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Case Number: T 2004/14 - 3.2.06

Application Number: 00978178.2

Publication Number: 1244410

IPC: A61F13/514, A61F13/535, A61F13/472, A61F13/532

Language of the proceedings: EN

Title of invention:
ABSORBENT ARTICLE WITH FLUID IMPERMEABLE BACKSHEET PORTION BENEATH MAIN ABSORPTION AREA

Patent Proprietor:
SCA Hygiene Products AB

Opponent:
THE PROCTER & GAMBLE COMPANY

Headword:

Relevant legal provisions:
EPC Art. 83

Keyword:
Sufficiency of disclosure - (no)

Decisions cited:

Catchword:

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Beschwerdekammern

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Chambres de recours

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Case Number: T 2004/14 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 6 September 2018

Appellant: (Opponent)	THE PROCTER & GAMBLE COMPANY One Procter & Gamble Plaza Cincinnati, Ohio 45202 (US)
Representative:	Anderson, James Edward George Elkington and Fife LLP Prospect House 8 Pembroke Road Sevenoaks, Kent TN13 1XR (GB)
Respondent: (Patent Proprietor)	SCA Hygiene Products AB 405 03 Göteborg (SE)
Representative:	Andersson, Per Rune Zacco Sweden AB P.O. Box 5581 114 85 Stockholm (SE)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 28 July 2014 concerning maintenance of the European Patent No. 1244410 in amended form.**

Composition of the Board:

Chairman	T. Rosenblatt
Members:	P. Cipriano
	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. 1 244 410 in an amended form met the requirements of the EPC.

II. The appellant requested with its grounds of appeal that the interlocutory decision be set aside and the patent be revoked. Auxiliarily, oral proceedings were requested.

III. The respondent (proprietor) requested in its reply that the appeal be dismissed, auxiliarily that the patent be maintained in an amended form according to one of auxiliary requests 1 to 7. An auxiliary request for oral proceedings was also made.

IV. The following documents were *inter alia* referred to by the parties:

D1 "Nonwovens: Theory, Process, Performance and Testing", TAPPI Press, 1993, Part B, pages 221-225;

D2 ISO 9073-6 "Textiles - Test methods for nonwovens - Part 6: Absorption" dated 1 December 2000;

D4 ISO 11948-1 "Urine-absorbing aids- Part 1: Whole product testing";

D12 Statement of Michael Purdon and EP 0 471 114 A2 in annex.

V. The Board issued a summons to oral proceedings and a communication containing its provisional opinion, in which it indicated that the subject-matter of claim 2 of the main request seemed to be unclear and that the invention defined in claim 1 of the main request did not seem to be sufficiently disclosed.

VI. With letter of 25 July 2018 the respondent filed a new main request and five auxiliary requests to replace the requests previously submitted.

VII. Oral proceedings were held before the Board on 6 September 2018.

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 or on the basis of one of the auxiliary requests 1 to 5 filed with letter dated 25 July 2018.

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

"An absorbent product in the form of a sanitary towel, a panty liner or an incontinence pad, with a longitudinal direction and a transverse direction, two side edges (109,110) extending in the longitudinal direction, a front portion (114), a rear portion (115), a first surface intended to be facing the wearer during use and a second surface intended to be facing away from the wearer during use, and an absorption body (105) arranged between the first surface and the second surface, the absorption body (105) having a liquid storage area (106), and a secondary absorption area (107), the secondary absorption area (107) comprising portions which completely surround the liquid storage area (106) in the plane of the product, and a liquid-impermeable material layer (104) being arranged on the second surface of the product, characterized in that the liquid storage area (106) accounts for at least 75% of the total absorption capacity of the product, and

that the liquid-impermeable material layer (104) is arranged only within the liquid storage area."

