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**Datasheet for the decision
of 2 April 2009**

Case Number: T 0836/07 - 3.2.05

Application Number: 99203112.0

Publication Number: 1223022

IPC: B29C 45/44

Language of the proceedings: EN

Title of invention:

Method of moulding plastics articles and articles produced thereby

Patentee:

E.R. Squibb & Sons, Inc.

Opponent:

Hollister Incorporated

Headword:

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Relevant legal provisions:

EPC Art. 114

Relevant legal provisions (EPC 1973):

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Keyword:

"Late filed requests (not admitted)"

Decisions cited:

-

Catchword:

-



Case Number: T 0836/07 - 3.2.05

D E C I S I O N
of the Technical Board of Appeal 3.2.05
of 2 April 2009

Appellant:
(Patent Proprietor)

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Representative:

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Decision under appeal:

Decision of the Opposition Division of the
European Patent Office posted 3 April 2007
revoking European patent No. 1223022 pursuant
to Article 102(1) EPC 1973.

Composition of the Board:

Chairman: W. Zellhuber
Members: P. Michel
E. Lachacinski

Summary of Facts and Submissions

- I. The appellant (patent proprietor) lodged an appeal against the decision of the Opposition Division revoking European Patent No. 1 223 022.
- II. The patent in suit was revoked by the Opposition Division on the grounds that each of the requests of the patent proprietor does not meet the requirement of either Article 123(2) or 84 EPC.
- III. Oral proceedings were held before the Board of Appeal on 2 April 2009.

The appellant requested that the decision under appeal be set aside and that the patent in suit be maintained on the basis of claim 1 filed on 23 March 2009 as auxiliary requests 4, 5, 5A and 6 to 9 respectively, or, alternatively, on the basis of claim 1 filed in the oral proceedings as auxiliary request 10.

The respondent (opponent) requested that the appeal be dismissed and that the late filed sets of claims not be admitted into the proceedings.

- IV. Claim 1 of the main request (auxiliary request 4) of the appellant reads as follows:

"1. An ostomy coupling (110,160), the coupling comprising a coupling element (110) and a counterpart press-fit coupling element (160), wherein
the coupling element comprises:
an annular body of moulded plastics material having a channel section, the channel section

comprising a base (116), a circumferentially continuous wall (112) and an undercut formation (130) disposed on the circumferentially continuous wall; and

a tab (110C), to afford a grasping point whereby the wearer may separate the coupling element from the counterpart press-fit coupling element (160) by peeling them apart,

and the counterpart press-fit coupling element comprises:

an annular rib member (165) of closed loop form which is designed to inter-engage with the channel of the channel-section coupling element; and

a rim (167) on the rib member adapted to engage said undercut formation,

characterised in that

said undercut formation comprises a series of undercut arcuate sections (130) alternating with spaces, the arcuate sections each having an undercut radially extending surface which is disposed at an angle to the axis of the body sufficient to give a required degree of security to the coupling; and

the positioning, number and arrangement of the arcuate sections (130) and the inward extent of the arcuate sections into the channel section are such that ease of separation of the two coupling elements (110, 160) by peeling is readily achieved and the security of attachment of the two coupling elements against a direct pull is enhanced".

Claim 1 of the first auxiliary request (auxiliary request 5) differs from claim 1 of the main request in that it includes the additional feature:

"said inward extent being an amount equal to between one tenth and one fifth of the width of the channel section measured in a radial direction".

Claim 1 of the second auxiliary request (auxiliary request 5A) differs from claim 1 of the main request in that the characterizing portion of the claim reads as follows:

"characterised in that
said undercut formation comprises a series of undercut arcuate sections (130) alternating with spaces, an inward extent of the arcuate sections into the channel section being between one tenth and one fifth of the width of the channel section measured in a radial direction, and each arcuate section having an undercut radially extending surface which is disposed at an angle to the axis of the body sufficient to give a required degree of security to the coupling element in respect of its attachment to the counterpart coupling element; and
the positioning, number and arrangement of the arcuate sections (130) are such that ease of separation of the two coupling elements (110, 160) by peeling is readily achieved."

Claim 1 of the third auxiliary request (auxiliary request 6) differs from claim 1 of the first auxiliary request in that it includes the additional feature:

"and wherein the ratio of the circumferential length of the spaces to the circumferential length of the arcuate sections is at least 1:3".

