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Datasheet for the decision of 7 December 2017

Case Number: T 1541/13 - 3.2.06

Application Number: 02784531.2

Publication Number: 1458317

IPC: A61F13/15

Language of the proceedings: EN

Title of invention:
RATIO OF ABSORBENT AREA TO OUTER PERIPHERAL AREA FOR DISPOSABLE ABSORBENT ARTICLES

Patent Proprietor:
KIMBERLY-CLARK WORLDWIDE, INC.

Opponent:
SCA Hygiene Products AB

Headword:

Relevant legal provisions:
EPC Art. 84, 123(2)
EPC 1973 Art. 56
RPBA Art. 12

Keyword:
Amendments - added subject-matter (no)
Claims - clarity after amendment (yes)
Inventive step - (yes)

Decisions cited:
T 0204/83

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

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Case Number: T 1541/13 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 7 December 2017

Appellant: (Opponent)	SCA Hygiene Products AB 405 03 Göteborg (SE)
Representative:	Romare, Laila Anette Valea AB Box 1098 405 23 Gothenburg (SE)
Respondent: (Patent Proprietor)	KIMBERLY-CLARK WORLDWIDE, INC. 401 North Lake Street Neenah, WI 54956 (US)
Representative:	Davies, Christopher Robert 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 23 May 2013 concerning maintenance of the European Patent No. 1458317 in amended form.**

Composition of the Board:

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

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. 1 458 317 in an amended form met the requirements of the EPC.

II. The appellant requested that the decision be set aside and the patent be revoked. The respondent (patent proprietor) requested that the appeal be dismissed or, in the alternative, that the patent be maintained according to an auxiliary request.

III. The following documents, referred to by the parties in their submissions, are relevant to the present decision:

D1 US-A-4 355 425
D2 WO-A-95/22951
D3 WO-A-00/02511
D4 WO-A-01/82850, and
D5 US-A-5 846 232

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 appeared not to meet the requirement of Article 123(2) EPC, that the alleged non-compliance with Article 84 EPC was seemingly not open to objection and that, if these objections were overcome, the presence of an inventive step in the subject-matter of claim 1 may be discussed.

V. With letter of 7 July 2017, the appellant indicated that it would not be attending the appointed oral proceedings, yet maintained its requests relying solely

on its written submissions.

VI. With letter of 8 November 2017, the respondent withdrew its auxiliary request and filed new auxiliary requests 1 and 2.

VII. Oral proceedings were held before the Board on 7 December 2017, during which the respondent filed a new main request to replace all requests on file.
The respondent's final request was that the patent be maintained in amended form based on claims 1 to 18 as filed during the oral proceedings, description pages as amended during the opposition proceedings and the figures as granted. All other requests were withdrawn.

VIII. Claim 1 of the sole (main) request reads as follows:

"A disposable absorbent diaper having a longitudinal axis and a lateral axis generally defining longitudinal front and back halves (103, 101) of the diaper, said diaper having a stretchable chassis comprising:
a stretchable liner (5) adapted for contiguous relationship with the wearer’s body; and
a stretchable outer cover (17) in generally opposed relationship with the stretchable liner (5), the back half (101) of the diaper having a surface defined in full by at least one of said stretchable liner (5) and said stretchable outer cover (17);
wherein the liner and outer cover are both stretchable generally laterally of the diaper; and
an absorbent core (3) disposed between the stretchable liner (5) and the stretchable outer cover (17) and secured to at least one of said stretchable liner (5) and said stretchable outer cover (17), at least a portion (105) of said absorbent core (3) extending within the back half (101) of said diaper,

characterised in that said portion (105) of the absorbent core (3) extending within the back half (101) of said diaper has a surface area (35) which is less than about 15% of the surface area (45) of the back half (101) of said diaper chassis."

