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**Datasheet for the decision
of 25 July 2024**

Case Number: T 1813/22 - 3.2.06

Application Number: 14859096.1

Publication Number: 3062672

IPC: A47K7/00, D04H1/4266, D04H18/04

Language of the proceedings: EN

Title of invention:
DISPERSIBLE MOIST WIPE

Patent Proprietor:
Kimberly-Clark Worldwide, Inc.

Opponent:
Andritz Küsters GmbH

Headword:

Relevant legal provisions:
EPC Art. 100(b), 83

Keyword:
Grounds for opposition - insufficiency of disclosure (yes)
Sufficiency of disclosure - parameters - main request (no) -
auxiliary request (no)

Decisions cited:

T 1714/15, T 1293/13, T 0593/09, T 0061/14

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 1813/22 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 25 July 2024

Appellant: Andritz Küsters GmbH
(Opponent) Eduard-Küsters-Strasse 1
47805 Krefeld (DE)

Representative: Kluin Patent
Patentanwälte Kluin Debelius Weber
PartG mbB
Benrather Schlossallee 111
40597 Düsseldorf (DE)

Respondent: Kimberly-Clark Worldwide, Inc.
(Patent Proprietor) 2300 Winchester Road
Neenah, Wisconsin 54956 (US)

Representative: Dehns
St. Bride's House
10 Salisbury Square
London EC4Y 8JD (GB)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 23 May 2022
rejecting the opposition filed against European
patent No. 3062672 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman M. Harrison
Members: T. Rosenblatt
J. Hoppe

Summary of Facts and Submissions

- I. The appellant (opponent) filed an appeal against the decision of the opposition division rejecting the opposition against European patent No. 3 062 672 (hereinafter "the patent").

- II. With its reply to the appellant's statement of grounds of appeal, the respondent (patent proprietor) requested that the impugned decision was upheld and submitted arguments and three sets of amended claims as auxiliary requests 1 to 3.

- III. The Board issued a summons to oral proceedings. In a communication pursuant to Article 15(1) of the Rules of Procedure of the Boards of Appeal (RPBA), the Board informed the parties that the opposition ground pursuant to Article 100(b) EPC appeared to prejudice maintenance of the patent as granted and that the considerations in this regard would apply equally to the auxiliary requests. It also informed the parties of its reason for not holding oral proceedings by videoconference, as had been requested by the respondent.

- IV. With its letter dated 28 June 2024 the respondent announced its intention not to attend the oral proceedings and submitted further arguments in regard to the Board's preliminary opinion on Article 100(b) EPC.

With its further letter dated 23 July 2024 the respondent confirmed that it would not attend the oral proceedings.

- V. Oral proceedings were held before the Board in the absence of the respondent.
- VI. The appellant requested that the decision under appeal be set aside and the patent be revoked.
- VII. The respondent requested (in writing) that the appeal be dismissed (main request) or as an auxiliary measure that the patent be maintained in amended form on the basis of one of auxiliary requests 1 to 3 submitted with the reply to the grounds of appeal.
- VIII. Claim 1 of the patent as granted (**main request**) has the following wording (the feature numbering inserted in square brackets corresponds to the numbering used in the statement of grounds of appeal, page 2, albeit noting that the features of the claim to be considered are those of the English text as used below):

"[M1.1] A dispersible moist wipe comprising
[M1.2] a nonwoven tissue web having regenerated fibers in an amount of 10 to 20 percent by weight and
[M1.3] natural fibers in an amount of 80 to 90 percent by weight,
[M1.4] wherein the regenerated fibers and the natural fibers are hydroentangled
[M1.5] such that the web has a geometric mean tensile strength of at least 150 grams per inch (58 Nm) and
[M1.6] a slosch-box break-up time of less than 155 minutes;
wherein:
[M1.7] the web has a formation value of at least 12;
[M1.8] the regenerated fibers comprise at least one of lyocell fibers and rayon fibers, and
[M1.9] have a fineness of from 1 to 3 deniers and
[M1.10] a length of from 3 millimeters to 20

millimeters;

[M1.11] the natural fibers comprise at least one of southern softwood kraft and cotton; and

[M1.12] the web is formed from a liquid suspension containing from 0.02 to 0.08 percent fiber by weight;

[M1.13] and wherein the geometric mean tensile strength, the sloss-box break-up time and the formation value are determined using the methods set out herein."

In **auxiliary request 1** feature M1.12 has been amended to read

"the web is formed from a liquid suspension containing from 0.03 to 0.05 percent fiber by weight"

Compared to claim 1 of the main request, in **auxiliary request 2** the following features have been amended to read

M1.5: "such that the web has a geometric mean tensile strength of at least 350 grams per inch (135 Nm)"

M1.10: "a length of from 4 millimeters to 15 millimeters"

M1.11: "the natural fibers comprise at least one of southern softwood kraft and cotton, and have a length of greater than 1 millimeter"

Compared to claim 1 of the main request, in **auxiliary request 3** the following feature has been inserted between features M1.12 and M1.13

"the wipe does not comprise a non-dispersible net or thermoplastic binder;"

IX. The following evidence has been referred to by the parties:

D18: email exchange between the respondent and "OpTest Equipment Inc."