Claim 1 of each of the auxiliary requests 1 to 5 includes the following feature of claim 1 of the main request:

"the liquid storage area (106) accounts for at least 75% of the total absorption capacity of the product"

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

Main request - sufficiency of disclosure

"Absorption capacity" was a term that did not have a standard meaning in the art. The patent did not give a definition of such a parameter and was silent about how such an absorption capacity should be measured. As attested by D12, absorbency could be measured either by spontaneous absorption tests or liquid retention tests that yield different values and would lead to different relations between the absorption capacity of the liquid storage and the total absorption capacity of the product, depending on the test and the materials chosen.

The blotter-method was not the only possible test. Whilst it was true that the introduction of D4 stated that tests had been performed in non-ambulatory heavily incontinent adults, it did not exclude other groups and mentioned simply that the test had not been validated for absorbent cores that were non-uniform in composition and absorbing properties. In addition the wording of claim 1 neither excluded products for non-ambulatory adults nor did it define details regarding

the core, thus the test of D4 was also suitable to test the absorption capacity of the product.

Even if, following the argument of the respondent, the blotter-method were the only possible choice for the skilled person, the parameters for performing the test would still be missing. For example, if the liquid storage area were made of a superabsorbent material (as suggested in paragraph [0033] of the patent), the liquid would be trapped in a gel and the final test results would be similar regardless of a pressure applied to the product. In contrast, a secondary absorption area made of cellulose-fibre-based material (as also suggested in paragraph [0033]) would expel much more water depending on the pressure applied. The value of the total absorption capacity would therefore vary considerably according to the pressure chosen to perform the blotter-method.

The invention according to claim 1 of the main request was thus not sufficiently disclosed.

Auxiliary requests 1 to 5

The feature "liquid storage area (106) accounts for at least 75% of the total absorption capacity of the product" was also present in claim 1 of the auxiliary requests 1 to 5, thus the invention of claim 1 of each of the respective requests could not be carried out without undue burden for the same reasons as claim 1 of the main request.

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

Main request -sufficiency of disclosure

Methods for measuring absorption capacity were readily known to the skilled person in the art, which would choose a suitable one as attested by D12. The introduction of D4 indicated that the method of D4 was not suitable, since it was only applicable to non-ambulatory heavily incontinent persons and excluded babies and ambulatory adults (the user groups to whom the patent was directed and which required products with several parts and different absorbent capacities).

The skilled person would then recognize from the absorption capacities required in paragraph [0029] for the user group of the patent that the only possible test would be the blotter-method, which was the only one adapted to non-uniform products.

Concerning the pressure to be applied, the blotter-method had been disclosed in 24 patent applications applying the same pressure (17,6 grams per square centimeter). The skilled person in knowledge of the prior art would thus recognize that this was the widespread applicable pressure in the art that should be used.

Further, the patent indicated in column 6, lines 16 to 20, the approximate absorption capacity for a panty liner and a sanitary towel. The skilled person would consider this to be an information regarding the actual capacity in use and would understand that the methods which gave a result in the order of these values were the most valuable.

Alternatively, it could be argued that, since only the relationship between the absorption capacity of the liquid storage area and the total absorption capacity of the product (instead of a concrete value) was claimed, any of the suitable methods could be used by the skilled person to arrive at such relationship.

The invention according to claim 1 of the main request was thus sufficiently disclosed.

Reasons for the Decision

1. Main request - sufficiency of disclosure

1.1 Claim 1 of the main request defines that "the liquid storage area (106) accounts for at least 75% of the total absorption capacity of the product".

1.2 When wishing to determine if the liquid storage area accounts for at least 75% of the total absorption capacity of the claimed product, the skilled person must be able, on the basis of the disclosure as a whole and using its common general knowledge, to reliably determine the absorption capacity of the liquid storage area and the total absorption capacity of the entire product.

1.3 The parameter "absorption capacity" does not have a standard meaning within the technical field of absorbent products.

It was not disputed that there is no indication in the disclosure of the patent as a whole regarding how this

absorption capacity is defined and how it should be measured.

