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**Datasheet for the decision
of 29 May 2017**

Case Number: T 1449/13 - 3.2.07

Application Number: 07735156.7

Publication Number: 1999034

IPC: B65D75/58, B65D77/04, B65D83/08

Language of the proceedings: EN

Title of invention:
PACKAGE FOR FOLDED ABSORBENT ARTICLES

Patent Proprietor:
The Procter & Gamble Company

Opponent:
SCA HYGIENE PRODUCTS AB

Headword:

Relevant legal provisions:
EPC Art. 56, 111(1)
RPBA Art. 13(1), 13(3)

Keyword:

Inventive step - main request (no)

Auxiliary request - admitted (yes)

Late-filed document - admitted (yes)

Remittal to the department of first instance - (yes)

Decisions cited:

Catchword:



Beschwerdekammern
Boards of Appeal
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 1449/13 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 29 May 2017

Appellant: SCA HYGIENE PRODUCTS AB
(Opponent) Patent Department
405 03 Göteborg (SE)

Representative: Zacco Sweden AB
Valhallavägen 117
Box 5581
114 85 Stockholm (SE)

Respondent: The Procter & Gamble Company
(Patent Proprietor) One Procter & Gamble Plaza
Cincinnati, OH 45202 (US)

Representative: O'Callaghan, Robert James
Elkington and Fife LLP
Prospect House
8 Pembroke Road
Sevenoaks, Kent TN13 1XR (GB)

Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted on 2 May 2013 rejecting the opposition filed against European patent No. 1999034 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman K. Poalas
Members: G. Patton
G. Weiss

Summary of Facts and Submissions

- I. The appellant (opponent) lodged an appeal against the decision of the opposition division to reject the opposition against European patent No. 1 999 034.

The opposition had been filed against the patent as a whole and was based on Article 100(a) EPC (lack of inventive step).

- II. The board provided the parties with its preliminary non-binding opinion, annexed to the summons for oral proceedings, that the subject-matter of independent claim 1 lacked inventive step.

In reaction, the respondent filed an auxiliary request with a letter dated 28 April 2017.

- III. Oral proceedings before the board took place on 29 May 2017.

The appellant requested that the decision under appeal be set aside and that the patent be revoked.

The respondent (patent proprietor) requested that the appeal be dismissed (main request) or, alternatively, that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of the auxiliary request filed with the letter dated 28 April 2017.

- IV. The documents of the opposition proceedings which are of relevance for the present decision are the following:

D3: WO-A-02/08087;

D5: US-A-2001/0040114;
D6: US-A-2004/0238393;
D7: US-A-2004/0050738 and
D8: US-A-5 569 230.

Documents D6 to D8 were filed late during the opposition proceedings and were not admitted into the proceedings by the opposition division (see impugned decision, point 2.1).

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

"A package of absorbent articles (8), said package comprising:
a container (10) comprising a front panel (12), a back panel (14) opposing said front panel, opposing side panels (16), a top panel (18), and a bottom panel (20) opposing said top panel (18), which are joined together to form an interior compartment (22), wherein said front panel, said back panel, said opposing side panels, said top panel, and said bottom panel comprise flexible sheet material;
a line of weakness (40), wherein at least a portion of said line of weakness is located within said front panel (12), wherein said line of weakness defines a predetermined portion (50) to be separated from said container or a slit (60), wherein said predetermined portion or slit comprises an opening dimension (600); wherein said opening dimension is the maximum dimension (600) of the predetermined portion (50) or slit (60);
a plurality of folded absorbent articles (300) arranged in a stacked relationship in said interior compartment of said container each said article comprising an article longitudinal centerline (LP) and an article transverse centerline (TP), a pair of article

longitudinal edges (286) generally disposed along said article transverse centerline and a pair of article transverse edges (288) generally disposed along said article longitudinal centerline, an article longitudinal edge length (700) defined by the distance between said pair of article transverse edges, an article transverse edge width (800) defined by the distance between said pair of article longitudinal edges (286), characterised in that said package of absorbent articles (8) comprises a plurality of pouches (200), wherein at least one folded absorbent article is contained in each pouch (200), and wherein said pouch longitudinal edge length (700) and at least one said pouch transverse edge width (800) are greater than said opening dimension (600)."

