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**Datasheet for the decision
of 17 June 2008**

Case Number: T 0780/07 - 3.2.06

Application Number: 96116588.3

Publication Number: 0836842

IPC: A61F 13/15

Language of the proceedings: EN

Title of invention:

Disposable non-woven cleaning articles

Patentee:

THE PROCTER & GAMBLE COMPANY

Opponents:

Kimberly-Clark Worldwide, Inc.
Unilever PLC

Headword:

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Relevant legal provisions:

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Relevant legal provisions (EPC 1973):

EPC Art. 56

RPBA Art. 13(3)

Keyword:

"Inventive step (no)"

"Late-filed request - not admissible because raising new issues"

Decisions cited:

-

Catchword:

-



Case Number: T 0780/07 - 3.2.06

D E C I S I O N
of the Technical Board of Appeal 3.2.06
of 17 June 2008

Appellant: THE PROCTER & GAMBLE COMPANY
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 27 February 2007
revoking European patent No. 0836842 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: P. Alting Van Geusau
Members: G. Pricolo
W. Sekretaruk

Summary of Facts and Submissions

I. The appeal is from the decision of the Opposition Division posted on 27 February 2007 revoking European patent No. 0 836 842, granted in respect of European patent application No. 96 116 588.3.

II. In a first decision of 15 September 2003 the Opposition Division rejected the Opponents' arguments concerning alleged lack of sufficient disclosure (Article 100(b) and 83 EPC). It held, however, that the subject-matter of claim 1 as granted (main request) and of claim 1 in accordance with the first auxiliary request lacked novelty over the disclosure of document:

D1: WO-A-94/02674.

As for claim 1 according to the second auxiliary request, the Opposition Division considered that it did not meet the requirements of Article 84 EPC.

III. In the subsequent appeal T 1161/03 lodged by the patent proprietor, Board 3.2.06 (in a different composition to the present case) rejected the main and first to third auxiliary requests of the appellant for lack of compliance with the requirements of Article 123(2) EPC. It acknowledged sufficiency of disclosure in respect of claim 1 according to the fourth and fifth auxiliary requests, in particular having regard to the disclosure of document

D2: US-A-3 485 706.

Further the Board held that the subject-matter of claim 1 according to the fourth auxiliary request lacked novelty over the disclosure of document

D6: WO-A-94/04737.

The Board acknowledged novelty of the subject-matter of claim 1 according to the fifth auxiliary request, and remitted the case to the opposition division for further prosecution.

- IV. In its further decision of 27 February 2007, which is the subject of the present appeal proceedings, the Opposition Division revoked the patent, holding that the subject-matter of claim 1 according to the main request, which corresponded to claim 1 according to the previous fifth auxiliary request, and of claim 1 according to new auxiliary requests 1 and 2, did not involve an inventive step in the light of D1 and D6.
- V. The appellant (patent proprietor) filed an appeal on 9 May 2007. Payment of the appeal fee was recorded on the same day. With the statement setting out the grounds of appeal, received at the EPO on 6 July 2007, the appellant requested that the decision under appeal be set aside and the patent be maintained on the basis of the main request or one of the auxiliary requests considered by the Opposition Division.
- VI. Claim 1 according to this main request reads as follows:
- "1. Disposable non-woven cleaning article (10) with an elongated shape having a major axis (L) and a minor axis (C), and at least one web of entangled fibres (11),

characterised in that said entangled fibres (11) are entangled in a direction parallel to said major axis (L), and said cleaning article (10) ranges in size from 30 millimetres to 200 millimetres in the direction of said major axis (L) and from 30 millimetres to 65 millimetres in the direction of said minor axis (C), and wherein said entangled fibres (11) are hydroentangled, and said cleaning article (10) is suitable for facial cleaning".

Claim 1 according to the first auxiliary request additionally defines:

"wherein said web is embossed with an embossing pattern".

VII. In an annex to the summons for oral proceedings pursuant to Article 15(1) of the Rules of Procedure of the Boards of Appeal, the Board expressed the preliminary opinion that even if D6 were not taken into consideration, the subject-matter of claim 1 according to the main request appeared to lack an inventive step over D1. D1 did not specify how the individual cleaning articles were cut. Faced with the problem of how to provide individual articles from the web according to D1, it appeared that the skilled person would consider cutting them with the major axis oriented in the machine direction, this being a routine and therefore obvious step.

VIII. Oral proceedings, at the end of which the decision of this Board was announced, took place on 17 June 2008.

During the oral proceedings the appellant withdrew its previous second auxiliary request and filed new second and third auxiliary requests. It requested that the decision under appeal be set aside and the European patent be maintained on the basis of the claims of the main request or of auxiliary request 1 both filed with letter dated 5 July 2007, or one of the auxiliary requests 2 or 3 filed during the oral proceedings on 17 June 2008.

The respondent I (opponent I) requested that the appeal be dismissed.

