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**Datasheet for the decision
of 1 June 2017**

Case Number: T 1175/13 - 3.2.06

Application Number: 02775634.5

Publication Number: 1448141

IPC: A61F13/494

Language of the proceedings: EN

Title of invention:
AN ABSORBENT ARTICLE

Patent Proprietor:
SCA Hygiene Products AB

Opponent:
Paul Hartmann AG

Relevant legal provisions:
EPC Art. 54
RPBA Art. 13(1)
EPC 1973 Art. 111

Keyword:
Novelty - main request (no)
Late-filed auxiliary requests - admitted (no)
Remittal (no)



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Case Number: T 1175/13 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 1 June 2017

Appellant: SCA Hygiene Products AB
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 19 March 2013
revoking European patent No. 1448141 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman M. Harrison
Members: G. de Crignis
W. Ungler

Summary of Facts and Submissions

I. European patent No. 1 448 141 was revoked by the opposition division which held that the subject-matter of claim 1 of the main request and of the first to fifth auxiliary requests was not novel with regard to documents D3 to D5:

D3	US-A-5 745 922
D4	EP-A-1 208 825
D5	JP-11-332911

II. The appellant (patent proprietor) filed an appeal against this decision and paid the appeal fee. In its grounds of appeal, the appellant requested that the decision of the opposition division be set aside and the patent be maintained, as a main request, in the form as granted, or in the alternative based on one of the first to ninth auxiliary requests filed with the grounds of appeal.

III. The Board summoned the parties to oral proceedings on 13 January 2017. In its communication sent as an annex, the Board indicated its provisional opinion that neither the main request nor one of the first to fifth auxiliary requests appeared to include a claim 1 which had novel subject-matter. Concerning the sixth to eighth auxiliary requests, objections were made with regard to Articles 84 and 123(2) EPC. With respect to claim 1 of auxiliary request 9, the Board indicated that no explanation had been given as to how the objection of lack of novelty had been overcome by this request, nor was it evident to the Board why that should be the case.

IV. In reply, the appellant submitted amended auxiliary requests 8 and 9.

V. Oral proceedings were held before the Board on 1 June 2017.

The appellant (patent proprietor) requested that the decision under appeal be set aside and the patent be maintained in amended form according to the main request or according to one of the first or second auxiliary requests as filed during the oral proceedings. Furthermore the appellant requested that the case be remitted to the department of first instance.

The respondent requested that the appeal be dismissed.

VI. Claim 1 of the main request reads as follows:

"Absorbent article such as an incontinence device of the pant type, or a pant diaper, comprising a liquid-permeable topsheet (10), a liquid-impermeable backsheet (11) and an absorption body (12) positioned therebetween, the absorption body (12) having an elongate shape with two longitudinal side edges (13, 14) and two transverse side edges (15, 16), the article having two longitudinal side edges (1, 2), a longitudinal centre line (5), a transverse centre line (6), a front end portion (17) which is intended during normal use to lie against or in proximity to the abdomen of the wearer, a rear end portion (18) which is intended during normal use to lie against or in proximity to the bottom of the back of the wearer, and a crotch portion (19) lying therebetween, the rear end portion (18) and the adjacent part of the crotch portion (19) having a transverse elastic system (25), a

rear leg elastic system (31) which runs between the two longitudinal side edges (1, 2) of the article along the leg cutout of the article in the rear part of the crotch portion (19) and crosses the crotch portion (19) essentially parallel to the transverse centre line (6) of the article, characterized in that the article has, on each side of the absorption body (12), a pocket (35, 36) for temporary storage of liquid, the extent of the pocket (35, 36) being limited by the longitudinal side edge (13, 14) of the absorption body (12), the transverse elastic system (25) and the rear leg elastic system (31), and that the transverse elastic system (25) crosses at least a part of the rear leg elastic system (31) in the rear part of the crotch portion (19) at the leg cutout of the article."

Claim 1 of auxiliary request 1 additionally includes the features of granted claim 3:

"the distance A between the rear leg elastic system (31) and the transverse elastic system (25), measured along the longitudinal centre line (5) of the article, is from 29 to 81 mm."

