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D E C I S I O N
of 13 April 1999

Case Number: T 0431/95 - 3.2.2

Application Number: 89105197.1

Publication Number: 0335253

IPC: A61F 13/15

Language of the proceedings: EN

Title of invention:
Absorbent article

Patentee:
The Procter & Gamble Company

Opponent:
NcNeill-PPC, Inc.
Kayserberg S.A.
Mölnylcke AB

Headword:
-

Relevant legal provisions:
EPC Art. 54

Keyword:
"Novelty (yes)"

Decisions cited:
-

Catchword:
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Boards of Appeal

Chambres de recours

Case Number: T 0431/95 - 3.2.2

D E C I S I O N
of the Technical Board of Appeal 3.2.2
of 13 April 1999

Appellant: The Procter & Gamble Company
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted 4 April 1995
revoking European patent No. 0 335 353 pursuant
to Article 102(1) EPC.**

Composition of the Board:

Chairman: W. D. Weiß
Members: M. Bidet
 C. Holtz

Summary of Facts and Submissions

- I. The appellant is proprietor of European patent No. 0 335 253.
- II. The patent was opposed by the respondents 1 to 3 on the grounds of Article 100(a) EPC (lack of novelty and inventive step). Respondent 1 further based its opposition on the ground of Article 100(b) (insufficiency of disclosure).

The opposition division revoked the patent in a decision dispatched on 4 April 1995, since, having regard to the documents

D1: US-A-3 696 187

D2: US-A-2 747 575

D3: US-A-3 575 174

D14: SE-B-374 650 (translated in English),

and three other documents,

the subject-matter of Claim 1 according to the main request (patent as granted) lacked novelty; and Claim 1 of two auxiliary requests also lacked novelty with regard to document D14. It was also considered that document

D12: EP-A-0 136 524

did not deprive Claim 1 as granted of novelty.

III. On 22 May 1995, the appellant filed an appeal and paid the fee for appeal. The statement of grounds was filed on 4 August 1995.

IV. Oral proceedings, at which respondent 02 was not represented, were held before the Board on 13 April 1999 during which the appellant filed a new main request, Claim 1 of which reads as follows:

"A disposable sanitary napkin (10) adapted to be held in place by the adjacent surface of the wearer's undergarment and the wearer's thighs, the napkin being elongate and having longitudinal side edges, the napkin comprising absorbent means (39) including an absorbent core (40) and a fluid permeable topsheet (45) having a body surface (13) overlying said absorbent core, said napkin optionally comprising a fluid impermeable barrier sheet (55) underlying said absorbent core, a portion of said body surface (13) having a convex upward configuration in use, **characterised in that** said article comprises a moisture stable deformation element (20) associated with said absorbent means (39), said deformation element having a flexure resistance of at least 100 g in a modified circular bend procedure whereby said deformation element maintains said portion of said body surface (13) in a convex upward portion configuration when said napkin is subjected to lateral compressive forces in use, and in that said deformation element (20) has flexure hinges (23,23A,23B,23C) for inducing said body surface (13) and the absorbent core (40) of a central region (62) of said napkin to have a W-shaped configuration, when said napkin is subjected to lateral compressive forces, the "W" including the said in-use convex upward portion, which convex upward

portion is generally symmetrically disposed between said longitudinal side edges and which is assumed, or, if present before use, increased, by said lateral forces."

- V. The appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of claims 1 to 8 of the main request as filed in the oral proceedings, amended pages 7 and 10 of the description as filed in the oral proceedings, Figures 1 to 13, 29 and 30 as granted, and the rest of the description to be adapted accordingly.

The respondents 01 and 03 requested that the appeal be dismissed.

- VI. The appellant presented the following arguments:

The amended Claim 1 and the description made clear that the deformation element inducing the body surface and the absorbent to have a W-shaped configuration did not cover the manipulation by the hands of the wearer prior to being put in use. Similarly, the flexure hinges contrary to flexure means, related now to a concrete, clear structural feature. The deformation element necessarily related to something on which a test of flexure resistance could actually be performed. There was no objection based on Article 123 or on Article 84 EPC.

Novelty of the subject-matter of Claim 1 was met since there was no document disclosing in combination all the features of Claim 1, particularly in the following respect:

Due to the presence of the outer wrapper 22 of the absorbent article disclosed in document D2, compressive lateral forces induced a configuration which was depressed in the central region instead of an increased convex upward configuration. There was nothing in this structure on which a flexure resistance test could be performed and the location of the hinges could not be identified.

Documents D3 and D1 were silent about the effect of compressive lateral forces on the central portion of the napkin, about the structure of the deformation element and about the flexure resistance of the material. These documents as well as document D12 did not disclose moisture stable deformation elements, but relied on grooves to permit bending of the napkin. Finally, the napkin disclosed in document D14 did not have its convex upward body surface deformed in a W-shaped configuration under lateral compressive forces.

Since there was no document disclosing all the features of Claim 1 in combination, the subject-matter of Claim 1 met the requirement of novelty.

VII. The respondents presented the following arguments:

The amended features did not meet the requirement according to Article 84, since the feature relating to the deformation element was not sufficiently defined.

Thus, the absorbent element provided with stitches as disclosed in document D2 also exerted the function of a deformation element. Furthermore, the grooves made in

the napkin according to document D3 (see groove 25 in Figure 3, 4 and 6), document D1 (grooves 12 and 14 in Figure 3) and document D12 (grooves a-a' to e-e' in Figure 1, 2 and 4) constituted the hinges, which inevitably formed a W-shaped configuration under the influence of lateral compressive forces.

The incontinence napkin described in document D14 was in effect a sanitary napkin or was at least suitable for such a use. In any case, the skilled person would find no distinguishing feature between the incontinence napkin and the claimed sanitary napkin. Further lateral compressive forces on the already convex upward central body surface inevitably led to a W-shaped configuration.

