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**Datasheet for the decision
of 4 September 2018**

Case Number: T 0979/14 - 3.2.06

Application Number: 02709388.9

Publication Number: 1367971

IPC: A61F13/15, A61F13/551

Language of the proceedings: EN

Title of invention:

TUCKED FASTENER FOR IMPROVED FASTENER PERFORMANCE

Patent Proprietor:

KIMBERLY-CLARK WORLDWIDE, INC.

Opponents:

Unicharm Corporation
Essity Hygiene and Health Aktiebolag

Relevant legal provisions:

EPC Art. 123(2)
EPC 1973 Art. 111(1)

Keyword:

Amendments - added subject-matter (yes)
Remittal to the department of first instance - (yes)



Beschwerdekammern

Boards of Appeal

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Case Number: T 0979/14 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 4 September 2018

Appellant: Essity Hygiene and Health Aktiebolag
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Party as of right: Unicharm Corporation
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
26 February 2014 concerning maintenance of the
European Patent No. 1367971 in amended form.**

Composition of the Board:

Chairwoman	G. de Crignis
Members:	M. Hannam
	W. Ungler

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. 1 367 971 in an amended form met the requirements of the EPC.
- II. The appellant requested that the decision be set aside and the European patent be revoked.
- III. The respondent (patent proprietor) requested that the appeal be dismissed or that the patent be maintained according to one of auxiliary requests 1 to 4.
- IV. The Board issued a summons to oral proceedings including a communication containing its provisional opinion, in which it *inter alia* questioned the basis in the application as filed for the subject-matter of claim 1 of each of the requests.
- V. With letter of 31 July 2018 the respondent filed new auxiliary requests 1 to 3 to replace all auxiliary requests previously on file.
- VI. Oral proceedings were held before the Board on 4 September 2018, during which the appellant filed a replacement main request and withdrew its auxiliary requests. The final requests of the parties were as follows:
The appellant requested that the decision under appeal be set aside and the European patent be revoked.
The respondent requested that the patent be maintained in amended form on the basis of the main request filed during the oral proceedings of 4 September 2018 or that the case be remitted to the opposition division for

further prosecution.

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

"A compressed package of tucked, refastenable, pant-like absorbent garments (24) having tucked, refastenable, pre-fastened seams, each absorbent garment comprising
an absorbent chassis (32) including a front region (22) and a back region (24), together defining a waist opening (50) and first and second leg openings (52); the package characterised by each pant-like absorbent garment comprising:
a first refastenable seam (80) joining a first distal portion (34) of the front region to a first distal portion (134) of the back region, and including a first resilient fastening component (82) positioned between at least a portion of the front region and at least a portion of the back region, the front region and the back region both folded such that the first resilient fastening component lies in a plane parallel to a plane in which a front waist region (90) of the front region lies; and
a second refastenable seam (80) joining a second distal portion (34) of the front region to a second distal portion of the back region (134), and including a second resilient fastening component (82) positioned between at least a portion of the front region and at least a portion of the back region, the front region and the back region both folded such that the second resilient fastening component lies in a plane parallel to a plane in which the front waist region of the front region lies, wherein:
the front region of the absorbent chassis includes a front panel (35) and the first and second distal portions of the front region are first and second side

panels extending from the front panel, and the back region of the absorbent chassis includes a back panel (135) and the first and second distal portions of the back region are third and fourth side panels (134) extending from the back panel;

the front panel, back panel, and each side panel including a waist region (90, 92);

the front and back panels each including a crotch region (26), the side panels each including a leg region;

the waist opening is defined by the front panel waist region, the back panel waist region and the waist regions of each of the side panels;

the first and second leg openings are defined by the front panel crotch region, the back panel crotch region, and the leg region of each of the side panels;

the first refastenable seam joins the first side panel to the third side panel, the first resilient fastening component is positioned between the first side panel and the third side panel, and the first resilient fastening component lies in a plane parallel to a plane in which a front waist region of the front panel lies;

and

the second refastenable seam joins the second side panel to the fourth side panel, the second resilient fastening component is positioned between the second side panel and the fourth side panel, and the second resilient fastening component lies in a plane parallel to a plane in which the front waist region of the front panel lies;

wherein each of the first, second, third and fourth side panels is folded at least once, and

wherein the first and second refastenable seams are positioned between the front panel and the back panel of the absorbent chassis."

