19 according to the second auxiliary request.

The Opposition Division was of the opinion that, although each claim 1 of the main and first auxiliary requests met the requirements of Articles 123(2), (3), 83 and 84 EPC, its subject-matter was not novel when compared with the relevant prior art according to:

D7: EP-A-0 433 951 (Article 54(3) EPC)

The second auxiliary request was allowed since its subject-matter fulfilled the requirements of patentability taking account of the prior art disclosed in the documents:

D1: US-A-4 923 456
D2: US-A-4 834 742
D3: US-A-4 381 781
D5: JP-A-04-04 744

- III. Notice of appeal was lodged against this decision by Appellant I (Opponent 01) on 3 June 2005 and by Appellant II (Patentee) on 15 June 2005, each together with payment of the appeal fee. The statements of grounds of appeal were filed on 17 and 18 August 2005, respectively.
- IV. In a communication pursuant to Article 11(1) of the Rules of Procedure of the Boards of Appeal dated 28 September 2006 sent together with the summons to oral proceedings the Board endorsed the Opposition Division's opinion concerning the requirements of Articles 123(2), (3), 83 and 84 EPC. However, its view on novelty was different from that taken in the decision under appeal, as a plurality of bond points at the inner ear portion did not seem to be clearly and unambiguously disclosed in D7. Inventive step would have to be discussed in this different context.
- V. Oral proceedings were held on 20 December 2006.

Appellant II (Patent Proprietor) requested that the decision under appeal be set aside and that the patent be maintained on the basis of the amended description and amended claims filed during the oral proceedings and Figures 1 to 6 as granted.

Appellant I (Opponent 01) and the other party (Opponent 02) requested that the decision under appeal be set aside and that European patent No. 0 838 205 be revoked.

Claim 1 reads as follows:

"An absorbent article (2) comprising:

a front section (6), a back section (8), having oppositely disposed side portions and a crotch section (10),

an absorbent medium (14) disposed on at least said crotch section (10), and

a pair of stretchable ears (44) being disposed on respective oppositely disposed side portions of said back section (8), characterised in that said ears are differentially stretchable and

each said differentially stretchable ear (44) comprises a stretchable inner ear portion (46) having a first stretchable characteristic and a stretchable outer ear portion (48) having a second stretchable characteristic, said outer portions (48) having a lower tension than said inner ear portions (46);

wherein said inner (46) and said outer (48) ear portions are made of the same stretchable material, said outer ear portions (48) having a plurality of holes (64) therethrough to lower the tension of the outer ear portions;

or said inner (46) and said outer (48) ear portions are made of the same stretchable material, said inner ear portions having a plurality of bond points (66) thereon to increase the tension of the inner ear portions;

or said inner (46) and said outer (48) ear portions are made of different stretchable materials."

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

The requirements of Article 83 and 84 EPC were met since the skilled person, in the context of the description of the preferred embodiments shown in Figures 4 to 6, would clearly recognize that "tension" meant the stretch resistance of the respective ear portion. Claim 1 which included the combination of granted claims 1, 6 and 13 to 15, was also in accordance with Article 123(2) EPC because each of granted claims 6, 13, 14 and 15 depended on granted claim 1 with the consequence that claim 1 could be restricted by their features.

The absorbent article according to claim 1 was novel when compared with D1 because this document did not disclose holes or bond points, and the ears were not made of differently stretchable materials. The claimed solution was also inventive since none of the relevant documents led the skilled person to form the ears having an inner ear portion and an outer ear portion, both having different stretch characteristics in accordance with one of the three alternative constructions as claimed.

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

The invention was not disclosed in a manner sufficiently clear and complete for it to be carried by a skilled person. Generally the expression "tension" was defined by reference to a force/cross section area, and tension in this sense cannot be altered without applying a force. Since the features "higher tension" or "lower tension"

were essential features, their use led to an unclarity which prevented the skilled person from being able to carry out the invention.

The subject-matter of claim 1 was not novel when compared with the teachings of D1, D3 or D7. Regarding Figures 9A and 9B of D1, the skilled person would clearly recognize that section 92 had a different stretchability than the proximal portion 88 bearing the loop material. "Stretchable" was not "elastic", and since the loop material was also somehow stretchable, the embodiment according to the third alternative of claim 1 lacked novelty. D1 also disclosed bond points, which lowered the elasticity of the ear shown in Figure 2, and therefore the second alternative was also not novel.

With regard to Figure 3 of D3, the portion containing elastic element 72 could be identified as an "ear" and, because of its tapered shape and the surrounding, less elastic material, the feature of the third alternative was also not novel.

The connected stretchable band 86 and the stretchable member 84 according to Figure 6 of D7 were made of different materials and since the stretchable member 84 was longer than the stretchable band 86, the inner and the outer ear portion consisted of differently stretchable materials.

Anyhow, the article according to claim 1 was not inventive because it was made obvious by D1. Since all ears shown there in the drawings had a tapered form, the skilled person would also apply this shape when carrying

out the embodiment shown in Figures 9A and 9B. Since the material of the ears was bonded by bond points and since, due to the tapered shape, the inner ear portion had a higher number of these bond points than the outer ear portion, its tension (in the meaning of the patent) was increased. Thus the skilled person was led to the subject-matter claimed without the involvement of inventive activity.

Reasons for the Decision

1. The appeal is admissible.

2. *Amendments (Article 123(2) EPC)*

Claim 1 was restricted by adding the features of granted dependent claims 6 and 13 to 15 to granted claim 1. Although claims 13 and 14 had only been dependent on claims 1 to 5, their combination with claim 6 is allowable since the subject-matter of these claims has further been restricted to meet the requirement of claim 6.

