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**Datasheet for the decision  
of 24 April 2015**

**Case Number:** T 0522/11 - 3.2.06

**Application Number:** 99968891.4

**Publication Number:** 1154745

**IPC:** A61F13/15

**Language of the proceedings:** EN

**Title of invention:**

ABSORBENT ARTICLES WITH REFASTENABLE SIDE SEAMS

**Patent Proprietor:**

KIMBERLY-CLARK WORLDWIDE, INC.

**Opponent:**

SCA Hygiene Products AB

**Relevant legal provisions:**

EPC Art. 100(c)

**Keyword:**

Extension of subject-matter (yes)



**Beschwerdekammern**  
**Boards of Appeal**  
**Chambres de recours**

European Patent  
Office  
D-80298 MUNICH  
GERMANY  
Tel. +49 (0) 89 2399-0  
Fax +49 (0) 89  
2399-4465

Case Number: T 0522/11 - 3.2.06

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.06**  
**of 24 April 2015**

**Appellant:** SCA Hygiene Products AB  
(Opponent) 405 03 Göteborg (SE)

**Representative:** Furlong, Christopher Heinrich  
Hoffmann - Eitle  
Patent- und Rechtsanwälte  
Arabellastraße 30  
DE-81925 München (DE)

**Respondent:** KIMBERLY-CLARK WORLDWIDE, INC.  
(Patent Proprietor) 401 North Lake Street  
Neenah, WI 54956 (US)

**Representative:** Davies, Christopher Robert  
Dehns  
St Bride's House  
10 Salisbury Square  
London  
EC4Y 8JD (GB)

**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 3 January 2011  
rejecting the opposition filed against European  
patent No. 1154745 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. By way of its decision dated 3 January 2011, the opposition division rejected the opposition against European Patent No. 1 154 745.
- II. The appellant (opponent) filed an appeal against this decision, and requested revocation of the patent. In its appeal grounds, the appellant argued that the subject-matter of claim 1 lacked novelty or inventive step. It also objected that claim 1 contained subject-matter extending beyond the content of the application as filed. The respondent (patent proprietor) in due course filed a reply.
- III. With a communication annexed to the summons to oral proceedings, the Board indicated its preliminary view on the objections raised.
- IV. Oral proceedings were held before the Board on 24 April 2015. By the end of the oral proceedings the requests of the parties had been narrowed down as follows:

The appellant requested that the decision under appeal be set aside and the patent be revoked.

The respondent requested that the appeal be dismissed.
- V. Claim 1 of the patent as granted reads as follows:

"An absorbent article (20), comprising;  
an absorbent chassis (32) defining a longitudinal axis (48), a transverse axis (49), front and back waist edges (38, 39) parallel to the transverse axis, opposite side edges (36) extending between the front and back waist

edges, a front waist region (22) contiguous with the front waist edge, a back waist region (24) contiguous with the back waist edge, and a crotch region (26) which extends between and interconnects the front and back waist regions, the front waist region having a pair of transversely opposed front side panels (34) and a front center panel positioned between and interconnecting the front side panels, the back waist region defining a pair of transversely opposed back side panels (134) and a back center panel positioned between and interconnecting the back side panels, wherein each of the front and rear side panels (34, 134) comprises an elastomeric material and is elastomeric in a direction generally parallel to the transverse axis, and the absorbent chassis further comprising a bodyside liner, an outer cover bonded to the bodyside liner, and an absorbent assembly disposed between the bodyside liner and the outer cover; and a fastening system (80) for releasably securing the absorbent article in a pant-like configuration, the fastening system comprising first and second fastening components (82, 83) disposed on the back side panels (134) and adapted to releasably engage first and second mating fastening components (84, 85) disposed on the front side panels (34); wherein the transverse distance between the first and second fastening components (82, 83) is substantially equal to the transverse distance between the first and second mating fastening components (84, 85), characterized in that the front side panels (34) are longitudinally spaced from the rear side panels (134), and the article further comprises leg elastic members (58) longitudinally aligned along each side edge in the crotch region, the leg elastic members having front terminal points (63) located adjacent longitudinally innermost parts of the front side panels and back terminal points (65) located adjacent longitudinally

innermost parts of the back side panels, the fastening components and mating fastening components forming refastenable side seams (88) allowing the article to be either pulled on like a pant or applied like a diaper."

VI. The arguments of the appellant may be summarised as follows:

Each of originally filed claims 3 and 5 was dependent solely on claim 1. Claim 1 defined that the panels were elastomeric, whereas claim 3 further limited this to the panels comprising an elastomeric material. Claim 5 was related to the feature of the leg elastics, an optional feature independent of the elastomeric nature of the side panels. No link between these features was disclosed in the application as filed.

