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**Datasheet for the decision
of 18 May 2017**

Case Number: T 0662/13 - 3.2.06

Application Number: 05000392.0

Publication Number: 1679055

IPC: A61F13/534, A61F13/539

Language of the proceedings: EN

Title of invention:
End seal for an absorbent core

Patent Proprietor:
THE PROCTER & GAMBLE COMPANY

Opponents:
Kimberly-Clark Worldwide, Inc.
SCA Hygiene Products AB
Uni-Charm Corporation

Headword:

Relevant legal provisions:
EPC 1973 Art. 83

Keyword:
Sufficiency of disclosure - (no)

Decisions cited:

Catchword:



Beschwerdekammern
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Case Number: T 0662/13 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 18 May 2017

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
11 January 2013 concerning maintenance of the
European Patent No. 1679055 in amended form.**

Composition of the Board:

Chairman M. Harrison
Members: M. Hannam
W. Ungler

Summary of Facts and Submissions

- I. Appeals were filed by the appellant (proprietor), appellant (opponent I) and appellant (opponent II) against the interlocutory decision of the opposition division, in which it found that European patent No. 1 679 055 in an amended form met the requirements of the EPC.
- II. In its decision (item 2.2), in respect of the opponents' objections under Article 83 EPC to the feature 'stripe of juncture' and the parameter of a particular open area percentage of a 'total area' in claim 1, the opposition division acknowledged that it was 'unclear how the parameter would be calculated' in cases where the stripe of juncture would be non-rectangular, but that 'the calculation had to be construed in good faith and in the light of the entire disclosure of the patent-in suit'.
- III. The appellant (proprietor), hereafter simply 'proprietor', requested that the decision under appeal be set aside and the patent be maintained according to the main request or, in the alternative, according to one of auxiliary requests 1 or 2.
- IV. The appellant (opponent I), hereafter simply OI, and the appellant (opponent II), hereafter simply OII, each requested that the decision under appeal be set aside and the patent be revoked.
- V. With letter of 4 October 2013 the proprietor filed further auxiliary requests 3 and 4.
- VI. The following document is referred to in the present decision:

D2 US-A-5 900 109

- VII. The Board issued a summons to oral proceedings and a subsequent communication containing its provisional opinion, in which it indicated *inter alia* that the requests on file appeared not to meet the requirement of Article 83 EPC.
- VIII. With letter of 4 May 2017 the proprietor filed seven further auxiliary requests.
- IX. Oral proceedings were held before the Board on 18 May 2017, during which the proprietor withdrew all the auxiliary requests on file.

The final requests of the parties were thus as follows:

The proprietor requested that the decision under appeal be set aside and the patent be maintained according to the main request filed with letter dated 21 May 2013.

OI and OII each requested that the decision under appeal be set aside and the patent be revoked.

- X. Claim 1 of the main request reads as follows:

"An absorbent article (20) having a longitudinal axis and a transverse axis, the absorbent article (20) comprising an absorbent core (28), said core (28) a wearer facing side oriented towards a wearer when said article (20) is being worn and an opposed garment facing side, said core (28) further comprising a storage layer (60), the storage layer (60) also comprising a wearer facing side and an opposed garment facing side,

the absorbent article (20) further comprising a liquid pervious topsheet (24) on the wearer facing side of the core (28) and

a liquid pervious backsheet (26) on the garment facing side of the core (28), the core (28) further comprising a first core wrap sheet (56) covering the wearer facing side of the storage layer (60) and

a second core wrap sheet (58) covering the garment facing side of the storage layer (60)

the first core wrap sheet (56) being joined to the second core wrap sheet (58) along at least one transverse stripe of juncture (72), said stripe of juncture (72) covering a total area, said stripe of juncture comprising bonding elements provided by adhesive bonding, wherein said article comprises superabsorbent particles, said absorbent article being characterized in that

the stripe of juncture (72) provides a bond strength of at least 1 N/cm between the first core wrap sheet (56) and a second core wrap sheet (58) as measured as tensile strength in the longitudinal direction and in that the stripe of juncture (72) comprises an open area of at least 20% of said total area."

