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**Datasheet for the decision
of 30 November 2021**

Case Number: T 2713/17 - 3.2.06

Application Number: 05854240.8

Publication Number: 1827343

IPC: A61F13/551, A61F13/84,
A61F15/00

Language of the proceedings: EN

Title of invention:

AN ARRAY OF ABSORBENT ARTICLES HAVING FUNCTIONAL ENHANCEMENT
INDICATORS

Patent Proprietor:

The Procter & Gamble Company

Opponent:

Essity Hygiene and Health Aktiebolag

Headword:

Relevant legal provisions:

EPC Art. 84, 123(2), 56
RPBA 2020 Art. 13(1), 13(2)

Keyword:

Amendment to appeal case - deletion of claims - no amendment
of a party's appeal case - new clarity objection - admitted
(no)
Amendments - allowable (yes)
Inventive step - (yes)

Decisions cited:

T 1480/16, T 0981/17

Catchword:



Beschwerdekammern

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Chambres de recours

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Case Number: T 2713/17 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 30 November 2021

Appellant: Essity Hygiene and Health Aktiebolag
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
18 October 2017 concerning maintenance of the
European Patent No. 1827343 in amended form.**

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 (opponent) against the interlocutory decision of the opposition division in which it found that European patent No. 1 827 343 according to the (then) main request met the requirements of the EPC. It requested that the decision under appeal be set aside and the patent be revoked.
- II. In its letter of reply, the respondent (patent proprietor) requested that the appeal be dismissed. In the alternative it requested that the patent be maintained according to one of auxiliary requests 1 to 10.
- III. The following documents, relevant to the present decision, were referred to by the parties:
- D1 US 2003/0078553 A1
D2 WO 02/096331 A2
- IV. The Board issued a summons to oral proceedings and a subsequent communication containing its provisional opinion, in which it indicated *inter alia* that it had doubts as to whether the amendments made in claim 6 of auxiliary request 1 (as then on file) were directly and unambiguously derivable from the application as filed, and that a main issue to be discussed was whether the subject-matter of any of the claims of the auxiliary requests involved in inventive step.
- V. Oral proceedings by videoconference were held before the Board on 30 November 2021, during which the respondent withdrew all pending requests and filed a

new main request containing a single claim which was identical to claim 6 of auxiliary request 1.

VI. The final requests of the parties were as follows:

The appellant requested that the decision under appeal be set aside and the patent be revoked.

The respondent requested that the patent be maintained in amended form according to its new main request submitted during the oral proceedings.

VII. The claim of the new main request as submitted during the oral proceedings reads as follows:

"A package comprising an array of feminine hygiene articles, each said feminine hygiene article of said array having a body-facing surface, a first end region and a second end region, and a functional enhancement indicator visible from said body-facing surface, wherein said array of feminine hygiene articles comprises feminine hygiene articles differing in at least one functional characteristic and wherein each said functional enhancement indicators differ in correspondence to said functional characteristic, wherein said feminine hygiene articles are pads that, other than their functional enhancement indicators, are identical in appearance."

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

The new main request was late filed.

The claim lacked clarity due to the terminology "identical in appearance" as such.

The subject-matter of the claim did not meet the requirement of Article 123(2) EPC. According to the claim, the articles differed in at least one functional characteristic and, correspondingly, in a functional enhancement indicator. The claim defined that the articles were, other than their functional enhancement indicators, identical in appearance, which meant that the functional difference was not visible. The application as filed however did not include a statement to that effect.

The subject-matter of the claim did not involve an inventive step. Starting from D2, no technical problem was solved by making all pads identical in appearance. Furthermore, D1 gave a clear teaching to put articles of the same size but different thickness into a single package.

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

The clarity objection should not be admitted into the proceedings as it was neither raised by the Board nor included in the grounds of appeal.

The subject-matter of the claim met the requirement of Article 123(2) EPC. There was a consistent teaching in the application as filed that the articles were identical in appearance. This was to be understood such that their functional difference was not visually perceptible to a user.

The subject-matter of the claim involved an inventive step. By making all pads in the package identical in appearance, there would be a class of users for which

the articles were well-suited. The user was thus able to select a package comprising an array of articles with a different functional characteristic, without having to compromise on size and shape. D1 taught away from the invention as it suggested providing articles of different thickness, which were thus not identical in appearance.

Reasons for the Decision

1. *Admittance*

The single claim of the new main request is identical to claim 6 of auxiliary request 1 as submitted with the reply to the grounds of appeal. The new main request thus corresponds to auxiliary request 1 with all claims but claim 6 deleted.

