BESCHWERDEKAMMERN DES EUROPÄISCHEN PATENTAMTS

BOARDS OF APPEAL OF THE EUROPEAN PATENT OFFICE

CHAMBRES DE RECOURS DE L'OFFICE EUROPEEN DES BREVETS

Internal distribution code:
(A) [ ] Publication in OJ
(B) [ ] To Chairmen and Members
(C) [ ] To Chairmen
(D) [X] No distribution

Datasheet for the decision of 19 November 2008

Case Number: T 1541/07 - 3.2.06

Application Number: 99943167.9

Publication Number: 1131024

IPC: A61F 13/00

Language of the proceedings: EN

Title of invention:
A wound dressing

Patentee:
Vibriant Technolgy Services Limited

Opponent:
Protex Healthcare (UK) Limited

Headword:
-

Relevant legal provisions:
RPBA Art. 13(1)

Relevant legal provisions (EPC 1973):
EPC Art. 56

Keyword:
"Late-filed test results - not admitted"
"Inventive step - (no)"

Decisions cited:
-

Catchword:
-

Europäisches Patentamt | European Patent Office | Office européen des brevets

Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 1541/07 **-** 3.2.06

D E C I S I O N
of the Technical Board of Appeal 3.2.06
of 19 November 2008

Appellant: (Patent Proprietor)	Vibriant Technology Services Limited 26A Aldermarle Street London W1S 4HY (GB)
Representative:	Altenburg, Udo Patent- und Rechtsanwälte Bardehle - Pagenberg - Dost - Altenburg - Geissler Galileiplatz 1 D-81679 München (DE)
Respondent: (Opponent)	Protex Healthcare (UK) Limited Unit 5 The Business Center Molly Millars Lane Workingham Berkshire RG41 2QZ (GB)
Representative:	Mills, Julia D Young & Co 120 Holborn London EC1N 2DY (GB)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted 27 July 2007 revoking European patent No. 1131024 pursuant to Article 102(1) EPC.**

Composition of the Board:

Chairman: M. Harrison
Members: G. de Crignis
W. Sekretaruk

Summary of Facts and Submissions

I. European Patent No. 1 131 024, granted on application No. 99 943 167.9, was revoked by the decision of the opposition division posted on 27 July 2007.

II. The opposition division found that the subject-matter of claims 1 and 18 in accordance with the patent proprietor's main request was novel but did not involve an inventive step (Article 56 EPC 1973) over the disclosure in

E1 GB-A-2 302 669

when combined with the common general knowledge of the person skilled in the art. The opposition division found that E1 disclosed a wound dressing which was structurally identical with the wound dressing of the patent in suit but did not specify any range for the needle punching density, although it referred to the same advantages. Therefore, the range of needle punching density could not be considered to be the underlying cause of these advantages. Accordingly, the claimed range of needle punching density was considered as being selected arbitrarily. With regard to the subject-matter of claim 1 of the proprietor's first auxiliary request, the same considerations applied with regard to the claimed length of the fibres.

III. The appellant (patent proprietor) filed a notice of appeal against this decision on 10 September 2007, and paid the appeal fee simultaneously. On 26 November 2007 the statement of grounds of appeal was filed together with the request to maintain the patent as granted or

in accordance with a first auxiliary request, as had been filed during the oral proceedings of 12 June 2007.

IV. In its communication dated 30 November 2007 accompanying the summons to oral proceedings, the Board indicated that no conclusive arguments had been presented against the finding of the opposition division.

V. In its letter of 17 October 2008, the appellant filed second and third auxiliary requests together with test results obtained by Professor Anand (Centre for Materials Research and Innovation, Bolton Institute, Bolton, Lancashire) which compared the wicking and strike-through behaviour of an ADVADRAW wound dressing with VIBRIANT Sumar Lite and VIBRIANT Sumar Max wound dressings.

With letter of 29 October 2008 a further detailed report on the experimental results relating to these wound dressings was submitted and a commercial web page printout was filed concerning ADVADRAW wound dressings.