Claim 1 of the auxiliary request comprises the following additional features over claim 1 of the main request:

"wherein said absorbent articles are selected from the group consisting of sanitary napkins, pants-liners, and incontinence products."

VI. The appellant argued essentially as follows

Main request

Starting from document D5 as closest prior art, the distinguishing features are the following:

- (a) the package of absorbent articles comprises a plurality of pouches, wherein at least one folded absorbent article is contained in each pouch, and

(b) wherein said pouch longitudinal edge length and at least one said pouch transverse edge width are greater than said opening dimension.

In view of their technical effects, the problem to be solved can be seen as modifying the package of D5 so as to keep the absorbent articles clean in the package and to prevent their contamination once taken out of the package.

There is no teaching away from the claimed solution in the disclosure of D5. Nothing prevents the skilled person from further improving the hygiene of the articles of the package of D5.

Individually wrapping the absorbent articles provides more options for the user, and the user is ready to pay more in order to have increased user-friendliness.

There is no prejudice against the claimed solution due to the alleged increase in stiffness of the wrapped absorbent articles and/or the alleged need to enlarge the opening of the package, since the skilled person will know how to select the appropriate wrapping material accordingly in order to keep the relative dimensions of the package of D5 as disclosed.

The technical fields of packages of absorbent papers and packages of sanitary napkins are neighbouring fields, and so the skilled person will see no reason not to apply a solution known from one field to the other.

Feature a) belongs to the common general knowledge, as illustrated in paragraphs 6 and 7 of the patent in suit.

For the above-mentioned reasons, inventive step should not be recognised for the subject-matter of claim 1.

Auxiliary request

The auxiliary request should not be admitted into the proceedings, because it could have been filed at an earlier stage and the subject-matter of claim 1 has never been discussed before the opposition division.

Late-filed documents D6 to D8

Due to the features introduced into claim 1 of the auxiliary request, D5 can no longer be regarded as the closest prior art.

It would be more appropriate to assess inventive step for the subject-matter of claim 1 of the auxiliary request taking the disclosure of documents D6 and/or D7 into account as well, these documents being related to sanitary napkins, pants-liners and incontinence products as now claimed in claim 1. D6 and/or D7 therefore represent a plausible starting point for assessing inventive step.

D8 is directed to individually packaged sanitary napkins.

For these reasons documents D6 to D8 should be admitted into the proceedings.

VII. The respondent argued essentially as follows:

Main request

Document D5 can be considered as representing the closest prior art. It does not disclose the above-mentioned distinguishing features a) and b).

In view of their technical effect, the problem to be solved can be seen in the modification of the package known from D5 in order to improve hygiene.

D5 already provides a solution to this problem, and so there is no incentive for the skilled person to consider additionally providing a plurality of pouches.

In particular, the skilled person will not take into consideration a solution known in the technical field of packages of sanitary napkins, which is different from that of D5.

Individual wrapping of the absorbent articles would increase the cost of the package known from D5. This would discourage the skilled person from additionally providing a plurality of pouches.

Even if the skilled person were to think of applying the common general knowledge of the technical field of packages of sanitary napkins to the package of D5, he would still have to adapt the relative dimensions between the opening and the pouch oppositely to those specified in claim 1, thereby falling outside the claimed scope.

In view of the above, inventive step has to be acknowledged.

Auxiliary request

The filing of the auxiliary request is a reaction to the board's comments provided to the parties in the annex to the summons to oral proceedings, see point 5.2.2.

The amendments are not complex and do not introduce any issues and/or objections with respect to fulfilment of the requirements of Articles 84 and 123(2) EPC.

The auxiliary request should therefore be admitted into the proceedings.

Late-filed documents D6 to D8

The opposition division correctly exercised its discretionary power in deciding not to admit D6 to D8 into the proceedings. In particular, documents D6 and D7 represent a mere alternative to document D3 already on file.

