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**Datasheet for the decision
of 15 October 2014**

Case Number: T 0299/11 - 3.2.06

Application Number: 00118869.7

Publication Number: 1080709

IPC: A61F13/84

Language of the proceedings: EN

Title of invention:

Absorbent article

Patent Proprietor:

KAO CORPORATION

Opponent:

The Procter & Gamble Company

Relevant legal provisions:

EPC Art. 100(a), 100(b), 114(2)

Keyword:

Sufficiency of disclosure -

The skilled person is capable of carrying out the test method
included in claim 3

Admittance of documents -

D8 correctly admitted by the opposition division -

D7 no admittance requested

Novelty (yes)

Inventive step -

(yes) inventive step attack not substantiated



**Beschwerdekammern
Boards of Appeal
Chambres de recours**

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Case Number: T 0299/11 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 15 October 2014

Appellant: The Procter & Gamble Company
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 30 November
2010 rejecting the opposition filed against
European patent No. 1080709 pursuant to Article
101(2) EPC.**

Composition of the Board:

Chairman M. Harrison
Members: G. de Crignis
K. Garnett

Summary of Facts and Submissions

- I. The opposition filed against European patent No. 1 080 709 was rejected by the opposition division by way of its decision posted on 30 November 2010.
- II. The appellant/opponent filed an appeal against this decision and requested revocation of the patent on the grounds that the subject-matter of the claims was not novel and did not involve an inventive step. The appellant referred to:

- D1 EP-A-811 387
- D2 EP-A-811 388
- D3 EP-A-811 390
- D4 WO-A-98/26808
- D5 WO-A-91/12030
- D6 JP-01-155857
- D7 EP-A-811 389
- D8 Kirk-Othmer Encyclopedia of Chemical technology, 3rd ed, 1982, 20, 766-779.

Further, with regard to the test procedure included in claim 3, the appellant argued that the invention was not described in a manner sufficiently clear and complete to enable a skilled person to carry out the invention (Article 100(b) EPC).

- III. In reply, the respondent/patent proprietor requested dismissal of the appeal, and requested that D8 be disregarded due to the incorrect exercise of the opposition division's discretionary power in admitting it into the proceedings.
- IV. In a communication annexed to the summons to oral proceedings, the Board indicated its preliminary views.

The Board stated that it saw no reason to overturn the opposition division's decision to admit D8 but not D7. In regard to the objection of lack of sufficiency of disclosure, the Board noted that the appellant had not provided any evidence supporting its allegations. Concerning novelty, the Board considered the subject-matter of the claims to be novel since the properties of the particular silica components in D1, D2 and D3 were not known. As regards inventive step, the Board noted that the appellant considered D7 to be the closest prior art, and had thus made inventive step attacks starting from a document which had not been admitted into proceedings. In regard to its further attacks on inventive step when starting from D1, D2 or D3 as the closest prior art, the Board stated that discussion appeared to be required as to how the appellant intended the same reasoning (i.e. based on D7 as the closest prior art) to apply.

V. Oral proceedings were held before the Board on 15 October 2014.

The appellant had previously informed the Board, by letter dated 22 July 2012, that it would neither be present nor represented at the oral proceedings, but that it maintained its request for revocation of the patent.

The respondent's eventual sole request was that the appeal be dismissed.

Claim 1 reads as follows:

"An absorbent article comprising a liquid permeable topsheet, a liquid impermeable backsheet, and a liquid retentive absorbent member and containing a porous deodorizing agent, wherein said porous deodorizing

agent has such pores that the volume of said pores whose diameter ranges from 20 to 200 Å is 0.2 ml/g or more."

VI. The appellant argued in the grounds of appeal as follows:

The invention was not disclosed in a manner sufficiently clear and complete for it to be carried out by a skilled person because claim 3 referred to a test method, and no information was given as to how to perform the test in order to obtain unequivocal results. This was because the orientation in which the article should be kept during the 30 minutes of drainage required by the test was not specified. The consequence was that different results would be obtained depending on whether the article was oriented in a vertical or a horizontal orientation.

Claim 1 included an unusual combination of parameters which disguised a lack of novelty. The selection of this combination of parameters had no physical meaning because the selected pore size was very broad and excluded only the pores which were very small or very large, while the minimum pore volume was set at a very low value. As a consequence, most if not all of the porous odour absorbers known at the priority date would have fallen within the scope of claim 1.

D8 represented an extract from a known technical encyclopedia which demonstrated the skilled person's common general knowledge at the priority date. Three types of silica gel were disclosed therein and all three types, in general, satisfied the claimed requirements.

