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**Datasheet for the decision
of 22 April 2008**

Case Number: T 0062/07 - 3.2.06

Application Number: 98908825.7

Publication Number: 1005314

IPC: A61F 13/15

Language of the proceedings: EN

Title of invention:

Absorbent article having a breathable backsheet

Patentee:

THE PROCTER & GAMBLE COMPANY

Opponents:

SCA Hygiene Products AB
Paul Hartmann AG
Kimberly-Clark Worldwide, Inc.

Headword:

-

Relevant legal provisions:

EPC Art. 123(2), 84, 54

Relevant legal provisions (EPC 1973):

-

Keyword:

"Main request: amendments - broadening of claim (yes)"
"Auxiliary request 1: novelty (no)"
"Auxiliary request 2/3: not admitted"

Decisions cited:

-

Catchword:

-



Case Number: T 0062/07 - 3.2.06

D E C I S I O N
of the Technical Board of Appeal 3.2.06
of 22 April 2008

Appellant:

(Patent Proprietor)

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted 20 November 2006
revoking European patent No. 1005314 pursuant
to Article 102(1) EPC.**

Composition of the Board:

Chairman: P. Alting Van Geusau
Members: G. de Crignis
K. Garnett

Summary of Facts and Submissions

- I. European patent No. 1 005 314 granted on application No. 98908825.7, was revoked by the opposition division by decision announced during the oral proceedings on 24 October 2006 and posted on 20 November 2006.

- II. The decision of the opposition division was based on the finding that the subject-matter of claim 1 was disclosed in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art (Article 100(b) EPC) as in particular the use and meaning of the terms "vapour pervious", "liquid pervious", "liquid impermeable", "vapour impermeable" and "air permeable" were well-known and accepted in the art. However, the subject-matter of claim 1 was considered not to be novel over the disclosure in D5 US-A-5, 571, 096.

- III. With its letter dated 15 January 2007 the appellant (patent proprietor) filed an appeal against the decision of the opposition division and on the same day paid the appeal fee. With its letter of 21 March 2007 the statement of grounds of appeal was filed, together with a main and a first auxiliary requests which were identical to the corresponding requests before the opposition division.

- IV. In a communication in preparation for the oral proceedings pursuant to Article 11(1) of the Rules of Procedure of the Boards of Appeal dated 11 December 2007, the Board indicated that it concurred with the findings of the opposition division in that the terms which were objected to under Article 83 EPC

were commonly used in the art, and that the subject-matter of claim 1 was not considered to be novel over the disclosure in D5. Furthermore, doubts were raised with regard to the compliance of the subject-matter claimed in claim 1 of the first auxiliary request with the requirements of Article 123(2) EPC.

- V. Oral proceedings were held before the Board on 22 April 2008, during which the appellant requested that the decision under appeal be set aside and the patent be maintained on the basis of the main request, or alternatively on the basis of the first to third auxiliary requests, all being requests filed during the oral proceedings.

The respondents requested the dismissal of the appeal.

Claim 1 according to the main request reads:

"A disposable diaper (20) having a front waist region (46) having a transverse width, a rear waist region (44) having a transverse width, a crotch region (48) having a transverse width positioned between the front waist region and the rear waist region, a pair of opposed side edges (50), a first end edge (52) located in said front waist region and a second end edge (52) located in said rear waist region, said diaper comprising an absorbent core having a pair of opposing longitudinal edges (60), a garment-facing side (64) and a body-facing side (62); a laminate (26) disposed adjacent said garment-facing side of said absorbent core, which is a breathable laminate by comprising an inner layer (90) and an outer layer (92) joined to one another, said inner layer being

positioned between said absorbent core and said outer layer, and whereby said inner layer being longitudinally coterminous with said diaper and of a smaller transverse width than the transverse width of said front waist region, said rear waist region, and said crotch region so as to form a central, non-breathable region (82), and a breathable zone (80) which is longitudinally coterminous with said diaper and adjacent to each of said side edges, the inner layer being absent from each of the breathable zones, characterized in that said outer layer comprises a vapor pervious and liquid pervious nonwoven web, and in that said inner layer is substantially liquid, vapor and air impermeable, and further characterized in that barrier leg cuffs are joined to the diaper at locations such that said central region extends outwardly to such locations, wherein said diaper further comprises a liquid pervious topsheet (24) disposed adjacent said body-facing side of said absorbent core, and wherein the topsheet (24) and the outer layer (92) are joined directly to each other in the diaper periphery and the topsheet (24) and the laminate are indirectly joined together by directly joining them to the absorbent core (28), and in that the non-breathable region covers the garment-facing side (64) of the absorbent core (28), and extends further laterally outwardly to said location at which the barrier leg cuffs are attached."

The subject-matter of claim 1 according to the first auxiliary request differs from the subject-matter of

claim 1 of the main request in that the penultimate paragraph is replaced by:

"and wherein the topsheet (24) and laminate backsheet are joined directly to each other in the diaper periphery and are indirectly joined together by directly joining them to the absorbent core (28), the laminate comprising only the outer layer in the breathable zones,".

