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**Datasheet for the decision  
of 17 June 2019**

**Case Number:** T 0741/15 - 3.2.06

**Application Number:** 03734496.7

**Publication Number:** 1575469

**IPC:** A61F13/15

**Language of the proceedings:** EN

**Title of invention:**

DISPOSABLE UNDERGARMENT WITH A GATHERED CROTCH MEMBER AND  
METHOD FOR THE MANUFACTURE THEREOF

**Patent Proprietor:**

KIMBERLY-CLARK WORLDWIDE, INC.

**Opponent:**

Essity Hygiene and Health Aktiebolag

**Headword:**

**Relevant legal provisions:**

EPC Art. 84, 123(2), 54, 114(2)

**Keyword:**

Claims - clarity (yes)

Amendments - added subject-matter (no)

Novelty - (yes)

Late-filed evidence - admitted (no)

**Decisions cited:**

**Catchword:**



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Case Number: T 0741/15 - 3.2.06

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.06**  
**of 17 June 2019**

**Appellant:** Essity Hygiene and Health Aktiebolag  
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**Respondent:** KIMBERLY-CLARK WORLDWIDE, INC.  
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**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
16 February 2015 concerning maintenance of the  
European Patent No. 1575469 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), hereafter simply 'opponent', against the interlocutory decision of the opposition division in which it found that European patent No. 1 575 469 in an amended form met the requirements of the EPC. The opponent requested that the interlocutory decision be set aside and the patent be revoked in its entirety.
- II. An appeal was also filed by the appellant (proprietor), hereafter simply 'proprietor'.
- III. With communication of 13 July 2015, the Registry of the Board informed the proprietor that the written statement of grounds of appeal had not been filed, and that it was therefore to be expected that its appeal would be rejected as inadmissible pursuant to Article 108, third sentence, EPC in conjunction with Rule 101(1) EPC.
- IV. With letter of 23 July 2015, the proprietor requested a refund of the appeal fee.
- V. With letter of 7 October 2015, the proprietor responded to the opponent's appeal and requested that this be dismissed or, in the alternative, that the patent be maintained according to one of auxiliary requests 1 or 2.
- VI. The following documents, referred to by the opponent in its grounds of appeal, are relevant to the present decision:

D3 EP-A-1 249 214

D6 EP-A-0 487 921  
D7 WO-A-96/11657

VII. In support of the alleged public prior use 'Friend', the following documents were submitted:

Annex 1 Declaration of Karl Karlsson  
Annex 2 Declaration of Jacob Stolk

VIII. Oral proceedings were held before the Board on 22 March 2019 during which various objections to the then main request were discussed before the oral proceedings were adjourned to provide the patent proprietor with the opportunity to reconsider its requests in the light of the discussions.

IX. With letter of 2 May 2019 the proprietor filed a new main request and auxiliary requests 1 to 3 to replace all previous requests on file. With a further letter of 6 June 2019 it filed a replacement auxiliary request 1.

X. The oral proceedings were continued on 17 June 2019 during which the proprietor withdrew all its auxiliary requests and filed adapted description pages for the main request filed on 2 May 2019.

XI. The requests of the parties still relevant from the oral proceedings of 22 March 2019 were:

The proprietor requested that D6, D7 and the allegation of prior use not be admitted into the proceedings. The proprietor further requested that the appeal fee be refunded in view of it not having filed a statement of grounds of appeal.

The opponent requested that D6, D7 and the allegation

of prior use be admitted into the proceedings.

The final requests of the parties at the oral proceedings of 17 June 2019 were as follows:

The proprietor requested that the patent be maintained according to the main request filed on 2 May 2019.

The opponent requested that the decision under appeal be set aside and the European patent No. 1 575 469 be revoked.

XII. Claim 1 of the main request (filed on 2 May 2019) reads as follows:

"A method of manufacturing a disposable undergarment comprising:

elongating a body panel material (4, 6) in a first direction to an elongated condition, wherein said body panel material (4, 6) is a laminate material with one or more elastic elements (36) sandwiched therebetween; attaching a crotch member (50) to said body panel material (4,6) while said body panel material (4, 6) is in said elongated condition; and retracting said body panel material (4, 6) in said first direction from said elongated condition to a relaxed condition;

characterized in that:

said crotch member (50) is configured as an absorbent insert (50) having first and second opposed terminal end edges (60, 62) and comprising a substantially liquid permeable topsheet (64) connected to a substantially liquid impermeable backsheet (66) and a retention portion (70) disposed between said topsheet (64) and said backsheet (66);

wherein said absorbent insert (50) is attached to said

body panel material (4, 6) while said body panel material (4, 6) is in said elongated condition; and retracting said body panel material (4, 6) comprises gathering said absorbent insert (50) in said first direction;

wherein said elongating said body panel material (4, 6) in said first direction to said elongated condition comprises elongating said body panel material (4, 6) between about 50% and about 250% in said first direction."