D1 to D3 and D7 should each be considered as prejudicial to the novelty of the subject-matter of claim 1. D1 disclosed in its examples (in the odour control system) the components "Silica 123" and "Syloblanc 82", which were porous silica gel materials where the volume of the pores whose diameter ranged from 20 to 200 Å was more than 0.2 ml/g. D2 and D3 also disclosed absorbent articles comprising "Syloblanc 82", while D7 disclosed absorbent articles using "Silica 123" as an odour control agent.

Even if claim 1 were found to be novel, it nevertheless lacked inventive step over any of those prior art documents taken alone or combined with common general knowledge. D7 represented the closest prior art. The only difference between D7 and the patent was that the deodorizing agent of claim 1 specified the total volume of the pores in the 20 to 200 Å size range as being over 0.2 ml/g. The technical effect of this feature was to provide an improved odour control system for the absorbent article. D7 taught that the preferred silica should have a pore volume of 1 - 2 ml/g and a pore average diameter of 9 - 11 nm and that silica gels were preferred materials. The skilled person knew from his common general knowledge, exemplified by document D8, that all commercially available grades of silica gel had pore volumes ranging from 0.4 to 2 ml/g and average pore diameters from 22 to 220 Å. Therefore, simply following the teaching of D7 and by selecting the preferred types of silica gel, the skilled person would have selected those with pore volume of 1 - 2 ml/g and with an average pore size within the limits of claim 1. Therefore, claim 1 lacked an inventive step with respect to D7 alone or when combined with the common general knowledge exemplified by D8. The same reasoning

could "be done equally validly starting from any of D1-D3".

VII. The respondent essentially argued:

The opposition division did not properly exercise its discretionary power when admitting D8. D8 was not *prima facie* relevant since it did not disclose common general knowledge at the priority date because it represented an "old" document. Moreover, it did not give a complete picture of the general technological background in the priority year which was demonstrated by considering comparative example 2 of the patent in suit.

The opposition division correctly decided not to admit D7 into the proceedings as it was not *prima facie* relevant. The appellant had not made a request to admit D7, nor had it explained why the opposition division was incorrect in not admitting it. Therefore all reasoning based on D7 should be disregarded.

The opponent had not provided any evidence that in the test procedure included in claim 3 a change in orientation would produce different results. A Japanese "Guideline for saturation absorption" existed and the skilled person had sufficient information and practical skill to obtain reliably reproducible results.

Concerning novelty, none of D1 to D3 disclosed that the absorbent member contained a porous deodorizing agent having such pores that the volume of the pores whose diameter ranged from 20 to 200 Å was 0.2 ml/g or more. Although D1 to D3 mentioned silica gels with particular trade names in an example, there was no disclosure that these materials met the claimed requirement. Moreover, no proof had been submitted concerning measurement

results for "Syloblanc 82" or "Silica 123", nor had any evidence been filed to the effect that "Silica 123" was equivalent to "Syloblanc 82".

Concerning inventive step, the appellant had not substantiated its objection. The attack starting from D7 was to be disregarded since D7 was not in the proceedings. The one-line statement given in the grounds of appeal that the same reasoning when starting from D7 could be applied when starting from D1 to D3 was wholly inadequate. The lines of argument were entirely incompatible and thus not understandable, since the teaching and disclosure of D7 differed from the disclosure in D1 to D3 in that D1 to D3 did not refer anywhere to silica gels with particular pore volumes or pore diameters. As far as the reasons given by the opposition division were concerned when starting from D1 as the closest prior art, the appellant had not addressed these at all.

Reasons for the Decision

1. Sufficiency of disclosure
 - 1.1 Claim 3 of the granted claims includes a test method concerning the saturation absorption of the absorbent article. The test method requires the drainage of the article for 30 minutes. It is correct that no further information concerning the drainage is present in the patent in suit. In particular, there is no information concerning the orientation in which the article should be kept during the 30 minute drainage.

1.2 A Japanese "Guideline for saturation absorption" (and a partial English translation) was submitted by the respondent wherein reference is made to a vertical position of the article during the drainage step. No comment concerning these guidelines has been submitted by the appellant, even though the Guideline had been submitted by the respondent during the proceedings before the opposition division. The Board considers that the Guideline can be taken as simply confirming what the skilled person would do from a practical point of view when wishing to drain the product. Hence, the skilled person would be capable of performing the test in a manner so as to obtain reliable results.

1.3 The Board had pointed out in its provisional opinion that the appellant had provided no evidence to support its allegation of lack of sufficient disclosure. The appellant did not reply. Hence, the Board does not see any reason to alter its provisional opinion and thus confirms that, based on the facts before the Board, the claimed invention is sufficiently clearly and completely disclosed for a skilled person to be able to carry it out, such that the ground of opposition under Article 100(b) EPC is not prejudicial to maintenance of the patent.