Claim 1 of auxiliary request 2 includes in addition to claim 1 of auxiliary request 1, the features of granted claim 4:

"the transverse elastic system can be stretched to 1.8 times its unstretched length."

VII. The arguments of the appellant relevant for the decision can be summarised as follows:

Claim 1 of the main request (submitted with the grounds of appeal as the first auxiliary request) required two separate pockets to be present in the absorbent article. The borders of the pockets as defined in claim

1 limited the pockets to being distinct, defined elements, each pocket having the function of temporary storage of liquid.

The term "temporary storage of liquid" described a function wherein liquid had to be first collected so as to be retained in the pockets, and wherein the liquid was subsequently released in order for it to be absorbed by the absorption body which was positioned next to each pocket. None of the cited documents referred to such a collection and retaining of liquid.

D4 disclosed an absorbent article including only one pocket since the two side spaces were linked continuously in the area adjacent to the waist elastic system. Thus, the subject-matter of claim 1 was novel with regard to D4.

Auxiliary requests 1 and 2 should be admitted into the proceedings. They had been submitted in reaction to the preliminary opinion of the Board. Claim 1 of the requests was a pure combination of granted claims. Thus, all the features had already been addressed by the respondent, whereby the issues to be discussed were neither surprising nor complex. Additionally, since the requests were limited to claims which were examined and which were dealt with in the opposition proceedings, no objections under Articles 84 EPC and 123(2) EPC were applicable. The amended claim 1 of each request included the definition of the distance A. This feature indicated precisely the relationship of the rear leg elastic system and the transverse elastic system. Accordingly, the function and the design of the pockets were clearly specified.

VIII. The arguments of the respondent relevant for the decision can be summarised as follows:

The subject-matter of claim 1 of the main request was not novel. Figure 1 of D4 showed an absorbent article having "pockets" according to the definition in claim 1. The pockets were also on both sides of the absorbent pad, and their extent was limited by the leg elastic system and the rear elastic system as well as the core. The fact that the absorbent pad did not extend up to the transverse elastic system of the rear portion was irrelevant.

The appellant's interpretation of claim 1 was not supported by the wording of claim 1; claim 1 was not limited to two completely independent pockets.

The auxiliary requests should not be admitted into the proceedings. They were only filed during the oral proceedings. No serious arguments had been provided previously against the reasons given in the appealed decision - although there had been a lengthy discussion concerning the extent and function of the pockets already during the first instance proceedings which should have prompted the appellant to have filed these requests far earlier. The appellant chose not to file such auxiliary requests during the proceedings before the opposition division - and the combination of granted claims should have been the first choice of amendment. Instead it chose to pursue various other lines of amendment. Hence, the new requests meant a complete change of case compared to the case made on appeal.

Reasons for the Decision

1. *Main request - Interpretation of claim 1*
- 1.1 Claim 1 includes the feature of "the article has, on each side of the absorption body (12), a pocket (35, 36) for temporary storage of liquid, the extent of the pocket (35, 36) being limited by the longitudinal side edge (13, 14) of the absorption body (12), the transverse elastic system (25) and the rear leg elastic system (31)".
- 1.2 The appellant's contention, made for the first time during oral proceedings before the Board, was that with regard to this wording, claim 1 should be understood such that two independent pockets were claimed, their individual extents being exactly and completely limited by the longitudinal side edge of the absorbent body, the transverse elastic system and the rear leg elastic system.
- 1.3 The wording of the claim defines that "the extent of the pocket" is limited by the specified boundaries. Accordingly, it is not the pockets themselves which are limited by the specified boundaries but their extent. The extent of the boundaries of the pockets does not further define whether these boundaries constitute all the actual borders of the pockets - thus leading to closed "cells", or whether these boundaries simply define the space/area which is available for the presence of the pockets.
- 1.4 In this respect the appellant argued that claim 1 did not refer to the extent of the pocket being "at least" limited to these boundaries and - therefore referred to the definitive extent of both pockets being

(essentially) "precisely" limited to these boundaries and areas.