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

The subject-matter of claim 1 did not meet the requirement of Article 123(2) EPC. The addition of the word 'absorbent' to the word 'chassis' in claim 1 was an intermediate generalisation of the original disclosure, since this at least further disclosed an absorbent assembly in combination with the absorbent chassis. The subject-matter of claim 1 was furthermore *inter alia* based on claims 24 and 40 as filed which concerned two separate embodiments with no link disclosed between the claimed regions and panels.

IX. The respondent's arguments relevant for the present decision may be summarised as follows:

The subject-matter of claim 1 met the requirement of Article 123(2) EPC. Both claims 24 and 40 as originally filed were directed to a pant-like absorbent garment such that the chassis of the garment was implicitly absorbent. Regarding the objection that the subject-matter of claim 1 lacked basis in a combination of claims 24, 39, 40 and 64 as filed, this was raised for the first time by the Board in its preliminary opinion. In order to allow sufficient opportunity to develop its new strategy with respect to this new objection, remittal of the case to the opposition division was appropriate.

Reasons for the Decision

1. Main request

1.1 Article 123(2) EPC

The subject-matter of claim 1 does not meet the requirement of Article 123(2) EPC.

1.1.1 The basis for the subject-matter of claim 1 is alleged to be a combination of claims 24, 39, 40 and 64 as filed. Claim 24 as filed discloses *inter alia* first and second refastenable seams in relation to front and back regions of the chassis of a pant-like absorbent article. In contrast hereto, claim 40 as filed discloses *inter alia* first and second refastenable seams in relation to first to fourth side panels of a pant-like absorbent garment.

1.1.2 In none of these cited claims is a direct and unambiguous basis to be found, however, for the structural link, included in the present claim 1, between the front/back regions and the first to fourth side panels. The respondent also did not suggest where such a basis could be found in the description as filed, instead requesting remittal of the case to the department of first instance for further prosecution.

1.1.3 It is noted that the opposition division in its interlocutory decision found all the features of claim 24 as filed to be included in claim 40 as filed, the subject-matter of claim 1 thus meeting the requirement of Article 123(2) EPC. As indicated above, this is not directly and unambiguously the case due to no link relating the front/back regions of claim 24 to the first to fourth side panels of claim 40. The opposition division's conclusion in this regard is thus found to be incorrect.

- 1.1.4 According to Article 111(1) EPC 1973, when deciding on an appeal, the Board may either exercise any power within the competence of the department which was responsible for the decision appealed or remit the case to that department for further prosecution.

- 1.1.5 In the exercise of such discretion, in the present case an important aspect is that the Board raised this specific objection for the first time in its preliminary opinion and that the respondent has consequently had little time to consider how to overcome the objection. The Board's conclusion on Article 123(2) EPC also takes away the entire basis for the opposition division's interlocutory decision, such that it appears appropriate to provide the opportunity for the respondent to develop its strategy afresh in trying to overcome the new objection. With remittal having been requested by the respondent, and accepted as appropriate action by the appellant, the Board avails itself of its power under Article 111(1) EPC 1973 to remit the case back to the department of first instance for further prosecution.

- 1.1.6 For completeness it is however noted that the objection of the appellant under Article 123(2) EPC that the addition of the word 'absorbent' to the word 'chassis' also lacked basis is not accepted. As also argued by the respondent in this regard, the Board finds that the skilled reader would understand the claimed garment being absorbent as necessarily and implicitly having an absorbent chassis.

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 for further prosecution.

The Registrar:

The Chairwoman:



M. H. A. Patin

G. de Crignis

Decision electronically authenticated