Claim 1 of the fourth auxiliary request (auxiliary request 7) differs from claim 1 of the main request in that it is directed to "A coupling (110,160) for use in an ostomy device" and includes the additional features:

"the channel section comprises a circumferentially continuous inner wall (114) and a circumferentially continuous outer wall (112) and in that the undercut formation is disposed on the circumferentially continuous outer wall;

undersides (132) of said arcuate sections are substantially flat and extend substantially in a plane perpendicular to the axis of revolution and in that said arcuate sections cover from 10 to 50% of the width of the channel;

said arcuate sections are spaced around the inner periphery of said circumferentially continuous outer wall (112); and

the peripheral extent of said arcuate sections is between 15 and 25°".

Claim 1 of the fifth auxiliary request (auxiliary request 8) differs from claim 1 of the fourth auxiliary request in that it includes the additional feature:

"and wherein the ratio of the circumferential length of the spaces to the circumferential length of the arcuate sections is at least 1:3".

Claim 1 of the sixth auxiliary request (auxiliary request 9) differs from claim 1 of the fifth auxiliary request in that it includes the additional feature:

"there are between 6 and 12 of said arcuate sections".

Claim 1 of the seventh auxiliary request (auxiliary request 10) differs from claim 1 of the fifth auxiliary request in that it is specified that the annular body is an annular body of a moulded plastics material, and that the arcuate sections extend from 10 to 20% of the width of the channel as opposed to 10 to 50%, and in that it includes the additional feature:

"the counterpart coupling element further comprises a flexible, resilient and deflectable seal strip (168) arranged to co-operate with the inner wall (114A) of the channel section to prevent leakage of bodily discharges".

V. The appellant argued substantially as follows in the written and oral procedure:

The amendments to claim 1 of each of the late filed requests are in line with the opinion of the Board and do not raise any new issues. The purpose of the amendments, which are not complicated, is to facilitate the procedure.

The application as filed discloses a rib member as specified in claim 1 of the main and first to sixth auxiliary requests. The invention is concerned with a coupling which provides better security of attachment for the same ease of separation. The seal is irrelevant to the invention, so that it is not necessary for the claim to refer to the seal. In addition, neither paragraph [0049] nor paragraph [0026] of the application as filed refers to a seal.

Claim 1 of each of the main and first to sixth auxiliary requests thus satisfies the requirement of Article 123(2) EPC and these requests should accordingly be admitted into the proceedings.

Claim 1 of the seventh auxiliary request specifies that the security of attachment is enhanced as compared with a coupling not having the specified features of position, number and arrangement of arcuate sections, for example a coupling having a continuous rim. The claim is clear and the request should accordingly be admitted into the proceedings.

VI. The respondent argued substantially as follows in the written and oral procedure:

The requests filed on 9 and 23 March 2009 were not filed within the period specified in the invitation to oral proceedings, which was issued in October 2008. In addition, no new issues were mentioned in the invitation over and above those indicated in the response to the grounds of appeal, so that the appellant had sufficient time to file amended requests. The amended requests introduce new combinations of features and changes in wording, including features drawn from the description, which result in new aspects for which there is insufficient time to prepare a thorough response.

Claim 1 of each of the main and first to sixth auxiliary requests specifies the presence of a rib member without mentioning the seal. The annular rib member is disclosed in the application as filed in paragraphs [0049] and [0050] in conjunction with

Figure 10. There is no disclosure in the application as filed of an embodiment in which the rib does not have a seal, so that the claims are directed to an unallowable intermediate generalisation. The shape of the rim, including the seal, has a bearing on the ease of peeling and security of attachment.

Claim 1 according to the seventh auxiliary request lacks clarity in view of the presence of the feature that "the positioning, number and arrangement of the arcuate sections (130) and the inward extent of the arcuate sections into the channel section are such that ... the security of attachment of the two coupling elements against a direct pull is enhanced"

Claim 1 of each of the requests of the appellant thus offends against either Article 123(2) or 84 EPC, and none of the requests should be admitted into the proceedings.

Reasons for the Decision

Admissibility

1. *Main Request and First to Sixth Auxiliary Requests*

An amended main request and auxiliary requests 1 to 8 were filed by the appellant on 9 March 2009. Further amended auxiliary requests 4, 5, 5A and 6 to 9 were filed on 23 March 2009. Only these latter requests, together with a new request, were maintained at the oral proceedings.