With respect to the opposition-appeal proceedings, the subject-matter of claim 1 of the auxiliary request, i.e. claim 9 of the patent as granted, should already have been attacked with the notice of opposition, and so D6 to D8 should have been filed at an earlier stage of the proceedings.

D8 is not *prima facie* more relevant than other documents already in the proceedings, as it clearly does not represent plausible closest prior art.

In any case D6 to D8 are not related to D5.

For these reasons documents D6 to D8 should not be admitted into the proceedings.

Reasons for the Decision

1. Main request (patent as granted)

The appellant contests that the subject-matter of claim 1 of the main request involves an inventive step starting from D5 as closest prior art in combination with the skilled person's common general knowledge as acknowledged in paragraphs 6 and 7 of the contested patent.

1.1 Closest prior art

Since D5, like claim 1 of the main request, lies in the technical field of packages of absorbent articles and aims at preventing contamination of said absorbent articles, the board shares both parties' view that D5 represents the closest prior art for subject-matter of claim 1 (see contested patent, paragraphs 6 and 61; D5, paragraphs 9 to 12).

1.2 Disclosure of the closest prior art

D5 discloses a package of absorbent articles ("absorbent paper", "handkerchief" 18), said package comprising:

a container ("wrapping sheet" 20) comprising a front panel ("fore panel" 22), a back panel ("rear panel" 24) opposing said front panel, opposing side panels ("left and right panels" 26, 28), a top panel ("upper panel" 30), and a bottom panel ("lower panel" 32) opposing said top panel (30), which are joined together to form

an interior compartment, wherein said front panel (22), said back panel (24), said opposing side panels (26, 28), said top panel (30), and said bottom panel (32) comprise flexible sheet material ("flexible material, usually a polyethylene film");

a line of weakness ("precut" 72), wherein at least a portion of said line of weakness is located within said front panel (22), wherein said line of weakness defines a predetermined portion ("movable flap" 36) to be separated from said container, wherein said predetermined portion comprises an opening dimension; wherein said opening dimension is the maximum dimension of the predetermined portion;

a plurality of folded absorbent articles (18) arranged in a stacked relationship ("bundle" 16) in said interior compartment of said container (20) each said article (18) comprising an article longitudinal centerline and an article transverse centerline, a pair of article longitudinal edges generally disposed along said article transverse centerline and a pair of article transverse edges generally disposed along said article longitudinal centerline, an article longitudinal edge length defined by the distance between said pair of article transverse edges, an article transverse edge width defined by the distance between said pair of article longitudinal edges (see paragraphs 37 to 51, figures, in particular figure 5).

1.3 Distinguishing feature(s)

D5 does not disclose that the package comprises pouches, and therefore, as agreed by both parties, the following features of the characterising portion of claim 1 are the only distinguishing features vis-à-vis

the package known from D5 (see statement setting out the grounds, point 3.1, first paragraph; reply, point 3, second and third paragraphs):

(a) the package of absorbent articles comprises a plurality of pouches, wherein at least one folded absorbent article is contained in each pouch, and

(b) wherein said pouch longitudinal edge length and at least one said pouch transverse edge width are greater than said opening dimension.

1.4 Technical effect(s)

The board shares the appellant's view put forward at the oral proceedings and based on paragraphs 6 and 61 of the contested patent that the technical effects of the distinguishing features are twofold: on the one side to keep the absorbent articles clean in the package and on the other side to prevent their contamination once taken out of the package and stored in a pocket or a purse until actual usage (see also statement setting out the grounds, point 3.1, second paragraph; reply, point 3, fourth paragraph).

1.5 Problem(s) to be solved

The respondent argues that the latter effect should not be considered when determining the problem to be solved, on the ground that it is not mentioned in D5. It considers that defining a problem on the basis of this effect would amount to pointing towards the claimed solution, i.e. making an *ex post facto* analysis.

