

Internal distribution code:

- (A) [-] Publication in OJ
- (B) [-] To Chairmen and Members
- (C) [-] To Chairmen
- (D) [X] No distribution

**Datasheet for the decision
of 14 September 2021**

Case Number: T 0259/17 - 3.2.06

Application Number: 05821835.5

Publication Number: 1959903

IPC: A61F13/472, A61F13/535,
A61F13/47

Language of the proceedings: EN

Title of invention:
ABSORBENT ARTICLE

Patent Proprietor:
SCA Hygiene Products AB

Opponent:
THE PROCTER & GAMBLE COMPANY

Headword:

Relevant legal provisions:
EPC Art. 100(b), 83, 111(1)
RPBA 2020 Art. 11, 12(2)

Keyword:
Sufficiency of disclosure - (yes)
Remittal to the department of first instance - (yes)

Decisions cited:

T 0593/09, T 1845/14, T 0019/90

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 0259/17 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 14 September 2021

Appellant: SCA Hygiene Products AB
(Patent Proprietor) 405 03 Göteborg (SE)

Representative: Valea AB
Box 1098
405 23 Göteborg (SE)

Respondent: THE PROCTER & GAMBLE COMPANY
(Opponent) One Procter & Gamble Plaza
Cincinnati, Ohio 45202 (US)

Representative: Elkington and Fife LLP
Prospect House
8 Pembroke Road
Sevenoaks, Kent TN13 1XR (GB)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 30 November
2016 revoking European patent No. 1959903
pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman M. Harrison
Members: M. Dorfstätter
A. Jimenez

Summary of Facts and Submissions

- I. An appeal was filed by the appellant (patent proprietor) against the decision of the opposition division to revoke European patent No. 1 959 903 (hereinafter "the patent"). It requested that the decision under appeal be set aside and the patent be maintained as granted, or in the alternative, on the basis of one of the auxiliary requests 1 to 9 as filed with the grounds of appeal dated 29 March 2017.
- II. In its reply to the grounds of appeal, the respondent (opponent) requested that the appeal be dismissed or, in the event that the appeal of the patent proprietor was allowed, that the case be remitted to the opposition division for consideration of the remaining grounds of opposition.
- III. The Board issued a summons to oral proceedings and a subsequent communication containing its provisional opinion *inter alia* as to whether the invention, in particular with regard to the test methods described in the patent and referred to in claim 1, was sufficiently disclosed in the sense of Article 83 EPC. The Board also indicated that it regarded it as appropriate to remit the case to the opposition division for further prosecution, should the requirement of sufficiency of disclosure be found to be met.
- IV. Oral proceedings by videoconference were held before the Board on 14 September 2021 with the consent of both parties.
- V. The parties' final requests remained as stated under items I. and II. above.

VI. The following document referred to by the appellant in its grounds of appeal is relevant to the present decision:

D6 Statement of Dr Bryn Hyrd of 6 October 2016

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

"An absorbent article, especially an incontinence pad, having a length and a width extension, said length being greater than said width, and comprising absorbent core material, characterised by the absorbent core material forming a central portion (6) and a pair of longitudinal extending side portions (7), wherein a pair of folding lines is provided so as to divide said absorbent core material into said central portion (6) and said pair of longitudinal side portions (7) and wherein the flexural rigidity of the article (1) at the side portions (7) is between 3 and 20 % of the flexural rigidity of the article (1) at the central portion (6), at a location opposite the side portions (7), preferably between 4 and 15%, most preferred between 4 and 10%; said flexural rigidities being calculated in accordance with the procedures of the description."

Auxiliary requests 1 to 9 are not of relevance for the present decision and their claims are thus not reproduced here.

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

The ground of opposition under Article 100(b) EPC did not prejudice maintenance of the patent.

There was no difference between the flexural rigidity of the central portion as defined in claim 1 and the one as measured by the procedure explained in the description. Claim 1 stipulated that the flexural rigidity of the central portion was to be "calculated in accordance with the procedures of the description". Although the formulation "at a location opposite the side portions", as defined in claim 1, did not appear in the description, there was no other procedure for calculating the flexural rigidity of the central portion derivable from the patent. It was thus clear that the procedures and the resulting flexural rigidities referred to in the description and the claims were the same.

The test procedures were intended to mimic the forces that the absorbent article was subjected to in use. The claimed absorbent article was intended to be worn in the crotch region. With the claimed range of values, the side portions were compressed rather than the central portion bent. The whole, i.e. uncut, central portion should be measured.