In this regard, it has first to be noted that the subject-matter of independent claim 6 of auxiliary request 1 was timely submitted as part of a request filed with the reply to the grounds of appeal. The appellant commented on it by letter of 7 September 2021 and it had already been discussed (with regard to all objections made against it) during the oral proceedings and the Board had already given its conclusion that this claim fulfilled the requirements of the EPC (see reasons below). By submitting the new main request, the respondent's action did not give rise to any new issues requiring discussion but, on the contrary, merely restricted its requests then on file to subject-matter which had already been discussed and on which the Board had already given its conclusions. Thus, although the appellant formally objected that the amendment was late-filed (without any argument), in the particular

circumstances of this case as explained above, the respondent had merely cancelled out all other issues remaining on appeal.

The Board concludes that under these special circumstances, the submission of the new main request does not constitute an amendment to the party's appeal case in the sense of Article 13 RPBA 2020. The requirement for exceptional circumstances of Article 13(2) RPBA 2020 to exist is therefore not applicable. This is also in line with a body of case law developed by the Boards, see e.g. T1480/16 (Reasons 2) and T981/17 (Reasons 3).

As a consequence, claim 1 of the new main request is in the appeal proceedings (Article 12(2) and (4) RPBA 2007).

2. *Clarity - Article 84 EPC*

In its grounds of appeal, the appellant objected that claim 6 of the (then) main request lacked clarity due to the word "otherwise". In particular, it argued that it was unclear whether the claim, in its last feature, referred to the article apart from the at least one functional characteristic and the functional enhancement indicator, or only apart from the functional enhancement indicator. With the claim of the new main request being amended such that it defines the articles as being identical in appearance "other than their functional enhancement indicators", this objection is moot. This was also not disputed by the parties.

During the oral proceedings and for the first time in the appeal proceedings, the appellant objected that the

terminology "identical in appearance", as such, lacked clarity. This objection is thus distinct from the clarity objection raised in the grounds of appeal, although this wording was already present in the (then) main request. It was also not anything the Board had identified in its communication under Article 15(1) RPBA 2020. If it were to have been admitted into the proceedings, entirely new issues would then have required discussion.

According to Article 13(2) RPBA 2020 "[a]ny amendment to a party's appeal case made ... after notification of a summons to oral proceedings shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned". The general principle at such a late stage of the proceedings is thus to not admit new requests, facts, objections, arguments or evidence (as listed in Article 12(3) RPBA 2020) into the proceedings. For applying the exception stated in Article 13(2) RPBA 2020, the party amending its case has to show that exceptional circumstances exist that would justify why deviation from the general principle should be allowed.

In the present case, the appellant did not invoke any such exceptional circumstances, nor could the Board itself identify any. The objection that the claim lacked clarity due to the terminology "identical in appearance" was thus not taken into account (Article 13(2) RPBA 2020).

3. *Article 123(2) EPC*

The subject-matter of the claim meets the requirement of Article 123(2) EPC. The expression "substantially

identical in appearance" used in the description means the same as "identical in appearance" used in the claim. Both terms are interpreted by the Board as meaning that any difference between two articles is not visually perceptible to a user.

- 3.1 The claim defines an array of articles differing in at least one functional characteristic and a corresponding functional enhancement indicator. The articles are identical in appearance, "other than their functional enhancement indicators". In other words, according to the claim, the appearance of the articles is not affected by the different functional characteristic(s) and the articles look exactly the same (i.e. identical). They can thus only be visually distinguished by their functional enhancement indicators.

As a basis for this definition, the respondent referred to the sentence bridging pages 18 and 19 of the application as filed, which states:

"Functional enhancement indicator(s) 34 can be beneficially utilized to distinguish between pads in an array of feminine hygiene articles that are otherwise substantially identical in appearance."

- 3.2 The appellant argued that this sentence did not describe visually identical articles, but referred to articles that were *substantially* identical in appearance. Thus, not only were they not identical (due to their different functional characteristics), their appearance was also only *substantially* the same. The articles described in the description on pages 18 and 19 thus looked slightly different. It was therefore possible to see the difference between the articles,

but it was difficult. By defining articles that did not visually differ at all, the claim encompassed subject-matter that was not derivable from the application as filed.

The Board does not accept this argument. As also pointed out by the respondent, there is a consistent teaching in the application as filed that the functional enhancement indicators are provided to distinguish between pads that cannot be distinguished otherwise, at least not visually. Other passages in the description refer to this by using the expression "not perceptible to the user" (see e.g. page 9, lines 13 and 16).

