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**Datasheet for the decision
of 5 October 2016**

Case Number: T 1062/12 - 3.2.06

Application Number: 03722380.7

Publication Number: 1490008

IPC: A61F15/00, A61F13/15

Language of the proceedings: EN

Title of invention:

PACKAGING MATERIAL SHEET WITH AT LEAST ONE LINE OF WEAKNESS,
AND PACKAGING MATERIAL

Patent Proprietor:

Johnson & Johnson GmbH

Opponents:

SCA Hygiene Products AB
Uni-Charm Corporation
THE PROCTER & GAMBLE COMPANY

Relevant legal provisions:

EPC Art. 100(c)

Keyword:

Amendments - allowable (no)



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Case Number: T 1062/12 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 5 October 2016

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 23 February
2012 revoking European patent No. 1490008
pursuant to Article 101(3) (b) EPC.**

Composition of the Board:

Chairman M. Harrison
Members: G. de Crignis
M.-B. Tardo-Dino

Summary of Facts and Submissions

- I. European patent No. 1 490 008 was revoked by the opposition division by way of its decision posted on 23 February 2012.
- II. The opposition division held that the ground of opposition under Article 100(c) EPC was prejudicial to maintenance of the patent since the subject-matter of claim 1 extended beyond the content of the application as originally filed. The same reasoning applied to the auxiliary requests 1 to 10.
- III. The patent proprietor (appellant) filed an appeal against this decision and in its grounds of appeal the appellant requested to set aside the decision of the opposition division and to maintain the patent based on the granted claims; auxiliary requests I to X were also filed.
- IV. The respondents (opponents OI to OIII) requested dismissal of the appeal.
- V. The parties were summoned to oral proceedings.
- VI. In a communication sent in preparation for the oral proceedings, the Board indicated its provisional opinion that in regard to Article 100(c) EPC the main request did not appear to be allowable. Additionally the Board stated that no arguments or comments had been submitted in support of the auxiliary requests and that it was also not clear in which way any of the auxiliary requests addressed the objections made against the main request.

VII. Oral proceedings were held before the Board on 5 October 2016.

The appellant requested that the decision under appeal be set aside, or the patent be maintained on the basis of one of auxiliary requests I to X as submitted with the statement of grounds and/or the case be remitted to the opposition division if novelty and inventive step had to be discussed.

For respondent OII nobody attended the oral proceedings as announced with letter of 31 May 2016.

The respondents OI and OIII requested that the appeal be dismissed.

VIII. Claim 1 of the main request (patent as granted) reads as follows:

"A tampon wrapped in a packaging material sheet having at least one line of weakness to form a packaged product, characterized in that the at least one line of weakness extends over at least a part of the longitudinally extension of the packaged product, whereas only an at least partial destruction of the at least one line of weakness (20, 21, 23, 24, 25, 26, 28, 28') makes a portion (30, 32) of the packaging material available to be gripped by a user in order to peel off the packaging material sheet from the tampon."

Claim 1 of each of auxiliary requests I to X includes the following features, which are also in granted claim 1:

"the at least one line of weakness extends over at least a part of the longitudinally extension of the packaged product";

and

"only an at least partial destruction of the at least one line of weakness (20, 21, 23, 24, 25, 26, 28, 28') makes a portion (30, 32) of the packaging material available to be gripped by a user in order to peel off the packaging material sheet from the tampon".

As explained *infra*, these features are decisive for the findings of the Board such that the further amendments are not stated here.

IX. The appellant argued essentially as follows:

Claim 1 fulfilled the requirement of Article 123(2) EPC. All features of claim 1 were disclosed in the application as filed in connection with the first aspect which formed the basis of originally filed claim 1 as well as current claim 1.

The word "only" was clearly to be understood in the meaning of "merely" by the skilled person, such that it was after the "at least partial destruction of the at least one line of weakness" that the packaging material sheet could be peeled off the packed product. This understanding was further based on the application as filed on page 3, lines 1 - 6, page 4, line 25 to page 5, line 2, page 10, lines 14 - 21 and page 11, lines 20 - 28. This supported that ("only") upon at least partial destruction of the at least one line of weakness a portion of the packaging material was made

available to be gripped by a user in order to peel off the packaging material sheet from the tampon.

