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Datasheet for the decision of 23 May 2019

Case Number: T 1032/15 - 3.2.06

Application Number: 05779017.2

Publication Number: 1773269

IPC: A61F13/15

Language of the proceedings: EN

Title of invention:
DISPOSABLE PULL-ON GARMENT

Patent Proprietor:
The Procter & Gamble Company

Opponent:
Kimberly-Clark Worldwide, Incorporated

Headword:

Relevant legal provisions:
EPC Art. 56, 111(1)
RPBA Art. 13(1)

Keyword:
Late-filed request - admitted (yes)
Novelty - (yes)
Inventive step - (no)
Remittal to the department of first instance - (no) - prima facie not inventive

Decisions cited:

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

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Case Number: T 1032/15 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 23 May 2019

Appellant: (Patent Proprietor)	The Procter & Gamble Company One Procter & Gamble Plaza Cincinnati, OH 45202 (US)
Representative:	Elkington and Fife LLP Prospect House 8 Pembroke Road Sevenoaks, Kent TN13 1XR (GB)
Respondent: (Opponent)	Kimberly-Clark Worldwide, Incorporated 401 North Lake Street PO Box 349 Neenah, Wisconsin 54957-0349 (US)
Representative:	Dehns St. Brides House 10 Salisbury Square London EC4Y 8JD (GB)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 19 March 2015 revoking European patent No. 1773269 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman	M. Harrison
Members:	M. Hannam
	C. Brandt

Summary of Facts and Submissions

I. An appeal was filed by the appellant (patent proprietor) against the decision of the opposition division revoking European Patent No. 1 773 269. With its grounds of appeal, the appellant requested that the decision under appeal be set aside and the case be remitted to the opposition division if novelty of the patent as granted were acknowledged (main request), or, alternatively, that the patent be maintained in amended form on the basis of one of auxiliary requests 1, 1a, 2, 2a, 3, 3a, 4, 4a, 5, 5a, 6, 6a, 7 or 7a filed with the grounds of appeal.

II. The respondent (opponent) requested that the appeal be dismissed.

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

D4 US-A-5 769 838

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 novelty of the subject-matter of claim 1 of the main request would require discussion at oral proceedings and that several of the auxiliary requests appeared to meet with objections under Articles 84 and 123(2) EPC.

V. Oral proceedings were held before the Board on 23 May 2019, during which the appellant withdrew all requests on file (main request and auxiliary requests 1, 1a, 2, 2a, 3, 3a, 4, 4a, 5, 5a, 6, 6a, 7 and 7a as filed with the statement of grounds of appeal) and filed a new

main request dated 23 May 2019 comprising a single claim as the sole request.

The final requests of the parties were as follows:

The appellant requested that the decision under appeal be set aside and the patent be maintained on the basis of the new main request filed during the oral proceedings on 23 May 2019 or that the case be remitted to the opposition division for considering inventive step on the basis of this new main request.

The respondent requested that the appeal be dismissed.

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

"A disposable pull-on garment (20) having a waist opening (36) and two leg openings (34) and extending in a longitudinal direction and a transverse direction, the pull-on garment (20) comprising an absorbent main body (38) and a ring-like elastic belt (40), wherein:

the absorbent main body (38) comprises a liquid pervious topsheet (58), a liquid impervious backsheet (60), and an absorbent core (62) disposed therebetween, the absorbent main body (38) has left and right longitudinally extending side edges (48), front and back transversely extending end edges (50), longitudinally opposing front and back waist panels (52), (54), and a crotch panel (56) between the waist panels (52), (54);

the ring-like elastic belt 40 comprises a front belt portion (84) and a back belt portion (86) each comprising a belt layer (91) and a belt elastic material (96) joined to the belt layer (91) and each having transversely extending proximal (90) and distal edges (88), the proximal edge (90) being located closer