XIII. The opponent's arguments may be summarised as follows:

Admittance of prior use 'Friend'

The prior use was substantiated solely on the basis of the written submissions. Photos 9 and 10 showed the elongated waistband of the pants-type diaper, this evidently having been extended at least 50%.

Admittance of D6 and D7

These documents disclosed the general knowledge of the skilled person insofar as elastic threads with elongation in the claimed range from 50 to 250% were disclosed therein.

Claim 1 of the main request was not clear (Article 84 EPC). It was not possible for a laminate material to have 'elastic elements sandwiched therebetween'; it was also not clear from the wording adopted into claim 1 whether the body panel material comprised the elastic elements or not.

The subject-matter of claim 1 also failed to meet the requirement of Article 123(2) EPC. Page 7, lines 8 to 10 of the application as filed, disclosed a body panel, not the claimed body panel material, and so failed to

provide a direct and unambiguous basis for the feature adopted into claim 1. Further, the last 5 lines on page 7 contradicted the proprietor's interpretation of the above passage used as the basis for the adopted feature.

The subject-matter of claim 1 was also not novel (Article 54 EPC). The last feature of claim 1 was still anticipated by just the elastic members (73, 74) of D3 elongating the claimed amount. Also, the claimed body panel material extension could be referring to the finished article rather than an elongation during the method of manufacture of the undergarment.

XIV. The proprietor's arguments may be summarised as follows:

Admissibility of the appeal

Having intentionally not filed any grounds of appeal, the appeal fee should be reimbursed.

Admittance of alleged prior use 'Friend'

This should not be admitted as it could have been filed before the opposition division. Having failed to present the promised article of the prior use at oral proceedings, the opponent's case in respect of the prior use had changed. Without inspection of the article, it was not possible to confirm that the prior use anticipated all features of the method claim 1, not least that the body panel material was elongated at least 50% while the absorbent core was being attached thereto.

Admittance of D6 and D7

These documents could have been presented before the opposition division and so should not be admitted.



Claim 1 of the main request was clear. A laminate inherently had layers such that the elastic elements implicitly were sandwiched between the layers of the laminate. The subject-matter of claim 1 had basis on page 7, lines 8 to 10, the last 5 lines of page 7 not contradicting the disclosure that the elastic elements were unambiguously comprised in the body panel material.

The subject-matter of claim 1 was also novel. The claimed elongating of the body panel material clearly related to the entirety of the body panel, not just the elastic elements, the claimed elongating also taking place during the method of manufacturing the undergarment.

## **Reasons for the Decision**

1. *Admissibility of the proprietor's appeal and request for refund of the appeal fee*
  - 1.1 The proprietor validly filed a notice of appeal and paid the requisite appeal fee. It failed, however, to file a statement setting out the grounds of appeal. This was not contested. The proprietor's appeal is therefore inadmissible (Article 108, third sentence, EPC in conjunction with Rule 101(1) EPC).
  - 1.2 As regards the proprietor's request for the appeal fee to be refunded, it is noted that the proprietor did not withdraw its appeal at any time, this being a necessary condition for such a refund as provided for in Rule 103(1) and (2) EPC. The request for the appeal fee to

be refunded is thus refused.

2. *Admittance of alleged public prior use 'Friend'*

2.1 With its grounds of appeal, the opponent filed a prior use 'Friend' allegedly depriving the novelty of claims of a request now no longer pursued by the proprietor. Before this request was withdrawn by the proprietor, the Board decided not to admit the prior use as it was not highly relevant (see below).

2.2 In addition to two annexes substantiating the prior use, the opponent indicated in its grounds of appeal that the article itself, which was the subject of the prior use, would be presented at oral proceedings. This however did not occur, the opponent instead relying solely on its written submissions.

2.3 The Board finds that, on the basis of the written submissions, the prior use is not of high relevance. In particular it is not possible to unambiguously establish how the article was made, which is important here since also the then relevant claim 1 concerned a method of manufacture. At least the feature concerning the elongation of the body panel material cannot be unambiguously derived from the written submissions or from the photographs, the statements in this regard amounting to unsubstantiated assertions. It is noted that photos 9 and 10 seemingly show the pants-type diaper in a condition whereby its waist circumference is in an extended state relative to the relaxed state of photos 6 to 8. It is however not unambiguously evident from the photos that the waistband extension occurs equally around its full circumference, photos 9 and 10 seeming to indicate the side areas of the waistband expanding to a greater relative extent than

the front and rear portions attached to the absorbent core. Absent the physical article to possibly confirm this feature or not, the evidence on file is insufficient to unambiguously establish that the body panel material was stretched between about 50 and about 250% when the absorbent insert was attached to the body panel material.

- 2.4 In the absence of an unambiguous disclosure of various features of the then relevant claim 1, the alleged prior use is not of such relevance that it would change the outcome relative to the objections already on file. The public prior use 'Friend' was consequently not admitted into the proceedings under Article 114(2) EPC.