IX. The appellant's arguments included in its written submissions and relevant to the main request filed at oral proceedings may be summarised as follows:

Article 123(2) EPC

The subject-matter of claim 1 did not meet the requirement of Article 123(2) EPC. The claimed feature 'said portion of the absorbent core extending within the back half of said diaper has a surface area which is less than about 15% of the surface area of the back half of said diaper chassis' (hereafter referred to simply as the '15% of the surface area' feature) was disclosed only on page 41 of the application as filed specifically in relation to the preferred embodiment of the present invention. This preferred embodiment was further addressed on page 15, where the bodyside liner was indicated to be extensible, and again on page 19/20, where the outer cover was also said to be extensible. There was thus no unambiguous disclosure of the liner and cover being stretchable in combination with the feature regarding 15% of the surface area.

Whilst page 15, lines 8-10 disclosed the diaper including the liner and the cover forming the chassis, the diaper was further specified on page 10, lines 24 to 28 as having the liner and cover adhered with an adhesive with the absorbent core therebetween. These features could not be combined in a claim without also including the feature that the core was attached to the

chassis by adhesive.

The use of reference numerals in different embodiments was not consistent in the application as filed, particularly with respect to the bodyside liner and the outer cover. Such an unclear disclosure should not allow the patentee to extend the scope of the original disclosure by combining different embodiments not originally envisaged to be combined.

Article 84 EPC

Claim 1 lacked clarity since it was unclear what constituted 'a surface' of the diaper. The original disclosure did not support the respondent's interpretation that the full outer and/or inner surface of the article consisted of a stretchable material.

Article 56 EPC

The term diaper was to be understood as including both a pant-type pre-assembled diaper and a fastenable diaper which was not pre-assembled. Starting from D3, this disclosed essentially all features of claim 1, excepting an explicit disclosure of the '15% of the surface area' feature. Starting from Fig. 1a of D3, the skilled person would be led to the claimed solution without an inventive step, particularly since no particular benefit of the 15% area was disclosed and this feature could thus be seen as arbitrary.

Further objections to the claims based on D1, D2 and D5 were as set out in the Notice of Opposition.

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

Article 123(2) EPC

The subject-matter of claim 1 met the requirement of Article 123(2) EPC when considering a combination of claims 27 and 28 with the statement of invention from page 2 and the '15% of the surface area' feature from page 41. The overall disclosure unambiguously concerned a stretchable chassis, the skilled person not limiting the disclosure to an extensible bodyside liner and outer cover.

Article 84 EPC

The amendment to claim 1 did not introduce the alleged lack of clarity and so no objection could be raised.

Article 56 EPC

The subject-matter of claim 1 involved an inventive step. Starting from D3 as the closest prior art, the objective technical problem could be seen as to provide a diaper with an improved fit in which the absorbent performance was not compromised. Neither the skilled person's general knowledge nor D4 included any hint to the '15% of the surface area' feature.

Reasons for the Decision

Main request

1. Article 123(2) EPC

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

1.1 The subject-matter of claim 1 finds basis in claims 27 and 28 as filed in combination with the statement of the invention from page 2, line 30 to page 3, line 5 and page 41, lines 23 to 31 of the application as filed.

1.2 The appellant's contention that there was no basis for the subject-matter of claim 1, in particular for the liner and outer cover to be stretchable, is not accepted. Page 2, line 30 to page 3, line 5 of the application as filed discloses that the 'diaper of the invention' includes a stretchable chassis, a stretchable bodyside liner and a stretchable outer cover. Indeed, throughout the entire description as filed, the bodyside liner and outer cover are both consistently disclosed as being stretchable, the single exceptions to this being in the passages from page 15, line 32 to page 16, line 4 for the bodyside liner and from page 19, line 30 to page 20, line 1 with regard to the outer cover, where they are defined as not only being stretchable but are limited to being 'extensible'. Seen as a whole, the skilled reader would not see these single disclosures of 'extensible', rather than stretchable, liner and outer cover as the general disclosure of the application as filed.

1.3 Whilst the two passages referenced above include a reference to the 'preferred embodiment of the present invention', perhaps giving the initial impression that an extensible bodyside liner and outer cover should be included in the claimed diaper when the '15% of the surface area' feature is also disclosed in a paragraph (page 41, lines 23 to 31) as a feature of 'the preferred embodiment', this is incorrect as explained below.

