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**Datasheet for the decision
of 4 February 2021**

Case Number: T 0004/17 - 3.2.06

Application Number: 09728908.6

Publication Number: 2260811

IPC: A61F13/15, A61F13/49,
A61F13/496

Language of the proceedings: EN

Title of invention:
DISPOSABLE DIAPER

Patent Proprietor:
Unicharm Corporation

Opponents:
Paul Hartmann AG
The Procter & Gamble Company

Headword:

Relevant legal provisions:
EPC Art. 123(2)

Keyword:
Amendments - added subject-matter (yes)

Decisions cited:

G 0002/10

Catchword:



Beschwerdekammern

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Case Number: T 0004/17 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 4 February 2021

Appellant:
(Opponent 1)

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Appellant:
(Opponent 2)

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Respondent:
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Decision under appeal:

**Interlocutory decision of the Opposition
Division of the European Patent Office posted on
11 November 2016 concerning maintenance of the
European Patent No. 2260811 in amended form.**

Composition of the Board:

Chairman	M. Harrison
Members:	M. Dorfstätter
	E. Kossonakou

Summary of Facts and Submissions

- I. An appeal was filed by opponents 1 and 2 (appellants 1 and 2) against the decision of the opposition division dated 11 November 2016, in which it found that, account being taken of the amendments made during the opposition proceedings, European patent No. 2 260 811 and the invention to which it relates met the requirements of the EPC. In their respective grounds of appeal both appellants requested that the decision under appeal be set aside and the patent be revoked.
- II. In its letter of response, the patent proprietor (respondent) requested that the appeals be dismissed or alternatively that the patent be maintained in amended form based on one of auxiliary requests 1 to 4.
- III. The Board issued a summons to oral proceedings and a subsequent communication containing its provisional opinion, in which it indicated *inter alia* that the subject-matter of claim 1 of all requests seemingly did not fulfil the requirement of Article 123(2) EPC.
- IV. Oral proceedings were held as a videoconference before the Board on 4 February 2021 without participation of appellant 2 as announced in advance.
- V. Claim 1 of the main request reads as follows (including the feature-by-feature analysis used by appellant 1):
1. "A disposable diaper
 - 1.1. having a longitudinal direction,
 - 1.2. a transverse direction,
 - 1.3. a side facing a wearer's skin,

- 1.4. a side facing away from said wearer's skin,
- 1.5. a front waist region (213),
- 1.6. a rear waist region (214),
- 1.7. a crotch region (215) extending between said front and rear waist regions,
- 1.8. a waist-opening (223)
- 1.9. and a pair of leg-openings,
2. and comprising
 - 2.1. an annular elasticized waist panel defining said front and rear waist regions
 - 2.2. and an absorbent chassis (212)
 - 2.2.1. joined to front and rear halves of said waist panel
 - 2.2.2. so as to extend across said crotch region into said front and rear waist regions
 - 2.3. and including an absorbent core
 - 2.4. and front and rear end flaps extending from front and rear ends of said absorbent core in said longitudinal direction,
 - 2.4a wherein said waist panel comprising a rectangular front waist panel (216) and
 - 2.4b a trapezoidal rear waist panel (217),
 - 2.4c said front waist panel (216) and said rear waist panel (217) are put flat together along respective pairs of opposite side edges and joined together along seams (222) arranged intermittently in the longitudinal direction, said disposable diaper being characterized in that:
3. said front and rear waist regions (213, 214) include elasticized regions extending at least in said transverse direction;
 - 3.1. said elasticized regions comprise a first elasticized region (225) defined between a periphery of said waist-opening and vicinity of

- said front end flap of said absorbent chassis so as to extend in said transverse direction,
- 3.2. a second elasticized region (226) defined adjacent said first elasticized region (225) so as to extend in said transverse direction
 - 3.3. and a pair of third elasticized region [sic] (227) defined adjacent said second elasticized region so as to extend from opposite side edges of said front waist region to opposite side edges of said absorbent chassis (212) and to be spaced from and opposed to each other in said transverse direction on both sides of a non-elasticized region (228A) defined in a transverse middle of said front waist region;
 - 3.4. and said second elasticized region (226) extends across said front end flap of said absorbent chassis, wherein
 - 3.4a said rectangular front waist panel (216) defines the front waist region (213) and
 - 3.4b the trapezoidal rear waist panel (217) defines the rear waist region (214) and a part of the crotch region (215),
 - 3.5. said elasticized regions in said rear waist region (215) further are formed with a pair of fourth elasticized regions (234) lying aside inward from said respective third elasticized region (227),
 - 3.5a and being adapted to cover a desired range of the wearer's buttock and being located in a part of the rear waist panel (217) forming part of crotch region (215) and extending inward in the longitudinal direction from said seams (222),
 - 3.6. wherein said fourth elasticized regions (234) are provided with fourth waist elastic elements (235) formed by the same elastic elements as

third waist elastic elements (232) used for said third elasticized region (227)