1.5 However, the Board finds that no such understanding can be derived from the wording of the claim. The claim neither refers to the extent of the "complete" or "entire" pocket, nor to the extent of the pocket being "exactly" limited by only the defined boundaries, but instead only expresses that the extent of the pocket is limited (somehow) by these boundaries. Hence, the wording of the claim does not require the pockets to effectively extend only to these boundaries - and thus to define "closed" elements - but only limits the pockets to lie within the defined boundaries. Accordingly, the extent of the pockets themselves has to be within the defined limiting boundary elements, and thus can result in pockets being smaller in area/depth in relation to the area covered by the defined limitations as long as the function of temporary storage of liquid is met as defined in the claim.

1.6 The appellant argued in its grounds of appeal that this function referred to a property of the article wherein liquid was first collected so as to be retained during a relatively short period of time in the pockets, and where the liquid was subsequently released in order to be absorbed by the absorption body. Accordingly, this property implied certain functional qualities. However, as already set out in the preliminary opinion of the Board, it suffices to fulfil the functional limitations of the claim that a space is provided which can store any amount of liquid temporarily and no differentiating structural features are defined in the claim. Hence, this function is not defined further, and thus generally applies for any size of pockets. No further comments or arguments were submitted by the appellant

in response to the Board's communication in this regard, such that the Board sees no reason to alter its provisional opinion in this regard and thus confirms same herewith.

2. *Novelty - Main request*

- 2.1 The interpretation of the meaning of the term pocket and any implied function was already discussed at length in the first instance proceedings (as feature 1.10, see pages 6, 8, 9, 10 and 13 of the decision under appeal) and underlies the opposition division's finding on lack of novelty in view of D3, D4 and D5 with regard to the current main request (at that time the first auxiliary request), claim 1 of which is a combination of claims 1 and 2 as originally filed (and as granted).
- 2.2 Taking into account the above interpretation of claim 1, which the Board finds is broader than that seen by the appellant, the Board comes to the conclusion that the subject-matter of claim 1 lacks novelty (Article 54(1) EPC 1973) at least over D4 (a document which constitutes prior art in accordance with Article 54(3) EPC).
- 2.3 The absorbent article disclosed in Figure 1 of D4 includes all the features of the preamble of claim 1. It was also not disputed that the (last) feature of the characterising portion of claim 1 "that the transverse elastic system (25) crosses at least a part of the rear leg elastic system (31) in the rear part of the crotch portion (19) at the leg cutout of the article" can be identified in this Figure.

- 2.4 Accordingly, the only feature in dispute concerned the feature related to the extent of the pockets and their function as a temporary storage of liquid such as specified in claim 1 of the patent in suit and discussed above under point 1.
- 2.5 The absorbent article shown in Figure 1 of D4 includes two pockets which have an extent limited individually between the rear leg elastic system and the side edges of the absorbent body, and they are further limited in their extent by the rear transverse waist elastic system. Accordingly, the Board considers that two pockets are present, each of which has an extent which is limited by the longitudinal side edge of the absorbent body, the transverse waist elastic system and the rear leg elastic system. This is all the claim requires. The fact that these pockets are linked by a small space between the lateral rear edge of the absorbent body and the rear transverse waist elastic system does not alter this conclusion. The function concerning the temporary storage of liquid is present independent of the extension of the pockets (see point 1 above).
- 2.6 The appellant contested that D4 disclosed two identifiable or completely separate pockets having such a function.
- 2.7 This argument however fails in view of the scope and meaning of claim 1 as set out under point 1 above.
- 2.8 Thus all features of claim 1 are known from D4. Therefore, the subject-matter of claim 1 lacks novelty (at least) over D4 (Article 54(1) and (3) EPC).

3. *Auxiliary requests 1 and 2*

3.1 Claim 1 of auxiliary requests 1 and 2 is based on the combination of claims 1 to 3 as originally filed and granted, and on the combination of claims 1 to 4 as originally filed and granted respectively.