The terminology "at a location opposite the side portions" in claim 1 simply meant that the central portion of the wire structure used in the test was located between the two side portions and centered such that it protruded as much in front of the side portions as behind the side portions. There was no instruction in the described method to perform any cutting of the central portion. The patent included instructions on what to do, but not about what not to do. The test was to be performed with the wire portion arranged as set out in the description. The sentence in paragraph [0123] was a leftover of a different application and

did not mean that the horizontal wire portion had to be longer than the tested article.

Equally, the parameter of the flexural rigidity of the side portions and the corresponding test procedure were also sufficiently disclosed. The respondent had not shown that a reasonably chosen test specimen would lead to any difficulties in testing. The samples of D6 had an unrealistic square shape and size for being a side portion of an article to be worn in the crotch region. They were not even taken from side portions but from the central portion of an absorbent article. A successful objection under Article 100(b) EPC presupposed that there were serious doubts, substantiated by verifiable facts. The respondent had not provided such facts in view of the side portions, as D6 was not concerned therewith and the specimens therein were not suitable as side portions of an article to be worn in the crotch region. Realistic examples of such an article had a certain thickness, which allowed the cut-off side portion to rest on its longitudinal edge without sliding. If such sliding still occurred, it would be natural to manually support the side portion until it was held by the equipment, but obviously in a way which would then not affect the result. If the specimen were allowed to slide, the test would give the flexural rigidity for the longitudinal direction. If that happened, the test would be meaningless. The skilled person would thus ignore the result of such a test.

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

The opposition ground under Article 100(b) EPC prejudiced maintenance of the patent. The invention

defined in claim 1 of the main request was not sufficiently disclosed for it to be carried out by a skilled person because "the flexural rigidity of the article at the central portion, at a location opposite the side portions" was an ill-defined parameter.

The flexural rigidity of the central portion defined in the claim did not correspond to the one measured according to the procedures given in the description. Claim 1 required the flexural rigidity of the central portion to be measured at a specific location "opposite the side portions", whilst the description described a procedure to measure the flexural rigidity of the entire central portion. The skilled person was thus presented with conflicting information and did not know how to measure the flexural rigidity of the central portion at this specific location.

The situation of a product in use was mimicked neither by carrying out the measurement on the entire central portion nor by carrying out the measurement only on the part opposite the side portions. The patent was ambiguous as to whether the measurement procedure was to be carried out on the entire central portion or only the part located opposite the side portions, for example by cutting off the ends. However, completely different measurement results would be obtained depending on how the test was carried out in this regard. Since the side portions were cut off in order to be tested, it was reasonable that the central portion was also cut out. There was no potential for the horizontal wire portion of the upper fixture to be centered on the entire central portion, as paragraph [0123] of the patent made clear that the length of the horizontal wire portion had to exceed that of the specimen being tested.

The procedure for measuring the flexural rigidity of the side portions was unusual as even acknowledged in the patent. It also did not specify whether the specimen was to be supported during testing. As shown by D6, this had a significant effect on the measurement result, if the specimen slid on the Teflon-coated bars and lay flat on the tester. If the sample were restrained from sliding, it would buckle and only be bent subsequently. The measurement procedure specified in the patent would thus not have permitted the skilled person to obtain repeatable results.

Claim 1 did not specify the structure of the side portions. It did not even specify the type of absorbent product to which it was directed. In particular, the claimed subject-matter was not limited to incontinence pads. The shape and size of the specimen used in D6 was chosen with due consideration to the measurement equipment, as the side portions needed to be large enough to bridge the 40mm spacing of the horizontal bars. The smaller the width of the specimen, the greater the force that would be needed to cause buckling. This would make sliding of the specimen even more likely.

As a consequence, the requirement for the skilled person to decide whether or not to apply additional restraint to the specimen of the side portions to prevent sliding represented an undue burden in identifying the technical measures necessary to solve the problem underlying the patent.

Reasons for the Decision

1. *Article 100(b) EPC*

The ground for opposition under Article 100(b) EPC does not prejudice maintenance of the patent according to the main request.

1.1 Instead, the patent does disclose the invention as set out in claim 1 of the main request in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art as explained below.

1.2 The patent aims at providing absorbent articles "that are placed against the skin of the wearer to absorb and contain body exudates, like urine, and menstrual fluid" (see e.g. paragraph [0054] of the patent). Together with the mention in paragraph [0002] of the patent, that such articles are "usually placed in the wearer's underwear", the Board accepts the appellant's argument that the whole description in the patent is concerned with an article that is intended to be worn in the crotch region of a human being, albeit the Board notes that claim 1 is not limited to this. Claim 1 defines a relationship between two flexural rigidities, one for the central portion, which is relatively stiff, and one for the side portions, which are more flexible. The deformation of the article when in use (when for instance an incontinence pad is put between the thighs of a user) is to be controlled "such that the side portions will fold and deform rather than the central portion" (see paragraph [0083] of the patent).