The board cannot share the respondent's view, since technical effects of distinguishing features can also be derived from the contested patent itself. However, the board agrees with the respondent's more general formulation of the objective technical problem to be solved, namely to improve hygiene in the package of D5 (see statement setting out the grounds, point 3.1.1; reply, point 3, fifth paragraph).

1.6 Obviousness

- 1.6.1 The board cannot share the respondent's view, see also the impugned decision, point 2.3.2, that the skilled person faced with said problem would be satisfied with the solution of D5 and would not think of further improving the package of D5 ("teaching away").

In fact, D5 makes clear in paragraphs 9 and 10 that contamination of the articles is an issue in the present technical field. By doing so it gives an explicit incentive to find solutions to said problem, and so the skilled person will also envisage additional measures to that already disclosed in D5 with a view to solving the above-mentioned problem. The board cannot see in the disclosure of D5 any "teaching away" in that respect. In D5 the skilled person will implement a known solution, be it disclosed in the prior-art documents or belonging to his common general knowledge, as long as it is technically feasible and not in contradiction with the disclosure of D5.

- 1.6.2 The board shares the following views that the appellant has put forward against the reasoning of the impugned decision, point 2.3.2 (see also statement setting out the grounds, point 3.1.3, second, third and fourth reasons):

The individual wrapping of the absorbent articles in the package of D5 is not detrimental to the user-friendliness of the articles, since it provides more options for the user. In fact, the user can choose to use the article directly or to store it in a pocket or purse prior to use while still keeping the wrapped absorbent article well protected from dirt.

With respect to the cost increase related to the individual wrapping of the absorbent articles, it cannot be ruled out that the user will be willing to pay more for the added value of further user possibilities and cleanliness.

The alleged increase in stiffness of the wrapped absorbent article cannot be seen as a prejudice, since the skilled person implementing the known solution (individually wrapping absorbent articles in a pouch) in the package of D5 will select and adapt the wrapping material accordingly. In any case, enlargement of the opening cannot be considered mandatory, as argued by the appellant. The board cannot see any technical impediment in this respect.

Concerning the dimension of the opening, the board considers that, since the absorbent article of the package of D5 fulfils the requirement specified by distinguishing feature b), a pouch comprising said article will inevitably also do so. Feature b) therefore cannot justify the presence of an inventive step.

- 1.6.3 In view of the above, since the claimed solution of pouches (above feature a)) belongs to the skilled person's common general knowledge as acknowledged in

the patent in suit (see paragraphs 6 and 7), the subject-matter of claim 1 of the main request lacks inventive step (Article 56 EPC).

- 1.7 At the oral proceedings, the respondent argued that the solution of having absorbent articles individually wrapped in a pouch is only known in the technical field of packages of sanitary napkins, which is different from that of D5 (packages of absorbent papers). For the respondent, the skilled person will then not think of implementing the known solution in the package of D5. In particular, the known solution is only relevant for sanitary napkins in terms of the way in which they are used, namely that after having been pulled out of the package they are stored in a pocket or purse prior to actual usage. During this storage the sanitary napkin needs to be kept well protected from dirt. This is not the case for the absorbent papers of D5, which are used directly after having been taken out of the package. In the case of absorbent papers such as handkerchiefs, the user cannot predict how many he will need and therefore always stores the complete package in a pocket or purse. In such a case an extra individual wrapping for protection against contamination is neither necessary nor desirable.

As discussed at the oral proceedings, the board cannot share this view for the reasons already given under point 1.6.1 above. In fact, faced with the above objective technical problem the skilled person will not restrict himself to the technical field of D5 but will also extend his search for solutions to neighbouring technical fields. In doing so, he will come across the known solution for sanitary napkins as mentioned in paragraph 6 of the contested patent and see no technical difficulties in applying it to the package of

D5. The respondent presented no evidence supporting its argument that the user always stores the whole handkerchief package in his pocket or purse. Especially in the absence of any supporting evidence, the board cannot regard the respondent's above-mentioned allegation as a valid argument.

