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**Datasheet for the decision
of 14 October 2024**

Case Number: T 1878/22 - 3.2.08

Application Number: 16205744.2

Publication Number: 3175830

IPC: A61F5/445, A61F5/448

Language of the proceedings: EN

Title of invention:

A CONVEX SUPPORTING DEVICE FOR AN OSTOMY APPLIANCE

Patent Proprietor:

Coloplast A/S

Opponent:

Salts Healthcare Limited

Relevant legal provisions:

EPC Art. 100(a), 56, 116(1)
RPBA 2020 Art. 12(8)

Keyword:

Inventive step - (yes)
Oral proceedings - non-attendance of party

Decisions cited:

T 0555/18



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Case Number: T 1878/22 - 3.2.08

D E C I S I O N
of Technical Board of Appeal 3.2.08
of 14 October 2024

Appellant: Salts Healthcare Limited
(Opponent) Richard Street
Birmingham
West Midlands B7 4AA (GB)

Representative: Forresters IP LLP
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Erika-Mann-Straße 11
80636 München (DE)

Respondent: Coloplast A/S
(Patent Proprietor) Høltedam 1
3050 Humlebaek (DK)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 23 June 2022
rejecting the opposition filed against European
patent No. 3175830 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairwoman P. Acton
Members: A. Björklund
F. Bostedt

Summary of Facts and Submissions

- I. The appeal was filed by the opponent (appellant) against the decision of the opposition division to reject the opposition.
- II. The opposition division decided that the invention was sufficiently disclosed for it to be carried out by the skilled person, that the subject-matter of claim 1 was new and that it involved an inventive step.
- III. By letter of 18 July 2024, the appellant announced that they would not attend the oral proceedings before the Board scheduled for 27 August 2024. The oral proceedings were therefore cancelled.
- IV. The appellant (opponent) requested that the decision be set aside and that the patent be revoked in its entirety.

The respondent (patent proprietor) requested that the appeal be dismissed or, in the alternative, that a patent be maintained on the basis of auxiliary requests A or B filed during the opposition proceedings.

- V. Independent claim 1 of the main request (patent as granted) reads:
 - a. "A base plate (100) for an ostomy appliance, the base plate comprising an adhesive wafer (102) for adhering the base plate to a skin area of a user,

- b. the adhesive wafer (102) defining a first through-going passage for receiving a stoma of a user, wherein
- c. the base plate comprises a convex supporting device (104) which is secured to the adhesive wafer in a first zone (108), wherein
- d. the convex supporting device (104) comprises a second through-going passage
- e. and defines a first bending axis and a second bending axis both of which axes define a right angle with a centre axis of the through-going passage, and wherein
- f. a resistance to bending is higher when bending the base plate about the second bending axis than a resistance to bending when bending the base plate about the first bending axis,
characterized in that
- g. a bending resistance of the base plate about the first bending axis is below a first predetermined level of 2 Newton per 20 mm, and
- h. an axial compression resistance of the base plate in a direction parallel to the centre axis is above a second predetermined level of 10 Newton per 3 mm."

VI. The following documents are relevant to the decision:

D1 WO 2010/054662 A2

D13 WO 02/094333 A2

VII. The appellant's arguments as far as relevant for the present decision can be summarised as follows:

Unusual parameters

Features g. and h., which distinguished the subject-matter of claim 1 from the base plate of D1, were unusual parameters. Therefore, in line with decision T 0555/18, the respondent should bear the burden of proof that the subject-matter of claim 1 involves an inventive step.

Inventive step

The subject-matter of claim 1 differed from the base plate in D1 in the mechanical properties defined in Features g. and h.

The skilled person would strive to achieve these properties in the light of their knowledge of the commercially available "Welland Flair" base plate. They would also arrive at a base plate with these properties using the material proposed in D13, which was the same as that proposed in the patent in suit.

The subject-matter of claim 1 therefore did not involve an inventive step.

VIII. The respondent's arguments as far as relevant for the present decision can be summarised as follows:

Unusual parameters

A reversal of the burden of proof was not justified. This required a strong presumption that the claimed subject-matter defined by an unusual parameter was

inherently disclosed in the prior art, which was not the case here.

Inventive step

The subject-matter of claim 1 involved an inventive step starting from the base plate in D1. None of the cited prior art would lead the skilled person to the specific combination of mechanical properties defined in features g. and h. Nor would the use of the material proposed in D13 lead to a base plate having those properties.

Reasons for the Decision

1. Decision in written proceedings

By letter of 18 July 2024, the appellant announced that they would not attend the oral proceedings before the Board scheduled for 27 August 2024.

Where oral proceedings are appointed upon a party's request and that party subsequently expresses its intention not to attend, such statement is generally interpreted as a withdrawal of the request for oral proceedings (Case Law of the Boards of Appeal of the European Patent Office, 10th edition 2022, III.C 4.3.2).

