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**Datasheet for the decision
of 25 November 2009**

Case Number: T 1856/08 - 3.2.06

Application Number: 94109486.4

Publication Number: 0640328

IPC: A61F 13/15

Language of the proceedings: EN

Title of invention:
Absorbent article

Patentee:
KAO CORPORATION

Opponent:
SCA Hygiene Products AB
KIMBERLY-CLARK WOLRDWIDE, INC.
The Procter & Gamble Company

Headword:
-

Relevant legal provisions:
EPC Art. 123(2)

Relevant legal provisions (EPC 1973):
-

Keyword:
"Amendments - not based on original disclosure"

Decisions cited:
-

Catchword:
-



Case Number: T 1856/08 - 3.2.06

D E C I S I O N
of the Technical Board of Appeal 3.2.06
of 25 November 2009

Appellant:
(Patent Proprietor) KAO CORPORATION
14-10, Nihonbashi Kayabacho 1-chome
Chuo-Ku, Tokyo 103 (JP)

Representative:
Viktor, Rainer
Vossius & Partner
Postfach 86 07 67
D-81634 München (DE)

Respondent:
(Opponent OI) SCA Hygiene Products AB
S-405 03 Göteborg (SE)

Representative:
Egeröd, Lisbeth
Valea AB
Lindholmospiren 5
S-417 56 Gothenburg (SE)

(Opponent OII) KIMBERLY-CLARK WORLDWIDE, INC.
401 North Lake Street
Neenah WI 54956 (US)

Representative:
Davies, Christopher Robert
Frank B. Dehn & Co.
St Bride's House
10 Salisbury Square
London EC4Y 8JD (GB)

(Opponent OIII) The Procter & Gamble Company
One Procter & Gamble Plaza
Cincinnati, OHIO 45202 (US)

Representative:
Boon, Graham Anthony
Elkington and Fife LLP
Prospect House
8 Pembroke Road
Sevenoaks
Kent TN13 1XR (GB)

Decision under appeal: Decision of the Opposition Division of the European Patent Office posted 14 July 2008 revoking European Patent No. 0640328 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- I. European patent No. 0 640 328 granted on application No. 94109486.4, was revoked by the opposition division by decision announced during the oral proceedings on 20 May 2008 and posted on 14 July 2008.

Claim 1 as granted read:

"A sanitary napkin (10) comprising a liquid permeable topsheet (11), a liquid impermeable backsheet (12), an absorbent member (13) interposed between said topsheet (11) and said backsheet (12), said absorbent member (13) comprising a super absorbent polymer moisture absorbent material in an amount of not less than 1.0 g, wherein the amount of said super absorbent polymer per unit area is not less than 5.0×10^{-3} g/cm², such that the moisture absorption per unit area of said sanitary napkin (10) is not less than 7.2×10^{-4} g/h.cm² and the total amount of moisture absorption of said sanitary napkin (10) is not less than 0.10 g/h in an environment of 35°C/75% relative humidity."

- II. The decision of the opposition division was based on the finding that claim 1 of the main request was not allowable for formal reasons (Article 123(2) EPC) and the subject-matter of claim 1 of auxiliary requests I to III was not sufficiently disclosed (Article 83 EPC) in particular having regard to the fact that neither the materials for the moisture absorbent material nor the area where such material should be dispersed was defined, and also that there was no clear information concerning preconditioning with regard to the test method for the total amount of moisture absorption.

III. On 18 September 2008 the appellant (patent proprietor) filed a notice of appeal against this decision and paid the appeal fee. The statement of grounds of appeal was filed on 24 November 2008 together with the main request, which was identical to the one before the opposition division, and fourteen auxiliary requests.

IV. In a communication in preparation for the oral proceedings according to Article 15(1) of the Rules of Procedure of the Boards of Appeal dated 10 July 2009, the Board gave its preliminary opinion on the case, generally agreeing with the objections which had led to the decision to revoke the patent.

V. Oral proceedings were held on 25 November 2009. The appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of the main request filed with the grounds of appeal, alternatively on the basis of the third auxiliary request filed with the grounds of appeal (hereafter the "first auxiliary request"), alternatively on the basis of the second auxiliary request filed during the oral proceedings.

The respondents requested that the appeal be dismissed.