X. The arguments of the appellant as far as relevant to the present decision may be summarised as follows.

Main request - Article 100(b) EPC

The invention defined in claim 1 was not disclosed in a manner sufficiently clear and complete so as to be carried out by the skilled person person. According to feature M1.13 the formation value, which was further specified in feature M1.7, had to be determined using the methods set out in the patent. It was acknowledged by the opposition division and the respondent that the formation value was an uncommon parameter in the technical area to which the claimed subject-matter belonged. Paragraph 43 of the description of the patent described the method for its determination. Accordingly the formation value should be determined with an apparatus "Paper PerFect Formation Analyzer Code LPA07", from OpTest Equipment Inc. (900 Tupper Str., Hawkesbury, ON Canada) and the measurement should be carried out according to the procedure outlined in section 10.0 of its operation manual ("LPA07_PPF_Operation_Manual_004.wpd 2009-05-20") of that apparatus, which method is however not described in the patent. The apparatus and its operation manual were no longer available to the public. Consequently the information disclosed in the patent was not sufficient to carry out the subject-matter of claim 1. The opposition division was wrong to conclude from D18 that the successor model LPA17 of the apparatus

indicated in paragraph 43 of the patent would deliver the same values for the claimed subject-matter. The author of the reply to the respondent's enquiry in D18 only indicated that the two models LPA07 and LPA17 gave the same results on the same papers, within precision tolerances. There was no evidence that this statement was valid also for dispersible moist wipes as specified in claim 1.

- XI. The arguments of the respondent as far as relevant for the present decision may be summarised as follows.

Main request - Article 100(b) EPC

It was not disputed that the apparatus mentioned in paragraph 43 of the patent was commercially available at the effective date of filing of the patent and for at least this reason the requirements of Article 83 EPC were met. As shown by D18, the specific product code LPA07 was superseded by a later model (product code LPA17), but the manufacturer had confirmed that the two models gave the same results. The formation value could be measured for a nonwoven web (as shown by the data in the patent) and, despite the incidental reference to paper, D18 implied that the same formation values would be obtained when using a nonwoven web for both product codes. The manual would of course be supplied by the manufacturer with the machine. The skilled person could therefore measure the formation value using the machine and corresponding manual which were commercially available. There were several examples within the patent having the required formation value (see at least Examples 3 and 15), which therefore provided further guidance for forming a moist wipe falling within the scope of claim 1. Paragraphs 17 and 47 linked the formation value to the use of a low

consistency former, i.e. forming a nonwoven web having a high formation value by using a liquid suspension containing just 0.02-0.08 wt% fiber as also required by claim 1.

Reasons for the Decision

Main request - Article 100(b) EPC

1. The reasons given by the opposition division for rejecting in particular the appellant's objection concerning the ground for opposition pursuant to Article 100(b) EPC do not stand up to scrutiny by the Board.

The Board finds that the invention defined in claim 1 of the patent is not disclosed in a manner sufficiently clear and complete for it to be carried out by a skilled person, for the reasons essentially set out in its communication pursuant to Article 15(1) RPBA and repeated here below in points 1.1 to 1.5.

- 1.1 It is undisputed that the parameter "formation value" in feature (M1.7) of the claimed invention, and thus a limiting feature thereof, is an uncommon parameter in the field of nonwovens (see e.g. the second complete paragraph on page 6 of the impugned decision, and the third sentence in the final paragraph on page 2 of the appellant's letter dated 16 February 2024).
- 1.2 According to the last feature of claim 1 (M1.13), the formation value is to be determined according to a method set out in the description, notably in paragraph

43 of the patent. Accordingly, this method should make use of a specific apparatus ("Paper PerFect Formation Analyzer Code LPA07" manufactured by OPTEST Equipment Inc.) and of a specific test procedure outlined in section 10.0 of its operation manual ("LPA07_PPF_Operation_ManuaI_004.wpd 2009-05-20").

1.3 As argued by the respondent, at the filing date of the patent this specific apparatus was seemingly available and so was presumably its manual of operation. The Board however cannot agree with the respondent's conclusion that for this reason the invention defined in claim 1 meets the requirement of sufficiency of disclosure (see point 8 of the respondent's reply to the appeal grounds). Such conclusion could only be confirmed if the apparatus mentioned in the cited paragraph as well as the manual were available over the entire lifespan of the patent (see for example Reasons 3.3 of T 1714/15).

1.4 Since, in the present case, the specific machine referred to in paragraph 43 of the patent as well as its operation manual containing the information necessary to perform the test according to its section 10.0, are undisputedly no longer available (see the first complete paragraph on page 2 of the appeal grounds and also the last three paragraphs on page 6 of the impugned decision), but only a successor model (D18, LPA17), the respondent's conclusion could only be followed if there was proof that both models (LPA07 and LPA17) indeed give the same results for the specific type of product defined by claim 1. As also argued by the appellant, no proof is available that this is the case. The statement in D18, referring to "the same paper" is insufficient in this regard (see also Reasons 1 of T 1293/13). There is no verifiable data or

evidence available supporting this statement, let alone that it would apply also to a dispersible moist wipe comprising a tissue web having the features according to claim 1.