than the distal edge (88) relative to the crotch panel (56) of the absorbent main body (38), longitudinally extending left and right side edges (89) connecting the proximal and distal edges (88) (90), a central panel (80), and left and right side panels (82) contiguous with its central panel (80), each side panel (82) having a longitudinal length (LF) (LB) defined by the respective side edge (89F) (89B) of the respective belt portion (84) (86);

the central panel (80) of the front belt portion (84) is joined to the front waist panel (52) of the absorbent main body (38), the central panel (80) of the back belt portion (86) is joined to the back waist panel (54) of the absorbent main body (38) and the respective left and right side panels (82) of the front belt portion (84) and the back belt portion (86) are joined together at or adjacent to the respective left and right side edges (89) to form the waist opening (36) and the two leg openings (34); and

the longitudinal lengths of the side panels (LB) of the back belt portion (86) are greater than the longitudinal lengths (LF) of the respective side panels of the front belt portion (84), wherein the proximal edges (90) of the front belt portion (84) and the back belt portion (86) are wavy."

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

The subject-matter of claim 1 was novel over D4. D4 failed to disclose:
- side panels having a longitudinal length defined by the respective side edge; and
- the proximal edges of the front belt portion and the back belt portion being wavy.
In the context of the entirety of claim 1 it was clear that the claimed 'longitudinally extending left and

right side edges' must basically be purely longitudinal. This was also apparent for the skilled reader in the claimed pants-type garment. Should there be any doubt as to how the claim should be construed, para. [0022] and Figs. 14 to 16 all clearly showed the side edges being purely longitudinal. The tapered leg edges 71, 71' did not extend longitudinally so the combined edges 71/72 and 71'/72' could not anticipate the longitudinally extending left and right side edges.

The case should be remitted to the opposition division to consider the issue of inventive step. The subject-matter of claim 1 *prima facie* involved an inventive step since the wavy proximal edge enabled the coverage of the side and central panels to be adapted as necessary: a lesser overlap allowing material savings; a greater overlap providing increased structural integrity. The term 'wavy' implied an alternating positive and negative deviation of the edge from the straight line embodiment. This differentiating feature was in claim 7 as originally filed, and as granted, and so was clearly considered important for the inventive garment. The nature of the wavy edge did not require greater definition since even high frequency waves (such as achieved through pinking shears) would achieve greater support below a simple straight line and low amplitude waves still provided support, albeit lesser support than high amplitude waves. Based on this technical effect, the objective problem could be formulated as being 'how to alter the relationship between elements in the central panel without altering article properties in the side panels'.

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

The subject-matter of claim 1 was not novel over D4. In addition to the other features of the claim, D4 also disclosed the proximal edges of the front belt portion and the back belt portion being wavy. This was disclosed by way of a combination of the proximal edge of the second belt layer 44 (see e.g. Fig. 2) with the inflected portion of both the left and right leg edges 71'; The proximal edge of the back belt portion being wavy was similarly disclosed by a combination of the proximal edge of the first belt layer 42 with the inflected portion of both the left and right leg edges 71 (see e.g. Fig. 2).

The subject-matter of claim 1 did not involve an inventive step. The patent was silent regarding any support or coverage advantage of the wavy proximal edge, nor could such be derived from the patent. The problem put forward by the proprietor was not objective as it did not solve that problem over the full scope of the claim, particularly for 'pinking shear' sized waves. That the adopted feature in claim 1 came from a dependent claim did not mean it was important or even solved a problem. The wavy proximal edge thus offered nothing more than an aesthetic effect.

Reasons for the Decision

Main request

1. *Admittance of the request*

1.1 With this request having been filed at oral proceedings before the Board, it may be admitted and considered at the Board's discretion (Article 13(1) RPBA), such discretion being exercised *inter alia* in view of the need for procedural economy. After hearing the parties

on the matter, the Board exercised its discretion to admit the request; the reasons for this decision are however not of importance for the present decision due to the Board finding the request not to be allowable on account of the subject-matter of claim 1 not involving an inventive step (see below).