As announced in its letter dated 4 June 2008, in which it requested a decision based on the written submissions already on file, the respondent II (opponent II) did not appear.

IX. Compared to claim 1 according to the first auxiliary request, claim 1 according to the second auxiliary request additionally defines:

"such that at least a part of the pattern is aligned perpendicular to the major axis of the cleaning article".

In claim 1 according to the third auxiliary request this wording has been amended by deleting "at least a part" to read "such that the pattern is aligned perpendicular to the major axis of the cleaning article".

X. The arguments of the appellant in support of its request can be summarized as follows:

In order to arrive at the claimed subject-matter starting from the closest prior art D1, even when read in combination with D2 which was cited in D1, the skilled person should make two distinct choices. Firstly, he should specifically choose a non-woven web having entanglement of fibres in the machine direction. Although D2 disclosed an embodiment in which the fibres were entangled in the machine direction, it was not limited to this. In fact, it related to a variety of non-woven webs having different patterns. Secondly, the skilled person should choose to cut the non-woven web in a manner such that the cleaning articles thus obtained would have the fibre entanglement oriented parallel to the major axis. It might be conceivable to argue that the skilled person would be most likely to cut cleaning articles from a non-woven web in the machine direction. However, there was no incentive in either D1 or D2 for also providing the entanglement of the fibres of the non-woven web, from which the cleaning articles were cut, in the machine direction.

Claim 1 according to the first auxiliary request included the additional feature according to which the web was embossed with an embossing pattern. The feature resulted in that dirt, grime and facial debris could be trapped in an effective manner and smearing was non-existent. D1, which related to a cleaning pad comprising at least one paper pad layer laminated to at least one non-woven layer, only disclosed embossing of the paper layer and not of the non-woven layer. Accordingly, the additional feature was non-obvious.

Discussion of the additional features included in claim 1 of auxiliary requests 2 and 3 was already accounted for by the discussion of the previous request. Since these additional features were based on the disclosure of the application as filed and provided clear limitations, the auxiliary requests should be admitted into the appeal proceedings.

XI. The arguments of the respondent I can be summarized as follows:

Where using the patterned forming fabrics of the type exemplified in D2, which was referred to in D1, there was inevitably at least some hydroentanglement of the fibres in the machine direction, consequential upon the relative movement of the fibres and the hydroentanglement jets. Claim 1 had within its scope cleaning articles whose lengths in the major and minor axes were not significantly different from one another, such that the articles might therefore be substantially square or substantially round. It was not evident what problem was solved by providing entangled fibres aligned with one axis or the other. In any event, the patent did not substantiate any particular technical effect being the direct result of the feature that the fibres were entangled in a direction parallel to the major axis. Accordingly, starting from D1, the technical problem could be seen in arbitrarily choosing an orientation for cutting the cleaning articles from the non-woven web. Since the skilled person would obviously contemplate cutting the articles from the web with their major axes oriented either parallel or perpendicular to the machine direction, the skilled

person would arrive at the subject-matter of claim 1 according to the main request without the exercise of inventive skill.

The disclosure of D1 was not limited to the provision of an embossment onto the paper layer, but also encompassed the provision of a pattern, in particular raised nubs and bumps, onto the non-woven web, which was in effect an embossment. Accordingly, the subject-matter of claim 1 according to the first auxiliary request also lacked an inventive step.

The amendments made in accordance with the second and third auxiliary requests filed during the oral proceedings raised new issues of clarity and in particular new issues of inventive step since the features which were added to claim 1 to support non-obviousness were taken from the description. The filing of these requests at such a late stage of the proceedings was inadmissible.

Reasons for the Decision

1. The appeal is admissible.
2. *Main request*
 - 2.1 The claims in accordance with the appellant's main request correspond to the claims in accordance with the fifth auxiliary request which were considered in the previous decision T 1161/03 of Board 3.2.06 to meet the requirements of Articles 123(2) and (3), 83, and 54(2) EPC.

2.2 In accordance with the view expressed by the opposition division in the decision under appeal, and in accordance with the view of the parties, D1 represents the closest prior art for the assessment of inventive step. The cleaning article of D1 is prepared by conventional hydroentanglement processes wherein webs of non-woven fibres are treated with high pressure fluids while being supported on apertured patterning screens (page 10, lines 6 to 9). As a consequence thereof, as also explained in the previous decision T 1161/03 (see point 5.4.1), the article of D1 is provided with a patterned contour corresponding to the pattern of the screen which supports the web, as shown e.g. in Fig. 9 of D2 referred to in D1 (see page 10, line 16), whereby one direction of entanglement necessarily corresponds to the machine direction along which the web is moved during the entangling process.

