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**Datasheet for the decision
of 6 April 2017**

Case Number: T 1279/13 - 3.2.06

Application Number: 04754834.2

Publication Number: 1638495

IPC: A61F13/15

Language of the proceedings: EN

Title of invention:

FLUID MANAGEMENT ARTICLE HAVING BODY-FACEABLE PROTRUSIONS

Patent Proprietor:

Johnson & Johnson Consumer Inc.

Opponent:

THE PROCTER & GAMBLE COMPANY

Headword:

Relevant legal provisions:

EPC Art. 123(2)

RPBA Art. 13(1)

Keyword:

Amendments - added subject-matter (yes) - main request,
auxiliary request 1
Late-filed auxiliary requests - admitted (no) - auxiliary
requests 2 and 3

Decisions cited:

G 0002/10

Catchword:



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Case Number: T 1279/13 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 6 April 2017

Appellant: Johnson & Johnson Consumer Inc.
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Decision under appeal: **Interlocutory decision of the Opposition**
Division of the European Patent Office posted on
18 March 2013 concerning maintenance of the
European Patent No. 1638495 in amended form.

Composition of the Board:

Chairman M. Harrison
Members: M. Hannam
E. Kossonakou

Summary of Facts and Submissions

- I. Appeals were filed by both the opponent and the patent proprietor against the interlocutory decision of the opposition division, in which it found that European patent No. 1 638 495 in an amended form met the requirements of the EPC. As both parties are appellants (and thus also respectively respondents), they will continue to be referred to as (patent) proprietor and opponent.
- II. The proprietor requested that the decision be set aside and the patent be maintained according to a main request or, in the alternative, according to one of auxiliary requests 1 to 11.
- III. The opponent requested that the decision be set aside and the patent be revoked.
- 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 meet with objections under Article 100(c) EPC and that the auxiliary requests appeared not to overcome these.
- V. With letter of 6 March 2017 the proprietor submitted a new main request and auxiliary requests 1 to 31 to replace all requests previously on file.
- VI. Oral proceedings were held before the Board on 6 April 2017, during which the proprietor filed a new main request and new auxiliary requests 1 to 3 replacing all requests previously on file.

The opponent requested that the decision under appeal be set aside and the European patent No. 1 638 495 be revoked.

The 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 to 3, all as filed during oral proceedings on 6 April 2017.

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

"A fluid-management article, comprising:
a body-faceable, liquid-pervious cover having a top surface;
a garment-faceable, liquid-impervious barrier; and
an absorbent system intermediate the cover and the barrier,
wherein the fluid-management article comprises a plurality of fluid-guiding channels,
wherein the fluid-guiding channels surround a plurality of isolated protrusions,
wherein the protrusions and the channels form a continuous region,
wherein the channels and the protrusions are formed through the top surface of the cover and at least a portion of the absorbent system,
wherein the protrusions have an apex that extends to a height that is greater than 0.5 mm above the plurality of channels, and wherein the apex of each of the protrusions extends above a reference point outside of the continuous region, wherein the reference point lies within a reference plane that defines the uppermost surface of a portion of the absorbent article that is outside of the continuous region of protrusions and channels,

wherein the protrusions have a number density greater than 0.15 protrusions/cm²,
wherein the reference point is immediately outside the continuous region,
wherein the channels form a continuous interconnected network that defines at least two adjacent protrusions,
and
wherein the fluid-management article is a sanitary napkin."

Claim 1 of auxiliary request 1 reads:

"A method of forming a fluid management article,
wherein the method comprises:
providing a body-faceable, liquid-pervious cover having a top surface, a garment-faceable, liquid-impervious barrier, and an absorbent system;
positioning the absorbent system intermediate the body-faceable, liquid-pervious cover and the garment-faceable, liquid-impervious barrier;
forming a plurality of fluid-guiding channels, the fluid-guiding channels defining therebetween a plurality of isolated protrusions,
wherein the protrusions and the channels form a continuous region,
wherein the plurality of fluid-guiding channels and the plurality of isolated protrusions are formed through the top surface of the cover layer and at least a portion of the absorbent system,
wherein the protrusions each have an apex that extends to a height that is greater than 0.5 mm above the plurality of channels, and wherein the apex of each of the protrusions extends above a reference point outside of the continuous region, wherein the reference point lies within a reference plane that defines the uppermost surface of a portion of the absorbent article

that is outside of the continuous region of protrusions and channels,
wherein the protrusions have a number density greater than 0.15 protrusions/cm²,
wherein the reference point is immediately outside the continuous region,
wherein the channels form a continuous interconnected network that defines at least two adjacent protrusions,
wherein the absorbent system comprises an absorbent core, and wherein the protrusions and channels are formed through the absorbent core, and
wherein the fluid-management article is a sanitary napkin."