VI. Claim 1 as granted reads as follows:

"A wound dressing comprising:
a first and a second absorbent layer, each absorbent layer being of a non-woven fabric of fibres, and each being able to absorb liquid; and
a screen comprising polyester and cotton fibres between, and bonded to, the two absorbent layers so that the two absorbent layers and the screen form essentially a single, layered fabric body, characterised in that the screen and the absorbent layers have a needle punched

density of about 1700 to 1900 punches per square cm, to thereby bond the screen and the absorbent layers."

Claim 1 of the first auxiliary request differs from this claim in that the following wording is added at the end of the claim:
"and in that the absorbent layers of non-woven fabric are in the form of two fibre batts fabricated on a needleloom, each being made of 100% polyester fibre in which the fibre batts have a fibre length of 7 - 8 cm".

Claim 1 of the second auxiliary request differs from claim 1 of the main request in that the following wording is added:
"and that the screen has a thread density of about (120 to 150 threads per square inch) 18.6 to 23.2 threads/cm^2".

Claim 1 of the third auxiliary request differs from claim 1 of the main request in that the wording added to claim 1 by way of the first and second auxiliary requests is added in combination.

VII. Oral proceedings were held on 19 November 2008.
The appellant requested that the patent be maintained as granted or alternatively on the basis of auxiliary request 1 filed on 12 June 2007 or on the basis of auxiliary requests 2 or 3 filed with letter of 17 October 2008.

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

VIII. The appellant essentially argued as follows:

The test reports by Professor Anand and the web page printout submitted with letters of 17 and 29 October 2008 should be admitted into the proceedings. These test reports and the web page printout substantiated the previous argumentation that the superior characteristics of the inventive product resulted from the claimed range of punching density. The inventive products VIBRIANT Super Max and VIBRIANT Super Lite were compared to the ADVADRAW product, which reflected the product disclosed in E1 and which had a much lower punching density.

With regard to inventive step of the subject-matter of claim 1 of the main request, when starting from the disclosure in E1, non-obvious advantageous effects were obtained by the selection of the claimed punching density. It was not an arbitrary but a purposeful selection. The quality of the wound dressing was substantially improved with regard to rigidity and wicking action by choosing the correct needleloom having very fine needles and allowing a one-step process. The prior art needling processes were generally carried out at lower punching densities.

With regard to inventive step of the subject-matter of claim 1 of the auxiliary request 1 when starting from the disclosure of E1, the fibre length represented a further distinguishing feature. The combination of the punching density with the fibre length led to the wound dressing having improved strike-through and wicking characteristics. No such effects were disclosed in E1 nor could these be assumed by the skilled person.

With regard to inventive step of the subject-matter of claim 1 of the auxiliary requests 2 and 3, the further feature specifying the thread density of the screen was included. No such combination with the punching density and the fibre length was disclosed or suggested by E1.

IX. The respondent relied essentially upon the following submissions:

The test reports were late-filed and the web page printout should not be admitted. The comparative ADVADRAW product did not reflect the product disclosed in E1 with regard to
- the absorbent fibre batts which were made of soft viscose/polyester pads contrary to the 100% polyester fibre batts according to E1;
- the central wicking layer which did not correspond to the screen according to E1;
- the thickness which was not indicated for the ADVADRAW product.
The needle punched density of the ADVADRAW product was not indicated. Accordingly these tests neither constituted comparative tests in the form of approximating the structural relationship of the closest prior art nor did they demonstrate an inventive step on the basis of any improved effect.

The late-filed report and the web page printout provided less information than already known from E1 and they were not suitable to overcome the objections in respect of inventive step. Also therefore, the late-filed test report and the web page printout were not relevant.

The subject-matter of claim 1 of the main request was not inventive in view of the disclosure of E1 and the common general knowledge of the skilled person. E1 disclosed all features except the needle punching density. The selection of the claimed range for the needle punching density was an arbitrary one, as no technical effect was disclosed which could support such a selection. E1 pointed to the possibility of applying the needling process repeatedly and thus the needle punching density had to be seen independently of the individual needle loom used.

The subject-matter of claim 1 of the auxiliary requests was also not inventive in view of the disclosure in E1 and the common general knowledge of the skilled person. E1 referred to the identical range for the thread density of the screen. E1 did not mention the fibre length, however it seemed likely that the same fibre length was used. Again, the selection of a certain fibre length was not supported by any effect as a result of such selection. The appeal should therefore be dismissed.