Claim 1 of the main request is as follows:

"A sanitary napkin (10) comprising a liquid permeable topsheet (11), a liquid impermeable backsheet (12), an absorbent member (13) interposed between said topsheet (11) and said backsheet (12), said absorbent member (13) comprising a super absorbent polymer moisture absorbent

material in an amount of not less than 1.5 g, wherein the amount of said super absorbent polymer per unit area is not less than 5.0×10^{-3} g/cm², such that the moisture absorption per unit area of said sanitary napkin (10) is not less than 7.2×10^{-4} g/h.cm² and the total amount of moisture absorption of said sanitary napkin (10) is not less than 0.10 g/h in an environment of 35°C/75% relative humidity."

Claim 1 of first auxiliary request differs from this request in that the feature of claim 1, namely:

"said absorbent member (13) comprising a super absorbent polymer moisture absorbent material in an amount of not less than 1.5 g, wherein the amount of said super absorbent polymer per unit area is not less than 5.0×10^{-3} g/cm²"

is amended to read:

"said absorbent member (13) comprising a super absorbent polymer moisture absorbent material *being mixed or dispersed in the material of the absorbent member* in an amount of not less than 1.5 g, wherein the amount of said super absorbent polymer per unit area of *said sanitary napkin (10)* is not less than 5.0×10^{-3} g/cm²". (amendments in italics)

Claim 1 of the second auxiliary request differs from claim 1 of the first auxiliary request in that the claim is directed to an absorbent article, and thus the wording begins with "*An absorbent article being a sanitary napkin (10) without flaps, said absorbent article comprising a liquid permeable topsheet (11), ...*". Consistently, the feature concerning the amount of super absorbent polymer per unit area has been changed so as to apply to the absorbent article.

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

The amendments of the subject-matter of claim 1 of the main request were disclosed in the description as originally filed (Article 123(2) EPC) and met the requirements of Article 84 EPC. In particular it was clear for the skilled person that all the parameters set out in the description in relation to an absorbent article had to apply for a sanitary napkin, which represented the preferred absorbent article. This could be derived from the various references throughout the description, from all the examples and the fact that the only Figure referred to a sanitary napkin.

With regard to the issue of whether the feature concerning the amount of super absorbent polymer per unit area being not less than $5.0 \times 10^{-3} \text{g/cm}^2$ concerned the area of the sanitary napkin or the area of the absorbent member, the descriptions on page 4, lines 41 to 48 and lines 49, 50 of the A-publication had to be read in combination. Such a lower threshold of the amount of super absorbent polymer per unit area applied for the examples, which all represented sanitary napkins.

So far as claim 1 of the first auxiliary request was concerned, the application as originally filed contained a clear and unambiguous, literal disclosure of "the moisture absorbent material being mixed or dispersed in the material of the absorbent member" on page 4, line 54. This disclosure was linked to the above discussed feature. Moreover, it was further

clarified that the amount of the super absorbent polymer per unit area concerned the sanitary napkin. Any ambiguity with regard to whether the absorbent member or the complete sanitary napkin was to be considered was thus excluded and the requirements of Article 84 EPC were met.

With regard to claim 1 of the second auxiliary request, the wording further clarified that the claimed absorbent article was a sanitary napkin without flaps.

VII. The respondents essentially argued as follows:

Concerning the subject-matter of claim 1 of all the requests, the requirements of Article 123(2) EPC were not met. No clear and unambiguous disclosure with regard to an absorbent article which was specifically a sanitary napkin having the claimed combination of features and in particular a certain amount of super absorbent polymer per unit area was derivable from the originally filed application.

This objection also applied to the subject-matter of claim 1 of the auxiliary requests. Therefore, the first auxiliary request should not be allowed and the second auxiliary request - filed late during the oral proceedings - should not be admitted.

Reasons for the Decision

1. The appeal is admissible.

2. Article 123(2) EPC - Main Request

2.1 In claim 1, the sanitary napkin is specified as comprising an absorbent member interposed between the topsheet and the backsheet. The absorbent member is further specified as "*comprising a super absorbent polymer moisture absorbent material in an amount of not less than 1.5 g, wherein the amount of said super absorbent material per unit area is not less than $5.0 \times 10^{-3} \text{ g/cm}^2$* ".