Elastomeric properties could be provided without using elastomeric materials as such, since they could be provided for example by necked and stabilized nonwoven webs which had elastomeric properties although not elastomeric materials. Accordingly, the provision of side panels comprising an elastomeric material was not inherent in the side panels being elastomeric.

Moreover, the description in the application as filed referred to the embodiment of Figure 7 as including side panel portions with at least one of the portions comprising an elastomeric material (page 18, lines 21 - 26). The description on page 19, lines 4 to 17 referred to suitable elastic materials which were stated as comprising laminates and laminate material. Hence, there was a difference between the terms "elastic" and "elastomeric" in combination with either "material" or "panel", since, consistent with the definitions on pages 7 and 8, "elastic" concerned the property of a material

and "elastomeric" referred specifically to a material or composite. Consequently, there was no disclosure in the application as filed of subject-matter comprising all the features of granted claim 1, contrary to Article 123(2) EPC.

VII. The arguments of the respondent may be summarised as follows:

Claim 1 of the main request essentially corresponded to a combination of originally filed claims 1 and 5. Concerning the feature of the side panels being elastomeric, the subject-matter of originally filed claim 3 was already inherently included in originally filed claim 1, since elastomeric side panels inherently comprised elastomeric material. Claim 1 as originally filed defined "at least one pair of side panels being elastomeric". Originally filed claim 3 merely concerned the limitation to "each" of the side panels comprising an elastomeric material. This was not a limitation to an elastomeric "raw" material because the term "material" as used in the application as filed did not have the meaning "raw material". This was best exemplified by page 19, line 4 *et seq* concerning "elastic materials", where the constructed laminates were elastic even though the raw materials were not.

As a separate line of argument, a skilled person would unambiguously understand that although claim 3 and claim 5 were each only drafted as being dependent on claim 1, both of these claims could also be combined together with claim 1 because a skilled person would not draw such a strict separation between the features of these claims. The characteristics "elastic" and "elastomeric" thus had to be interpreted according to the definitions given in the specification, according to which no

distinction was made. Accordingly, the ground of opposition under Article 100(c) EPC was not prejudicial to maintenance of the patent as granted.

### **Reasons for the Decision**

1. *Respondent's sole request - claim 1 - Article 100(c) EPC*

- 1.1 Claim 1 is a combination of the features defined in originally filed claims 1, 3 and 5, together with the additional feature "the fastening components and mating fastening components forming refastenable side seams (88) allowing the article to be either pulled on like a pant or applied like a diaper", which is taken from the final paragraph on page 2 of the application as filed.
- 1.2 Originally filed claims 3 and 5 are each dependent only on claim 1. Claim 5 reads: "The absorbent article of claim 1, further comprising leg elastic members longitudinally aligned along each side edge in the crotch region, the leg elastic members having front terminal points located adjacent longitudinally innermost parts of the front side panels and back terminal points located adjacent longitudinally innermost parts of the back side panels." There is no disclosure in the originally filed application which links the disclosure of leg elastic members as generally defined in claim 5 as filed to a general disclosure of the combination of features defined in claims 1 and 3.

1.3 The respondent's position is that (granted) claim 1 is essentially a combination of claims 1 and 5 as filed, and that the features of claim 3 are implicit in claim 1 as filed, since originally filed claim 3 merely requires that each of the side panels comprises an elastomeric material, which is already the case in claim 1 due to the side panels being defined in that claim as being elastomeric.

Accordingly, the issue around which this objection under Article 100(c) EPC revolves is whether there is a difference between the side panels being elastomeric and the side panels comprising an elastomeric material.

1.4 The Board concludes that the side panels "being elastomeric" concerns a behavioural property of the side panels, whereas the side panels comprising an elastomeric material refers to the side panels which include a component, the raw material of which is itself elastomeric. The skilled person is aware of the possibility of providing elastomeric properties without using elastomeric materials, as it is well known in the art that such properties can be provided for example by necked and stabilized nonwoven webs which have elastomeric properties although not themselves elastomeric (raw) materials. Accordingly, the provision of side panels being elastomeric differs from the provision of side panels comprising an elastomeric material.

1.5 The respondent argued that the skilled person would consider any material as being possible under the heading of "elastomeric material" as long as it had the characteristics defined in the application as filed (page 8, lines 1 to 5) concerning elongation and recovery. In particular, the "material" would not be understood as meaning the "raw" material but would be



understood as the material which makes up the side panel.