3.2 When comparing auxiliary requests 1 and 2 to the auxiliary requests filed with the grounds of appeal, both of these requests include amendments which constitute a change of the appellant's case: Auxiliary requests 2 to 9 filed with the grounds of appeal each include a claim 1 having amendments which go in various different directions, the amendments concerning

- (a) the function of the absorbent article (the absorption body, (auxiliary requests 2 to 5);
- (b) the the addition of a front leg elastic system (auxiliary request 6);
- (c) the position/arrangement of the transverse elastic system (auxiliary requests 7 and 8);
- (d) the definition of the absorbent article being an incontinence device (auxiliary request 9).

Auxiliary requests 1 and 2 now rely on a combination of granted claim 1 with granted dependent claims which go in a direction different to the directions of the requests pursued with the grounds of appeal.

3.3 Auxiliary requests 1 and 2 were filed during the oral proceedings. Even when taking into account that they were (essentially) first filed (then numbered as eighth and ninth auxiliary requests, the latter including an erroneous deletion) in reply to the preliminary opinion of the Board indicated in the annex to the summons, they were filed long after both the grounds of appeal

and the response to the appeal grounds had been filed (Article 12(1) and (2) of the Rules of Procedure of the Boards of Appeal (RPBA)). Thus, the provisions of Article 13(1) RPBA apply to these requests since they are a change of the appellant's case.

- 3.4 According to Article 13(1) RPBA, any amendment to a party's case after it has filed its grounds of appeal or reply may be admitted and considered at the Board's discretion. The discretion shall be exercised in view of *inter alia* the complexity of the new subject-matter submitted, the current state of the proceedings and the need for procedural economy.
- 3.5 Although the appellant had been aware of the interpretation of the term "pocket" set out above (see point 1), since the opposition division had based its decision on this, the appellant had not pursued claims based on the current dependent claim 3, which was argued to be an attempt at defining the pocket size further, with the grounds of appeal but chose to amend the claims in a different direction.
- 3.6 Already in the first instance proceedings, after having discussed at length the interpretation of the claim with regard to the pockets and their function, the filing of a request which clarified any limitations of the extent of the pockets based on granted claims should normally be the first possibility of amendment to be considered, particularly as problems under Article 123(2) and Article 84 EPC are normally avoided. This applies *a fortiori* in the present case as the first auxiliary request present in the opposition proceedings had already gone in this particular direction by combining claims 1 and 2 as originally

filed (and as granted) to provide a new independent claim.

3.7 Therefore, the current auxiliary requests 1 and 2 could arguably have been filed already in the opposition proceedings, but at the very latest with the grounds of appeal. The appellant's argument that the submission of these requests could only have been made in reply to the preliminary opinion of the Board is not accepted. The submission made before the opposition division followed by the decision of the opposition division and the objections of the opponent already on file should have provided sufficient impetus for filing such requests earlier.

3.8 Therefore, in the present case it is irrelevant that the combination of claims in auxiliary requests 1 and 2 concerns features where the respondent as an opponent already had given his view during opposition proceedings and had made comments already on individual dependent claims with its written response to the grounds of appeal. The submission of such requests is also not a convergent and economical approach to the order of claim requests already previously on file in proceedings, specifically because those requests related to a clearly different direction of limitation being pursued. It is not for the Board to surmise why such other lines of limitation were pursued rather than a combination of dependent claims which may have provided limitations going in the direction argued by the appellant, but it cannot be overlooked that the appellant made a choice to follow a different path of amendments. Hence, neither the fact that the claims are merely a combination of originally filed and granted claims nor the appellant's argument that they were now convergent with regard to the (current) main request

are sufficient reasons for the Board to admit such requests only at such a late stage of the appeal proceedings.

3.9 The Board thus exercised its discretion according to Article 13(1) RPBA not to admit auxiliary requests 1 and 2 into the proceedings.

4. *Request for remittal - Article 111 EPC 1973*

With the main request not being allowed with regard to lack of novelty and auxiliary requests 1 and 2 not being admitted into the proceedings, there is no request upon which a remittal of the case back to the department of first instance for further prosecution can be based. The appellant's request for remittal is therefore refused.

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