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**Datasheet for the decision
of 13 June 2019**

Case Number: T 1066/15 - 3.2.06

Application Number: 03791400.9

Publication Number: 1550425

IPC: A61F13/514, A61F13/15

Language of the proceedings: EN

Title of invention:

ABSORBENT ARTICLE HAVING DECORATIVE ELEMENT

Patent Proprietor:

UNI-CHARM CO., LTD.

Opponent:

THE PROCTER & GAMBLE COMPANY

Headword:

Relevant legal provisions:

EPC Art. 83, 123(2), 54, 56, 111(1)
RPBA Art. 13(1)

Keyword:

Sufficiency of disclosure - (yes)

Amendments - added subject-matter (no)

Novelty - (yes)

Inventive step - (yes)

Remittal to the department of first instance - (yes)

Decisions cited:

Catchword:



Beschwerdekammern

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Case Number: T 1066/15 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 13 June 2019

Appellant: THE PROCTER & GAMBLE COMPANY
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 17 March 2015
rejecting the opposition filed against European
patent No. 1550425 pursuant to Article 101(2)
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 (opponent) against the decision of the opposition division rejecting the opposition to European patent No. 1 550 425. It requested that the decision be set aside and the patent be revoked.
- II. In its letter of response, the respondent (patent proprietor) requested that the appeal be dismissed or that the patent be maintained according to one of auxiliary requests 1 and 2.
- III. The following documents, referred to by the parties in their submissions, are relevant to the present decision:
- D3 EP-A-1 415 629
D3a WO-A-03/011201
D4 EP-A-1 078 620
D5 US-A-2002/0095126
- 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 ground for opposition under Article 100(c) EPC appeared to prejudice maintenance of the patent as granted. It further provided the preliminary opinion that the objections raised under Article 100(b) EPC did not appear persuasive.
- V. With letter of 21 May 2019 the appellant indicated that it would not attend the scheduled oral proceedings.

- VI. With letter of 3 June 2019 the respondent filed additional auxiliary requests 3 to 6.
- VII. Oral proceedings were held before the Board on 13 June 2019 in the absence of the appellant, during which the respondent withdrew its main request and auxiliary requests 1 to 4 and filed a new auxiliary request 1.

The final requests of the parties were as follows:

The appellant requested (in writing) that the decision under appeal be set aside and the European patent No. 1 550 425 be revoked.

The respondent requested that the patent be maintained in amended form on the basis of the new auxiliary request 1 filed during the oral proceedings on 13 June 2019.

- VIII. Claim 1 of the new auxiliary request 1 reads as follows:

"An absorbent article (10) comprising a flexible chassis (12) defining front and rear waist regions (15, 16) opposed to each other when said article is put on the wearer's body and a crotch region (17) extending between said front and rear waist regions, a semirigid absorbent member (13) laid on an inner surface of said chassis and having a decorative element (14) adapted to be seen through said chassis and laid on at least one of said front and rear waist regions (15, 16), wherein said front and rear waist regions are joined together along transversely opposite lateral marginal zones (18) thereof so as to form a waist-hole (19) and a pair of leg-holes (20), wherein said chassis has an intermediate zone (26) and opposite lateral zones (27),

wherein the opposite lateral marginal zones (18) are at transversely opposite margins of the opposite lateral zones (27), and said intermediate zone (26) exhibiting an optical transmittance higher than an optical transmittance exhibited by said opposed lateral zones (27), wherein said intermediate zone (26) of the chassis and the opposed lateral zones (27) are formed by a fibrous non-woven fabric and a fiber density in said opposed lateral zones (27) is higher than a fiber density in said intermediate zone (26), wherein said waist-hole (19), said leg-holes (20) and said waist regions (15, 16) extending between said waist-hole (19) and said leg-holes (20) are provided with elastic members (25), respectively, so that said intermediate zone (26) of said chassis (92, sic) in which said decorative element (14) is laid does not substantially elastically contract under the influence of said elastic members (25), wherein each of said elastic members (25) provided in said waist regions (15, 16) is secured only at longitudinally opposite ends thereof to said opposite lateral zones of said chassis (12), wherein said chassis (12) comprises inner and outer sheets (29a, 29) laminated on each other and a liquid barrier sheet (30) laminated on an inner surface of said inner sheet facing said absorbent member, wherein said decorative element (14) is displayed on said liquid barrier sheet."

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

The requirements of Article 83 EPC were not met. It was unclear whether the claimed optical transmittance was to be measured in a stretched or unstretched state of the intermediate and lateral zones. It was also unclear whether the liquid barrier sheet was included in the

chassis when the optical transmittance was measured. No indication of which measurement technique should be used was provided in claim 1 which would result in potentially different results from the different measurement techniques.