Claim 1 of auxiliary request 2 reads as for claim 1 of auxiliary request 1 up to and including the feature 'wherein the reference point is immediately outside the continuous region' whereafter it reads as follows:

"wherein the plurality of channels are connected so as to form a continuous network that defines at least two adjacent protrusions and interconnects the protrusions; wherein the absorbent system includes an absorbent core and a transfer layer, wherein the transfer layer contacts the absorbent core, and wherein the transfer is intermediate the absorbent core and the cover layer, wherein the protrusions are formed through the absorbent core and the transfer layer, and
wherein the fluid-management article is a sanitary napkin."

Claim 1 of auxiliary request 3 reads as for claim 1 of auxiliary request 1 up to and including the feature 'wherein the reference point is immediately outside the continuous region' whereafter it reads as follows:

"wherein the plurality of channels are connected so as to form a continuous network that defines at least two adjacent protrusions and interconnects the protrusions; wherein the absorbent system comprises two separate layers, a transfer layer and an absorbent core, wherein the transfer layer is positioned directly underneath the cover layer and directly contacts the absorbent core, and wherein the transfer layer is more dense than the liquid-pervious cover layer and has a larger proportion of smaller pores than the liquid-pervious cover layer, and wherein the fluid-management article is a sanitary napkin."

VIII. The proprietor's arguments relevant to the present decision may be summarised as follows:

The subject-matter of claim 1 of the main request met the requirement of Article 123(2) EPC. Deletion of the expression 'at least a portion of' had basis in the understanding of claim 1 as filed alone and also on page 2, lines 28 to 29. The drafter had also deliberately chosen the expression 'at least a portion of' to not only encompass but also disclose all of the channels since 'a portion of' already encompassed all of the channels; in order to assign any relevance to the addition of 'at least', this had to be interpreted to thus disclose all of the channels.

The subject-matter of claim 1 of auxiliary request 1 met the requirement of Article 123(2) EPC. Even though drafted as singly dependent claims, the skilled person would read claims 1, 2, 4, 6 and 10 as filed as being combinable with one another when the resultant subject-matter did not contradict the disclosure in the application as filed as a whole. In this respect, Fig.

1a was a manifestation of the various embodiments of the invention depicted in a single article rather than each possible embodiment being individually depicted, each embodiment relating to one of the dependent claims. The features of each dependent claim were also disclosed in the application as filed from page 5, line 1 to page 17, line 28. The features of claim 6 as filed, now included in claim 1, were disclosed on page 6, lines 7 to 9 and thus had an unambiguous basis.

The subject-matter of claim 1 of auxiliary request 2 also met the requirement of Article 123(2) EPC. Because certain features in the description were disclosed as preferable, this meant that they did not all have to be included in the claim. The same applied also to claim 1 of auxiliary request 3.

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

The subject-matter of claim 1 of the main request did not meet the requirement of Article 123(2) EPC. The deletion of the expression 'at least a portion of' in relation to the plurality of channels had no basis in the application as filed.

Regarding auxiliary request 1, the dependent product claims as filed did not provide a basis for the present method claim. Page 6, lines 7 to 9 of the description as filed also disclosed more than had been included in claim 1.

Regarding auxiliary request 2, it was not possible to derive the combination of selected features included in claim 1 from the original disclosure, particularly where several features were indicated as preferable and only some of which were included in claim 1. Similarly

some features were disclosed as mandatory and yet had been omitted from claim 1. The same arguments applied to auxiliary request 3.

Reasons for the Decision

1. *Main request*

1.1 *Article 123(2) EPC*

The subject-matter of claim 1 fails to meet the requirement of Article 123(2) EPC.

1.1.1 Claim 1 as originally filed includes the feature that the protrusions have an apex that extends a height above 'at least a portion of' the plurality of channels. In present claim 1, the expression 'at least a portion of' has been deleted.