The Board concludes that the parameters defined in claim 1 and their inter-relationship relate to an

article with such properties, such that the tests can be fully understood in that context (i.e. tests adapted to provide results for an article adapted to be worn in the crotch region between a user's thighs).

- 1.3 The respondent argued that it was established case law that an ill-defined parameter gave rise to insufficiency within the meaning of Article 83 EPC at least if the skilled person was not able to identify, without undue burden, the technical measures necessary to solve the problem underlying the patent at issue (the respondent referred to the summary of T593/09 at page 359 of the Case Law Book of the Boards of Appeal, 2016 edition, the wording corresponding literally to T593/09, Reasons 4.1.4). As also argued by the appellant, however, the problem to be solved is not defined in the claim, such that identifying the technical measures to solve any particular problem is limited in this case to carrying out what is defined in the claim itself, i.e. the relative flexural rigidities where the measurement of each is defined by the described test procedures. Whether the relative flexural rigidities measured in this way ultimately solve any particular problem is something which can be left for discussion of inventive step.

Later case law (see e.g. T1845/14, Catchword and Reasons 9) is also in line with how sufficiency of disclosure is to be understood where the claim does not include or imply a problem to be solved within it. Thus all that is required of the skilled person in the present case is whether, in the context of what is defined in claim 1, a ratio of flexural rigidities as defined can be achieved based on carrying out the test procedures given in the description.

The question to be answered is thus whether either of the two flexural rigidities defined in claim 1 by reference to the description is so ill-defined that the skilled person is unable to identify the technical measures to achieve flexural rigidities fulfilling the claimed ratio.

The flexural rigidity of the central portion

- 1.4 Whilst claim 1 refers to a "flexural rigidity of the article (1) at the central portion (6), at a location opposite the side portions (7)" (emphasis added by the Board), the description (in paragraph [0118]) describes a measurement procedure to obtain the "flexural rigidity of the central portion", without reference to a particular location thereon. The nomenclature used in the description and in claim 1 is thus not identical.

The skilled person is however not "left in the dark" (as the opposition division put it in the contested decision, Reasons 9.4.5). Nor is the skilled person presented with conflicting information. Claim 1 explicitly refers to the procedures of the description, and not some other unstated procedures, that shall be used to calculate said flexural rigidities. Claim 1 is thus to be understood such that the procedure described in paragraphs [0116] and [0118] is that to be used to calculate the flexural rigidity of the article at the central portion at a location opposite the side portions. The skilled person would understand that they had to follow the steps described in these paragraphs and thereby position the wire structure of the upper fixture of the tensile tester such that it will impact the middle of the sample (as also explained in paragraph [0107] of the patent).

The respondent argued that the patent was ambiguous as to whether paragraphs [0116] to [0118] concerned a method at all since these fell under the heading "Results" and thus it was unclear whether what was stated was not simply the specific results when carried out on the article of the embodiment. However, whilst the heading "Results" may be inappropriately placed and the immediately following paragraph [0115] even referring to "the method described above", it can be readily understood when considering paragraphs [0116] *et seq* that method instructions are being stated when using an intended product. This is due to what appears in paragraph [0119] which explains what the test is designed to achieve, albeit noting that the values obtained are not immediately comparable. The lack of immediate comparability of results as stated in [0119] is however not something which detracts from being able to carry out the tests as stated, but merely relates to what meaning can possibly be derived from the values.

Further, the respondent argued that it was ambiguous whether the measurement procedure was to be carried out on the entire central portion or only the part located opposite the side portions, for example by cutting off the ends, and that completely different measurement results would be obtained depending on how the test was carried out. These arguments are not accepted. The Board sees no 'ambiguity' as to whether parts of the central portion should be cut off, when this is neither explicitly mentioned in the patent nor implicitly necessary, common practice or otherwise suggested.