It was acknowledged by the respondent that several methods for measuring the absorption capacity of an absorbent product were known to the skilled person, such as the liquid retention tests mentioned in D12, points 5 and 6, or in D1, D2, D4. As explained in the statement of D12, paragraph 6, these liquid retention tests may:

i) include interstitial fluids (e.g. the method described in D4), i.e. fluid absorbed or held in interstitial spaces of an absorbent product, for example between the fibers of one of its absorbent components, which is taken into account in the determination of the product's absorption capacity,

ii) exclude some of the interstitial fluids (e.g. the method described in D2), for example by applying vertical drainage of interstitial fluids by gravity, or

iii) exclude most of the interstitial fluids (e.g. the blotter-method described on page 4, lines 31 to 45, of the patent application annexed of D12), by applying an external load on the product.

In all of the exemplified methods above the absorption capacity is essentially determined by a comparison of the weight of a product in its dry state, i.e. before absorption of fluid, and of its final weight loaded with absorbed fluid, where its final weight is determined according to the above methods after drainage or not of interstitial fluid. The determination of the relative absorption capacity ("at least 75%") defined by the crucial feature cited above

could be obtained by a determination of the total absorption capacity of the entire product and a determination of the absorption capacity of only the absorbent body.

The Board can agree that a skilled person would exclude liquid retention tests comprising vertical drainage (under point ii) above) such as the one of D2. These do not seem to be appropriate for draining a product according to the invention, since they do not resemble the way that a user would wear such a product. However, tests falling under categories i) and iii) do still remain.

It is plausible that procedures taking into account interstitial fluids result in an increased value for the absorption capacity. The measured values for the absorption capacity would thus vary depending on the nature of the materials constituting the product and the test method chosen. The Board finds that, contrary to the respondent's argument, no experimental data is needed. In fact, as exemplified by the materials suggested in paragraph [0033] of the patent, a liquid storage area made of superabsorbent material, where liquid is absorbed in a medium forming a gel, is less susceptible to applied pressure than a secondary absorption area made of a fibre wadding of synthetic fibres. The absorption capacity of such a liquid storage area, made of a superabsorbent polymer, would not vary substantially for the methods mentioned above. The total absorption capacity of the absorbent product including a superabsorbent liquid storage area and additionally a fibrous secondary absorption area, would thus vary depending on whether interstitial fluid retained in the fibrous secondary absorption area were included or whether most of the interstitial fluid

would be expelled from it for the determination of the total absorption capacity. Furthermore, regarding methods of determination in which most of the interstitial fluid would be excluded (category under point iii) above), the value of the total absorption capacity would then still depend on the undetermined factors influencing the amount of expelled interstitial fluids, e.g. under which external pressure or load the interstitial fluid should be drained from the product. The relative absorption capacity of the liquid storage area compared to the product's total absorption capacity depends consequently on the method of determination and the test conditions (e.g. level of external pressure or load applied).

In the absence of any indication in the patent in regard to the method (and the test conditions) of determining the absorption capacity the skilled person is not able to reliably and repeatably determine the crucial condition set out in claim 1. The patent therefore does not disclose the invention defined in claim 1 in a manner sufficiently clear and complete for it to be carried out by a skilled person.

1.4 The respondent's arguments, that even without an indication the skilled person would still recognize the blotter-method of D12 as the only possible method, whereas D4 was not a suitable method since it was only applicable to non-ambulatory heavily incontinent persons, cannot be accepted by the Board. In fact, the introduction of D4 states that the method was tested *inter alia* on non-ambulatory female users. It continues to state that its applicability to other groups is "unknown", i.e. it has never been carried out with other groups. These statements thus do not exclude its use in tests of similar products intended for other

groups.