2. Admittance of documents

2.1 Under Article 114(2) EPC, the departments of first instance as well as the Boards of Appeal have a discretion to admit late-filed submissions and documents. The exercise of this discretion depends on the facts of each case.

- 2.2 D8 was filed during the oral proceedings before the opposition division and admitted by the opposition division. It is a copy of the section concerning silica in Kirk-Othmer's Encyclopedia of Chemical Technology.
- 2.2.1 Concerning silica gel, three types are classified (page 773/774):
- regular-density silica gel having an average pore diameter of 2.2 to 2.6 nm and a pore volume of 0.37 to 0.40 ml/g;
 - intermediate-density silica gel having an average pore diameter of 12 to 16 nm and a pore volume larger than the regular-density silica gel;
 - low-density silica gel having an average pore diameter of 18 to 22 nm and a pore volume of 1.4 to 2.0 ml/g.
- 2.2.2 No other document in the proceedings, in particular none of D1 to D3, is as specific as D8 in this regard. For this reason it was admitted by the opposition division.
- 2.2.3 D8 was submitted in order to demonstrate that certain particulate silica gels available at the date of publication of this encyclopedia (i.e. 1982) had a pore size range and a pore volume overlapping with the claimed ones.
- 2.2.4 Moreover, although the information contained in D8 was older than the information contained in D1 to D3, it appears to accurately represent common general knowledge at the relevant date - even if it might not have reflected the complete state of the art as regards available silica gels at the priority date. Nevertheless, it represented certain components of the state of the art at its publication date. In contrast

- D1 to D3 did not contain such details. The opposition division thus considered the substantive weight of D8, found it to be *prima facie* relevant and admitted it into proceedings.
- 2.2.5 The respondent's arguments as to why the discretion was incorrectly exercised were directed to the lack of relevance of D8 and the fact that it was filed only the day before the oral proceedings before the Opposition Division. For the reasons given above, however, the Board accepts that it is *prima facie* relevant. As to its being late filed, the Opposition Division was clearly aware of this fact (see the minutes of the oral proceedings, point 5) but it was not apparently argued that the respondent was thereby placed at a particular disadvantage. Absent any other ground for saying that the opposition incorrectly exercised its discretion in admitting D8, the Board finds no reason to overturn the decision as regards this document.
- 2.3 D7 was filed during the oral proceedings before the opposition division, but not admitted by the opposition division. It held that D7 did not add any *prima facie* relevant information with respect to novelty. In particular no explicit link between pore diameter and pore volume in relation to silica gel could be seen, so that it did not provide more information than could be gained from D1 to D3.
- 2.3.1 As stated in the Board's preliminary opinion, the appellant gave no reasons in the grounds of appeal as to why the opposition division had erred in the exercise of its discretion. The Board thus confirms its provisional opinion not to admit D7 into proceedings.

3. Novelty

- 3.1 D1 discloses an absorbent article which comprises a liquid permeable topsheet (page 5, line 35), a liquid impermeable backsheet (page 5, line 44) and a liquid retentive absorbent member (page 4, lines 14-19), and which contains as an odour control system a porous deodorizing agent (page 2, lines 51/52). The odour control system comprises silica in combination with zeolite (see e.g. claim 1), which components are specified in the examples via their trade names ("Syloblanc 82" or "Silica Gel 123", see page 6, lines 14/15). Nothing is said concerning the characteristics of the deodorizing agents.
- 3.2 No evidence has been submitted supporting the appellant's assertion that the pore volume of "Syloblanc 82" and "Silica Gel 123" was measured and found to have an average pore volume for the pores whose diameter ranges from 20 to 200 Å of about 2.5 ml/g. The appellant argued that this data demonstrated that the claimed ranges were implicitly present in these components of D1. The opposition division in its decision (see point 4.2) as well as the Board in its communication (see point 2) pointed out that the relevant measurement data had not been supplied.
- 3.3 No proof being available for the claimed feature concerning the pore volume/diameter being present in the deodorizing system of D1, this feature cannot be considered as disclosed in D1 and the subject-matter of claim 1 is thus novel (Article 54 EPC) over this prior art.
- 3.4 The same reasons are applicable when considering D2 and D3, which were also cited in this respect. They refer

to a similar example concerning sanitary napkins including also, as odour control agents, the use of a silica component in the form of "Silica Gel 123" or "Syloblanc 82". The subject-matter of claim 1 has therefore to be considered as being novel over these documents as well.