Also the description made reference to, and all the drawings (Figures 1 to 8) showed, that the at least one line of weakness extended over at least a part of the longitudinal extension of the packaged product.

On page 6, lines 19 to 25 of the application as filed, it was explicitly disclosed that the at least one line of destruction extended over at least part of the longitudinal extent of the article after the product had been packed. Accordingly, the information content of this passage was identical to the feature of claim 1 that "the at least one line of weakness extends over at least a part of the longitudinal extension of the packaged product". Although this passage referred to the second aspect of the invention concerning the peeling-off feature, it was apparent that the feature of the packaging material sheet being peeled off or being withdrawn in a sleeve-like manner was not relevant with regard to the directional extension of the line of weakness.

Further, page 3, last paragraph, referred to an embodiment indicating a longitudinal extension of the line of weakness, while page 12, line 30 to 33 referred to all the exemplary embodiments having lines of weakness. Accordingly, the description included several passages containing a clear and unambiguous disclosure with regard to the longitudinal extension of the line of weakness.

The embodiments shown in Figures 3/4 and 5/6 showed that the cut-out portion was present in the sheet such that in the final product no overlapping portions

existed. Accordingly, there was no gripping portion present prior to tearing the line of weakness. This was confirmed on page 4, lines 20 - 26, page 10, lines 34/35. The main request should be allowed.

No comments were made on the auxiliary requests.

X. The respondents argued essentially as follows:

Claim 1 included an undisclosed combination of features.

Concerning the feature "the at least one line of weakness extends over at least a part of the longitudinally extension of the packaged product", there was no explicit or general disclosure in the application as filed of a "longitudinal" extension of the line of weakness with regard to the first aspect which was the underlying basis for claim 1.

Although all schematic drawings (Figures 1 to 8) pertaining to the first aspect of the invention showed a certain longitudinal extension of the line of weakness, these Figures showed embodiments which included further features. No embodiment having the isolated feature of longitudinal extension of the line of weakness was disclosed. The main request was not allowable.

Also all drawings pertaining to the second aspect (Figures 9 and 10) of the invention showed a specifically directed wavy or sinusoidal line. Additionally, this aspect related to a sleeve-like construction for the withdrawal of the packaging material and not to a peeling-off as claimed. So this

aspect was clearly distinguished from the first aspect which formed the underlying basis of claim 1.

The embodiment shown in Figures 5 and 6 included further features such as curved lines of weakness having two end points in the sheet. The embodiment shown in Figure 3 and 4 included further features. Thus, there was no disclosure in the application as filed of the claimed article.

There was nothing to add concerning the auxiliary requests; the appellant had not argued on them.

Reasons for the Decision

1. Article 100(c) EPC - Amendments

1.1 Claim 1 as granted is amended in relation to claim 1 as originally filed *inter alia* to include additionally the following features:

(i) "*the at least one line of weakness extends over at least a part of the longitudinally (sic) extension of the packaged product*"

and

(ii) "*... only an at least partial destruction of the at least one line of weakness (20, 21, 23, 24, 25, 26, 28, 28') makes a portion (30, 32) of the packaging*

material available to be gripped by a user in order to peel off the packaging material from the tampon."

- 1.2 Concerning feature (i), the wording originates from originally filed independent claim 18, which includes the feature that
"at least one line of destruction (70) extends over at least part of the longitudinal extent of the pack after the product has been packed".

This claim however relates to the second aspect of the invention which is based on the corresponding disclosure on page 6, lines 19 to 36 in the general part of the description of the application as filed and which is illustrated in Figures 9 and 10. In this paragraph, it is disclosed that the at least one line of destruction extends

"over at least part of the longitudinal extent of the pack after the product has been packed".

This passage continues

"This achieves the situation where the parts of the pack which are produced following the destruction of the line of destruction and which are substantially sleeve-like, do not extend completely around the circumference of the product to be packed, at least over part of their longitudinal extent. Since, in this way, the friction between the sleeve-like parts of the pack which are produced and the product to be packed is reduced, the sleeve-like parts can be pulled off the packed product more easily, substantially in the longitudinal direction of said product."