2. *Remittal / Inventive step*

2.1 The appellant requested remittal of the case to the opposition division for consideration of inventive step. Having filed the (new) main request, it can be assumed that the appellant sees this as meeting all the requirements of the EPC, including that the subject-matter of claim 1 involves an inventive step.

2.2 According to Article 111(1) EPC, 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. In the exercise of its discretion in this case, the Board considers that remitting a case in which the subject-matter of claim 1 fails *prima facie* to involve an inventive step using D4 as the closest prior art would be procedurally inefficient. In particular, it was not apparent to the Board what technical problem might be solved over D4 when considering the added features. The Board thus decided first to consider the issue of inventive step in regard to the subject-matter of claim 1 of this request, and in particular which objective problem was being solved, and to then further consider the issue of remitting the case.

2.3 The respondent's argument that the feature 'wherein the proximal edges of the front belt portion and the back

belt portion are wavy' was known from D4 is not accepted. If the respondent's contention were followed regarding the respective proximal edges including the inflected portion of both the left and right leg edges (see particularly Figs. 1 and 2 of D4), the consequence would be that the claimed relative longitudinal lengths of the side panels would no longer be unambiguously met by the garment of D4. With Fig. 2 being a schematic drawing of the garment and solely the longitudinal distances indicated by 26 and 28 being disclosed, no unambiguous conclusion regarding the side panel lengths can be drawn if the side edges of this panel do not extend the full longitudinal distance indicated by 26 and 28. The transversely extending proximal edges comprising a proximal portion of the leg edges 71/71', as contended by the respondent, thus prohibits an unambiguous side panel edge length to be ascertained such that the feature regarding 'the longitudinal lengths of the side panels of the back belt portion are greater than the longitudinal lengths of the respective side panels of the front belt portion' can then not be unambiguously ascertained.

2.3.1 The appellant maintained that, in addition to the wavy proximal edge, D4 also failed to disclose the claimed longitudinally extending left and right side edges which defined the longitudinal length of each side panel. The Board however does not accept this.

2.3.2 Contrary to the opinion of the appellant, the claimed 'longitudinally extending left and right side edges' are not so limited in the scope of claim 1 so as to have to extend purely in a longitudinal direction. The breadth of the expression 'longitudinally extending ... edges' as understood by the skilled person is such that it also encompasses edges not extending purely

longitudinally i.e. at least also those which predominantly have a longitudinal extension but also have some transverse extension.

2.3.3 The appellant's contention that the claimed ring-like elastic belt was defined by transversely extending proximal and distal edges and longitudinal side edges joining the two transverse edges does not exclusively result in the side edges having to extend purely longitudinally. Whilst a rectangularly shaped belt is indeed one possible embodiment of the claimed arrangement, the scope of the claim is not so limited and nothing in the claim excludes the possibility that the left and right side edges do not extend exclusively longitudinally.

2.3.4 In this regard the appellant's reference to para. [0022] and to Figs. 14 to 16 of the patent does not change this finding. The features present in claim 1 are all clear for the skilled reader and allow them to understand the structural features of the claimed garment. Even if reference to the description were made, para. [0022] describes a particular embodiment of the invention associated with Figs. 9 and 10; Figs. 14 to 16 each disclose different processes of forming the garment of the invention. It follows that the appellant's references all relate to specific embodiments of the invention which, even if referred to, would be understood by the skilled person as disclosing garments falling under the scope of claim 1 rather than an exclusive indication of how claim 1 is to be interpreted.

2.3.5 It thus follows that the claimed longitudinally extending left and right side edges which define the longitudinal length of each side panel are anticipated

by the edges 71/72 and 71'/72' of D4 (see e.g. Fig. 2 and the description in column 6, lines 20 to 24).

2.3.6 In summary, therefore, D4 fails to disclose solely the following feature of claim 1:
'wherein the proximal edges of the front belt portion and the back belt portion are wavy'.