2.2 One issue in dispute is whether the amount of super absorbent material per unit area was originally disclosed with regard to the unit area of the absorbent member or with regard to the unit area of the sanitary napkin and whether the claimed combination of features was originally disclosed.

2.3 When reading the wording of claim 1 set out under point 2.1 above, the amount of "said" super absorbent material per unit area specified in the second part of this wording clearly concerns the super absorbent polymer moisture absorbent material which is defined in the first part of the wording as being comprised in the absorbent member. For this reason alone, the Board sees no room for any other interpretation than that the specified amount of the super absorbent polymer is positioned within the absorbent member.

2.4 Nevertheless, the appellant's view was that the second part of this wording should be interpreted as being related to the sanitary napkin.

2.5 The first reason given for such view was that the feature of the amount of super absorbent material per unit area was originally disclosed with regard to the unit area of the sanitary napkin as a whole, as could be derived from the combination of the originally filed claims, in particular claims 1 to 4.

2.5.1 However, the originally filed claims 1 to 6 and 8 to 10 are directed to an absorbent article. Originally filed claim 1 specifies the absorbent article as comprising a topsheet, a backsheet and an absorbent member interposed therebetween. With regard to the moisture absorbent material, the subject-matter of originally filed claim 1 does not specify its chemical structure or its location, and is to be understood from the context as meaning that, according to originally filed claims 6 and 8, it is comprised either in the absorbent member or in the topsheet. The disclosure in the specification also relates, with regard to the (moisture absorbent) material, to lithium chloride or silica gel in addition to super absorbent polymers.

2.5.2 Accordingly no explicit disclosure concerning specifically a sanitary napkin with the currently claimed characteristics is present in the originally filed claims.

2.6 The second argument relied upon by the appellant was that such subject-matter could be immediately derived from the examples.

2.6.1 However, all the examples disclosing sanitary napkins having moisture absorbent material have the superabsorbent contained in the absorbent member. For

this reason alone, this argument of the appellant cannot be accepted.

2.7 The main thrust of the appellant's argument was that the feature concerning the amount of highly absorbent polymer required per unit area being not less than $5.0 \times 10^{-3} \text{g/cm}^2$ was a general disclosure and was equally valid for absorbent members and sanitary napkins, something which was immediately apparent for the skilled person from page 4, lines 49/50 in combination with the disclosure on page 4, lines 41 to 48 of the A-publication.

2.7.1 Page 4, lines 49/50 of the A-publication reads as follows:

"The amount of highly absorbent polymer as required per unit area of the absorbent article is preferably not less than $5.0 \times 10^{-3} \text{ g/cm}^2$ and more preferably $1.5 \times 10^{-2} \text{ g/cm}^2$ to $7.6 \times 10^{-2} \text{ g/cm}^2$."

This is the only passage referring to the claimed lowest limit of the amount of super absorbent polymer per unit area and merely indicates that all the absorbent articles referred to in the application should not have less than this amount. However it leaves totally open which specific range of amount applies to the different groups of absorbent articles, (the sub-groups of sanitary napkins, incontinence pads and disposable diapers are disclosed) when compared to the group of absorbent articles as a whole. The only condition specified is that the amount applicable for all these groups of absorbent articles is **not less** than the value indicated.

An example will make the point clear: a sanitary napkin with an amount of absorbent polymer of 7×10^{-3} g/cm² clearly has an amount of superabsorbent polymer of **not less than** 5.0×10^{-3} g/cm² and thus would meet the general requirement. However such disclosure cannot in itself support a claim for a **sanitary napkin** having an amount of less than 7×10^{-3} g/cm², because there is no disclosure of sanitary napkins having amounts lower than 7×10^{-3} g/cm².

Since there is no positive disclosure, either explicit or implicit, that the sub-group of sanitary napkins within the group of absorbent articles is to be correlated precisely to the first preferred range of superabsorbent polymer as disclosed for all the absorbent articles on page 4, lines 49/50 of the A-publication, any different, smaller range, for example the more preferred range cited in this paragraph of the A document, may also be the range which is appropriate for the group of sanitary napkins. For these reasons the Board concludes that there is **no clear and unambiguous disclosure** of the claimed range in relation to sanitary napkins.