- 3.7. and the number of said fourth waist elastic elements (235) is fewer than any other waist elastic elements,
- 3.8. wherein said fourth elasticized regions have a tensile stress in said transverse direction lower than a tensile stress in said transverse direction of any of said first (225), second (226), and third elasticized regions (227),
 - 3.8a wherein the front and rear waist regions (213, 214) comprise the first elasticized region (225) extending along a waist-opening's periphery (223a) in the transverse direction (Y),
 - 3.8b the second elasticized region (226) defined adjacent the first elasticized region (225) so as to extend across a front end of the absorbent chassis (212),
 - 3.8c and the pair of third elasticized regions (227) spaced from and opposed to each other on both sides of first and second non-elasticized regions (228A, 228B) defined in respect of transverse middles of the front and rear waist regions (213, 214) wherein
 - 3.8d the respective first, second and third elasticized regions (225, 226, 227) are provided with strand-like waist elastic elements (230, 231, 232), respectively,
 - 3.8e wherein the region in the rear waist panel (217) defining the part of the crotch region (215) is formed on both sides of the second non-elasticized region (228B) with a pair of the fourth elasticized regions (234)
 - 3.8f spaced from each other in the transverse direction (Y) wherein the fourth elasticized

regions (234) are provided with the plurality of fourth waist elastic elements (235) extending in the transverse direction (Y)."

Claim 1 of auxiliary requests 1 to 4 include further limitations, but have the features 2.4b and 3.4b with their respective references to a 'trapezoidal rear waist panel' unamended.

VI. The arguments of the appellants which are relevant for the decision may be summarised as follows:

The requirement of Article 123(2) EPC was not fulfilled. By using the word 'trapezoidal', claim 1 protected shapes which were not derivable from the application as filed.

VII. The respondent's arguments which are relevant for the decision may be summarised as follows:

The requirement of Article 123(2) EPC was fulfilled. The skilled person read the patent in view of the figures and understood the term 'trapezoidal' in that sense. The opposition division had also understood it as approximating to the rear waist panel shape shown in the figures. A reader with a willingness to understand the claim would have realised that the rear waist panel did not exhibit a perfect trapezoidal shape but, as a whole, merely reflected such a shape, such that what was shown in the figures was correctly defined.

Reasons for the Decision

1. *Main request*

1.1 The subject-matter of claim 1 does not fulfil the requirement of Article 123(2) EPC. By referring to a 'trapezoidal rear waist panel' in features 2.4b and 3.4b, claim 1 defines subject-matter that extends beyond the content of the application as filed.

1.2 At its single occurrence in paragraph [0024] of the application as filed, the expression 'substantially trapezoidal' relates to the rear waist panel 217 of the embodiment shown in Figures 1 to 5 (called 'first aspect' in paragraphs [0019] and [0021]). This is immediately apparent from the preceding paragraph [0023], beginning with 'As shown in Fig. 1', which is applicable to the whole content of paragraphs [0022] to [0026]. The expression 'substantially trapezoidal' thus relates to the particular shape of the rear waist panel 217 with its approximately six-sided shape as depicted in Figures 2 and 4, as opposed to a 4-sided shape with only two parallel sides, which is a trapezoid in a mathematical sense.

1.3 Thus, whilst the Board can accept that a person skilled in the art might well construe the term in a sense which is somewhat broader than its literal or mathematical meaning, they would not however interpret the claim as corresponding to the shape of the rear waist panel disclosed in the figures. Thus, by introducing the term "trapezoidal" into claim 1 without specific reference to the special six-sided shape shown in the figures, the claim defines shapes which are not disclosed.

- 1.4 As regards the respondent's argument that a skilled person with a 'willingness to understand' would read the patent in view of the figures and would understand the term 'trapezoidal' in that sense as the opposition division had done, this is not accepted.
- 1.4.1 A willingness to understand (often referred to as "a mind willing to understand" in Board of Appeal case law) is not the applicable standard when assessing whether a claim fulfils the requirement of Article 123(2) EPC. An amendment may only be made within the limits of what a skilled person would derive directly and unambiguously, using common general knowledge, and seen objectively and relative to the date of filing, from the application documents as filed (referred to as the 'Gold Standard', see G2/10, Reasons 4.3).
- 1.4.2 Even if the term 'trapezoidal' were to be understood somewhat more broadly, it evidently still covers shapes approximating to a true trapezoid. Such shapes are not disclosed for the rear waist panel.
- 1.4.3 Moreover, when applying the 'Gold Standard' as referred to above, the skilled person would instead conclude that no other shape than the one shown in Figure 4 is derivable from the application as filed, let alone directly and unambiguously.
- 1.4.4 More importantly, the Board sees no reason to construe 'trapezoidal' as being interpreted in such a way that it should correspond to a particular shape of an embodiment which itself is far from trapezoidal. In particular the mere fact that the opposition division came to that conclusion (see the impugned decision page 9, item a)) gives the Board no reason to alter its

own finding. This is not only the result of judicial independence in the evaluation of a case; in the case at hand it is the result of judicial review of the opposition division's conclusion on Article 123(2) EPC which does not state how the feature was found to be directly and unambiguously derivable from the application as filed but is more concerned with aspects of clarity and the opponent's arguments about the trapezoid feature having to be introduced into the claim.

By using the term 'trapezoidal' claim 1 thus defines rear waist panels with shapes that are not derivable from the application as filed, contrary to the requirement of Article 123(2) EPC.

2. *Auxiliary requests*

As was not disputed by the respondent, the features added to claim 1 in all auxiliary requests do not overcome the objection with respect to the term 'trapezoidal' under Article 123(2) EPC.

These requests are therefore also not allowable for the same reason as applies to the main request.

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:



A Nielsen-Hannerup

M. Harrison

Decision electronically authenticated