- 1.6 The Board however considers that "material" is disclosed in the sense of "raw" material, in contrast to the side panels which are disclosed as including various portions or materials. This is in line with the following passages in the originally filed application:
  - 1.6.1 The definitions in the application as filed with regard to "elastic" (page 7, lines 33 to 35) and "elastomeric" (page 8, lines 1 to 6) refer to "elastic" as concerning generally the property of a material or composite, whereas "elastomeric" refers specifically to the material or composite having a defined minimal elongation (25 %) and recovery (100 %) (see page 7, lines 33 to 35 and page 8, lines 1 to 3).
  - 1.6.2 The definitions in the application as filed with regard to "stretch bonded" and "stretch bonded laminate" (page 10, lines 4 to 12) refer generally to members or composites having at least two layers/members but not specifically to either "raw" material or side panels. Hence, these definitions do not support the view of the respondent.
  - 1.6.3 In reference to Figure 7, it is disclosed (page 18, lines 21 - 24) that each of the side panels can include one or more individual, distinct pieces of material. As illustrated in Figure 7, the side panels include separate first, second and third members. According to the description on page 25, lines 1 to 6, these distinct members are attached to each other at seams and one of the members may comprise a non-elastomeric material as well as panels of elastomeric materials. Hence, this embodiment exemplifies that it is the "raw" material of

the specific part of the component which is being identified.

- 1.6.4 The respondent argued that page 19, lines 4 to 17 gave a definition of the term "material" and that this should be applied to the terminology "elastomeric material". A skilled person would thus recognise that the term "material" was not being used in the sense of "raw material".
- 1.6.5 However, this section of the description does not give a definition of the term "material", let alone a definition of "elastomeric material". Instead, it merely refers to elastic materials and how these can be constructed in certain embodiments. At most, this section gives a description of laminate materials in the sense of these laminates being the raw material.
- 1.7 In respect of the respondent's line of argument based on the allegedly allowable combination of features in claims 1, 3 and 5 as filed, the Board notes that originally filed claims 3 and 5 are not only formally each separately dependent on claim 1, but concern entirely distinct subject-matters. The subject-matter of claim 3 as filed relates to the specific material comprised in the side panels and also to the behavioural characteristics of the side panels. The subject-matter of claim 5 concerns the leg elastic members and their points of attachment. Accordingly, from the claims alone the skilled person would not unambiguously consider the subject-matter of these dependent claims as being linked in some way.
- 1.8 The respondent argued that the skilled person would not view the single dependency of claims 3 and 5 in the application as filed as being a restrictive disclosure,

and would instead understand implicitly that these separate features could readily be combined.

1.9 The Board however does not accept this. The claims define subject-matter which is to enjoy protection, and it is the applicant's choice how the claims are formulated. If protection is desired for a particular combination of features, for example if such combination provides some inventive structure, then the applicant when filing the application has the possibility of defining such a combination unambiguously. Claim 3 and claim 5 as filed in fact contain very general definitions of the side panel material and behaviour on the one hand, and the location and extent of the leg elastics on the other. Nowhere in the application as filed can support be found to indicate, let alone unambiguously disclose, that such general product features should be combined to achieve any particular technical purpose. Instead, when referring to leg elastics (see e.g. page 13, line 4 *et seq* of the application as filed), the leg elastics are simply one amongst many other features which are disclosed in combination belonging to the specific embodiment disclosed with regard to Figures 1 to 3. Thus a skilled person has no basis upon which the combination of features in claims 3 and 5 as filed can be unambiguously extracted in isolation from the other features of the embodiment. Also, the elastomeric material in the side panels (i.e. as defined in claim 3 as filed) does not even form part of that disclosed embodiment.

1.10 It may be added that whilst nothing would seemingly prevent the combination of the features in claims 3 and 5 from a technical viewpoint, this is not the standard which is to be applied when deciding on the issue of a direct and unambiguous disclosure of the combination of

these features. Therefore, the respondent's argument that a skilled person would not view the disclosure provided by dependent claims 3 and 5 in such a restrictive manner that their single dependency has to be strictly adhered to, is merely a supposition which is unsupported by the disclosure in the application as filed.

- 1.11 Thus, to summarise, no part of the application as filed provides a direct and unambiguous disclosure of the combination of the leg elastics and the elastomeric material of the side panels in the general manner defined in claims 3 and 5.
- 1.12 Accordingly, originally filed claim 1 can only unambiguously be understood to concern generally the fact that the side panels are elastomeric in terms of their behaviour, albeit without defining to what extent, whereas originally filed claim 3 additionally requires the side panels to comprise an elastomeric material.
- 1.13 Consequently, there is no disclosure in the application as filed which would support the view that the subject-matter of originally filed claim 3 was inherently already present in originally filed claim 1.
- 1.14 In view of the foregoing, there is no disclosure in the originally filed application of subject-matter comprising the combination of features in granted claim 1. The requirement of Article 123(2) EPC is thus not met. Since the respondent's sole request is not allowable, the patent has to be revoked.

**Order**

**For these reasons it is decided that:**

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



N. Schneider

M. Harrison

Decision electronically authenticated