The subject-matter of claim 1 according to the second auxiliary request differs from the subject-matter of claim 1 of the main request in that the following paragraph is inserted before the penultimate paragraph:

"the topsheet and the laminate extending beyond the edges of the absorbent core to thereby form the periphery of the diaper,". The subject-matter of claim 1 according to the third auxiliary request differs from the subject-matter of claim 1 of the first auxiliary request in the same way.

VI. In support of its requests the appellant essentially relied upon the following submissions:

With regard to the subject-matter of claim 1 of the main request, according to the disclosure on page 13, l. 9 of of the application as originally filed the breathable zone comprises only the outer layer. Hence, the backsheet laminate was limited to such an outer layer in the diaper periphery. Accordingly, the topsheet was always joined directly to the outer layer in the diaper periphery, as is also shown by Figure 4. Therefore, the feature referring to the topsheet and the outer layer being joined directly to each other was clear (Article 84 EPC) and disclosed in the originally

filed application (Article 123(2) EPC). The meaning of the term "periphery" was given in paragraph [0013] and was limited to the perimeter or edges of the diaper.

With regard to the subject-matter of claim 1 of the first auxiliary request, this feature was now amended so as to correspond literally to the disclosure on page 7, lines 21 - 24 as originally filed; the requirements of Article 123(2) EPC thus were met. No clarity problem could be seen in such a wording either.

Concerning novelty of claim 1 of the first auxiliary request, the feature distinguishing the subject-matter of claim 1 from the disclosure of D5 concerned the location of the inner layer. According to the patent in suit, the non-breathable zone was formed by the inner layer of the laminate, and the inner layer of the laminate was absent from each of the breathable zones. Accordingly, in the breathable zones the laminate consisted only of the outer layer. According to D5, the laminate comprised both layers - the inner layer and the outer layer - also in the breathable zones. Therefore, according to D5 the inner layer was not absent from each of the breathable zones as required according to claim 1 of the patent in suit. Accordingly, in D5 the topsheet was not directly joined to the laminate backsheet but rather to the inner layer in the diaper periphery. Hence, the subject-matter of claim 1 was novel over the disclosure in D5.

The arguments presented in respect of the main and the first auxiliary requests also applied to the second and third auxiliary requests.

VII. The respondent essentially argued as follows:

The subject-matter of claim 1 of the main request lacked a proper basis under Article 123(2) EPC and was also not clear (Article 84 EPC). With regard to the wording of claim 1, "the topsheet (24) and the outer layer (92) are joined directly to each other in the diaper periphery", neither a literal basis was present in the originally filed specification nor was its meaning clear as regards the interpretation of "diaper periphery" or the "outer layer". Further with regard to the wording of claim 1, namely "the barrier leg cuffs are joined to the diaper at locations such that said central region extends outwardly to such locations", no basis for this was present in the originally filed specification. Moreover, Figure 4 of the patent in suit showed a specific embodiment where the barrier cuffs were joined to the topsheet. No general disclosure allowing the present broader definition could be found in this respect.

The subject-matter of claim 1 of the first auxiliary request also lacked a proper basis under Article 123(2) EPC. There was no disclosure which specified which layer the barrier leg cuffs were joined to. In particular when elastics were used, it was not clear whether they were part of the outer layer of the laminate or not. There was no disclosure other than that the *entire* periphery should be joined to the topsheet.

Furthermore, the subject-matter of claim 1 of the first auxiliary request was not novel over the disclosure in D5. D5 disclosed with regard to the backsheet laminate

a central region comprising one film or other member and one or more outer regions joined to the central region comprising the same or different films or other materials. In the central region, the backsheet comprised a liquid impervious, non-apertured film and, in the outer regions, the backsheet comprised an air-pervious apertured film. The backsheet could comprise any number of layers to form a laminate and the layers did not need to be uniform throughout the backsheet. Therefore, D5 disclosed the totality of the subject-matter of claim 1.

The second and third auxiliary requests included the same objectionable wording under Articles 123(2) EPC and 84 EPC as the main and first auxiliary requests. The objection concerning lack of novelty of the first auxiliary request also applied. These requests were late-filed and, because of their deficiencies, were not clearly allowable and so should not be admitted into the proceedings.

Reasons for the Decision

1. The appeal is admissible.
2. *Main Request - Article 84 EPC - Article 123(2) EPC*
 - 2.1 Claim 1 of the main request comprises in addition to the features of claim 1 as originally filed and as granted *inter alia* the following feature:
"the topsheet (24) and **the outer layer** (92) are joined directly to each other in the diaper periphery"
[emphasis added].

2.2 This feature is said to be taken from the description, page 5, last paragraph, and page 7, second paragraph, of the originally filed application, which passages correspond to paragraphs [0016] and [0020] of the patent in suit.

