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**Datasheet for the decision
of 8 January 2009**

Case Number: T 0273/07 - 3.2.02

Application Number: 96919913.2

Publication Number: 0833596

IPC: A61F 5/445

Language of the proceedings: EN

Title of invention:

A water-dispersible disposable enclosure

Patentee:

Bioprogress Technology International, Inc.

Opponent:

Hollister Incorporated

Headword:

-

Relevant legal provisions:

EPC Art. 104

Relevant legal provisions (EPC 1973):

EPC Art. 52(1), 54

Keyword:

"Novelty (no)"

"Apportionment of costs (no)"

Decisions cited:

T 0632/88, T 0275/89, T 0507/89, T 0544/94

Catchword:

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Case Number: T 0273/07 - 3.2.02

D E C I S I O N
of the Technical Board of Appeal 3.2.02
of 8 January 2009

Appellant: Hollister Incorporated
(Opponent) 2000 Hollister Drive
Libertyville
Illinois 60048-3781 (US)

Representative: HOEIBERG A/S
Store Kongensgade 59A
DK-1264 Copenhagen K (DK)

Respondent: Bioprogress Technology International, Inc.
(Patent Proprietor) Hostmoor Avenue
March
Cambridgeshire PE15 0AX (GB)

Representative: Hill, Justin John
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 6 December 2006
rejecting the opposition filed against European
patent No. 0833596 pursuant to Article 102(2)
EPC.

Composition of the Board:

Chairman: M. Noel
Members: S. Chowdhury
A. Pignatelli

Summary of Facts and Submissions

I. The appellant (opponent) lodged an appeal against the decision of the opposition division relating to European patent No. 0 833 596, rejecting its opposition to the grant thereof. The decision was dispatched on 6 December 2006.

A notice of appeal against this decision was filed on 15 February 2007 and the appeal fee was paid on the same day. The statement of grounds was submitted on 16 April 2007.

II. The opposition was filed against the entire patent and based on Article 100(a) EPC (lack of novelty and inventive step), Article 100(b) EPC, and Article 100(c) EPC 1973.

The opposition division decided that the patent met the novelty and inventive step requirements of the EPC, and also the requirements of Article 83 EPC and Article 123(2) EPC, and rejected the opposition, accordingly.

III. Oral proceedings were held before the Board on 8 January 2009, at which the respondent (patentee) did not appear, having sent notice on the previous day of its intention not to attend.

The following requests were submitted:

The appellant requested that the decision under appeal be set aside and that the European patent No. 0 833 596

be revoked, and that costs for the oral proceedings be awarded to the appellant.

The respondent requested, in its written submissions, that the appeal be dismissed, i.e. that the patent be maintained on the basis of claims 1 to 7 as granted (main request) or on the basis of claims 1 to 6 as granted (auxiliary request).

The following document was of particular interest in the appeal procedure:

D2: WO-A-94/12128.

IV. Independent claim 1 of the patent as granted reads as follows: -

"An ostomy pouch or urinary incontinence pouch, which is dispersible in water, characterised in that the pouch is formed from a material (3) which is rapidly soluble in an organic solvent such that when the organic solvent is introduced into, released onto, or coated onto the external surface of, the pouch at the time of disposal into a water closet bowl, the pouch disperses for flushing."

Claims 2 to 7 are dependent on claim 1.

V. The parties argued as follows:

Appellant

D2 disclosed an ostomy pouch comprising an inner and an outer bag, the inner bag being made from two layers of

starches or starch derivatives. These were the same as the gelatinised starch film used in one example of the patent, and had a similar thickness and was, therefore, rapidly soluble in an organic solvent. The device of claim 1 lacked novelty, accordingly.

The oral proceedings could have been avoided if the appellant had been informed earlier that the other party was not attending. Furthermore, the company would not have sent two representatives and a consultant to the oral proceedings had they known that the other party would not attend. Appellant referred to the decisions cited in the "Case Law of the Boards of appeal" 5th edition, page 339.

Respondent

The outer bag of document D2 was not an ostomy bag, and the appellant had not shown that the inner bag was rapidly soluble in an organic solvent. Therefore, D2 did not anticipate the claimed ostomy pouch.

Reasons for the decision

1. The appeal is admissible.
2. *Interpretation of claim 1*

Claim 1 relates to an ostomy pouch or urinary incontinence pouch which is formed from a material which is rapidly soluble in an organic solvent when it is introduced into, released onto, or coated onto the external surface of the pouch.