- 1.5 Since neither the apparatus LPA07 nor the test procedure set out in section 10.0 of its operation manual is available, examples 3 and 15 in the patent are of no help to the skilled person either since they can not be tested for the formation value which needs to be determined according to the procedure of paragraph 43 of the patent using an LPA07 and the test procedure in section 10.0 of its manual. Such test is a prerequisite for concluding that a test of this parameter for the same sample wipe based on a procedure using the successor model LPA17 would lead to the same value as obtained with LPA07.
- 1.6 For the above reasons in points 1.1 to 1.5 given in its communication pursuant to Article 15(1) RPBA, the Board provisionally concluded that the invention according to claim 1 of the patent was not disclosed in a manner sufficiently clear and complete for it to be carried out by a skilled person. Additionally, the further arguments submitted by the respondent in writing in reply to the Board's communication did not change this conclusion for the following reasons.
 - 1.6.1 Even if the facts of the present case differ slightly from decisions T 1714/15 and T 1293/13 (see above points 1.3 and 1.4), in that in claim 1 of the contested patent the unavailable machine is not explicitly specified, the conclusions of the Board remain the same. In order to carry out the invention according to claim 1, the skilled person is directed to the description by the claim's explicit reference in

feature M1.13 to the "formation value [is] determined using the methods set out herein". The skilled person is therefore faced with the same insufficient information as in the cited decisions. It was also not explained by the respondent why this difference should lead to a different conclusion on insufficiency of disclosure.

1.6.2 The Board is also not convinced by the respondent's argument that the general type of machine ("PerFect Formation Analyzer") rather than the specific machine identified by its product code ("LPA07") would be understood as the relevant aspect for the skilled person when considering suitability for carrying out the test. Moreover, this allegation is not supported by any evidence. Similarly, there is no evidence that the operating manuals of two machines with different product codes ("LPA07" and "LPA17") contain the same details with respect to the methods to be used, let alone that the LPA17 manual discloses the same method as specifically referred to on page 9, lines 2/3 of the description of the patent, namely "in section 10.0 of the Paper PerFect Code LPA07 Operation manual (LPA07_PPF_Operation_ManuaI_004.wpd 2009-05-20)".

1.6.3 Contrary to a further argument of the respondent, reproducing the two examples 3 and 15 of the patent, which should inherently have formation values within the claimed range, would also not allow the claimed invention to be carried out by the skilled person over the whole scope of the claim. Absent any evidence other than the unsupported statement in D18 that formation values measured by the successor model LPA17 would be the same "for the same paper" (rather than for a dispersible moist wipe made of a nonwoven tissue web as required by claim 1 - see also point 1.4 above), the

skilled person is not provided with sufficient information to carry out the invention defined in claim 1 for any other wipes than the two examples.

1.6.4 The further decisions T 593/09 and T 61/14 referred to by the respondent also do not alter the Board's conclusion. Due to the unavailability of the machine "Paper PerFect Formation Analyzer Code LPA07" and consequently the impossibility of determining the formation value according to the method in paragraph 43 of the patent, the parameter "formation value" is indeed so ill-defined that the skilled person, taking into account common general knowledge and the description of the patent, is not able to carry out the invention of claim 1 over its whole scope.

1.6.5 Further, the Board also does not accept the respondent's argument that the use of a low consistency former as specified by feature M1.12 of claim 1 would be linked or necessarily lead to a dispersible moist wipe having a web with a high formation value within the claimed range, as specified by feature M1.7. The claim does not establish any link between features M1.7 and M1.12; both parameters are defined independently of each other. Although paragraphs 17 and 47 of the patent indeed disclose formation quality as being enhanced by the use of a low consistency former, there is no indication or evidence that low consistency in the range claimed by feature M1.12 necessarily leads to a formation value within the claimed range. At least the data provided for the fifteen examples (Table 2) shows a great lacuna in regard to the respective formation value and does not allow such a link to be established.

1.7 The Board therefore confirms its provisional opinion set out in its communication under Article 15(1) RPBA

and concludes that the ground for opposition pursuant to Article 100(b) EPC prejudices maintenance of the patent.

Auxiliary requests

2. The respondent has not argued that the amendments to claim 1 of the respective auxiliary requests 1 to 3 would remedy an insufficient disclosure of the invention and the Board cannot see that this could be the case. Therefore, auxiliary requests 1 to 3 are not allowable since the invention specified in independent claim 1 of each request respectively is not disclosed in a manner sufficiently clear and complete for it to be carried out by the skilled person (Article 83 EPC), for the same reasons as given above.

3. Absent any set of claims meeting the requirements of the EPC, the Board can only accede to the appellant's request that the patent be revoked.

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:



D. Grundner

M. Harrison

Decision electronically authenticated