1.1.2 Whilst the originally filed expression 'at least a portion of the plurality of channels' includes within its scope all of the plurality of channels, it does not specifically disclose the plurality of channels as now claimed.

1.1.3 The proprietor's argument that the claimed plurality of channels was disclosed on page 2, lines 28 to 29 of the application as filed is not accepted. This passage relates to the method of forming the fluid management article and thus does indeed provide a basis for claiming the plurality of channels in the context of the method. However, the present claim 1 is directed to a fluid management article for which the cited passage of the originally filed application, directed to a method, provides no basis. The proprietor's further

argument that this cited section of page 2 describes the product produced by the method of the invention is also not persuasive. In this respect it is noted that the foregoing paragraph of the description, from lines 10 to 18 of page 2, discusses the fluid management article itself, although solely in relation to an apex extending a height above at least a portion of the plurality of channels. This clear distinction made between the article and the method of producing the article clearly underlines that it is solely the method of forming the article which is envisaged to have an apex extending a height above the plurality of channels, such that this cited passage of the application as filed provides no basis for the deletion of the expression 'at least a portion of' in claim 1.

- 1.1.4 The proprietor's argument that, relative to 'a portion', the expression 'at least a portion' must disclose all the channels is not accepted. It can be accepted that the expression 'a portion of the channels' can encompass all channels. However, to therefore surmise the drafter's intent, as alleged by the proprietor, that when claiming 'at least a portion of the channels' it was intended to unambiguously disclose 'all the channels', is mere supposition. Firstly, this direct comparison between the expressions cannot be made since the expression 'a portion of' is not used directly juxtaposed to 'at least a portion of' anywhere in the application as filed. The skilled person, on reading 'at least a portion of', would thus not be motivated to make this comparison and thereby come to a conclusion regarding what the expression discloses different to that indicated in point 1.1.2 above. Secondly, on reading the expression 'at least a portion of the channels' in its isolated context in the application as filed, the skilled person would apply

the normal interpretation to this expression i.e. that the scope includes all of the channels, but conversely that all that is actually disclosed is, specifically, a portion of the channels.

1.1.5 It thus follows that, at least for this reason, the subject-matter of claim 1 fails to meet the requirement of Article 123(2) EPC. The main request is thus not allowable.

2. *Auxiliary request 1*

2.1 *Article 123(2) EPC*

The subject-matter of claim 1 fails to meet the requirement of Article 123(2) EPC.

2.1.1 At least the feature 'wherein the channels form a continuous interconnected network that defines at least two adjacent protrusions' lacks a direct and unambiguous basis in the application as filed.

2.1.2 The subject-matter of claim 1 has as its alleged basis *inter alia* claims 1, 2, 4 and 10 as originally filed, the wording of the above feature being additionally taken from claim 6 of the application as filed. The claimed subject-matter, however, has no unambiguous basis from the claims as filed due to the dependency of at least claim 6 being solely from claim 1, however not also from claims 2 and 4, from which features have also been included in the present claim 1.

2.1.3 The proprietor's argument as to how individual dependent claims can be combined is not accepted. Whether the subject-matter of the combined claims contradicted the disclosure in the application as filed

is not the test for allowability of amendments. Even its reference to decisions T68/99 and T583/93 in this respect cannot be used as justification to go against the finding in G 2/10, the more recent decision of the Enlarged Board of Appeal on this issue. Indeed, as stated in G 2/10 (see item 4.3), an amendment to an application 'can only be made within the limits of what a skilled person would derive directly and unambiguously, using common general knowledge, and seen objectively and relative to the date of filing, from the whole of these documents as filed'. It is thus a necessity for a positive disclosure of the claimed subject-matter in the application as filed, and not, as argued by the proprietor, that the claimed subject-matter should simply not be contradicted by the application.

2.1.4 Due to the subject-matter of claim 1 not having basis in the originally filed claims, the requirement of Article 123(2) EPC can only be met if the subject-matter of claim 1 has a direct and unambiguous disclosure in the description or Figures as filed. The proprietor's reference to page 6, lines 7 to 9 is unsatisfactory in this respect. In this passage the continuous network of channels is said to interconnect the protrusions, which feature has not been included in claim 1. The passage further includes a reference to Figure 1a which shows additional features not included in claim 1 such as, for example, flaps 13, 14 and a very specific shape of the continuous region 27. It thus follows that the adopted feature in claim 1 does not have a basis in this passage of the description as filed.

