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**Datasheet for the decision
of 23 March 2018**

Case Number: T 1284/14 - 3.2.06

Application Number: 02712456.9

Publication Number: 1374817

IPC: A61F13/537

Language of the proceedings: EN

Title of invention:

LIQUID DISTRIBUTION UNIT AND ABSORBENT PRODUCT HAVING THE SAME

Patent Proprietor:

Daio Paper Corporation

Opponents:

SCA HYGIENE PRODUCTS AB
THE PROCTER & GAMBLE COMPANY

Relevant legal provisions:

EPC Art. 123(2)

Keyword:

Amendments - extension beyond the content of the application
as filed (yes)



Beschwerdekammern

Boards of Appeal

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Case Number: T 1284/14 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 23 March 2018

Appellant:
(Patent Proprietor)

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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted on 10 April 2014
revoking European patent No. 1374817 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman M. Harrison
Members: G. de Crignis
 J. Hoppe

Summary of Facts and Submissions

- I. An appeal was filed by the appellant (patent proprietor) against the decision of the opposition division, in which it revoked European patent No. 1 374 817.
- II. The opposition division did not admit the main request and auxiliary requests 1 to 4 filed during the oral proceedings on 25 March 2014. It also held that the main request filed on 24 February 2014 and auxiliary requests 1 to 4 (auxiliary requests 1 and 2 filed on 24 February 2014 as first and second auxiliary requests; auxiliary request 3 filed on 25 February 2014 as a third auxiliary request; auxiliary request 4 filed on 12 April 2013 as a second auxiliary request) were not allowable in that the subject-matter of claim 1 of each request did not meet the requirement of Article 123(2) EPC.
- III. A statement setting out the grounds of appeal was received with letter of 11 August 2014 at the European Patent Office. The appellant requested that the decision of the opposition division be set aside and the patent be maintained based on the requests filed in opposition proceedings, or on the basis of the requests attached to its grounds of appeal including a request labelled as "main request" and auxiliary requests 1 to 7. Oral proceedings were requested.
- IV. The respondents (opponents OI and OII) requested dismissal of the appeal.
- V. The Board summoned the parties to oral proceedings.

- VI. The appellant withdrew its request for oral proceedings and announced that it would not attend the oral proceedings.
- VII. With a communication prior to the oral proceedings the Board indicated its understanding of the order of requests made by the appellant and also stated its provisional opinion that none of the requests appeared to be allowable due to a contravention of Article 123(2) EPC.
- VIII. Respondents I and II informed the Board that they would not attend the oral proceedings.
- IX. Oral proceedings were held before the Board on 23 March 2018 in the absence of the appellant and both respondents.

The requests made by the appellant in its grounds of appeal (see point III above) remained unchanged. The respondent (opponent 1) requested in writing that the appeal be dismissed. The respondent (opponent 2) requested in writing that the appeal be dismissed and that the case be remitted to the opposition division if further examination of novelty or inventive step is required.

- X. Claim 1 of the main request (24 February 2014) reads as follows:

"An absorbent article comprising an absorbent member (40), including:
a liquid permeable top sheet (47) positioned on an inner side with respect to a wearer's body in a wearing state, the top sheet being a nonwoven fabric containing synthetic fibers as major components;

a liquid impermeable sheet positioned on an outer side from the top sheet;
an absorbent disposed between the top sheet and the liquid impermeable sheet comprising a first absorbent sheet (43) and a second absorbent sheet (46), said second absorbent sheet containing super absorbent polymer particles as a major component;
a liquid distribution unit (100) disposed in a position between the wearer and the absorbent,
wherein the liquid distribution unit is composed of a liquid impermeable material and comprises a plurality of openings and a plurality of introductory tubes (12), each of the introductory tubes extending toward a surface of the absorbent or a surface of the liquid permeable top sheet from each of the openings,
an end of each of the introductory tubes is contacted to the surface of the absorbent or the surface of the liquid permeable top sheet;
the introductory tubes are adjacent to one another through a space (P), and the open area ratio of the openings is in a range of 10% to 90% of the surface of said unit and the number of the openings is at least 200 per 100 cm² of said unit."

