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Datasheet for the decision of 6 May 2009

Case Number: T 0055/07 - 3.2.06

Application Number: 00932231.4

Publication Number: 1189562

IPC: A61F 13/15

Language of the proceedings: EN

Title of invention:
Disposable absorbent article combining low viscosity liquid handling and high viscosity liquid handling

Patentee:
THE PROCTER & GAMBLE COMPANY

Opponent:
Paul Hartmann AG

Headword:
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Relevant legal provisions:
-

Relevant legal provisions (EPC 1973):
EPC Art. 100(b)

Keyword:
"Test method for determining a product parameter - insufficiently disclosed"

Decisions cited:
-

Catchword:
-

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0055/07 **-** 3.2.06

D E C I S I O N
of the Technical Board of Appeal 3.2.06
of 6 May 2009

Appellant: (Patent Proprietor)
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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted 27 November 2006 revoking European patent No. 1189562 pursuant to Article 102(1) EPC 1973.**

Composition of the Board:

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

Summary of Facts and Submissions

I. This case concerns the appeal by the appellant (proprietor) against the decision of the opposition division posted on 27 November 2006 revoking European patent number 1 189 562.

The opposition division concluded with regard to Article 100(b) EPC 1973 that the manner of determining one of the parameters in claim 1, namely the "topsheet wetness value" was insufficiently disclosed in the patent. In particular, test results supplied by the opponent showed that the results obtained by the topsheet wetness test method defined in claim 1 varied significantly depending on the test which was used for determination of the absorbent capacity for a particular product, and that the absorbent capacity test to be used was however not stated in the patent.

II. The appellant requested that the decision under appeal be set aside and that the patent be maintained as granted.

III. The respondent (opponent) requested dismissal of the appeal.

IV. In its communication of 24 February 2009 subsequent to summoning the parties to oral proceedings, the Board stated with regard to Article 100(b) EPC 1973 and with respect to the appellant's argument that "theoretical capacity" and not empirically determined "absorbent capacity" should be used, that the patent contained no disclosure of a method by which a theoretical capacity was to be calculated and that no evidence had been

supplied which demonstrated that a skilled person would understand the terminology "theoretical capacity" in the manner indicated by the appellant which namely implied that the connections and interactions of the different materials within the absorbent structure were to be ignored even though these were normally considered as important when considering absorption of liquids by such structures. Further, the Board noted that the appellant had not supplied any evidence which might cast doubt upon the validity of the tests performed by the respondent which also appeared to be standard tests.

V. No response was received from the appellant to the Board's communication.

VI. Oral proceedings were held before the Board on 6 May 2009. Since the appellant did not appear at the oral proceedings, the Board continued the oral proceedings in the appellant's absence after having confirmed with the appellant's representative by telephone that the appellant would not be attending.

VII. At the oral proceedings, the respondent confirmed its request for dismissal of the appeal.

VIII. Claim 1 of the patent reads as follows:

"A disposable absorbent article (20) having a transverse centerline, (110) a first region (81), and a second region (82), said first region being positioned forward of said transverse centerline, said first region coming into contact with the front waist of the wearer during use, said second region being positioned

backward of said transverse centerline, said second region coming into contact with the back waist of the wearer during use, said disposable absorbent article comprising a liquid pervious structured carrier (24), a liquid impervious backsheet (26) at least partially peripherally joined to said structured carrier, a liquid storage structure (28) positioned intermediate said topsheet and said backsheet, and a liquid handling structure (29) positioned intermediate said topsheet and said liquid storage structure; a portion of said liquid handling structure being positioned in said first region, a portion of said liquid handling structure being positioned in said second region, characterised in that said absorbent article has a topsheet wetness value of less than 120 milligrams according to the Topsheet-Finished-Product-Wetness Test Method disclosed herein and said disposable absorbent article has a front region Storage Under Pressure of at least 800 grams per square meter according to the Storage Under Pressure Test disclosed herein."