The appellant submitted that D2 was not limited to a pattern as shown in Fig. 9 of D2, and that it disclosed other screen patterns having a contour which was not aligned with the machine direction. However, since the hydro-entangling jets are perpendicular to the web which advances in the machine direction, the fibres are necessarily realigned in the machine direction irrespective of the pattern of the screen (see also point 4.2 of previous decision T 1161/03).

As explained in T 1161/03 (point 5.4.1), D1 does not specify how the individual cleaning articles are cut from the hydroentangled web. Therefore, D1 does not disclose the feature of claim 1 according to which the

fibres are entangled in a direction parallel to the major axis.

- 2.3 In view of the fact that D1 does not disclose how the individual articles are cut from the hydroentangled web, the skilled person desirous to put in practice the teaching of D1 would necessarily be faced with the problem of finding a suitable manner of cutting the individual articles. As stated by the opponent I in its letter of 26 October 2006 filed during the proceedings before the opposition division, which statement was referred to by the Board during the oral proceedings and was not contested by the appellant, it is usual in this industry to dispose articles in the machine direction when being cut at high speed from a moving web, from the point of view of ease of handling, packaging and reducing material wastage. Since the articles are elongated along their major axes, the skilled person would immediately consider that a suitable and efficient manner of cutting the articles is to cut them with their major axes parallel to the machine direction. Indeed, he would recognize that in such a case the articles could be easily cut in a row with conventional means, such as e.g. cutting rollers, since the direction of cutting would be mostly in the machine direction. One direction of entanglement being the machine direction of the web, the articles cut with their major axes parallel to the machine direction also have their major axes parallel to a direction of entanglement. Accordingly, when putting into practice the teaching of D1, the skilled person would, using normal skill, provide articles having fibres entangled in a direction parallel to their major axes, thus

arriving at the subject-matter of claim 1 in an obvious manner.

2.4 The appellant submitted that the feature of entanglement in a direction parallel to the major axis of the article imparted superior strength and cleaning benefits (see par. [0019] of the patent in suit). However, since it was already obvious for the skilled person to arrive at an article falling within the terms of the claim when solving the general problem of putting into practice the teaching of D1, as explained above, the claimed subject-matter lacks an inventive step irrespective of whether these advantageous effects are, possibly, obtained.

2.5 It follows that the appellant's main request does not comply with the requirement of inventive step according to Article 56 EPC.

3. *First auxiliary request*

3.1 As compared to claim 1 according to the main request, claim 1 has been amended by including the additional feature of granted claim 4, which is identical to claim 4 of the application as filed, whereby the web is embossed with an embossing pattern. This amendment does not give rise to objections under Article 123(2) and (3) EPC.

3.2 Contrary to the appellant's view, D1 not only discloses providing an embossment onto the paper layer of the article (see page 6, lines 13 to 17) but also on the non-woven layer, in particular the non-woven layer obtained by hydroentangling. On page 9, lines 19 and 20,

D1 discloses that "*in any of the embodiments*", thus also in the embodiment where the non-woven layer is hydroentangled, "*the nonwoven layer can also comprise raised nubs or bumps*". Considering that claim 1 does not specify the kind of the embossment, and thus is in particular not limited to the embossing pattern comprising ridges and valleys mentioned in the description of the patent in suit (see par. [0015]), the "raised nubs or bumps" according to D1 are to be regarded as an embossment in accordance with the wording of claim 1.

It follows that the subject-matter of claim 1 of the first auxiliary request is distinguished from the closest prior art D1 by the same feature as the subject-matter of claim 1 of the main request, i.e. by the fibres being entangled in a direction parallel to the major axis. Thus the subject-matter of claim 1 according to the first auxiliary request lacks an inventive step for the same reasons already given above in respect of claim 1 according to the main request.

4. *Second and third auxiliary requests*

4.1 These requests were filed during the oral proceedings after the discussion of the main and first auxiliary request had taken place. Claim 1 in accordance with these requests has been amended by including the following features, respectively:

"such that at least a part of the pattern is aligned perpendicular to the major axis of the cleaning article" (second auxiliary request), and

"such that the pattern is aligned perpendicular to the major axis of the cleaning article" (third auxiliary request).

4.2 The Board agrees with respondent I that these amendments raise new issues, in particular a new issue of clarity (Article 84 EPC), because it has to be assessed whether it is clear when a "pattern" (that might assume any shape) can be considered to be aligned perpendicular to the major axis of the article, and a new issue of inventive step, because the features added to the claims in support of inventive step are taken from the description and were never the subject of discussion before the oral proceedings. Since neither the Board nor the respondents can reasonably be expected to deal with the latter issue without adjournment of the oral proceedings (which would be necessary in particular for allowing the respondents to carry out an additional search in respect of the features taken from the description), the second and third auxiliary requests are not admitted into the proceedings in application of Article 13(3) of the Rules of Procedure of the Boards of Appeal.

5. It follows from the above that the decision of the Opposition Division to revoke the patent shall be maintained.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

D. Sauter

P. Alting van Geusau