- 1.8 At the oral proceedings, the respondent further argued that in case the skilled person were to think of applying the common general knowledge of the technical field of packages of sanitary napkins to that of D5, namely packages of absorbent papers, he would have to adapt the latter accordingly. In particular, as a result of the increase in stiffness of the wrapped absorbent article, the opening of the package of D5 would have to be enlarged, since not doing so would prevent the user from pulling the wrapped absorbent article out of the package. The skilled person will then end up with a relative relationship between the dimensions of the opening and those of the pouch different from the one claimed in claim 1, i.e. falling outside the claimed scope.

The board cannot share this view for the reason already given under point 1.6.2 above that the skilled person will select and adapt the wrapping material in such a manner as to keep the relative dimensions of the package of D5 as disclosed therein.

2. Auxiliary request

- 2.1 The auxiliary request was filed by the respondent with letter dated 28 April 2017, i.e. after oral proceedings had been arranged. Hence, its admission is to be decided in accordance with the requirements of Article 13(1) and (3) RPBA.

2.2 The appellant has argued that claim 1 of the auxiliary request, which consists of the combination of claims 1 and 9 of the patent as granted, should not be admitted into the proceedings since it has never been discussed before the opposition division. The auxiliary request could have been filed at an earlier stage, during the opposition proceedings.

2.3 The board cannot share the appellant's view. Firstly, the patent was maintained as granted by the opposition division; so there was no reason for the respondent to file the auxiliary request during the first-instance proceedings. The earliest stage for filing the auxiliary request was therefore in the appeal proceedings. Secondly, the board considers that the filing of the auxiliary request is an allowable reaction to the board's comments provided to the parties in the annex to the summons to oral proceedings, see point 5.2.2.

In addition, the board shares the respondent's view that claim 1 of the auxiliary request corresponding to claim 9 of the patent as granted was known to and attacked by the appellant during the opposition proceedings and that the amendments made to said claim do not increase the complexity of the case and do not introduce any issues and/or objections with respect to the fulfilment of the requirements of Articles 84 and 123(2) EPC. This has not been contested by the appellant.

Further, the type of absorbent article has always been a key issue in the discussion of inventive step, in particular for the combination of the disclosure of D5 with the skilled person's common general knowledge, and

the amendment represents a further limitation in this respect. Hence, the auxiliary request cannot be seen as diverging from the main request. This has likewise not been contested by the appellant.

Finally, the board considers that claim 1 of the auxiliary request does not raise issues which the board or the appellant cannot reasonably be expected to deal with without adjournment of the oral proceedings.

For the above-mentioned reasons the board, in accordance with the requirements of Article 13(1) and (3) RPBA, admits the auxiliary request into the proceedings.

3. Late-filed documents D6 to D8

3.1 As a result of the admission of the auxiliary request into the proceedings, the board considers it a matter of fairness to also admit documents D6 to D8 into the proceedings.

3.2 In fact, it appears plausible to the board, as argued by the appellant at the oral proceedings, that the features introduced into claim 1 of the auxiliary request (claim 9 of the patent as granted) can have an impact on the arguments on inventive step, such that D5 may no longer be regarded as representing the closest prior art. In this respect, the inventive step of the subject-matter of claim 1 of the auxiliary request should be assessed also taking into account the disclosure of documents D6 and/or D7, which relate to sanitary napkins, panti-liners and incontinence products (D6, paragraph 19; D7, paragraph 42). D8 for its part discloses an individually packaged sanitary napkin.

3.3 Thus the initial issue of whether or not the opposition division correctly exercised its discretionary power in deciding not to admit D6 to D8 into the proceedings is now irrelevant. The same applies to the issue of whether or not claim 9 should have been objected to at an earlier stage of the present proceedings on the basis of said documents.

4. Remittal

In view of the above and of the fact that both parties requested remittal of the present case to the opposition division in case documents D6 to D8 were admitted into the proceedings, the board exercises its discretion under Article 111(1) EPC and remits the case to the department of first instance for further prosecution on the basis of the auxiliary request.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for further prosecution on the basis of claims 1 to 9 of the auxiliary request.

The Registrar:

The Chairman:



G. Nachtigall

K. Poalas

Decision electronically authenticated