Firstly, the passages on pages 15 to 16 and 19 to 20 indicate extensibility of the bodyside liner and outer cover yet precede this disclosure with the indication that this pertains to the 'preferred embodiment of the present invention'. The application as filed, however, solely claims a 'disposable absorbent article', such articles thus being what was clearly regarded as the 'preferred embodiment of the present invention' at the time of filing. In this regard the disclosure of the bodyside liner and outer cover each (themselves) being the 'preferred embodiment of the present invention' is inconsistent with this, such that the validity of the preferred embodiment in relation to the extensibility of the bodyside liner and the outer cover would anyway be questioned by the skilled person.

Secondly, relying on these single, isolated passages to conclude that the liner and outer cover are extensible rather than stretchable would require the teaching of the remaining description to essentially be disregarded, even though it provides a repeated and consistent disclosure of the chassis, and thus the liner and outer cover (see page 15, lines 8 to 10), being stretchable.

1.4 From page 34 to page 41 of the description, the layout of the preferred diaper is disclosed with respect to the bodyside liner, outer cover and absorbent core, and consistently in the context of the chassis being stretchable. The appellant's reference to 'the preferred embodiment of the present invention' on page 41, line 23 would thus be understood by the skilled person as a disclosure of the claimed feature 'the portion of the absorbent core extending within the back half of said diaper has a surface area which is less than about 15% of the surface area of the back half of said diaper chassis' solely within the context of the chassis being stretchable as repeatedly and consistently disclosed in the foregoing pages 34 to 41 (as well as in the 'summary of the invention' on page 2, line 30 to page 3, line 5, where the area feature is 'less than about 50%'). As a consequence, and as already indicated in points 1.2 and 1.3 above, the skilled person therefore would not see the suggestions of the bodyside liner and outer cover being extensible on pages 15 to 16 and 19 to 20 as being anything more than just one embodiment of the bodyside liner and outer cover of the inventive diaper. The unambiguous disclosure in the application as filed is for all of the liner, the outer cover and the chassis to be stretchable. The stretchable multilayer chassis is again quoted on page 41, line 27 and it is in this context that the '15% of the surface area' feature is disclosed.

1.5 As regards the appellant's contention that a feature including the core being attached to the chassis by adhesive was missing from claim 1 in contravention of Article 123(2) EPC, this is not convincing. The passage referred to by the appellant on page 10, lines 24 to 28 explicitly indicates solely the outer cover and

bodyside liner as being 'assembled to each other' with an adhesive; the absorbent core is simply indicated to be 'therebetween' without any suggestion that adhesive secures its location. This is even confirmed a few lines later from line 31 to 34 in which the connection of the absorbent core to the bodyside liner and/or the outer cover is presented as an optional feature: ' .. the absorbent core 3 may also be connected ...'. This feature, contrary to the opinion of the appellant, is thus not disclosed in a structural and functional combination with the further features included in claim 1 to render its inclusion necessary to meet the requirement of Article 123(2) EPC.

1.6 The appellant's argument that the inconsistent reference signs applied to the bodyside liner and outer cover should not allow embodiments to be combined which were not originally envisaged for combination, does not change the above finding. Indeed the basis for the subject-matter of claim 1 is not taken from multiple embodiments of the invention, rather from claims 27 and 28 in combination with the summary of the invention (page 2, line 30 to page 3, line 5) and a preferred core-to-chassis-area ratio (page 41, lines 23 to 31). Any differences or errors in the allocation of reference signs between different embodiments of the invention can thus not be influential with regard to the basis of the claim since the very basis for claim 1 is, as indicated above, not reliant on a combination of multiple embodiments.

1.7 The Board thus finds that the subject-matter of claim 1 meets the requirement of Article 123(2) EPC.

2. *Article 84 EPC*

2.1 The appellant's argument that claim 1 lacks clarity is not accepted. Reference is made to the Enlarged Board of Appeal decision G3/14.

2.2 As also argued by the respondent, granted claim 1 required that the article had a surface defined 'at least in part' by one of the stretchable liner and said stretchable outer cover. Claim 1 of the present request has the surface defined in full by the liner or cover which falls under the scope of the granted claim in respect of the feature 'at least in part'. Limiting the claimed scope from that as granted to that presently provided in claim 1 has not introduced a non-compliance with Article 84 EPC. This amendment is thus not open to objection for lack of clarity as found in G3/14 (see the 'catchword').