The third paragraph of the introduction mentions that user performance of the product is affected *inter alia* by the position and motion of the user or by the number of parts of the product. The paragraph warns that the test cannot differentiate between these features. However, this also applies to the blotter-method as well as the other liquid retention tests referred in D12 and does therefore not disqualify the methods of D4 to be considered by the skilled person. The Board notes that D4 is an ISO-standard, directed to whole product testing of urine absorbing aids and would clearly present one of the methods considered by the skilled person required to determine the absorption capacity of such products covered also by claim 1.

Moreover, the product of claim 1 does not have any feature that would exclude the use of the claimed product by heavily incontinent, non-ambulatory subjects. Paragraph [0029] of the patent in suit mentions the (non-ambulatory) night use of the product, i.e. the invention of claim 1 also applies to non-ambulatory subjects.

The blotter-method in the annex of D12 is thus not the only applicable test known by the skilled person and it is not clear for the skilled person, on the basis of the disclosure as a whole and using its common general knowledge, how absorption capacity should be determined or which test should be applied to determine it.

1.5 Even if the skilled person were to consider the blotter-method, at least the value for the draining pressure to be applied in order to expel interstitial fluids would still be lacking.

The argument that twenty-four patent publications disclosed the blotter-method being performed with the pressure of 17,6 grams per square centimeter so that the skilled person would have recognised that this was the value to be used, does not convince the Board. Unlike the method of D4, the blotter-method is not a standardized test comprising specific instructions for its procedure and requires the choice of an appropriate drainage pressure to be applied, which could be different according to the application and type of user group intended to apply the product.

In addition, all the twenty-four patents are solely from two corporations, as acknowledged by the respondent (who did not state either that it generally employed this test for the relevant purpose). It is likely that, when applying such a non-standardized method as the blotter-method, different test laboratories from different companies with different internal processes would perform the test under different conditions, which is exactly what standards aim to avoid. Further, the proportion between the twenty-four patents and the total number of patents disclosing blotter-methods is also unknown, making it impossible to assess the relevance of this number of publications and the relevance of the pressure value indicated therein.

Thus, even assuming that the blotter-method should be used, it is not clear for skilled person, on the basis of the disclosure as a whole and using its common general knowledge, what the required pressure to determine the absorption capacity should be.

1.6 The argument from the respondent, that the level of absorbed liquids indicated in the description (column 6, lines 16 to 20 of the patent) would guide the skilled person to select a suitable test, does not convince the Board. These values are only possible estimations of the capacity required for panty liners and sanitary towels. In fact, it is stated in the same paragraph further below that, for night use and incontinence pads, a greater (unspecified) capacity may be desirable. The skilled person would thus not interpret the indicated values as restrictive or indicative in any way.

Further, none of the tests discussed above has any indication of suitability or limitation regarding the amount of liquid to be absorbed. Thus the skilled person would not be guided to any particular absorbency test when faced with the possible capacity values for panty liners and sanitary towels indicated in the description.

1.7 The alternative argumentation of the respondent that only with the relationship between the absorption capacity of the liquid storage area and the total absorption capacity of the product being claimed, any of the suitable methods could be used, is also not found convincing by the Board. As mentioned already above, the absence of a clear definition for absorption capacity also affects the ratio between the absorption capacity of the liquid storage area and of the whole product.

1.8 The invention according to claim 1 of the main request does therefore not fulfill the requirement of Article 83 EPC. The main request is thus not allowable.

2. Auxiliary requests 1 to 5

2.1 Claim 1 of each of the auxiliary requests 1 to 5 includes the crucial feature "liquid storage area (106) accounts for at least 75% of the total absorption capacity of the product". In absence of any argument from the respondent in support of these requests beyond those already presented with respect to the main request on the matter of sufficiency of disclosure, the Board finds for the same reasons as the main request that the invention according to claim 1 of each of the auxiliary requests 1 to 5 is not disclosed in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art.

2.2 Since claim 1 of each of the auxiliary requests 1 to 5 does not meet the requirement of Article 83 EPC, the auxiliary requests 1 to 5 are also not allowable.

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:

M. H. A. Patin T. Rosenblatt

Decision electronically authenticated