The respondent's argument in this regard, that since the side portions were cut out to be tested, it was reasonable that the central portion was also cut, is not persuasive. It is self-evident that the side

portions are cut off from the central portion, such that these side portions can be tested without the influence of the much stiffer central portion. Testing the side portions together with the central portion would yield a value for the flexural rigidity of mainly the central portion. An influence, in a comparable amount, of the front and back region on the middle area of the central portion is not necessarily present. Although some influence of the front and back regions on the flexural rigidity of the central portion cannot be excluded, this need not lead to difficulties in measuring the claimed parameter. When the front and back regions are rather flexible (which the Board considers likely in a real article to be placed between a wearer's thighs, for which the test was intended) the influence of these regions on the measurement might even be negligible. No results to the contrary proving that the effect of the ends might have had a noticeable influence were supplied by the respondent, albeit the Board can understand that stiff end portions might affect the result, albeit however to some unknown extent.

The Board thus concludes that, without an explicit instruction in the patent, the skilled person has no reason to cut off anything more than the side portions from the article. When testing the central portion without any further cutting, the whole of it will be bent during each test. Thereby, the measurements will yield repeatable results with regard to a tested article.

- 1.5 The respondent's argument that the situation of a product in use was mimicked neither by carrying out the measurement on the entire central portion nor by carrying out the measurement only on the part opposite

the side portions, does not change the Board's finding. With the central portion being bent along its entire length, the situation when the article is worn in the crotch region might not be exactly reproduced by the test anyway. However, and as also stated in paragraph [0119], the patent accepts that the measurement procedures yield values which are not immediately comparable. This does however not affect the ability of the skilled person to obtain these values in a reliable and repeatable manner.

- 1.6 The respondent's further argument that there was no potential for the horizontal wire portion of the upper fixture to be centered on the entire central portion, as paragraph [0123] of the patent made clear that the length of the horizontal wire portion had to exceed that of the specimen being tested, is not accepted.

Paragraph [0123] of the patent reads as follows:

"For testing wider products than the ones described above, longer horizontal bars as well as a longer horizontal wire portion may be used."

The respondent interpreted this sentence as if it actually referred to testing longer products. Whilst it is clear that the literal meaning does not make technical sense, the respondent's interpretation is not clearly the one to be followed. Other interpretations are equally possible. Although the appellant argued that the sentence was a leftover from a different application and referred to products that are tested in their width direction, this might be possible but again is pure conjecture.

In any case the sentence does not have a single clear meaning such that no conclusion can be drawn as to whether the length of the horizontal wire portion had

to exceed that of the specimen being tested or not, or whether there was some other error. The Board is however unable to conclude that the skilled person would not be able to carry out the test procedure because of this unclear paragraph.

- 1.7 The respondent also argued that the patent was, for a further reason, ambiguous as regards the length of the horizontal wire of the upper fixture. Indeed, whilst paragraph [0104] sets out a value of 140mm, the corresponding length in Figure 8 is labelled with 100mm.

The Board however concludes that this does not impede the skilled person from identifying the technical measures necessary to measure the flexural rigidities. Claim 1 defines that these should be calculated in accordance with the procedures of the description. When doing so, the skilled person would use a tester with a horizontal wire portion having a length of 140mm as set out in paragraph [0104]. This is in fact the only value presented in the description of the patent. It is highly likely that they would ignore the differing dimension in Figure 8. But even if they chose to use a horizontal wire section of only 100mm as presented in Figure 8, this would still render the measurements repeatable, because the skilled person would either make all measurements with the one or with the other wire length. Furthermore, as set out above, the Board regards it as highly probable from a technical point of view that the whole of the central portion will anyway be bent during the test. In such a case it is to be expected that the length of the horizontal wire portion has no or only a negligible influence on the measured value. The respondent provided no results to show that

this dimensional difference would actually have produced any difference on the results obtained.

- 1.8 The Board thus concludes that the skilled person would perform the measurement of the central portion arranged and set up as laid out in the description, without any further cutting and with the same length of the horizontal wire structure for any article to be tested. They would thereby achieve the flexural rigidity of the central portion at the specific location opposite the side portions. An influence from the front and back region on this value cannot be excluded, but will be the same for any tested article (which is indeed what claim 1 is directed to), such that the test yields repeatable and reliable results.

The flexural rigidity of the side portions

- 1.9 The Board can agree with the respondent that the procedure for measuring the flexural rigidity of the side portions is unusual. It measures a different kind of flexural rigidity than that of the central portion but sets these values in relation to one another. Whether the calculated ratio gives a meaningful dimension is however not a matter of sufficiency of disclosure. The question to be answered here is again whether the measurement procedure specified in the patent permits the skilled person to obtain repeatable results. The respondent has not shown that this is not the case. In particular, it has not proven that the skilled person was impeded from obtaining repeatable results when test samples are measured that were obtained by cutting off real side portions of an absorbent article to be worn in the crotch region (again acknowledging that claim 1 is not limited to this, but the test was designed with this in mind).