As the Board does not consider it necessary to hold oral proceedings (cf. Article 116(1) EPC), the oral proceedings were cancelled, and the decision handed down in written proceedings (Article 12(8) RPBA 2020).

2. Unusual parameters - reversal of burden of proof

The appellant submitted that Features g. and h., which distinguish the subject-matter of claim 1 from the base plate of D1, were unusual parameters because they were not commonly used in the field of the invention.

The appellant submitted that the respondent should therefore bear the burden of proving that the skilled person would not arrive at a base plate according to claim 1 by applying to the base plate of D1 a bending resistance and an axial compression resistance equal to or better than those of the "Welland Flair" base plate (described in the patent in suit). In this respect, important parallels could be drawn between the decision T 0555/18 and the present case.

2.1 However, the Board does not see that any parallels can be drawn between the decision T 0555/18 and the present case.

As set out in the reasoning under point 1.5.5 of that decision, the Board found that the parameter defined in the claim did "clearly not represent a conventional (or even a suitable) parameter for determining crystallinity of all polyamides defined therein" (emphasis added by the present Board). This situation is different from the present case where the parameters used in Features g. and h. represent mechanical properties of the base plate which are valid irrespective of the specific material used.

The parameters used in Features g. and h. do therefore not justify a reversal of the burden of proof.

3. Inventive step starting from D1

It is common ground that Figures 1 to 3 of D1 disclose a base plate according to features a. to f., whereby the ring 5 represents a "convex supporting device" according to feature d.

Due to the grooves 10 to 13, the bending forces around axis B are smaller than those around axis A.

3.1 According to the appellant, the technical problem solved by the distinguishing Features g. and h. is the provision of a base plate for retracted stomas which is flexible and comfortable, and secures against leakage of stomal fluids and provides flexibility to be able to follow the user's body movements.

3.2 In combination with "Welland Flair"

The appellant submitted that the skilled person seeking to solve the problem posed would arrive at the base plate of claim 1 without any inventive step because of their knowledge of the commercially available "Welland Flair" base plate.

According to the appellant, the skilled person knew the mechanical properties of the "Welland Flair" base plate, which are listed in Tables 1 and 2 of the patent in suit, and this knowledge gave them a clear and unmistakable goal to improve upon. They would therefore aim for the base plate of D1 to have a bending resistance significantly below 2.27 N per 20 mm of bending, whilst maintaining an axial compression resistance similar to that of the "Welland Flair" base plate.

In doing so, they would arrive at a base plate according to claim 1.

- 3.2.1 However, according to Table 2 of the patent in suit, the "Welland Flair" base plate has a bending resistance of at least 2.27 Newtons at 20 mm bending which is above the upper limit required by Feature g. Applying the values for the bending resistance of the "Welland Flair" base plate to that of D1 would thus not lead to the subject-matter of claim 1 as granted.

Furthermore, the knowledge of the "Welland Flair" base plate does not give the skilled person any reason to aim for a lower bending resistance than that of the "Welland Flair" base plate. Neither the patent in suit nor any other prior art provides any explanation as to why the specific values of the bending resistance and axial compression resistance of the "Welland Flair" base plate were chosen. In the absence of any teaching as to why this combination of mechanical parameters was chosen and how it affects comfort, flexibility and leakage prevention, the skilled person has no reason to aim for any bending properties other than those of the "Welland Flair" base plate.

The subject-matter of claim 1 is therefore not obvious to the skilled person starting from D1 in view of the "Welland Flair" base plate.

- 3.3 In combination with D13

The appellant submitted that the subject-matter of claim 1 was obvious also in the light of D13.

According to the appellant, D13 addressed the same problem as the patent in suit (page 2, lines 20 to 22;

page 3, lines 24 to 26 and page 5, lines 7 to 11). The solution proposed was to make the convex ring-shaped member of a copolymer of ethylene and octene, preferably DuPont Dow's Engage[®] 8401. In view of this teaching, the skilled person would have used this material for the base plate of D1. This was also the preferred material for the convex supporting device of the base plate of the patent in suit according to paragraph [0173]. Thus, making the convex shell 1 of the base plate in Figures 1 and 2 of D1 from the material proposed in D13 would inevitably result in a base plate having the bending resistance and axial compression resistance required by Features g. and h.

- 3.3.1 However, contrary to the appellant's view, the use of the material Engage[®] 8401 for the convex shell of the base plate of D1 does not inevitably result in a base plate with the mechanical properties defined in Features g. and h.

It should be noted that there is a strong similarity between the base plates of Figures 1 and 2 of D1 and Figures 25 and 26 of the patent in suit. However, since drawings in patent documents are generally schematic, the similarity between the drawings in D1 and in the patent does not mean that these base plates have exactly the same dimensions. Therefore, they do not inevitably have the same mechanical properties if they are made of the same material.

- 3.4 The subject-matter of claim 1 thus involves an inventive step.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairwoman:



C. Moser

P. Acton

Decision electronically authenticated