In the annex accompanying the invitation to oral proceedings, it was indicated that any further submissions from the parties should be filed "in any case ... at least one month before the date set for oral proceedings", that is, on or before 2 March 2009. It was further stated that "the criteria for exercise of discretion of the Board include inter alia whether or not there are good reasons for the late filing". It was explained that the representative of the appellant had been absent on holiday for a week before 2 March and that, on his return, no instructions had been received from his American associates. This is not regarded as being a reason which could justify the discretion of the Board being exercised in favour of the appellant.

However, it is considered that the requests could, nevertheless, be admitted into the proceedings, provided that the amendments to claim 1 were such that, prima facie, the objections under Articles 123 and 84 EPC as set out in the communications from the respondent and the Board had been overcome. This is not, however, the case.

Claim 1 of each of these requests includes the feature that the counterpart press-fit coupling element comprises "an annular rib member (165) of closed loop form which is designed to inter-engage with the channel of the channel-section coupling element; and a rim (167) on the rib member adapted to engage said undercut formation". No further characteristics of the rib member are specified.

In the application as filed (published version), the rib member is disclosed in paragraphs [0049] and [0050]

with reference to Figure 10. In particular, it is stated that the rib member is "formed for mutual inter-engagement with coupling element 110" and "has a radially outer rim 167 and a radially inner flexible deflectable seal strip 168. The purpose of the strip 168 is to assure good sealing between the two coupling elements when they are inter-engaged. The rim 167 has a shaped surface 166, located at substantially 45° to the plane of the flange 162. Of course other angular values may be employed but about 45° is preferred. When the two coupling parts are connected together, the edges of the roof portions 130 engage the surface 166 at peripherally spaced locations. The seal strip 168 is deflected slightly radially outwardly and bears resiliently against the surface 114A of the wall 114, so providing a good seal and taking up any minor tolerance variations which may have arisen in manufacture."

As regards paragraph [0026], this paragraph is a reference to a prior art ostomy coupling and not to the disclosure of the invention. Further, paragraph [0049] cannot be read alone, that is, without referring to paragraph [0050] and Figure 10.

There is no suggestion in the application as filed that the seal strip could be omitted or provided at a location other than the rib. The seal strip is thus disclosed as being an indispensable element of the rib.

The subject-matter of claim 1 of each of the requests thus extends beyond the disclosure of the application as filed, so that the requirement of Article 123(2) EPC is not satisfied.

2. *Seventh Auxiliary Request*

This request was submitted during oral proceedings and includes an amendment intended to overcome the objection to the remaining requests as set out in section 1 above.

The feature of claim 1 according to which "the positioning, number and arrangement of the arcuate sections (130) and the inward extent of the arcuate sections into the channel section are such that ease of separation of the two coupling elements (110, 160) by peeling is readily achieved and the security of attachment of the two coupling elements against a direct pull is enhanced" is amended as compared with claim 1 as granted by the addition of the words "and the security of attachment of the two coupling elements against a direct pull is enhanced". This feature is, however, not clear.

Firstly, it is not clear with respect to what standard security of attachment is enhanced. It was suggested that this is with respect to a coupling having a continuous rib as opposed to arcuate sections. There is, however, no indication in the patent in suit that this is intended and, indeed, the implication of the wording is that the security of attachment is enhanced as compared with a coupling having a different positioning, number and arrangement of the arcuate sections. That is, that the three parameters of positioning, number and arrangement of the arcuate sections must be chosen so as to enhance security of attachment.

It is noted that the claim further specifies that the arcuate sections each have "an undercut radially extending surface which is disposed at an angle to the axis of the body sufficient to give a required degree of security to the coupling". This provides an indication that the required security of attachment is achieved by the choice of a suitable orientation of the undercut radially extending surface of the arcuate sections rather than by the positioning, number and arrangement of the arcuate sections.

The claim specifies, in addition, the ratio of the circumferential length of the spaces to the circumferential length of the arcuate sections and the radial and peripheral extent of the arcuate sections. These features cannot, however, be seen as serving to clarify the reference in the claim to the positioning, number and arrangement of the arcuate sections giving rise to an enhanced security of attachment. In particular, there is no indication in the claim as to the number of arcuate sections. In addition, there is no evidence to suggest that the selection of the specified parameters will, in fact, achieve the desired enhancement of security of attachment, and thereby serve to replace this unclear feature.

3. Accordingly, the Board does not find it appropriate to exercise their discretion to admit any of the late filed requests into the proceedings. None of the requests of the appellant are thus admissible.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

D. Meyfarth

W. Zellhuber