2.1.5 The proprietor's argument that Figure 1a was a manifestation of the various embodiments of the

invention, and thus could not be considered as a single particular embodiment, is not accepted. Figure 1a is indicated as presenting a plan view of a sanitary napkin consistent with embodiments of the invention described (in the description). With the Figure depicting a plurality of different embodiments, it cannot provide a direct and unambiguous disclosure of features of a sub-group of embodiments, or even of just a single embodiment depicted therein. It thus follows that the Figure cannot provide the basis for the selection of the feature relating to 'the channels forming a continuous interconnected network that defines at least two adjacent protrusions' in isolation from further features.

2.1.6 The subject-matter of claim 1 thus, at least for this reason, fails to meet the requirement of Article 123(2) EPC. Auxiliary request 1 is thus not allowable.

3. *Auxiliary request 2*

3.1 *Admittance of request*

The proprietor filed auxiliary request 2 during the oral proceedings before the Board. The request thus represents 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 may be admitted and 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. As is established case law of the Boards of Appeal, such procedural economy implies that amended requests should at least be *prima facie* allowable in order to be admitted.

- 3.1.1 The present claim 1 has taken up a number of features disclosed as 'preferable' to the invention in the description as filed. These features, however, are a selection from the large number of features of the invention indicated as preferred or preferable, and for which no direct and unambiguous basis for the specific selection made can be found. For example page 13, lines 17 to 18 indicate a transfer layer and an absorbent core as preferably being comprised in the absorbent system (which features have been included in claim 1) whereas the preferable feature on page 14, lines 13 to 17 still regarding the transfer layer, yet in relation to it having a melt-processible or thermoplastic component, has not been included in claim 1. Such a selection of particular features described as preferable for inclusion in claim 1 and the omission from claim 1 of other similarly preferable features lacks basis in the application as filed.
- 3.1.2 Claim 1 also omits detail disclosed as mandatory in the application as filed in relation to certain features included in claim 1. For example, page 13, lines 21 to 22 states that, if present, the transfer layer is 'positioned directly underneath the cover layer'. Despite claim 1 claiming the transfer layer, this detail in relation to it has been omitted, such that this omission from the combination of features defined in claim 1 also lacks basis in the application as filed.
- 3.1.3 The proprietor's contention that all features disclosed as preferable did not need to be taken up into claim 1 is not persuasive for the issue of Article 123(2) EPC. The proprietor relies on the description as providing the basis for certain features included in claim 1, *inter alia* for the absorbent system including an

absorbent core and a transfer layer. In direct relationship with the preferable presence of a transfer layer, further features are indicated in the description as being preferably included therewith, such as the transfer layer having a melt-processible or thermoplastic component. The selection of certain features disclosed as preferable for inclusion in claim 1 thus amounts to a cherry-picking of these features from a disclosure of many more features disclosed in combination, for which no direct and unambiguous basis can be seen.

3.1.4 There is therefore no *prima facie* direct and unambiguous basis at least for the specific selection of preferable features included in claim 1 and the omission of other features disclosed as mandatory.

3.1.5 Therefore, the subject-matter of claim 1 *prima facie* lacks a direct and unambiguous basis, which would *inter alia* be necessary for fulfilling the need for procedural economy and consequently admitting the request into the proceedings. Accordingly, the Board exercised its discretion under Article 13(1) RPBA not to admit this request into the proceedings.

4. *Auxiliary request 3*

4.1 *Admittance of request*

The proprietor also filed auxiliary request 3 during oral proceedings such that this request may also be admitted and considered at the Board's discretion under Article 13(1) RPBA.

4.1.1 The subject-matter of claim 1 suffers from the same objections under Article 123(2) EPC as found to be

prejudicial to the admittance of claim 1 of auxiliary request 2. The proprietor offered no further arguments in defence of this request beyond those already submitted for auxiliary request 2. The Board thus finds no reason to change its opinion in this regard.

4.1.2 There is thus no *prima facie* direct and unambiguous basis at least for the specific selection of preferable features included in claim 1 relative to the plethora of features indicated to be preferable for the invention in the description as filed.

4.1.3 Accordingly, the Board exercised its discretion under Article 13(1) RPBA not to admit this 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:



L. Malécot-Grob

M. Harrison

Decision electronically authenticated