Hence, this passage concerns the longitudinal extent of the line of destruction with regard to the second aspect of the invention which is related to a sleeve-like packaging, and is not related to a longitudinal extension of the line of weakness which makes a portion

of the packaging material available to be gripped by a user to peel off the packaging material sheet from the tampon which is however also in claim 1. The design and function of the first and second aspects of the invention thus differ in a significant manner: a sleeve-like part would be drawn away but not peeled off. Hence, even in acknowledging that the line of destruction can be designed as a line of weakness (as set out in originally filed claim 22), which extends longitudinally, this disclosure concerns only the second aspect of the invention which does not underlie current claim 1.

- 1.2.1 Concerning feature (i), the appellant argued that the feature of a longitudinal extension of the line of weakness was generally disclosed in the application as filed, hence, would be unambiguously understood as disclosed in connection with the first aspect.
- 1.2.2 The appellant's arguments in this respect were that the description referred to a plurality of embodiments all having a linear extension of the line(s) of weakness and that all the Figures showed some linear extension of the line(s) of weakness.
- 1.2.3 However, the disclosed line(s) of weakness and their linear extensions are all of a specific nature with regard to the shape of the line (wavy, sinusoidal, uniform) and with regard to the extent of the line (over a particular limited area of the article), as well as with regard to the number of such lines (mainly one or two lines) and/or in combination with further features such as specific end points or reinforcing areas within the packaging sheet.

- (a) Page 4, line 28 to page 5, line 2 of the application as filed refer to the line of weakness. This line is defined as being preferably curved and/or running at least partially in at least two directions differing from each other.
- (b) Page 3, lines 28 to 32 of the application as filed, refers to an embodiment having a line of weakness having at least one end point and preferably having at least two end points arranged at a distance from each other, the end points being within the packaging sheet (i.e. rather than at the borders of the packaging sheet).
- (c) Consistent with this earlier disclosure, page 12, lines 30 to 33 of the application as filed refers to all the exemplary embodiments having lines of weakness with at least two end points lying within the packaging sheets.
- (d) The further cited reference on page 6, lines 19 to 22 of the application as filed concerns specifically the second aspect of the invention and includes further features regarding the kind of destruction (i.e. for opening) resulting in sleeve-like partial packages following the destruction of the destruction line(s), contrary to the "peeling off"-feature from the packaging material sheet as claimed.

Accordingly, all the cited passages are related to purposeful and limited longitudinal extensions of the line of weakness, which are however not defined in the claim.

- 1.2.4 The appellant further argued that all the drawings showed that the at least one line of weakness extended over at least a part of the longitudinal extension of the packaged product. This *per se* is correct, but does not reflect the unambiguous disclosure. This feature is

specifically not shown in isolation in the drawings but in combination with further features. All the drawings show either one or two lines of weakness (or lines of destruction), and all these lines do not simply extend along the longitudinal extension but are either split (Figure 1), curved (Figure 2, 5, 6, 8, 9, 10), wavy (Figure 7, 8, 9, 10), lead in two directions (Figure 3, 4), and/or have additional features such as end points or orientation points. So, there is no general disclosure in the drawings of merely a longitudinal extension - in the form of a straight line without further features. To select just the aspect of a longitudinal extension from each embodiment would be taking the longitudinal aspect of the line out of the specific context in which it is disclosed.

1.2.5 Hence, the application as filed neither explicitly refers generally to a line of weakness extending over at least a part of the longitudinally extension of the claimed article nor is such a general or isolated feature shown in the Figures. For this reason, feature (i) represents subject-matter of the claim which extends beyond the content of the application as originally filed, such that the ground of opposition under Article 100(c) EPC is prejudicial to maintenance of the patent.

1.3 Concerning feature (ii), in claim 1 of the application as filed the following is defined:
"wherein the packaging material sheet can be peeled off the packed product (100) after the at least partial destruction of the at least one line of weakness". Accordingly, this feature differs from the claimed feature (ii) which relates specifically to a

"portion (30, 32) of the packaging material available to be gripped by a user in order to peel off the packaging material from the tampon."