Claim 1 of auxiliary requests 1 and 2 (filed on 24 February 2014), auxiliary request 3 (filed on 25 February 2014) and auxiliary request 4 (filed on 12 April 2013 as a second auxiliary request) includes the feature:

"an end of each of the introductory tubes is contacted to the surface of the absorbent or the surface of the liquid permeable top sheet".

Claim 1 of the main request and of auxiliary requests 1 to 4, all filed on 25 March 2014 includes the feature:

"an end of each of the introductory tubes is contacted to the surface of the absorbent member". These requests were not admitted by the opposition division.

Claim 1 of the main request and of auxiliary requests 1, 2 and 3 (submitted with letter dated 11 August 2014) include the feature:

"an end of each of the introductory tubes is contacted to the surface of the absorbent or the surface of the liquid permeable top sheet".

Claim 1 of auxiliary requests 4 and 5 (submitted with letter dated 11 August 2014) has been amended to include the above cited feature in the wording:
"an end of each of the introductory tubes is contacted to the surface of the liquid permeable top sheet".

Claim 1 of auxiliary requests 6 and 7 (submitted with letter dated 11 August 2014) has been amended to include the above cited feature in the wording:
"an end of each of the introductory tubes is contacted to the surface of the absorbent".

The further amendments made in claim 1 of any of the requests are not relevant for the decision.

XI. The appellant argued as follows with respect to the feature present in all of the various requests:

The requirement of Article 123(2) EPC was met. Concerning the feature of "each of the introductory tubes extending toward a surface fo the absorbent from each of the openings, an end of each of the introductory tubes is contacted to the surface of the absorbent or the surface of the liquid permeable top sheet", the introductory tubes were part of the liquid

distribution unit. Page 5 of the application as filed gave information about the orientation of the introductory tubes. The patent in suit disclosed only one length ("H") of the tubes such as shown in the sketch of Figure 5 and referred to throughout the text of the description. No disclosure was present concerning two possible different lengths of the tubes (such as considered by the opposition division). Nothing in the patent in suit would justify a reading that "some tubes are not in contact with the surface".

In the auxiliary requests filed in the appeal proceedings, the term "an end of each of the introductory tubes is contacted to the surface of the absorbent or the surface of the liquid permeable top sheet", was amended into "each of the introductory tubes extending toward a surface of the absorbent from each of the openings". This amendment replied to the raised objection.

XII. The respondents argued with respect to this feature:

There was no disclosure in the application as filed of the feature: "an end of each of the introductory tubes is contacted to the surface of the absorbent (or the surface of the liquid permeable top sheet)".

Figure 5 was merely a sketch showing an "explanatory view showing a mechanism of liquid distribution" (see page 8, l. 16-24 of the application as originally filed). Accordingly, it could not provide a basis for the above cited feature.

The requirement of Article 123(2) EPC was not met in any of the requests, this feature having been included in claim 1 either with this wording or with the

deletion of one of the surfaces to which an end of each of the introductory tubes should be contacted to. This deletion did not overcome the objection.

Reasons for the Decision

1. *Main request (filed on 24 February 2014)*
- 1.1 The opposition division held that the requirement of Article 123(2) EPC was not met at least in that no disclosure in the application as filed was present for the feature in claim 1 of "an end of each of the introductory tubes is contacted to the surface of the absorbent or the surface of the liquid permeable top sheet".
- 1.2 The appellant argues that the basis for this feature is to be found on page 5 and in Figure 5 in the description of the application as originally filed, and that the description would not disclose tubes of different lengths.
- 1.3 Figure 5 is a schematic drawing. It shows an enlarged view of a part of a liquid distribution unit and an absorbent surface disposed under the unit shown in Figure 4. Whether each of the introductory tubes are actually in contact with an underlying surface cannot be established from this schematic drawing.
- 1.4 The description as originally filed (in the following cited as: "description") on page 5 does not disclose the objected feature, in particular the extension of

