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**Datasheet for the decision
of 23 February 2007**

Case Number: T 0715/05 - 3.2.06

Application Number: 96929155.8

Publication Number: 0874610

IPC: A61F 13/15

Language of the proceedings: EN

Title of invention:

Highly absorbent transfer layer structure

Patentee:

JOHNSON & JOHNSON INC.

Opponent:

The Procter & Gamble Company

Headword:

-

Relevant legal provisions:

EPC Art. 100(c), 123(2)

Keyword:

"Admissibility of amendments - no"

Decisions cited:

-

Catchword:

-



Case Number: T 0715/05 - 3.2.06

D E C I S I O N
of the Technical Board of Appeal 3.2.06
of 23 February 2007

Appellant: The Procter & Gamble Company
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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 the
European patent No. 0874610 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. 0 874 610 with 16 claims in respect of European patent application No. 96 929 155.8 claiming a Canadian priority from 17 October 1995 and filed on 12 September 1996 was published on 26 June 2002. Claim 1 reads as follows:

"An integrally formed liquid-absorbent Article (10) of particulate material including first (12) and second (16) zones in intimate fluid communicative relationship, and first (18) and second (20) opposite main faces, said first zone (12) including said first main face and said second zone (16) including said second main face, each zone having a multiplicity of inter-particle interstices admitting passage of liquid, whereby liquid contained in one of said zones is capable of migrating toward the other of said zones, said liquid-absorbent Article (10) containing binder, said first zone (12) having a higher average concentration of binder than said second zone (16), characterised in that:

said first zone (12) has a binder concentration gradient wherein there is a maximum binder concentration at the first face (18) and the binder concentration progressively diminishes towards the interface between the first zone and the second zone, and said second zone has a binder concentration gradient wherein there is a maximum binder concentration at the second face (2) and the binder concentration gradually decreases towards the interface between the first and second zones."

II. Notice of opposition was filed against this patent with request for revocation based on the grounds of Article 100(a) and (b) EPC. During the opposition proceedings a new ground of opposition under Article 100(c) was raised.

By decision posted on 8 April 2005 the patent was maintained as amended with 13 claims.

The Opposition Division was of the opinion that claim 1 as granted did not meet the requirements of Articles 100(c) or 123(2) EPC. The subject-matter of independent claims 1 and 10 according to the auxiliary request overcame the deficiencies objected by the opponent and was also novel and inventive when compared with the relevant prior art.

III. Notice of appeal was lodged against this decision by the Appellant (Opponent) on 7 June 2005, received at the EPO on 8 June 2005, together with payment of the appeal fee.

The statement of grounds of appeal was filed on 28 July 2005.

IV. In a communication pursuant to Article 11(1) of the Rules of Procedure of the Boards of Appeal dated 10 November 2006 sent together with the summons to oral proceedings the Board indicated its preliminary opinion that the invention appeared capable of being carried out by a skilled person. The questions of added subject-matter, novelty and inventive step would have to be discussed during oral proceedings.

V. Oral proceedings were held on 23 February 2006.

The Appellant requested that the decision under appeal be set aside and that the European patent No. 0 874 610 be revoked.

The Respondent (Patentee) requested that the decision under appeal be set aside and that the patent be maintained on the basis of the claims in the form of the Main Request filed with letter of 19 January 2007, alternatively of the First, Second or Third Auxiliary Requests filed with that letter.

Claim 1 of the main, first and third auxiliary requests include the wording of claim 1 as granted, to which the following features are added:

"... said liquid-absorbent article includes a third zone (14) located between said first zone (12) and said second zone (16), said third zone (14) having a lower density than said first and second zones; said first zone (12) and second zone (16) have approximately the same thickness; said third zone is thinner than the first (12) and second zones (16); and virtually no binder exists in the third zone (14)."

Claim 1 of the second auxiliary request includes in addition to the features added to claim 1 of the main, first and third auxiliary requests:

"... and wherein said binder is either ethylene vinyl acetate (EVA) or acrylic."

VI. In support of its request the Appellant essentially relied upon the following submissions:

Each claim 1 of all requests contained added subject-matter which was not disclosed in the application as originally filed.

The invention was not disclosed in a manner sufficiently clear and complete for it to be carried by a skilled person.

The claims were also unclear because it was not derivable from the wording of claim 1 how much binder was allowed to be present in the intermediate zone with regard to the feature "virtually no binder" in the third zone.

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

To the skilled person who is minded to understand their technical meaning, the added features to each claim 1 were sufficiently disclosed in the application as originally filed. This person would clearly understand, as was derivable from original claim 3, that the "zones" had the form of layers. The application of a curable binder was not a structural but a process feature, and since it was not essential it was not necessary that it be incorporated into claim 1.

Not all the features of each claim 1 were technically linked, with the consequence that it was not necessary to include them all as a combination, as described in the application (pages 5 to 6).

Claim 1 clearly defined the liquid absorbent article as comprised of three zones, the third zone needing to be present but its actual thickness not being critical. The term that virtually no binder existed in that zone was also clearly understood by a person skilled in the art in that the binder content was negligible.

Reasons for the Decision

1. The appeal is admissible.

2. *Amendments*

2.1 According to the Respondent's submissions, the basis for the third zone in relation to the first and second zone was to be found in the application as filed (page 5, line 31 to page 6, line 20). The article shown in Figure 1 is described there as including three superposed layers, namely an upper layer 12, an intermediate layer 14 and a lower layer 16.

However, in contrast to that disclosure claim 1 defines a first zone (12), a second zone (16) and a third zone (14). Since in original claim 3 it is stated that the zones can take the more specific form of layers, it is evident that "zone" is not identical with "layer", and that the term "zone" has a broader meaning than the expression "layer". Because of this difference the technical meaning of the expression "layer" as disclosed in the description is narrower than the term "zone". Consequently claim 1 of the main request contains a feature that is more general than originally

disclosed and for that reason contains added subject matter contrary to Article 123(2) EPC.

2.2 According to the original disclosure the upper layer 12 and the lower 16 have approximately the same thickness, while the intermediate layer 14 is much thinner (page 5, line 37) and has a much lower density (higher void volume) than layers 12 and 14 (page 6, line 33). Although the term "much" is of undefined scope and would not be acceptable on the grounds of lack of clarity, its omission leads to an undisclosed generalization of the disclosure because it omits a further restriction of the thickness and density vis à vis the upper and lower layers.

2.3 Furthermore, the Respondent's argument that the curable binder disclosed in the application as filed was not technically linked with the other features of the article of claim 1 and that it therefore could be left out of the combination of features defining the construction of the layers, is not convincing. As is particularly shown in Figure 2, the borderlines of zone 14 can only be achieved when applying a specific binder, the curing of which is practically completed there (page 6, lines 3 to 13) to form the different layers.

3. Summarizing, the above deficiencies lead to the conclusion that claim 1 contains subject-matter which was not originally disclosed. Claim 1 is consequently not admissible under Articles 100(c), 123(2) EPC. Since the amendments to the subject-matter of claim 1 as granted discussed above in point 2.1 to 2.3 are also present in each claim 1 of the auxiliary requests, these requests are also not allowable.

Order

For these reasons it is decided that:

- 1 The decision under appeal is set aside.

2. The patent is revoked.

The Registrar:

The Chairman:

M. Patin

P. Alting van Geusau