- 1.3.1 The amended feature (ii) is clearly related to the first aspect of the invention which is disclosed generally on pages 1 to 5 of the application as filed and illustrated in Figures 1 to 8. The action of peeling off the packaging material is schematically shown by the sequential drawings a) to d) in Figures 4 and 6. Thus, the application as filed differentiates clearly between peeling off (tearing away, first aspect) and a sleeve-like (drawing off, second aspect) withdrawal of the packaging material as also already set out with regard to feature (i) above.
- 1.3.2 The word "only" which has been added in this amended feature ("whereas only an at least partial destruction of the at least one line of weakness ...") is understood to have the meaning that "merely" upon partial destruction can the material be gripped by the user. Although the foregoing is not explicitly stated, the disclosure on page 4, lines 30 - 35 *"... following the destruction of the line of weakness, the product can be unpacked more easily or the packaging material sheet can be peeled off more easily, ..."*, would cause the skilled person to understand the term "only" in this way.
- 1.3.3 The term "at least" in the claim is simply superfluous in that any partial destruction includes an "at least" partial destruction. This understanding is thus consistent with the "peeling off" feature of the claimed first aspect of the invention such as set out on page 3, lines 1-6, page 10, lines 14 - 21 and page 11, lines 2 - 28. The other interpretations seen by the

respondents are essentially artificially contrived on the alleged basis of an extra meaning having been introduced into claim 1.

- 1.3.4 As regards the description being relied upon by the appellant as a basis for this feature (ii), the cited paragraphs are again related to disclosures in a context which includes a variety of further features which however have not been taken up into claim 1.
- 1.3.5 The appellant cited page 4, last paragraph as a basis for the feature being derivable from the application as filed. This paragraph reads: *"The at least one line of weakness is preferably curved and/or it runs at least partially in at least two directions differing from each other. As a result, following the destruction of the line of weakness, the product can be unpacked more easily or the packaging material can be peeled off more easily, since any prestresses which may be present are already relieved in a plurality of directions. Furthermore, such a line of weakness or the interaction of a number of lines of weakness lead to one end of the pack being available to be gripped by the user in order to peel off the packaging material sheet, after the at least partial destruction of the at least one line of weakness."*
- 1.3.6 This paragraph refers to an embodiment where the at least one line of weakness is either curved or runs at least partially in at least two different directions in order to direct the stress for peeling off in a plurality of directions. These features having been omitted in claim 1, this paragraph does not give a clear and unambiguous disclosure of the now claimed combination of features.

- 1.3.7 The reference of the appellant to the embodiments shown in the Figures also fails to overcome this objection. As already set out above with respect to feature (i), each of the drawings depicts a significantly greater number of features in combination with that which has been taken up into claim 1. The lines of weakness are shown to have a certain shape (curved, U-shaped, waves) as well as specific end point(s). Thus, no clear and unambiguous disclosure of the feature (ii) by itself is present in the Figures either.
- 1.3.8 In relation to Figures 5 and 6, the issue arose of whether it could be inferred from these Figures that the tab shown therein represented a gripping portion which was present in addition to the completed package or whether the tab represented a gripping portion which formed part of the completed package and thus whether or not it matched with a recess in the packaging material sheet. Since these drawings anyway disclose further features (such as two particular curved continuous lines of weakness having specific end points, as well as reinforcing areas), all of which are not in the claim, the specific issue of how the tab is formed has no bearing on the conclusion that the line of weakness is anyway disclosed in combination with specific features and can thus be left undecided.
- 1.4 As explained above, both features (i) and (ii) are not disclosed in the application as originally filed in the combination now claimed. Thus, the subject-matter of claim 1 extends beyond the content of the application as filed and the main request is not allowable. The ground of opposition under Article 100(c) EPC thus prejudices maintenance of the patent as granted.

2. *Auxiliary requests I to X*

2.1 In its communication in preparation for the oral proceedings, the Board had stated that no arguments had been supplied as to the allowability of the auxiliary requests and further that it was not seen in which way the requests addressed the objections to the main request. No arguments were submitted in response to the Board's communication. During the oral proceedings the appellant also elected not to present any arguments in relation to the auxiliary requests.

2.2 Since the same features (i) and (ii) above are present in the auxiliary requests, and since the Board has not been presented with any reason as to why the auxiliary requests should be allowable, the same objections remain.

2.3 Accordingly, the reasoning set out for the main request applies equally to these requests, such that auxiliary requests I to X are also not allowable.

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