XI. The proprietor's arguments may be summarised as follows:

The 'percent open area of the total area' of the stripe of juncture was a well-known parameter in the technical field as shown by D2, col. 16, lines 30 to 33 in which the same kind of parameter to that claimed was disclosed. The opposition division had also stated that open area was a parameter known in the prior art. Even if not well-known, it was still sufficiently defined in the patent. As stated by the opposition division, the patent had to be interpreted in good faith. For non-

rectangular stripes of juncture, the skilled person would base the total area on that defined by its periphery, particularly in view of [0065] of the patent. The skilled person would understand from one of the mentioned concepts in the patent that areas outside the periphery did not trap superabsorbent particles and so were not of interest with regard to the damage of the core wrap sheets. The opponents' problems with measuring the total area arose from contrived embodiments with irregularly shaped stripes of juncture which were at the edge of the claimed scope; these were not described. The vast majority of possible embodiments could be carried out by the skilled person.

XII. OI's arguments may be summarised as follows:

The parameter 'percent open area of the total area' had not been defined in a manner sufficiently clear and complete for the invention to be carried out. Even the opposition division had acknowledged that it was unclear how to calculate the parameter for anything but a rectangular stripe of juncture. The patent solely described a rectangle (72) which comprised all bonding elements as being the total area of that stripe (see paragraph [0058]), but stripes of juncture of non-uniform and irregular shape would, according to the proprietor's own statements, have their total area defined by the periphery of the stripe of juncture; the skilled person thus did not know which of the two methods to use, and these would produce differing results dependent on essentially unknown selection criteria for the total area. D2 did not provide any guidance as to how to measure the parameter.

XIII. OII's arguments may be summarised as follows:

The main request did not meet the requirement of Article 83 EPC. The one disclosed way of carrying out the invention did not allow this to be carried out across the scope of claim 1. The 'chevron-shaped' stripe of juncture on page 3 of OII's statement of grounds of appeal was just one example illustrating the difficulty in establishing what to measure as the total area.

Reasons for the Decision

1. *Article 83 EPC 1973*

1.1 The Board finds the parameter in claim 1 regarding the percent open area of the total area of the stripe of juncture not to be a well-known parameter in the technical field of absorbent articles. The patent also provides no guidance as to how to measure the total area of the stripe of juncture across the whole scope of claim 1 with the consequence that the invention is not disclosed in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art.

1.2 The proprietor's reference to D2 in support of its contention that the claimed parameter was well-known is not convincing. Irrespective of the fact that the bonding discussed in relation to the percent bonded area of D2 relates to thermal, rather than adhesive bonding (as in claim 1 under consideration), the extent of the attachment region 60 of D2 is clearly defined and depicted in Figs. 9, 12 and 13 such that no

ambiguity exists as to its physical extent; the percent thermally bonded area within the appointed attachment region of D2 can thus be unambiguously interpreted by the skilled person. By contrast in the opposed patent, when the stripe of juncture is not of a regular rectangular shape (which is included in the scope of the claim; see paragraph [0039] of the patent, last sentence) the skilled person does not know how to identify and then measure the total area of the stripe of juncture which is necessary in order to determine the percent open area in the claimed parameter. If the total area were to be taken as that of a rectangle comprising all bonding elements, as described in paragraph [0058] of the patent, this would not provide the same measurement of total area to that achieved by taking the periphery of the irregularly shaped stripe of juncture as the total area, as stated by the proprietor. As a consequence the skilled person would simply not know which method to use in order to define the total area of the stripe of juncture, these two methods evidently producing significantly varying areas and values at least for certain embodiments falling under the scope of the claim.