2.7.2 Considering next whether the area of the sanitary napkin is to be taken when applying the amount of "not less than 5.0×10^{-3} g/cm²" superabsorbent or whether the area of the absorbent member of the sanitary napkin is to be taken instead, the following passage on page 4, lines 41 - 48 of the A-publication has to be taken into account:

"It suffices to use the moisture absorbent material in such an amount that the amount of moisture absorbed by

the absorbent article in its entirety is within the range as mentioned before. If, for example, the highly absorbent polymer is employed as the moisture absorbent material for the sanitary napkin, the moisture absorbent material is employed, in an amount of not less than 0.7g, preferably in an amount not less than 1.0g, more preferably in an amount of 1.5 to 10g. If it is used in an amount exceeding 10g, the absorbent article is undesirably lowered in pliability."

2.7.3 Accordingly, this paragraph is concerned about the moisture absorption by the absorbent article and in particular, by a sanitary napkin. The first sentence of this paragraph emphasizes that it is the moisture absorption which dictates the range. The second sentence refers to the absolute minimum total amount of super absorbent polymers for sanitary napkins, independent of their chemical structure and the size of the napkin.

2.7.4 When additionally taking into account the examples and calculating the amount per unit area thereof, any calculation has to be based on the area of the absorbent member, which is 122.5 cm² for all the examples.

For the absorbent member of the sanitary napkin which contains the lowest disclosed amount of 0.7g super absorbent polymer, a value of 5.7×10^{-3} g/cm² results. Correspondingly, for the absorbent member of a currently claimed sanitary napkin, which contains super absorbent polymer in an amount of 1.5g, a value of 12.2×10^{-3} g/cm² can be calculated.

- 2.8 Hence, the claimed total amount of super absorbent polymer and the claimed amount of super absorbent polymer per unit area of the absorbent member are not independent features of the absorbent member. Both values are based upon an absorbent member having the dimensions as disclosed for all the examples. In such a case, when choosing different dimensions, the absolute amount should be adapted accordingly - something which is possible by knowing the "relative" amount. Such dependencies are also apparent in view of the varying dimensions for sanitary napkins (either shorter or longer).
- 2.9 Therefore, although the above cited passage on page 4, lines 49/50 explicitly states that the amount of highly absorbent polymer per unit area of the absorbent article should preferably lie above a certain lowest limit, in view of the examples, the skilled person would arrive at the conclusion that, on the one hand, the amount of the super absorbent polymer per unit area refers to the absorbent member (and not to the article independent of whether it is a sanitary napkin or other absorbent article) and, on the other, that any calculations have to be based upon an absorbent member having an area of 122.5 cm^2 . Under such conditions, the lowest total amount of 0.7g super absorbent polymer also meets the requirement to lie above the specified lowest amount of $5.0 \times 10^{-3} \text{ g/cm}^2$.
- 2.10 Therefore, firstly, the position of the appellant that it is not the absorbent member but the complete sanitary napkin which should be taken into account with respect to the amount of super absorbent polymer per

unit area is contrary to the disclosure of the patent in suit.

2.11 Secondly, in the absence of any disclosure linking specifically a sanitary napkin comprising as regards its absorbent member an amount of 1.5g of super absorbent polymer to the claimed lowest limit of super absorbent polymer per unit area, the subject-matter of claim 1 has been amended by a generalisation of the original disclosure, thereby adding subject-matter.

2.12 Therefore, the subject-matter of claim 1 does not meet the requirements of Article 123(2) EPC and the main request cannot be allowed. Accordingly, it is not necessary to discuss in detail the further objections referred to by the respondents.

3. First and second auxiliary requests

The subject-matter of the respective claims 1 of the first and second auxiliary requests includes the above discussed lower limit of $5.0 \times 10^{-3} \text{ g/cm}^2$ with respect to the unit area of either the sanitary napkin (first auxiliary request) or the absorbent article (second auxiliary request) in combination with a total amount of 1.5g super absorbent polymer. The same considerations as regards added subject-matter as set out above apply to these requests.

3.1 The first auxiliary request, which was submitted with the grounds of appeal, is thus not allowable. The second auxiliary request, which was filed during the oral proceedings and was thus a late-filed request,

would thus also not have been allowable and was therefore not admitted into the proceedings.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

M. Patin

P. Alting van Geusau