2.4 The entire patent provides no explicit technical effect achieved by the proximal edges being wavy. Para. [0033] discusses the wavy cut lines but provides no indication of a resultant technical effect. The cited paragraph furthermore relates solely to the process for manufacturing the garment and so, in the present case, could anyway only be seen at best as disclosing a possible effect for the process, not for the garment itself. The Board also fails to see a technical problem which would be derivable by the skilled person resulting from the proximal edges being wavy.

2.4.1 The appellant's argument that the differentiating feature of claim 1 over D4 was also in claim 7 as originally filed does not convince the Board that it must therefore have been drafted that way due to it solving a specific problem. This is not a requirement for a dependent claim. The lack of indication in the patent as a whole for a derivable technical problem solved by the wavy proximal edge further underlines this.

2.4.2 The first technical problem formulated by the appellant of 'how to alter the relationship between elements in the central panel without altering article properties in the side panels' is not solved over the whole scope of claim 1 and cannot thus be understood to be an objective problem. The exact nature of the wavy

proximal edge as claimed is undefined and so can be of any wave form, of any frequency and even of any wave amplitude. Although the appellant argued that a single wave element might have advantages in certain situations, claim 1 was not limited to a single wave such that these arguments lack relevance for the whole scope of the claim. As an example, considering a high frequency, low amplitude wave (referred to by the respondent as a 'pinking shear' wave), e.g. ten low amplitude waves across the transverse dimension of the garment, this would not result in any recognisable changes to physical properties in the central panel without equally altering the side panels since the wave pattern would be identical in both central and side panels. This illustrates just one example of how the appellant's problem is not solved by the features of claim 1 when considering that any, undefined, wavy proximal edge is included within its scope. Thus, the purported problem is not solved over the full breadth of the claim.

2.4.3 If, on the other hand, the problem to be solved were formulated as being 'how to provide differential coverage in the transverse direction of the garment', as also mooted by the appellant, the same difficulty arises with this problem not being solved over the whole scope of the claim. If a high frequency wave as above were again considered as the claimed wavy proximal edge, the common, repeating wave pattern in both the central and side panels would not provide any appreciable differential coverage between the central and side panels; this technical problem is thus also not solved across the scope of the claim.

2.4.4 The appellant's further argument that even high frequency waves would achieve greater support in the

longitudinal direction of the garment when compared to a simple straight line edge is not decisive in respect of either of the objective technical problems identified above. These problems concern differences in coverage between regions transversely offset one from the other. Whether a wavy line achieves greater longitudinal 'support' of the garment, which would be almost negligible anyway (unless other more precise measures were taken), thus has no influence on a desired differential coverage in the transverse direction of the garment as motivated by the problems above.

2.4.5 The Board was thus not presented with any technical problem which was plausibly solved over the whole scope of the claim. It thus follows that, based on the case presented by the appellant, for the skilled person, no derivable technical problem is solved by the subject-matter of claim 1 over its whole scope. The proximal edges of the front belt portion and the back belt portion being wavy thus cannot be regarded as presenting anything more than an aesthetic appearance in the context of the garment of claim 1. The subject-matter of claim 1 therefore *prima facie* does not involve an inventive step (Article 56 EPC).

2.4.6 In view of the above finding, the Board sees it as procedurally inefficient to remit the case back to the opposition division. It therefore decided to exercise its discretion in substantively considering the inventive step objections to the subject-matter of claim 1 of the main request and thus not to remit the case to the opposition division for further prosecution (Article 111(1) EPC).

2.4.7 In response to the *prima facie* finding of lack of inventive step above, the appellant in responding to the specific question of the Board in this regard offered no further argument in defence of the main request. The Board thus concludes, for the same reasons which led to the subject-matter of claim 1 being considered *prima facie* not to involve an inventive step, that the subject-matter of claim 1 does not involve an inventive step (Article 56 EPC). The main request is thus not allowable.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

M. H. A. Patin M. Harrison

Decision electronically authenticated