Reasons for the Decision

1. The appeal is admissible.

2. *Late-filed documents*

According to Article 13(1) of the Rules of Procedure of the Boards of Appeal (RPBA) any amendment to a party's case after it has filed its grounds of appeal may be

admitted and considered at the Board's discretion. The discretion has to be exercised in view of *inter alia* the complexity of the new subject-matter submitted, the current state of the proceedings and the need for procedural economy.

The test reports and the web page printout were filed after the summons to oral proceedings. They also do not overcome the deficiencies referred to in the decision of the opposition division. In particular they do not demonstrate that any superior characteristics are obtained, even less so that any improvements whatsoever are obtained due to the claimed range of punching density compared to the product disclosed in E1.

The products VIBRIANT Max and VIBRIANT Lite are compared to an ADVADRAW product. The characteristics indicated on the web page printout for the ADVADRAW product include a central wicking layer sandwiched between highly absorbent, soft viscose/polyester pads and an outer non-adherent contact layer, without any reference to a specific punching density, a fibre length or a thread density. Consequently the test reports and the web page printout are not sufficiently relevant for the purposes of establishing a true comparison between the product of E1 and the product of claim 1. The need for procedural economy and the lack of relevance of the aforementioned documents leads the Board to the conclusion that the amendment of the appellant's case by introduction of these documents must be rejected. The aforementioned documents are therefore not admitted into the proceedings.

3. *Novelty - Main Request*

3.1 E1 represents the closest prior art and discloses all features of the preamble of claim 1. This matter is undisputed between the parties and the Board finds no reason to conclude otherwise. Furthermore, E1 discloses that the wound dressing is needle punched to bond the layers (page 4, lines 2-4). Accordingly, the feature distinguishing the claimed subject-matter over E1 is only the range claimed for the needle punched density of about 1700 to 1900 punches per square cm.

3.2 It is not necessary to evaluate whether an alleged prior use referred to by the respondent during the opposition procedure anticipates the claimed subject-matter because, as set out below, it does not involve an inventive step.

4. *Inventive step - Main request*

4.1 As set out under point 3.1 above, E1 does not disclose a wound dressing having a needle punched density in the claimed range.

4.2 In order to assess inventive step, the Board applies the problem/solution approach. In a first step, the closest prior art is identified (here: E1) and then, starting from this prior art, the objective problem to be solved by the subject matter of claim 1 must be formulated. When determining the objective problem, the technical results or effects achieved by the claimed invention when compared with this prior art should be established.

4.3 For the wound dressing of the patent in suit, no technical result or effect is disclosed which is different from the technical results or effects obtained by the wound dressing of E1. The technical results or effects which are referred to in the patent in suit as advantages of the invention (see paragraphs [0038 - 0040]) are the same as those described in E1 (see page 4, second paragraph) and not related to the distinguishing feature. The appellant's allegation that lower punched densities are also known in the art and these might be used thus lacks relevance when taking the teaching of E1 into account.

4.3.1 According to paragraph [0038] these advantages of the invention are obtained either by using a tightly woven screen which serves to prevent or inhibit "strike-through", which screen is also provided in the wound dressing of E1 (see page 3, lines 21/22); or by the liquid permeable layer bonded to at least one of the absorbent layers, which is merely an optional feature of the patent in suit referred to in claim 3.

4.3.2 Paragraph [0039] refers to another advantage of the invention which concerns the possibility of bonding the three layers together by a single needle-punching process. However, this possibility relates to a process feature which is not defined in the claim.

4.3.3 The further advantage of the invention referred to in paragraph [0040] refers to an allegedly improved dispersion action of the wound dressing which is based upon a theory which considers that the choice of fibres and the needle-punching procedure used to fabricate the dressing influences the dispersion of the fluid.

However, neither the choice of fibres nor the needle punching procedure are substantiated further and no data concerning the dispersion action have been presented. Hence, this is merely a speculative theory.

4.3.4 Accordingly, none of these alleged advantages conclusively relates to the needle punched density and nothing in the patent in suit supports the appellant's view that a technical problem is solved or that characteristics of the wound dressing are improved.

4.4 The Opposition Division already pointed to the fact that nothing in the patent specification identified which special advantages were present when using the claimed needle punched density range compared to known similar wound dressings having the same components - such as disclosed in E1 - as no surprising effects were mentioned in relation to the claimed range of needle punched density.