The property "rapidly soluble" is not defined, but an indication of what this means is given in the patent in paragraph [0017]. In view of this paragraph and in the absence of a more precise definition, this expression is taken to mean that the material dissolves in an organic solvent in the order of minutes, as opposed to days, for example, which is the time scale for the decay of biodegradable materials, or hours, which is the time required for certain grades of cold water soluble PVA to dissolve.

Claim 1 defines the pouch by reference to this property, which is a function, inter alia, of the material of the pouch, its thickness, and the organic solvent used.

3. *Novelty*

3.1 D2 discloses an ostomy bag comprising an inner bag and an outer bag, each formed of two sheets laminated together. The inner bag is formed of a first layer which dissolves rapidly in water, causing the second layer to become limp for easy flushing in a WC (D2: page 11, lines 10 to 14).

3.2 In one variation, both layers of the inner bag may be formed of the same polymer having the same thickness, and the polymer may be starches or starch derivatives (see the paragraph linking pages 5 and 6 of D2). Thus, the entire inner bag may be made of starches or starch derivatives.

3.3 Moreover, D2 discloses the thickness of the sheet as being about 17 to 40 microns (Table 1). Although the

materials listed in Table 1 are not starches or starch derivatives, it is reasonable to assume that in the case of sheets of starch comparable thicknesses of sheet would be used in order to achieve the combination of strength and flexibility properties required of an ostomy bag.

- 3.4 Since the ostomy bag of D2 has a similar material to that used in one example of the patent in suit (see paragraph [0017] of the opposed patent), and also a comparable thickness (30 microns) it may be assumed that the colostomy bag of D2 would also be soluble in a few minutes, i.e. rapidly, in the organic solvent N-methyl pyrrolidone, as is the ostomy bag made of a gelatinised starch film used in the example of the patent.

Even if a bag made of starches or starch derivatives would need to be made of a film twice as thick as the materials of Table 1 of D2, the dissolution time would still be of the order of minutes, which is still "rapidly soluble" according to the considerations in point 2. above.

- 3.5 Therefore, D2 discloses an ostomy pouch which is formed from a material which is rapidly soluble in an organic solvent when the organic solvent is introduced into, released onto, or coated onto the external surface of the pouch.
- 3.6 The ostomy pouch of claim 1 lacks novelty, accordingly. Since claim 1 of the main request and the auxiliary request are identical, both define subject-matter lacking in novelty.

4. *Costs*

4.1 The appellant requests that the costs for oral proceedings be awarded to it because the respondent did not appear at the oral proceedings and gave notice of its non-attendance by telephone only late in the afternoon before the appointed day.

4.2 According to Article 104 EPC, a different apportionment of costs can be ordered for reasons of equity. The Board of appeals have defined in their jurisprudence criteria to be followed in establishing what these reasons of equity are. Although this jurisprudence concerns the old version of Article 104 EPC, it is still applicable because the new Article 104 EPC has not been modified in this respect. The non-appearance of a party generally does not adversely affect the party which did attend (T 544/94, T 632/88 and T 507/89). While, as correctly stated by the appellant, the parties have a general obligation to give notice in due time if they intend not to appear at oral proceedings, only if the absence of the party rendered the oral proceedings unnecessary, can the costs for the oral proceedings be apportioned differently (T 275/89 (OJ EPO 1992, 126)).

In the present case, the appellant itself requested oral proceedings "in the event that the Board of Appeal does not intend to revoke the patent in its entirety based on the written procedure". This request was an unconditional request not depending on the presence of the other party at the oral proceedings.

The Board summoned the parties to an oral proceedings and in its communication made it clear that its preliminary opinion was in favour of the respondent/patentee.

The oral proceedings were therefore to be held due to the request of the appellant and independently of the question of the presence of the respondent.

The fact that a party decides to be represented at the oral proceedings by more than one representative and/or by accompanying persons whatever tasks they have to fulfil (consultants, experts, observers etc.) is a unilateral decision of the party concerned. The other party cannot be held responsible for this decision.

A different apportionment can only be ordered if the costs incurred because the other party was absent i.e. because the oral proceedings was not necessary which is not the case as explained above.

Furthermore, the appellant has not submitted and proved that the collaboration of the three persons present at the oral proceedings was unnecessary because the other party was absent. On the contrary, they worked together, discussed and consulted each other during the oral proceedings.

4.3 The request is rejected, accordingly.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.
3. The request for apportionment of costs is rejected.

The Registrar

The Chairman

D. Sauter

M. Noel