3. *Admittance of D6 and D7*

D6 and D7 were filed with the opponent's statement of grounds of appeal based on the argument that they disclosed the common general knowledge of the skilled person. However, patent documents are not usually suited to show what is included in the common general knowledge and there is nothing particular in D6 or D7 for these to be considered otherwise. Therefore, D6 and D7 are not admitted due to a lack of relevance.

4. *Main request*

4.1 *Article 84 EPC*

The feature added to claim 1 'wherein said body panel material is a laminate material with one or more elastic elements sandwiched therebetween' is clear.

- 4.1.1 Contrary to the opinion of the opponent, the only realistic interpretation of the relationship between

the elastic elements and the laminate material defined by this feature is that the elastic members are located within, and are a part of, the laminate material. As the proprietor also indicated, a laminate material inherently comprises at least two layers such that the only sensible technical understanding is that the elastic elements must be sandwiched between the at least two layers.

4.1.2 Claim 1 thus meets the clarity requirement of Article 84 EPC.

4.2 *Article 123(2) EPC*

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

4.2.1 The basis for the feature added to claim 1 is given as page 7, lines 8 to 10 of the application as filed.

4.2.2 The opponent's objection that the passage quoted above as basis for the amendment to claim 1 disclosed a body panel rather than the claimed body panel material is not accepted. The skilled person would unambiguously interpret this passage to disclose the laminate material as being the equivalent of the claimed body panel material and thus the body panel material having one or more elastic elements sandwiched between the inherent layers of the laminate. This interpretation is also consistently disclosed in the application (see e.g. page 18, lines 16 to 26).

4.2.3 The opponent's contention that the last 5 lines on page 7 contradict this interpretation is not accepted. This paragraph of the description indicates two different ways in which the elastic elements can be secured to

the body panel material in order to realise the material gathers. The discussion of the body panel material being 'secured' to the elastic elements thus unambiguously discloses the manufacturing method comprising the elongation of the elastic elements within the body panel material itself prior to these being secured (e.g. through adhesive) to the sandwiching layers of the body panel material. Whilst the opponent's contention is a linguistically possible interpretation of these last 5 lines of page 7, this is not regarded to be realistic in the context of the application as a whole which unambiguously discloses the elastic elements to be comprised in the body panel material.

4.2.4 The subject-matter of claim 1 is thus directly and unambiguously disclosed in the application as filed (Article 123(2) EPC).

#### 4.3 *Novelty*

The subject-matter of claim 1 is novel (Article 54 EPC).

4.3.1 The sole novelty objection raised by the opponent was based on D3. This fails to disclose the last feature in claim 1, namely:

'wherein said elongating said body panel material (4, 6) in said first direction to said elongated condition comprises elongating said body panel material (4, 6) between about 50% and about 250% in said first direction'.

4.3.2 The opponent's contention that the last feature of claim 1 was anticipated by just the elastic members

(73, 74) of D3 elongating the claimed amount is not accepted. Claim 1 clearly defines that it is the body panel material, not just the elastic elements, which is elongated between about 50% and about 250%. Contrarily, in D3 it is solely the elastic members (73, 74) which are elongated (see col. 8, lines 42 to 47) prior to the absorbent pad (84) being attached to the first and second half-webs (81, 82), not the entire first and second half-webs as would be required to anticipate the claimed feature.

- 4.3.3 The opponent's argument that the claimed body panel material extension could be referring to the finished article is also not accepted. Claim 1 is directed to 'a method of manufacturing a disposable undergarment' and is unambiguous with respect to when the claimed elongation occurs, firstly defining the method step of 'elongating a body panel material' and then the step of 'attaching a crotch member to said body panel material while ... in said elongated condition'. The claimed elongation is thus unequivocally that of the body panel material during manufacture of the disposable undergarment.
- 4.3.4 D3 thus fails to disclose the feature of claim 1 cited in point 4.3.1 above such that the subject-matter of claim 1 is novel over D3 (Article 54 EPC).
- 4.3.5 The opponent confirmed that it had no further attacks on novelty.
- 4.3.6 The Board thus finds that the subject-matter of claim 1 is novel over D3 having consideration to the arguments presented by the opponent. Since no further novelty attack was presented and none is evident to the Board, the subject-matter of claim 1 is found to be novel and

the requirement of Article 54(1) EPC met.

4.4 No further objections to the claims of the present request were raised by the opponent. The proprietor filed amended description pages adapted to the amended claims of the present request. To these, the opponent also raised no objection. The Board also finds these to be unobjectionable.

4.5 The Board thus finds the main request to meet the requirements of the EPC.

## 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 19 of the main request filed by letter of 2 May 2019;
  - description pages 1, 1A and 2 to 14 filed during the oral proceedings before the Board;
  - figures 1 to 5 of the patent specification.

The Registrar:

The Chairman:



M. H. A. Patin

M. Harrison

Decision electronically authenticated