- 3.3 The appellant's argument that this passage also failed to indicate that the functional difference was not visible, is also not accepted. The Board concurs with the respondent's argument that a reader of the application as filed would have understood the expressions "substantially identical in appearance" and "visually not perceptible to the user" as being synonymous and meaning that a user would not be able to identify the functional differences with the unaided eye only (as also indicated on page 9, lines 26-28, where a definition of "visually perceptible" is given).

The expression "identical in appearance" thus defines no more than what was presented in the description by referring to "substantially identical in appearance" and to "(not) visually perceptible by the user". The subject-matter defined in the claim and the one described in the application as filed is therefore not different in this respect. The requirement of Article 123(2) EPC is thus fulfilled.

4. *Inventive step*

The subject-matter of the claim involves an inventive step (Article 56 EPC). The difference over D2 that the articles are, other than their functional indicator, identical in appearance, has the technical effect that despite the articles differing in at least one functional characteristic, their dimensions can be designed to correspond to the preferences of a group of users. A skilled person gets no hint in this direction, either from their common general knowledge or from D1 (see below). They would thus not arrive at the claimed subject-matter without requiring inventive skill.

- 4.1 D2 represents the closest prior art for the array of feminine hygiene articles in the form of pads (as defined in the claim). This was also common ground between the parties. The attack presented in the written proceedings starting from D1 is no longer valid, as the claim now excludes the articles being of different length, since they are identical in appearance (other than their functional indicator).

D2 shows (see e.g. the Figure and page 5, lines 12 to 25; page 6, line 20 to page 7, line 10) a package comprising an array of sanitary napkins (and thus of feminine hygiene articles in the form of pads), each having a body-facing surface, a first end region and a second end region, and a functional enhancement indicator visible from said body-facing surface (see page 7, line 2 with reference to the topsheet). The pads of this embodiment in D2 further differ in that different types of absorbent articles are provided. As an example, D2 refers to a different absorbent capacity, which represents a functional characteristic according to the claim. D2 also describes that the

functional enhancement indicator differs in correspondence to the different functional characteristic, as it identifies each type of absorbent article (D2, page 6, line 29). That these features are all known from D2 was not contested by the parties.

4.2 Therefore, the subject-matter of the claim differs from D2 in that the articles are, other than their functional enhancement indicators, identical in appearance. In other words, all articles in the package are of the same size and shape and cannot thus be visually distinguished by a user other than by their functional enhancement indicator.

4.3 The appellant argued that no technical effect is achieved, and thus no problem solved, by making all pads in the package look the same. The Board however finds differently.

It follows the respondent's arguments that by making all pads in the package identical in appearance, these can be made according to the needs and preferences of a group of users which would otherwise have to accept that the products in the package not only differed in a functional characteristic but also in e.g. size. With the pads all being identical in appearance, the technical effect is achieved that at least a group of users will find only their preferred size and shape (i.e. adapted in that regard to their particular needs) for all pads to be used over their menstruation period, despite the pads in the package differing in at least one functional characteristic.

The objective technical problem to be solved by the invention is thus to provide a package with sanitary pads differing in at least one functional

characteristic without having to compromise on the fit of the articles.

- 4.4 This is not suggested by any means in D2. On the contrary, D2 only describes articles of different dimensions, having a respective longitudinal length of 240, 280 and 320mm (see page 5, lines 19-23). Nor would the skilled person, without the benefit of hindsight, know from their common general knowledge that a benefit would be achieved by making the pads in the package not functionally, but visually identical.
- 4.5 The appellant's further argument that D1 led the skilled person to the invention as it gave a clear teaching to put several articles of the same size but with different thickness into a package, is also not persuasive. If the passage referred to by the appellant (paragraphs 0087 and 0088 in D1) indeed gave such a motivation, the resulting articles would not be, other than their functional enhancement indicator, identical in appearance, as they would differ in their thickness. This however is a property that is visually perceptible to the user. A package including such articles would thus be outside of the scope of the claim.
- 4.6 The Board thus concludes that the attacks presented by the appellant do not demonstrate that the skilled person would have arrived at the claimed subject-matter in an obvious way. It therefore concludes that the subject-matter involves an inventive step (Article 56 EPC).

Since no further objections have been made against the claim of the main request, the main request is allowable subject to a correctly adapted description (including, where required, its Figures).

5. The Board thus avails itself of its power under Article 111(1) EPC to remit the case to the opposition division for the description to be adapted to the amended claim.

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 sole claim of the main request filed during the oral proceedings and a description to be adapted thereto.

The Registrar:

The Chairman:



D. Grundner

M. Harrison

Decision electronically authenticated