4.5 When assessing inventive step nevertheless, the distinguishing feature has to be taken into account. Accordingly, the objective problem to be solved starting from E1 can only be understood as being the use of an appropriate needle punching process when forming the product.

4.6 The skilled person, acknowledging the disclosure in E1 that a needle punching process could be used in order to bond the screen and the absorbent layers, would know the advantages (and disadvantages) of particular needle looms. Accordingly, when desiring to obtain certain characteristics of the wound dressing, the skilled person would choose an appropriate needleloom and thus

arrive at a certain needle punched density in the product. By applying the method disclosed in E1, which already points to the possibility of repeated needling of the layers, the needle punched density of the final dressing would be adjusted to the desired product characteristics.

It is well-known in the art that the features of the needling process such as for example the number and kind of the needles (barbs and blade forms), the penetration depths of the needles, the thickness and structure of the fibres, the draft, the design of the stripper plate and the stitching plate, one-sided or double-sided needling etc., influence the characteristics of the final product. No such data are available for either the wound dressing of E1 or the wound dressing according to the patent in suit.

The needle punched density, when considered independently of a particular needle loom, also cannot conclusively provide any particular effect. An effect upon an article could only be considered and verified when taking into account additional features of the needling process such as specified above. Accordingly, when only defining the needle punched density of the article, the skilled person has further to investigate these features influencing the final product. The appropriate adaptation of such parameters for any particular purpose however lies within the normal activities of a skilled person.

4.7 Since no surprising or advantageous effects are given by the claimed range, the Board can only conclude that the choice of a suitable combination of parameters for

the needling process belongs to the normal activities and knowledge of the skilled person. Accordingly the definition of the defined range for the needle punched density represents nothing more than a suitable selection in accordance with the circumstances whereby the skilled person merely has to adapt necessary parameters in order to arrive at the desired product characteristics. Therefore, the subject-matter of claim 1 does not involve an inventive step (Article 56 EPC 1973).

5. *Inventive step - auxiliary request 1*

5.1 Claim 1 of the first auxiliary request specifies the absorbent layers of the non-woven fabric further in that fibre batts being fabricated on a needleloom are defined, each being made of 100% polyester fibre in which the fibre batts have a fibre length of 7 to 8 cm.

5.2 E1 already discloses two absorbent fibre batts fabricated on a needleloom, each being made of 100% polyester fibre of 1.2 to 1.5 denier (see page 3, lines 19 - 20). E1 however does not disclose a fibre length of 7 to 8 cm.

5.3 The selection of the fibre length

(a) is disclosed in the patent in suit as an optional choice (paragraph [0009]);

(b) is not disclosed as being related to any particular advantageous characteristic;.

5.4 The parties did not agree which problem should be solved by the fibres having a certain length. The view of the appellant that the combination of the claimed

punching density with the claimed fibre length would result in an improved wound dressing is not supported in any way by means of evidence. Accordingly, the claimed range of fibre length can only be regarded as being an arbitrary choice of fibre length when wishing to arrive at a suitable product, as no significance of this parameter is evident from the specification. Therefore, also the subject-matter of this claim 1 does not involve an inventive step (Article 56 EPC 1973).

6. *Inventive step - auxiliary request 2*

6.1 The subject-matter of claim 1 of the second auxiliary request includes, in addition to the subject-matter of the main request, the feature that the screen has a thread density of about 18.6 to 23.2 threads/cm^2.

6.2 The wound dressing of E1 discloses exactly the same thread density of the screen (page 3, line 24). Accordingly, the conclusion concerning inventive step of this request does not differ from the conclusion made in regard to the main request.

7. *Inventive step - auxiliary request 3*

The subject-matter of claim 1 of the third auxiliary request combines the features of claim 1 of the first and second auxiliary requests. No combinatory effects of these features are disclosed. Accordingly, the conclusion concerning inventive step of this request does not differ from the conclusion made with regard to the first (and second) auxiliary request.

8. Consequently the subject-matter of claim 1 of the appellant's main request and first to third auxiliary requests lacks an inventive step (Article 56 EPC 1973).

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar The Chairman

M. Patin M. Harrison