The subject-matter of the independent claims (of previous requests) lacked an inventive step starting from any of D3, D4 or D5. D5 disclosed the decorative element 6 on the liquid barrier sheet 11 (see paragraph [0026]).

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

The subject-matter of claim 1 involved an inventive step when starting from D4. Securing the elastic members only at their longitudinally opposite ends to the opposite lateral zones of the chassis increased the optical transmittance of the intermediate zone and reduced that in the opposed lateral zones relative to D4. The decorative element on the liquid barrier sheet also improved the visibility of the element due to the high fiber density in the liquid barrier sheet enabling high quality image presentation. As a consequence, all the differentiating features of claim 1 over D4 contributed to enhancing the visibility of the decorative element. Neither D5 nor the general knowledge of the skilled person provided a hint as to how D4 should be modified in order to reach the claimed solution while solving the objective technical problem. The same was true when starting from D5 and combining this with the technical teaching of D4 or the general knowledge of the skilled person.

Remittal of the case back to the opposition division for adaptation of the description was appropriate.

Reasons for the Decision

New Auxiliary request 1

1. *Article 123(2) EPC*

- 1.1 The subject-matter of claim 1 directly and unambiguously has basis as follows:

Claims 1, 7, 8 and 15 to 17 as filed, combined with the features

'wherein said intermediate zone (26) of the chassis and the opposed lateral zones (27) are formed by a fibrous non-woven fabric and a fiber density in said opposed lateral zones (27) is higher than a fiber density in said intermediate zone (26)'

coming from the second alternative disclosed in paragraph [0006] of the application as filed, combined with

'wherein the opposite lateral marginal zones (18) are at transversely opposite margins of the opposite lateral zones (27)' (inserted for reasons of clarity) being implicitly derivable from all the figures showing precisely what is to be understood by the marginal zones.

- 1.2 The appellant presented no arguments questioning the basis for this claim, nor does the Board find there to be any doubt in this regard.

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

2. *Article 83 EPC*

The invention is disclosed in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art.

2.1 The sole objection raised by the appellant in its grounds of appeal, that the skilled person would not know whether to carry out the optical transmittance measurement on a stretched or unstretched chassis, is not persuasive. As indicated in the Board's preliminary opinion, paragraphs [0024] to [0026] of the patent in combination with the knowledge that material 'gathers' affect optical transmittance would guide the skilled person to carrying out the measurement on substantially flat material samples. To this preliminary opinion the appellant presented no counter arguments.

2.2 The appellant's further sufficiency of disclosure arguments, presented for the first time in its letter of 7 September 2018, are an amendment to its case (see Article 13(1) RPBA), which may be admitted and considered at the discretion of the Board. An important factor in the exercise of this discretion is the *prima facie* relevance of the new arguments.

2.2.1 As indicated in the preliminary opinion, it is the relative optical transmittance which is claimed and the decorative element needs to be visible solely through the outer sheet 29 of the chassis such that the related objections of the appellant are *prima facie* not persuasive. To these elements of the preliminary opinion the appellant also presented no counter

arguments.

2.2.2 As regards a further objection of sufficiency raised by the appellant, that the skilled person would be unsure as to whether the optical transmittance of the chassis should be measured including the liquid barrier sheet or not, the Board finds there not to be any doubt. Although claim 1 indicates that the liquid barrier sheet is comprised in the chassis, the Board finds the disclosure in paragraph [0023] of the patent to be unequivocal in how the optical transmittance of the chassis is to be measured: '..it is essential that the optical transmittance of the chassis 12 except for the liquid barrier sheet 30 is higher in the intermediate zone 26 than in the opposite lateral zones 27.' That it is solely the inner and outer sheets (29a, 29) of the chassis that are of importance for the optical transmittance is also evident to the skilled person due to the decorative element being claimed as 'displayed on the liquid barrier sheet'. The decorative element located on the liquid barrier sheet is what is important to be visible through the chassis i.e. through the inner and outer sheets of the chassis only. The skilled person would thus unequivocally understand the liquid barrier sheet as not being included when the optical transmittance of the chassis is measured.

2.2.3 In summary therefore, at least *prima facie*, the arguments presented by the appellant in its letter of 7 September 2018 are not persuasive and are thus not admitted (Article 13(1) RPBA).

2.3 The present request thus meets the requirements of Article 83 EPC.

3. *Novelty (Article 54 EPC)*

3.1 No arguments were presented by the appellant questioning the novelty of the subject-matter of claim 1 of the present request. The Board also finds none of the cited documents to anticipate the claimed subject-matter, as indicated below:

3.1.1 D3, prior art under Article 54(3) EPC, fails to disclose (see e.g. paragraphs [0023] and [0026]) a chassis with a three-layer laminate construction, nor with a decorative element displayed on the innermost of the three sheets.

