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**Datasheet for the decision
of 27 April 2017**

Case Number: T 0920/13 - 3.2.06

Application Number: 02723644.7

Publication Number: 1423069

IPC: A61F13/15, A61F13/551

Language of the proceedings: EN

Title of invention:
FOLDED ABSORBENT ARTICLE

Patent Proprietor:
KIMBERLY-CLARK WORLDWIDE, INC.

Opponent:
Paul Hartmann AG

Headword:

Relevant legal provisions:

EPC Art. 84
EPC 1973 Art. 56
RPBA Art. 13(1)

Keyword:

Late-filed auxiliary requests - admitted (no)

Decisions cited:

Catchword:



Beschwerdekammern
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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 0920/13 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 27 April 2017

Appellant: Paul Hartmann AG
(Opponent) Paul-Hartmann-Strasse 12
89522 Heidenheim (DE)

Representative: DREISS Patentanwälte PartG mbB
Friedrichstrasse 6
70174 Stuttgart (DE)

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

Representative: Mabey, Katherine Frances
Dehns
St Bride's House
10 Salisbury Square
London EC4Y 8JD (GB)

Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
28 February 2013 concerning maintenance of the
European Patent No. 1423069 in amended form.**

Composition of the Board:

Chairman M. Harrison
Members: M. Hannam
M.-B. Tardo-Dino

Summary of Facts and Submissions

- I. An appeal was filed by the appellant (opponent) against the interlocutory decision of the opposition division in which it found that European patent No. 1 423 069 in an amended form met the requirements of the EPC.
- II. The appellant requested that the decision under appeal be set aside and the patent be revoked.
- III. The respondent (proprietor) requested that the appeal be dismissed or, in the alternative, that it be maintained according to one of auxiliary requests 1 to 5.
- IV. The Board issued a summons to oral proceedings and a subsequent communication containing its provisional opinion, in which it indicated *inter alia* that the subject-matter of claim 1 of the main request appeared to extend beyond the content of the application as filed.
- V. With letter of 13 April 2017, the respondent filed further auxiliary requests 6 to 10.
- VI. Oral proceedings were held before the Board on 27 April 2017, during which the respondent serially filed three new versions of auxiliary request 8, each version replacing that previously on file. At the end of the oral proceedings the respondent withdrew all requests save for the final version on file of auxiliary request 8.

The final requests of the parties were as follows:

The appellant requested that the decision under appeal

be set aside and the European patent No. 1 423 069 be revoked.

The respondent requested that the patent be maintained according to auxiliary request 8.

VII. The text of claim 1 of auxiliary request 8 is appended to this decision.

VIII. The appellant's arguments may be summarised as follows:

Auxiliary request 8 should not be admitted since it could and should have been filed by the respondent at the same time as the previous version of auxiliary request 8 was filed. The chairman had even indicated the potential procedural consequence of that. Such a 'salami-tactic' did not comply with the need for procedural economy. Claim 1 of this request was two pages long with many new features included compared to claim 1 as granted, the introduction of which could not have been expected, and thus which involved a level of complexity which did not allow the appellant to deal with the matter of inventive step properly without significant adjournment merely for formulating its arguments.

IX. The respondent's arguments may be summarised as follows:

Despite not having filed the present auxiliary request 8 at the same time as the previous version of the request, its preparation had been referred to by the respondent at that time. Its intention was not to tactically gauge the Board's opinion on the previous version of the request before filing this one, as was indeed indicated by the reference to the request's

preparation. The amendments made to claim 1 of the present request were not particularly complex and should anyway not change the respondent's arguments with regard to Article 56 EPC.

Reasons for the Decision

1. *Auxiliary request 8*

Admittance (Article 13(1) RPBA)

1.1 The respondent filed auxiliary request 8 during oral proceedings. The request represented a change to the respondent's complete case as defined in Article 12(2) of the Rules of Procedure of the Boards of Appeal (RPBA) and its admittance may thus be considered at the Board's discretion under Article 13(1) RPBA, such discretion being exercised *inter alia* in view of the need for procedural economy.

1.2 At the time of discussing claim 1 of the previous version of auxiliary request 8 during oral proceedings, the chairman had indicated to the respondent that should either of the two options included in the claim be judged unclear, the request as a whole would not be allowable. The Board subsequently concluded that indeed one of the two options included in the claim lacked clarity (Article 84 EPC). Only at this point did the respondent file the present auxiliary request 8, which was limited to the option included in claim 1 of the previous auxiliary request 8 found to meet the clarity requirement of Article 84 EPC. The present auxiliary request 8 was the third version of the request that had been filed in the course of the oral proceedings. The

respondent's decision not to file the present auxiliary request 8 at the time of the chairman indicating the potential danger associated with including two options in claim 1 of the previous request was therefore adverse to procedural economy.