- 3.5 The objection with regard to lack of novelty was also based on the argument that all commercially available silica gels satisfied the characteristics of the claimed pore volume and pore diameter. Therefore, when considering the disclosure of D1 to D3, there was implicitly no other option than - when including any commercially available silica gel - arriving at the claimed subject-matter since any silica gel used in an odour control system would meet the claimed requirements.
- 3.6 In this regard D8 was provided as evidence of common general knowledge of the characteristics of available silica gels to show that silica gel was commercially available in three types which all, in general, allegedly satisfied the required pore volume and diameters in that pore volumes ranged from 0.4 to 2 ml/g and average pore diameter ranged from 22 to 220 Å (albeit that claim 1 defines a different parameter, i.e. not the volume of average pore diameters of the agent, but the volume of pores lying in a more specific pore diameter range).
- 3.7 However, comparative example 2 of Table 1 of the patent in suit (surface area of 450 m²/g) demonstrates that at the priority date there was at least one further type of silica gel which fell outside the claimed ranges for pore volume and diameter and outside of the three types disclosed in D8. Hence, example 2 shows that the

assertion of the appellant, that at the priority date any available silica gel would implicitly have met the claimed requirements, is incorrect. In this respect the publication date of D8 should be noted (17 years before the priority date of the patent in suit, 1 September 1999), and hence that it is likely that the common general knowledge of a skilled person in 1999 included additional types of silica gel. Accordingly, the disclosure in D8 is not suitable to anticipate the subject-matter defined in claim 1 when considered in the light of any of D1 to D3.

4. Substantiation of inventive step
 - 4.1 Concerning the issue of inventive step, the opposition division provided reasons why in their view the subject-matter of claim 1 involved an inventive step when starting from D1 as the closest prior art.
 - 4.2 No arguments were presented in the grounds of appeal substantiating why the opposition division's decision in this regard was said to be incorrect.
 - 4.3 Instead, when addressing in the grounds of appeal the issue of inventive step concerning claim 1 of the patent in suit, the appellant referred to D7 as representing the closest prior art. A reference is made in the first and in the final paragraph of point 6.6 of the grounds of appeal to the possibility also of starting the assessment of inventive step from any of D1 to D3 but this is not adequately substantiated.
 - 4.4 Thus, when starting from D7, the objective technical problem to be solved was considered by the appellant to be the provision of an improved odour control system. The teaching and disclosure of D7 was evaluated and the

conclusion was drawn that, by "simply following the teaching of D7, by selecting the preferred types of silica gel, the skilled person would select those with pore volume of 1 - 2 ml/g and with an average pore size within the limits of claim 1 of the patent". Thus the reasoning concerning lack of inventive step was based in the grounds of appeal upon the specific disclosure in D7 which related to a preferred silica (having this particular pore volume and a pore average diameter of 9 to 11 nm).

- 4.5 No such disclosure is present in any one of documents D1 to D3. The appellant did not suggest otherwise. The disclosure therein merely refers to a specific combination of materials (zeolite and silica) in the odour control system. Accordingly, the reasoning given for D7 cannot be transferred to an attack using D1 to D3 as the closest prior art for the assessment of inventive step. Hence, although the appellant argued that "The same reasoning can be done equally validly starting from any of D1-D3", neither the Board nor the respondent is in a position to understand the reasoning behind an inventive step attack starting from any one of D1 to D3.
- 4.6 As regards the attack starting from D7, this does not need to be considered further as D7 is not in proceedings (see point 2.3 above).
- 4.7 As was already clear from the Board's provisional opinion, a matter to be discussed at oral proceedings, was how the reasoning applicable when starting from D7 should apply when starting from any of D1 to D3. It is also noted that the appellant did not supply any written response to the Board's provisional opinion nor did it take part in the oral proceedings before the

Board, with the consequence that the Board could only take into account arguments (and evidence) which were previously submitted in the written proceedings. As stated above, the appellant's inventive step attack starting from any of D1 to D3 cannot reasonably be understood. The objection of lack of inventive step starting from any of D1 to D3 has therefore not been substantiated.

4.8 In as far as the first paragraph of item 6.6 of the grounds of appeal may be considered as forming an inventive step attack, this states that "...over any from D1, D2, D3 and D7 the opponent herein submits that nevertheless claim 1 lacks inventive step over any of those prior art evidences taken alone or combined with the common general knowledge". As stated above, D7 is not in the proceedings and requires no further consideration in this regard. As to the remaining documents, first, the broad argument made by the appellant does not address the reasons given by the opposition division. Further, the attack, in so far as it can be understood, leaves it entirely to the imagination of the reader to know which particular evidence or disclosure in any one of these documents taken alone is to be considered, let alone how it is to be considered for inventive step. Likewise, in what way common general knowledge is to be applied to any one of these documents in relation to an attack of inventive step cannot be understood. Thus, the attacks provided by these sweeping statements are also unsubstantiated.

4.9 In the light of the foregoing, the Board finds no reason to overturn the decision of the opposition division concerning inventive step.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



M. H. A. Patin

M. Harrison

Decision electronically authenticated