3. *Article 56 EPC 1973*

3.1 The subject-matter of claim 1 involves an inventive step over the documents and the arguments based thereon presented by the appellant.

3.2 In its communication referenced under point IV above, the Board gave the following preliminary opinion with regard to the inventive step objections of the appellant when starting from D3 and combining this with the teaching of D4:
- The feature 'said portion of the absorbent core extending within the back half of said diaper has a surface area which is less than about 15% of the surface area of the back half of said diaper chassis' appears not to be unambiguously disclosed in D3;
- The absorbent core 50 of D3 seems not to be disposed

between a stretchable liner and a stretchable outer cover;
- Based on these differentiating features the objective technical problem can be seen as 'how to improve fit whilst maintaining absorbency performance of the diaper'; and
- the general knowledge of either the skilled person or D4 seemingly fail to provide a hint as to how to modify D3 in order to solve the objective technical problem so as to arrive at the claimed subject-matter.

These preliminary findings with respect to the respondent's main request filed in reply to the appellant's grounds of appeal apply equally to the subject-matter of claim 1 of the present request, this having been amended solely to explicitly state that the chassis is 'stretchable'.

3.3 As regards the appellant's argument that the '15% of the surface area' feature' was essentially disclosed in Fig. 1a of D3, this is not accepted. The figures in a patent specification are not suited to have specific dimensions extracted from them. This is also established case law of the Boards of appeal (see e.g. T204/83, Reasons 7). Also in the present case, the Board finds that the figurative nature of Fig. 1a does not allow specific dimensions to be extracted therefrom, the '15% of the surface area' feature thus not being unambiguously disclosed in Fig. 1a of D3.

3.4 Regarding the appellant's contention that no particular benefit of the '15% of the surface area' feature was disclosed in the patent, this is not accepted. With reference to paragraph [0112] of the patent, a technically plausible benefit of improved diaper fit through unencumbered stretch of the chassis is

discussed, on the basis of which the above objective technical problem is formulated.

3.5 The appellant's argument that D3 itself guided the skilled person to the claimed invention is also not accepted. Lacking an unambiguous disclosure of the '15% of the surface area' feature and wishing to solve the objective technical problem of improving diaper fit whilst maintaining absorbency performance, D3 provides no hint to the claimed solution with, as the respondent also argued, the absorbent core of D3 extending substantially into the rear half of the garment. D4 similarly discloses the absorbent body 34 extending significantly into the rear portion 24 of the diaper 2 (see Fig. 1) such that the skilled person is not guided thereby to the claimed solution.

3.6 To the Board's provisional opinion, the appellant submitted no further arguments to support its objection of lack of an inventive step. With no new arguments on file to change its opinion, the Board thus confirms its provisional opinion that, starting from D3 and wishing to solve the objective technical problem, the skilled person would not be led by common general knowledge or by the teaching of D3 or D4, to the claimed solution without exercising an inventive step.

3.7 Further objections of the appellant under Article 56 EPC 1973 based on D1, D2 and D5 were only cursorily indicated in the statement setting out the grounds of appeal through a general reference to arguments presented in the appellant's notice of opposition. In its provisional opinion, the Board indicated that only expressly made arguments had to be taken into account (Article 12(4) Rules of Procedure of the Boards of Appeal). With no expressly stated arguments concerning

these further objections being forthcoming, the Board finds that these further objections are not substantiated and thus cannot deprive the subject-matter of claim 1 of an inventive step.

3.8 The requirements of Article 56 EPC are therefore fulfilled.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the opposition division with the order to maintain the patent on the basis of the following documents:
   - claims 1 to 18 of the main request filed during the oral proceedings before the Board,
   - description as adapted during the oral proceedings before the opposition division and annexed to the impugned decision and
   - figures 1 to 8 of the patent specification.

The Registrar: The Chairman:

M. H. A. Patin M. Harrison

Decision electronically authenticated