3.1.2 D4 (see e.g. Fig. 2; col. 5, lines 10 to 12; paragraph [0037]) fails to disclose at least the following features of claim 1:

- (a) elastic members secured only at their longitudinally opposite ends to the opposite lateral zones of the chassis;
- (b) the fiber density in the opposed lateral zones being higher than the fiber density in the intermediate zone; and
- (c) the decorative element being displayed on the liquid barrier sheet.

3.1.3 D5 (see e.g. Fig. 1; paragraphs [0019] and [0020]) fails to disclose at least:

- (a) elastic members secured only at their longitudinally opposite ends to the opposite lateral zones of the chassis; and
- (b) a decorative element displayed on a liquid barrier sheet; and
- (c) the front and rear waist regions being joined together along marginal zones to form a waist hole

and a pair of leg holes.

3.2 The Board thus finds that none of the cited documents deprive the subject-matter of claim 1 of novelty (Article 54 EPC).

4. *Inventive step (Article 56 EPC)*

4.1 It is firstly noted that under the heading 'Inventive step, Art 56 EPC' of the opposition division's decision, a cursory mention is made to arguments of the opponent based on D5 'during written proceedings'. These arguments were however not addressed in the decision at all which, as such, amounts to a procedural violation. This violation has, however, notably not been objected to by any of the parties. As the Board is able to deal with the objections under inventive step starting from D5, these are addressed in this decision in the interests of procedural economy.

4.2 It is however first to be noted that no arguments as such are on file from the appellant explicitly directed to the present request as it did not attend the oral proceedings where the request was filed. Even to the requests previously on file, only very general comments were made under inventive step to the effect that 'the subject-matter of the independent claims ... lacks an inventive step starting from any of D3, D4 and D5'.

4.2.1 As regards D3 and D3a (referred to on page 9 of the appellant's grounds of appeal), these are not prior art under Article 54(2) EPC due to the opposed patent validly claiming priority from JP2002-256073. Contrary to the opinion of the appellant, the present patent validly claims priority from JP2002-256073 in view of paragraphs [0014] and [0020] in combination with the

abstract in which 'a decorative element 14 adapted to be seen through the chassis 12' is disclosed. Neither D3 nor D3a can therefore be used in an inventive step attack; solely D4 and D5 are thus considered as starting points in what follows.

- 4.3 Considering, first, objections starting from D4 as the closest prior art, this discloses a pants-type diaper enabling a decorative element to be observed from outside the article (see e.g. paragraph [0008] of D4).
- 4.3.1 As indicated in 3.1.2 above, D4 fails to disclose the following features of claim 1:
- (a) elastic members secured only at their longitudinally opposite ends to the opposite lateral zones of the chassis;
 - (b) the fiber density in the opposed lateral zones being higher than the fiber density in the intermediate zone; and
 - (c) the decorative element being displayed on the liquid barrier sheet.
- 4.3.2 Feature (c), contrary to the respondent's opinion, does not contribute to improved visibility of the decorative element compared to D4. The pattern sheet 15 of D4 can be a resin film (see col. 6, lines 2 to 3) and thus would support an accurately printed decorative element to the same degree as the claimed liquid barrier sheet of high fibre density (see paragraph [0019] of the patent). Lacking a technical effect different from that in D4, feature (c) cannot contribute to the objective technical problem to be solved.
- 4.3.3 The respondent's suggestion that feature (a) increased the optical transmittance of the intermediate zone and also reduced that in the opposed lateral zones relative

to D4 is not accepted. Whilst the elastic members not being secured to the chassis in the intermediate zone would be expected to eliminate gathering of the chassis material in this zone (material gathers decreasing a zone's optical transmittance relative to ungathered material), the elastic members could be secured solely at the lateral extremities of the opposed lateral zones which would not result in a decrease in optical transmittance in these zones. Feature (a) is thus seen to solely contribute to an increase in optical transmittance of the intermediate zone relative to D4, but, over the breadth of claim 1, not to have any recognisable effect on transmittance in the lateral zones.