IX. The appellant's submissions may be summarised as follows:

In order to carry out the Topsheet-Finished-Product-Wetness Test Method described in paragraph [0155] of the patent, the absorbent structure had to be loaded with two gushes of synthetic urine according to the test described in paragraphs [0150] to [0154] which was for products having an absorbent capacity of 300 ml to 400 ml, corresponding to a size 4 diaper, whereby the gush volume was adapted if the absorbent structure was significantly different, such that the gush volume was 20% of the theoretical capacity of the absorbent

structure. The opposition division had misinterpreted paragraph [0154] when considering how the capacity was to be determined, since the concept of "theoretical absorbent capacity" existed independently of the concept of empirically determined absorbent capacity. "Theoretical absorbent capacity" was calculated as follows:

$$\sum_{component}(weight_{component} \; x \; absorbent\ capacity_{component}).$$

Thus, the invention was sufficiently disclosed, since the theoretical capacity was a mere calculation and did not rely on any test.

The test results submitted by the opponent during opposition were not relevant since they were an empirical determination and not a theoretical determination. Even if these results were considered, insufficient information had been provided by the opponent to determine whether the tests had been performed properly.

X. The respondent's arguments may be summarised as follows:

If the terminology "theoretical absorbent capacity" should be considered in the manner argued by the appellant, this would mean that it would be a value independent of the interaction of the various components. Such was not disclosed. The patent also contained no indication as to how the specific absorbent capacity of the various components was to be determined, even if this were to be considered the correct approach. Nothing argued by the appellant

overcame the conclusions reached by the opposition division.

Reasons for the Decision

Article 100(b) EPC

The value "less than 120 milligrams" in claim 1 relates to the parameter of topsheet wetness that is determined according to the Topsheet-Finished-Product-Wetness test method described in paragraph [0155] of the patent. This test in turn relies on applying the Finished-Product-Acquisition test described in paragraphs [1050] to [0154], whereby however only two gushes of synthetic urine are to be used. Paragraph [00154] states that the described test is for the evaluation of products having an absorbent capacity of about 300 ml to 400 ml and that with products having significantly different capacities, the "fluid volume per gush should be adjusted appropriately to about 20% of the theoretical capacity".

Claim 1 puts no limitation on the size of the absorbent articles, whereby absorbent articles having absorbent capacities significantly different to 300 ml to 400 ml are included within its scope.

In accordance with the decision under appeal, the test results supplied by the respondent showed that different test methods produced different results for the absorbent capacity of the same article. Due to the differing values of absorbent capacity from the respective tests, significantly different gush volumes

to be used in the tests were obtained. These different gush volumes resulted likewise in significantly different values for the topsheet wetness parameter when tested according to paragraph [0155] of the patent. Values of 1.102 g and 0.447 g topsheet wetness resulted from the respective tests performed by the respondent.

In its communication subsequent to summoning the parties to oral proceedings, the Board had already stated that the tests used by the respondent appeared to be standard tests and that this was a matter which was apparently not disputed by the appellant. Further, the Board had pointed out that the appellant had supplied no evidence which might cast doubt upon the validity of the tests or the results obtained. Since the appellant supplied no response to that communication, the Board has no reason to doubt either the validity of the test methods or the results.

Indeed, the appellant has not specifically contested the findings of the opposition division based on the tests performed by the respondent, but instead has argued that the empirical values from those tests are not relevant because the "theoretical capacity" of the absorbent article should be used for determining the gush volume, in accordance with paragraph [0154]. In its communication subsequent to summoning the parties to oral proceedings, the Board had however informed the appellant that the patent contained no disclosure of a method by which a theoretical capacity was to be calculated and that no evidence had been provided that a skilled person would understand the terminology "theoretical capacity" in the manner stated by the appellant, i.e. that the theoretical capacity was

simply the sum, for all components, of the weight of a component multiplied by its absorbent capacity. Since the appellant supplied no response to the Board's communication, the Board can only conclude that the disclosure in the patent is indeed insufficiently clear and complete for a skilled person to be able to determine a theoretical capacity as stated in paragraph [0154] when attempting to carry out the invention in claim 1.

The Board therefore finds no reason for setting aside the decision of the opposition division, and that the ground of opposition under Article 100(b) EPC 1973 is prejudicial to maintenance of the patent.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

M. Patin P. Alting van Geusau