the end of each of the introductory tubes in relation to the adjacent surfaces is not referred to. The description discloses in this respect that the liquid distribution unit is disposed (page 5, l. 5-7) "to keep in contact with the surface of a liquid permeable sheet of an absorbent article", the liquid distribution unit (page 5, l. 9-11) "includes a plurality of liquid distribution passages in a hanging direction with respect to the surface of the unit", and that the introductory tubes are (page 5, l. 15-20) "extending toward the surface of an absorbent member from the openings, and may be formed so as to guide the liquid from the openings toward the surface of the absorbent member through the introductory tubes". Additionally it is disclosed (page 5, l. 27/28) that the "length of the introductory tube is preferably not less than 0.50 mm and not more than 5 mm". Hence, no uniform length of each of the introductory tubes is disclosed, nor is there a disclosure of a contact of each of the introductory tubes with an adjacent surface.

- 1.5 Also the further description is not related to the length of each of the introductory tubes concerning their extension in relation to the adjacent layer(s). Moreover, in the absence of any statement in the description concerning the congruence of the length of the individual tubes or concerning the contact with regard to adjacent layers, there is no disclosure which could be considered as implicitly referring thereto. Contrary to the arguments of the appellant, and as argued by the respondents, the fact that the description does not explicitly mention tubes of different lengths does not implicitly or logically lead

to the consequence that they are identical and contact the surface of the absorbent.

1.6 Hence, the Board concludes that this feature is neither explicitly nor implicitly disclosed. Accordingly, there is no basis for the above-cited feature in the application as filed and the requirement of Article 123(2) EPC is not met.

1.7 Claim 1 of auxiliary requests 1 and 2 of 24 February 2014, auxiliary request 3 of 25 February 2014 and of auxiliary request 4 filed on 12 April 2013 as a second auxiliary request, all include the feature discussed above in relation to claim 1 of the main request. Accordingly, the above conclusion applies equally to these requests such that these requests are also not allowable.

2. *Main request and auxiliary requests 1 to 4 (filed on 25 March 2014)*

Although these requests were not admitted by the opposition division, it has been noted that claim 1 of each of these requests also includes the feature referred to above - even though limited to one of the alternatives, namely the surface of the absorbent which is additionally further specified as being the surface of the absorbent member. It is not necessary to consider the admittance (or not) of these requests into proceedings, since the above conclusion applies equally.

3. *Main request and auxiliary requests 1 to 7 (filed with the grounds of appeal on 11 August 2014)*

- 3.1 The feature discussed above in relation to claim 1 of the main request is included in claim 1 of each of auxiliary requests 1, 2 and 3 (submitted with letter dated 11 August 2014). Accordingly, the above conclusion applies equally to these requests such that these requests are also not allowable.
- 3.2 In claim 1 of each of auxiliary requests 4 and 5 (submitted with letter dated 11 August 2014) the aforementioned feature was amended in that the feature is limited to read:
"an end of each of the introductory tubes is contacted to the surface of the liquid permeable top sheet". However, this limitation cannot overcome the above objection. No basis is present in the application as filed for this subject-matter as already set out under item 1 above. Again, therefore, the requirement of Article 123(2) EPC is not met.
- 3.3 In claim 1 of each of auxiliary requests 6 and 7 (submitted with letter dated 11 August 2014) this feature was amended to read:
"an end of each of the introductory tubes is contacted to the surface of the absorbent". Again, this limitation cannot overcome the objection. No basis is present in the application as filed for this wording as already set out under item 1 above and the requirement of Article 123(2) EPC is not met.
4. Hence, there is no basis for the objected feature in the originally filed application and the requirement of Article 123(2) EPC is therefore not met by the subject-matter of any claim 1 of any request submitted.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



L. Malécot-Grob

M. Harrison

Decision electronically authenticated