Paragraph [0016] refers to the embodiment shown in Figure 1 and states that: "*The topsheet 24 and the laminate backsheet 26 extend beyond the edges of the absorbent core 28 to thereby form the periphery of the diaper 20.*"

Paragraph [0020] states that: "... *the topsheet 24 and the laminate backsheet 26 are joined directly to each other in the diaper periphery...*".

2.3 These paragraphs refer to the topsheet and the **laminate backsheet** and their relationship to the diaper periphery whereas in claim 1 reference is made to the "top sheet" and the "outer layer" and their relationship to the diaper periphery. The question thus arises whether the laminate backsheet is the same as the "outer layer".

2.4 The **outer layer** is disclosed as comprising a nonwoven web and as covering the entire laminate backsheet (paragraph [0027]). The nonwoven web of the outer layer provides the diaper with a cloth-like look and feel (paragraph [0027]). Therefore, the nonwoven web of the outer layer represents the garment-facing side of the laminate backsheet. However, the laminate backsheet does not necessarily consist of only an "outer layer" but can comprise further layers. In any case, no disclosure is derivable from the application as filed

of an embodiment in which the topsheet and the outer layer of the laminate backsheet are joined directly to each other in the diaper periphery. For this reason, claim 1 of the main request is not allowable at least for reasons of Article 123(2) EPC. Thus, it is not necessary to consider the further objections raised in respect of claim 1 of the main request.

3. *First auxiliary request*

3.1 Formal admissibility

With regard to the above objectionable feature of claim 1 of the main request, the subject-matter of claim 1 of the first auxiliary request was amended and reads:

"the topsheet(24) and **the laminate backsheet** are joined directly to each other in the diaper periphery ..."
[emphasis added].

3.2 There is a literal disclosure of this wording in paragraphs [0016] and [0020] of the patent in suit and the requirements of Article 123(2) EPC are thus met in this respect. The clarity objections and the further objections with regard to the formal admissibility are not decisive since, for the reasons given below, the subject-matter of claim 1 is not novel. Therefore, the further formal objections of the respondents are not considered in detail in this decision.

4. *Novelty*

4.1 The only features of claim 1 of the first auxiliary request in dispute with respect to the disclosure in D5 are the features concerning

- "the inner layer being absent from each of the breathable zones" and
- "the laminate comprising only the outer layer (92) in the breathable zones".

4.2 D5 discloses an absorbent article having a backsheet (col. 6, l. 30 to 65). This backsheet can comprise any number of layers to form a laminate and the layers need not to be uniform throughout the backsheet. It also may have a central region comprising one film and one or more outer regions joined to the central region comprising the same or different films or other materials. In particular, the central region of the backsheet may comprise a liquid impervious, non-apertured film and two opposing outer regions comprising an air pervious, apertured film.

4.3 Accordingly, D5 discloses a central region comprising a different film from the film(s) used in the outer regions. Hence, the film comprised in the central region can be absent from the outer regions in D5. Therefore the first feature, namely "the inner layer being absent from each of the breathable zones", is present in an alternative disclosed in D5. D5 refers to the outer regions as comprising an air-pervious, apertured film. Considering that as an alternative reference is made to the inner layer being absent from the outer regions, this alternative implicitly covers the feature of the second feature in dispute, namely

"the laminate comprising only the outer layer in the breathable zones".

Thus, the subject-matter of claim 1 is not novel with respect to D5 and consequently, the requirements of Article 54 EPC are not met.

5. *Second auxiliary request*

Claim 1 of the second auxiliary request includes the feature "the topsheet (24) and the outer layer (92) are joined directly to each other in the diaper periphery", which has been discussed above with regard to the main request. Therefore, this late-filed request neither overcomes the above objection nor is it a converging request. The Board does not admit this request into the proceedings.

6. *Third auxiliary request*

Claim 1 of the third auxiliary request includes additionally to the features of claim 1 of the first auxiliary request, the feature "the topsheet and the laminate extending beyond the edges of the absorbent core to thereby form the periphery of the diaper" (as also does claim 1 of the second auxiliary request). It was included by the appellant with the intention of overcoming the clarity and disclosure objections discussed during the oral proceedings with regard to the main and the first auxiliary requests. However, this feature does not further delimit the subject-matter of claim 1 from the disclosure of D5. Therefore, the reasons given above with regard to lack of novelty concerning the first auxiliary request still apply. For

this reason also this late-filed request is not admitted into the proceedings.

7. In conclusion, the subject-matter of claim 1 of the main request is not allowable under Articles 123(2) and 84 EPC, the subject-matter of claim 1 of the first auxiliary request is not novel (Article 54 EPC), the subject-matter of claim 1 of the second and third auxiliary requests does not overcome the objections set out above and so, as late-filed requests, are not admitted into the proceedings.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar

The Chairman

T. Buschek

P. Alting van Geusau