- 4.3.4 With feature (b) also contributing to increasing the optical transmittance of the intermediate zone, the objective technical problem may be seen as how to facilitate visibility of the decorative element in the intermediate zone.
- 4.3.5 Neither the common general knowledge of the skilled person nor any of the cited documents would lead the skilled person to the claimed solution of the objective technical problem without exercising an inventive step.
- 4.3.6 As regards D5, this discloses an indicator 6 disposed between a base sheet 3 and the absorbent core 4 which is notably not, contrary to the appellant's argument, displayed on a liquid barrier sheet since, according to claim 1, this would need to be on the inner side of the inner sheet of the chassis were it present. The base sheet of D5 has a luminous transmittance between 60% and 85% such that, when the indicator becomes wet, it will become visible through the base sheet e.g. due to it changing colour ('becomes distinct' - see paragraph

[0029]). In D5, there is no suggestion of any of:

- limiting the securing of the elastic members solely to the lateral zones of the chassis (see paragraph [0019]);
- providing a reduced fiber density in the vicinity of the indicator to facilitate its visibility; nor of
- positioning the indicator on a liquid barrier sheet.

4.3.7 Contrary to the opinion of the appellant, the base sheet 3 comprising a plastic film 11 (see paragraph [0020]) is the outermost sheet of the chassis and so cannot be equated to the claimed liquid barrier sheet laminated to the inner surface of the inner sheet of the chassis. D5 thus fails to provide the skilled person with guidance as to how the diaper of D4 should be modified in order to reach the claimed subject-matter while solving the objective technical problem.

4.3.8 Regarding a modification to D4 on account of the skilled person's common general knowledge, this provides them with no hint to the claimed solution of the technical problem, not least since the pattern sheet 15 of D4 is already adequately visible by way of positioning away from the waist gather (see paragraph [0037]). The skilled person would thus not be motivated to limit the securing of the elastic members solely to their longitudinally opposite ends in order to reduce gathering in the intermediate zone of the chassis. Equally, the skilled person lacks any motivation to display the decorative element on the liquid barrier sheet or to adjust the fiber density in the opposed lateral zones to be higher than the fiber density in the intermediate zone.

4.3.9 In summary, therefore, the subject-matter of claim 1 involves an inventive step when starting from D4 and

combining this with either the teaching of D5 or the common general knowledge of the skilled person.

- 4.4 With reference to the comments in point 4.1 above, despite representing a less promising starting point than D4 for an inventive step attack, D5 is also considered here for the sake of completeness. D5 fails to disclose at least the following features of claim 1:
- (a) elastic members secured only at their longitudinally opposite ends to the opposite lateral zones of the chassis; and
 - (b) a decorative element displayed on a liquid barrier sheet; and
 - (c) the front and rear waist regions being joined together along marginal zones to form a waist hole and a pair of leg holes.

- 4.4.2 These features do not address a single technical effect so the formulation of partial problems is appropriate. The present differentiating feature (a), as also identified in point 4.3.3 with respect to D4, contributes to an increase in optical transmittance of the intermediate zone, the objective technical problem thus being how to facilitate visibility of the decorative element in the intermediate zone. The partial problem related to feature (b) can be 'to provide an alternative sheet to locate the decorative element' and that for feature (c) is 'how to provide a pants-type article'.

- 4.4.3 Neither D4 nor the common general knowledge of the skilled person provides a hint to the solution of at least the first of these partial objective technical problems, such that the subject-matter of claim 1 involves an inventive step when considering the objections made starting from D5. D4 discloses elastic

members 7 around the waist opening of the diaper which, with reference to Fig. 1, cause gathers in the waistband and so the elastic members must be secured around the full waistband rather than just at longitudinally opposite ends of the elastic members as claimed. As regards modification to D5 on account of the skilled person's common general knowledge, this provides them with no hint to the claimed solution to the technical problem either, particularly since the indicator 6 in D5 is sufficiently visible through an appropriate luminous transmittance of the base sheet 3 (see paragraph [0029]). The skilled person would thus not be motivated to limit the securing of the elastic members solely to their longitudinally opposite ends in order to reduce gathering in the intermediate zone of the chassis.

4.4.4 In summary, therefore, the subject-matter of claim 1 involves an inventive step when starting from D5 and combining this with either the teaching of D4 or the common general knowledge of the skilled person.

4.5 With none of the inventive step arguments based on the cited documents being successful, the Board finds that the subject-matter of claim 1 involves an inventive step (Article 56 EPC).

5. *Remittal (Article 111(1) EPC)*

In view of the extensive amendments made to the present claim 1 relative to the patent as granted, the adaptation of the description is considered to entail not inconsiderable amendments. It is thus appropriate to remit the case back to the opposition division in accordance with Article 111(1) EPC for adaptation of the description to the amended claims of the present

request.

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 with claims 1 to 4 of the new auxiliary request 1 filed during the oral proceedings on 13 June 2019 and a description, and if need be the drawings, to be adapted thereto.

The Registrar:

The Chairman:



M. H. A. Patin

M. Harrison

Decision electronically authenticated