- 1.3 The proprietor's reference to paragraph [0065] of the patent in support of its contention that the skilled person would know when to use the periphery of the stripe of juncture rather than a rectangle for establishing the total area is not accepted. The sole method disclosed for determining the total area of the stripe of juncture is provided in paragraph [0058] of the patent. For irregularly shaped stripes of juncture, such as would be formed by discontinuous adhesive application or through curvilinear patterned joins (see last sentence paragraph [0039] of the patent), the skilled person would have guidance from the patent

solely to construct a rectangle comprising all bonding elements in order to establish the total area. If, as contended by the proprietor, the skilled person would rather use the periphery of the stripe of juncture in situations where a rectangle would include areas outside of the periphery of the bonding elements, this poses the question as to where the boundary lies directing the skilled person to use the one or the other method. For example, taking the stripe of juncture example sketched on page 3 of OII's statement of grounds of appeal, would the skilled person choose the 'contour' or 'rectangle 2' as delimiting the total area of the stripe of juncture? Paragraph [0065] of the patent does not help in making this decision since the triangularly shaped open area within rectangle 2 may, on the one hand, be seen as being located between adhesive bonding elements and therefore being included in the total area, or it could be seen as being outside the area of concern for trapping superabsorbent particles and thus be outside the total area. The two total areas defined by the contour and rectangle 2 are significantly different such that the skilled person, on the basis of the disclosure in the patent alone, would be in a quandary as to which total area to select in its calculation of the claimed parameter.

- 1.4 As regards the proprietor's argument that problems with measuring the total area arose only from contrived, not described, embodiments of the invention, this is not accepted. Firstly in this regard, the claim is not limited to any shape or form of stripe whatsoever and certainly not to embodiments solely with some particular form of rectangularly shaped stripe of juncture; the claim is much broader, with the transverse stripe of juncture being defined simply as the transverse join between the first and second core

wrap sheets. Secondly, paragraph [0039] of the patent explicitly discloses options for discontinuous and curvilinear patterns of adhesive to make up the join, such that the allegedly 'contrived' nature of some of the embodiments suggested by the opponents in their arguments are in fact even suggested by this paragraph of the description. Considering specifically the stripe of juncture example sketched on page 3 of OII's statement of grounds of appeal (discussed already in point 1.3 above), such a 'pattern' of adhesive bonding elements can be envisaged in the transverse join of the core wrap sheets of a disposable nappy, where stronger bonding (and therefore longer length bonding elements) may be required at the ends of the stripe of juncture possibly subject to higher stresses in use due to being in the vicinity of the leg openings of the nappy. Far from contrived therefore, this example shows for a typical absorbent article the problem the skilled person faces in determining what total area is involved, before being able to measure the claimed parameter.

- 1.5 The proprietor's argument that the vast majority of embodiments could be carried out by the skilled person such that those which could not merely concerned the edges of the claimed scope is also not accepted. Whilst embodiments with essentially rectangular stripes of juncture may well cover many embodiments envisaged by the proprietor, the scope of the claim encompassing irregularly shaped stripes of juncture, as suggested by paragraph [0039] of the patent, indicates that embodiments with non-rectangular stripes of juncture are indeed also envisaged by the patent and therefore do not just concern the fringes of the claimed scope. How the skilled person can carry out the invention with such irregularly shaped stripes of juncture is thus

equally important and is not disclosed in the patent sufficiently clearly and completely for the invention to be carried out.

1.6 The opposition division's finding (see item II *supra*) also does not assist the proprietor's argument in this regard, and indeed simply confirms that no method has been given for determining the parameter as argued by OI, which is of importance in particular when considering that the invention must be able to be carried out over the whole scope claimed, which whole scope is notably not limited to any shape of stripe, let alone the specific structure and shape of stripe shown in the preferred embodiment to which paragraph [0058] refers. Any reference to a 'good faith' interpretation of the patent, as simply stated in writing by the proprietor in its reference to the opposition division's findings, was not further discussed by the proprietor, nor was any reference given where the Board was not applying good faith. The Board also cannot find any part of the patent which would require an interpretation relying in some way solely on good faith, since the patent quite clearly relates also to non-rectangularly formed stripes of juncture for which no disclosure is provided for total area determination.

1.7 It thus follows from the considerations above that, since the skilled person is unable to determine what is to be considered as the total area with the consequence that the percent open area of the total area of the stripe of juncture cannot be measured with any reliability, the invention is not disclosed in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art.

1.8 The main request thus fails to meet the requirements of Article 83 EPC 1973. The main (and sole) request is consequently not allowable.

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:



M. H. A. Patin

M. Harrison

Decision electronically authenticated