1.10 The respondent's argument that claim 1 did not specify whether the specimen was to be supported during testing, and that D6 showed that this had a significant effect on the measurement result, is also not persuasive. It is self-evident that different results are to be expected when a relatively thin 7 x 7cm sample is put upright on the bars of the tester, depending on whether it lies flat on the tester and is subsequently bent and folded, or if it is compressed in an upright position by forming multiple buckles.

The Board also accepts the respondent's argument that claim 1 does not specify the structure of the side portions or the type of absorbent product. However, it reads the claim, in as far as the test is concerned, as relating to a test on an article to be worn in the crotch region, as laid out above.

1.11 The argument that the sample used in D6 would slide during the test and that the patent was silent on whether it needed to be restrained from sliding, e.g. by manually supporting it, is supported by a sample that, in the Board's view, cannot form a side portion of an absorbent article as claimed. Since the side portions of the claimed article lie in use in the crotch region, it is unrealistic that they would have a width of 7cm. Furthermore, and as also argued by the appellant, the samples of D6 have an unrealistic square shape. The skilled person would expect a shape with a longer dimension in the direction along the central portion than its width. The fact that the samples were not taken from real side portions but from the central portion of an absorbent article, underlines this deficiency in the respondent's argumentation.

- 1.12 In this regard, the respondent's argument that the shape and size of the specimen used in D6 was chosen in consideration of the measurement equipment, is not accepted. A realistic sample, i.e. a true side portion of an absorbent article to be worn in the crotch region, would equally have worked, as it only needs to bridge the distance of the horizontal bars of the tester, i.e. 4cm.
- 1.13 The further argument of the respondent that sliding of the specimen was even more likely in narrower samples, because the smaller the width of the specimen, the greater the force that would be needed to cause buckling, is not persuasive. It may be true that higher buckling forces are achieved in narrower samples, albeit this had not been shown to be the case with compressible samples (i.e. samples containing absorbent core material, as required by claim 1). By the same token however, the tendency to tip over is also reduced when a narrower sample is put upright on the tester. It is also self-evident that a thin, square and oversized sample will not as easily remain in the upright position during the test as a narrow, elongated and thick sample. The Board thus concludes that the respondent did not prove that the alleged difficulties exist when a realistic sample is used, i.e. a side portion cut off from an absorbent article to be used in the crotch region.
- 1.14 Lastly, even if a sample were chosen which corresponded to a side portion in the sense of claim 1, and this did indeed start to slide sideways on the Teflon bars, it would appear only logical that extremely minimal force (using the tester's fingers for example) could be used initially to prevent such sliding before removing the fingers in order to obtain the required test result

which is noticeably a maximum force. The skilled person would have no reason to suspect that any effect of such a minimal force, laterally, would be noticeable in the results, and such was also not shown by D6. Instead D6 merely took a situation where a result was obtained which did not reflect what result was intended in paragraph [0119].

1.15 The appellant additionally referred to the case law of the Boards of Appeal (the wording originally emanating from T19/90, Reasons 3.3), arguing that a successful objection under Article 83 EPC presupposed that there were serious doubts, substantiated by verifiable facts. For the reasons given above, the respondent did at least not provide verifiable facts that allowed the conclusion that, with a realistic sample, a skilled person was faced with an undue burden in identifying the technical measures necessary to solve the problem underlying the patent. The alleged lack of sufficiency of disclosure is thus not substantiated by the facts provided by the respondent.

1.16 The Board thus concludes that by applying the test procedures laid out in the description, the skilled person is able to carry out the invention of claim 1.

2. *Remittal*

In its communication, the Board indicated that it intended to remit the case to the opposition division, if it were to conclude that the ground of opposition under Article 100(b) EPC did not prejudice maintenance of the patent.

In the decision under appeal, the opposition division did not deal with all the grounds for opposition but

only with sufficiency of disclosure under Article 100(b) EPC. Since the primary object of the appeal proceedings is to review the decision under appeal in a judicial manner (Article 12(2) RPBA 2020), it is not the function of an appeal board to consider and decide upon grounds for opposition for the first time during appeal proceedings. This represents a special reason according to Article 11 RPBA upon which a Board may remit a case.

Both parties agreed that the Board should remit the case, such that the further grounds of opposition can be dealt with.

Under these circumstances, the Board decides to remit the case to the opposition division under Article 111(1) EPC for further prosecution.

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 for further prosecution.

The Registrar:

The Chairman:



D. Grundner

M. Harrison

Decision electronically authenticated