In particular, the features of claim 13 and 14 were supplemented by the functional definition "to lower the tension of the outer ear portions" and "to increase the tension of the inner ear portions", respectively. Support for this amendment is also found in the description of the application as filed (A-document column 7, lines 55 to 58 and column 8, lines 11 to 19).

2. *Sufficiency of disclosure (Article 83, 100(b) EPC)*

The Board agrees with the reasons given by the Opposition Division on this issue. The skilled person reading the patent specification would clearly recognize that the patent uses the terms "tension" or "tension range" in an unusual manner. However, the explanation in the description (see [0023] and [0024] in particular) elucidates the different stretchability of the ears and the inherent functions caused thereby, so that no problem is apparent in carrying out the invention, taking the teachings of the patent as a whole.

3. *Novelty (D1, D3 and D7)*

- 3.1 D1 discloses an absorbent article including the features of the precharacterising portion of claim 1 with ears which are covered by a loop material on their body-facing surfaces (column 12, lines 17 to 20). According to the description (column 5, lines 56 to 58) bond points between two members affect the stretch characteristics of the elastomeric component that is thereby bonded. D1 fails to disclose that the loop material and bond points should be selected such as to achieve different stretchability of the ear as required by claim 1.

In Figures 9A and 9B of D1 another embodiment of an ear is shown to which a fastening means 76 is attached having a proximal portion 88, a user end portion 90 and an elastomeric medial portion 92. As is clearly recognisable from the hatching covering the whole cross section area, the ear is made from the same material. However, no information is given about the shape of the

ear, in particular as to whether it has a rectangular or a tapered shape thus influencing the stretch characteristic. Therefore it cannot clearly and unambiguously be derived from that embodiment that the inner ear portion and the outer ear portion have different stretch characteristics.

3.2 With respect to D3 (Figure 3) it was submitted that a different stretch characteristic in the same elastic material 80 within the opening 72 was disclosed. However, the elastic insert can perhaps be identified as an inner portion of an ear 42, 44 (Figure 3), and it differs from the subject-matter of claim 1 in that the outer portions do not have a lower tension than the inner ear portions as claimed.

3.3 The ear shown in D7 (Figure 6) is made from a stretchable member 84 and a stretchable band, which are connected. The stretchable band is obviously slightly shorter than the stretchable member bearing an attachment means, however that does not affect the stretch characteristic of the whole ear because the difference in length lies outside the attachment portion. Thus this embodiment differs from the subject-matter of claim 1 also by the feature that the outer ear portions do not have a lower tension than the inner ear portions.

3.4 None of these documents discloses the two other alternatives defined in claim 1, in which either the ear portions are made of the same stretchable material and the outer ear portions have a plurality of holes through them to lower the tension of the outer ear portions, or the inner ear portions have a plurality of bond points

in them to increase the tension of the inner ear portions.

3.5 The further prior art documents were not relevant as regards novelty. None of them discloses the combination of features of claim 1. Consequently the requirement of novelty is met (Article 54(1) EPC).

4. *Inventive step*

4.1 The closest prior art is represented by D1, which document discloses an absorbent article including the features of the precharacterising portion of claim 1, and relates to an absorbent article 10 comprising a front section 13, a back section 14, having oppositely disposed side portions 15 and a crotch section 16, an absorbent medium 32 disposed on at least said crotch section 15, and a pair of stretchable ears 20, 22 being disposed on respective oppositely disposed side portions of said back section 14 (Figures 2, 8, 10,). This absorbent article in the form of a disposable garment is designed to overcome the drawbacks of the prior art which consist in the tendency for the garment to blouse outwardly from the body at the hip and abdominal regions and to sag downwardly in the abdominal region, and for tensile stresses to concentrate undesirably along the leg and waist openings of the garment. Generally, the problem can be seen in improving of the fit of the disposable garment to the wearer and easy handling, by providing ears having controlled stretchability.

Since that problem is already solved by the subject-matter disclosed in D1, the problem underlying the patent in suit is the provision of alternative means to solve this known problem.

- 4.2 This technical problem is solved by the means defined in the characterising portion of claim 1, comprising three alternatives of varying the stretch characteristic of the inner ear portion and the outer ear portion, such that the outer ear portion has a lower tension than the inner ear portion.
- 4.3 Document D1 neither discloses holes nor provides any indication towards such a manner of providing different stretchability according to the first alternative. The other cited prior art is also silent about such a possibility. This embodiment is therefore not obvious by reference to the prior art.

With regard to the second alternative, the Appellant relied on the embodiment of Figures 9A and 9B of D1. The skilled person would recognise that the fastening means 76 can be attached to the ear by a plurality of bond points. However, as is already indicated in point 3.1 above, D1 does not suggest providing the bond points in the manner claimed.

As stated in paragraph 3.1 above, it is clearly recognisable from the hatching in Figures 9A and 9B that the ear is made from the same material. The fastening means is applied in the form of a strip covering only a small length of the ear portion, and therefore it cannot reasonably be identified as the inner ear portion. Since any indication is lacking that the inner ear portion and

the outer ear portion would have different stretch characteristics with the outer portions having a lower tension than the inner ear portions, this embodiment does not lead the skilled person towards the solution according to the third alternative.

5. In view of the above findings the Board comes to the conclusion that the proposed solution to the technical problem underlying the patent in suit defined in claim 1 as amended is novel and inventive and thus complies with the criteria of patentability. Together with claim 1 dependent claims 2 to 19 can be maintained too (Article 52(1) EPC).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the Opposition Division with the order to maintain the patent on the basis of the amended description, columns 1 to 13, and amended claims 1 to 19 filed during the oral proceedings and Figures 1 to 6 of the patent as granted.

The Registrar:

The Chairman:

M. Patin

P. Alting van Geusau