- 1.3 The respondent's assertion that it had already prepared the present auxiliary request at the time of discussing the previous auxiliary request, and was thus not engaging in 'salami tactics', was not persuasive. The present auxiliary request had not been filed until after the Board had given its conclusion on the previous request. It does not make any difference, in terms of procedural economy, that the respondent had prepared the request but not filed it together with the previous one. Indeed had the present request been filed along with the previous auxiliary request, the Board and the appellant could have considered them simultaneously, thus helping to reduce the duration of the oral proceedings. The respondent's decision not to file the present auxiliary request until the Board's conclusion on the previous request had been announced was instrumental in extending the duration of the oral proceedings and was thus adverse to procedural economy.
- 1.4 Furthermore, the auxiliary request also introduced a high degree of complexity at a very late stage of the proceedings.
- 1.5 The respondent's argument that the request was not complex since it would not change the inventive step issues, and that this should be a reason for admitting the request, is not accepted. Objections under Article 56 EPC 1973 had not been addressed for any of the previous requests filed during oral proceedings since these requests were successively considered not

allowable for other reasons. Also, the last handwritten amendments which had been introduced into the claim concerned a feature of the folding method described in the patent as resulting in particular bulk reduction advantages (see e.g. patent column 14, lines 44 to 53) which had never been a subject of the proceedings and which would have to be considered in relation to inventive step. The appellant and the Board were thus presented with a request which had been considerably amended relative to any for which inventive step objections had previously been considered, which made the issues to be considered complex, and this at a very late stage of the proceedings.

The circumstances were thus such that in order to allow the appellant sufficient time to prepare its objections at least under Article 56 EPC 1973 to the new subject-matter claimed (for which the appellant had requested a significant adjournment, the length of which the Board considered not to be unreasonable in the circumstances) let alone the time necessary for considering further counter arguments, the oral proceedings would have been at least considerably delayed, contrary to the consideration in Article 13(1) RPBA regarding procedural economy, and it could not be excluded that they should have been postponed depending on the findings of the respondent regarding the objection against the new request.

- 1.6 In summary, therefore, considering its filing having been unnecessarily delayed and considering the complexity of the issues raised by the new subject-matter included therein at a very late stage of proceedings, the Board exercised its discretion under Article 13(1) RPBA not to admit the request into the

proceedings.

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

Yuan 27104/17

Eighth Auxiliary Request 

1. A method of providing a rectangular folded absorbent article (10), the rectangular folded absorbent article comprising:

a) a front portion (12) and a back portion (14) joined together by a crotch portion (16), said front portion (12) is joined to said back portion (14) by first and second side seams (48, 50) to form an absorbent article having a waist opening (52) and a pair of leg openings (54), said absorbent article having a longitudinal centerline (X-X) and a transverse centerline (Y-Y), each of said front and back portions (12, 14) having a first section, a second section and a third section;

b) an absorbent core (18) positioned in said crotch portion (16) and having a front edge (110) and a back edge (112), wherein said absorbent core includes a liquid permeable cover (40), a liquid impermeable baffle (42) and an absorbent layer (44) positioned therebetween, the liquid permeable cover and the liquid impermeable baffle being joined together, wherein the absorbent layer (44) has a length L_1 and a width W_1 and the absorbent core (18) has a length L_2 and a width W_2 , wherein L_1 and W_1 are less than L_2 and W_2 , wherein the liquid permeable cover (40) and the liquid impermeable baffle (42) are larger in size than the absorbent layer (44) and both extend beyond the outer periphery of the absorbent layer (44); and wherein

c) said first section (26) is longitudinally folded over said second section (28) such that said first side seam (48) is positioned laterally outboard of said longitudinal centerline (X-X) to form a first longitudinal fold line (118), said third section (30) is longitudinally folded over said first section (26) such that said second side seam (50) is positioned laterally outboard of said longitudinal centerline (X-X) to form a second longitudinal fold line (120), and such that the third section overlaps the first section, wherein the absorbent layer (44) has side edges, and the first and second longitudinal fold lines (118, 120) are formed laterally outboard of the side edges of the absorbent layer (44), **characterized in that** each of said front and back portions (12, 14) has a first zone and a second zone with a transverse demarcation line (24)

⊕ wherein the first and second side seams are aligned parallel to one another, end

Wj Malaya
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therebetween, and said first zone (22) is transversely folded along said transverse demarcation line (24) over at least a portion of said crotch portion (16) to form the folded absorbent article;

the article further comprising elastic (66) positioned in at least the first zone (22) of at least one of said front and back portions (12, 14) to define an elastic waistband (68) and wherein the front edge (110) and back edge (112) of the absorbent core (18) are positioned between or about the two transverse demarcation lines (24), and the absorbent core (18) of said folded absorbent article (10) contains only one transverse fold line located approximately along the transverse centerline (Y-Y);

the method comprising longitudinally folding said first section over said second section such that said first side seam is positioned laterally outboard of said longitudinal centerline to form the first longitudinal fold line, longitudinally folding the third section over the first section such that the third section overlaps the first section and such that the second side seam is positioned laterally outboard of the longitudinal centerline to form the second longitudinal fold line, ⁽¹⁾ wherein the first and second longitudinal fold lines (118, 120) are formed laterally outboard of the side edges of the absorbent layer (44), ⁽²⁾ and wherein, when the absorbent article is folded along the second longitudinal fold line (120), the first and second side seams (48, 50) are ~~aligned parallel to one another, and wherein when the third section is folded along the second longitudinal fold line such that the third section overlaps the first section, no gap or space is present between the first and second side seams,~~ the method comprising then transversely folding the first zone along the transverse demarcation line over the at least a portion of the crotch portion to form the rectangular folded absorbent article.

2. The method of providing a folded absorbent article of claim 1 wherein said elastic (66) is positioned transversely across at least a portion of said first zone (20) to form said elastic waistband (68) in said front and back portions.

- ⁽¹⁾ wherein when the second longitudinal foldline is formed, the first and second side seams are aligned parallel to one another, and
- ⁽²⁾ wherein the first and second longitudinal foldlines respectively about the side edges of the absorbent layer,