The subject-matter of Claim 1 was therefore not novel.

Reasons for the Decision

1. The appeal is admissible
2. *Amendments*

Claim 1 contains all the features of Claims 1, 2 and 3 as granted and is completed by features from Claim 4 and from the description as granted.

Essentially, these added features relate to the disposable absorbent article being a sanitary napkin adapted to be held in place by the wearer's undergarment and wearer's thighs; the deformation

element being moisture stable; the flexure means of the deformation element being flexure hinges inducing the body surface and the absorbent core of a central region of the napkin to have a W-shaped configuration when subjected to lateral compressive forces, the W-shaped configuration including the convex upward portion and this portion being symmetrically disposed between the longitudinal side edges and which is assumed, or, if present before use, increased, by the lateral compressive forces. The board is satisfied that these amendments are supported by the description of the application as filed as well as by the patent in suit and that they reduce the scope of the protection of the claims as granted.

Therefore, these amendments are considered to meet the requirements of Article 123(2) and (3)EPC.

The feature concerning the manner in which the napkin is held in place defines a well-known type of napkin, which by its configuration and dimensions is positioned within a lady's undergarment and is kept there mainly by its direct association with the wearer's body (see also patent in suit, column 27, lines 26 to 54). An adhesive member, when present, is only a measure of additional security.

The deformation element is now provided with the additional attributes of being moisture stable, as defined in column 12, lines 24 to 29 of the patent, and having hinges, i.e. localisable construction elements. These attributes together with the requirement of a minimum value for its flexure resistance make clear that the deformation element is an element which -

although associated with the absorbent element- is separate therefrom and must be accessible to the standardised test procedure for the measurement of the flexure resistance. Moreover, the passage in column 11, lines 40 to 44 of the patent in suit, which could have rendered the nature of the deformation element unclear, has now been cancelled.

These amendments, therefore, also meet the requirement of clarity according to Article 84 EPC.

3. *Novelty*

- 3.1 Document D2 discloses an elongate sanitary napkin with longitudinal side edges and comprising absorbent means including an absorbent core and a fluid permeable topsheet having a body surface overlying the absorbent core. In use, the napkin comprises a portion of the body surface having a convex upward configuration, (see the hump 16) and the portion of the body surface is maintained in a convex upward configuration when the napkin is subjected to lateral compressive forces in use. The longitudinal side portions of the napkin are bent upward giving the body surface and the absorbent core a W-shaped configuration at its central region. The convex upward portion is symmetrically disposed between the longitudinal side edges and is assumed or increased by the lateral forces. Due to the accordion type folding of the pad, the napkin is kept in position both laterally and longitudinally by the wearer's thighs and also by the undergarment.

Maintenance of the hump is achieved by a strip of substantial fabric 19 at the bottom of the napkin and

by lines of stitches 20 applied through the absorbent core. A measure of the flexure resistance of the maintaining means formed by the substantial fabric and the stitches or the lines of stitches alone is **not** possible since the stitches always are related to and therefore dependent on the absorbent core. Instead any measure of a flexure resistance may only be carried out on the napkin as a whole, namely only on the napkin made of the two elements. Therefore, the substantial fabric and the stitches, either alone or together, do **not** relate to a concrete deformation element separate from the absorbent means, with which it should be associated and is not able to pass the measuring test as specified in Claim 1. For this reason, the subject-matter of claim 1 is novel with respect to the sanitary napkin according to document D2 in that there is a deformation element, which, additionally, has the claimed flexure resistance, a moisture stability and the structure of flexure hinges.

- 3.2 The sanitary napkin disclosed in document D3 comprises an absorbent means, a fluid permeable topsheet with its body surface, and a fluid impermeable barrier sheet 18 as in the first part of Claim 1 of the patent in suit, whereby a portion of the body surface has a convex upward configuration in use.

The supporting structure of the absorbent core is obtained by cover materials 14b of an increased tensile strength to cover the bottom and side surfaces of the napkin and by the longitudinally and transversally extending embossed channels 20, 22. The convex upward configuration results from the deeply embossed wedge-shape channel 25 formed from the bottom of the napkin

and at its rear end (see column 4, lines 32 to 44).

From this technical analysis, the sanitary napkin described in document D3 does **not** disclose (i) that the cover material 14b and the embossed channels 20,22 form a deformation element separate from the pad, (ii) that there are flexure hinges for raising upwardly the side portions of the napkin edges formed between the longitudinal channels 20 and the longitudinal sides of the napkin enabling any W-shaped configuration, (iii) that a deformation element is moisture stable, and (iv) that the convex upward configuration formed by the deformation element is located in the center of the longitudinally extending napkin as specified in Claim 1 and in the description of the patent in suit (see column 9, lines 42 to 55, column 12, line 50 to column 13, line 1; page 20, lines 18 to 24 and Figure 12).

3.3 The embodiment according to Figures 1 to 3 of document D1 is of a type similar to that of document D3 in that it has a pair of longitudinal channels 12 at its upper surface and a longitudinal groove 14 at its bottom surface obtained by compression causing the napkin to adopt its desired configuration. As for the napkin according D3, there is no disclosure of a separate deformation element on which a flexure test may be carried out. Consequently, the features in claim 1 relating to the provision of the deformation element are also novel with respect to this document.

3.4 Document D12 discloses an elongate sanitary napkin comprising an absorbent core, a fluid permeable topsheet with a body surface, and a fluid impermeable

barrier sheet. At one of its end portion, this known napkin is provided with up to three grooves in order to enable the napkin to conform to the anteroposterior curvature of the perineal area and the concave space between the buttocks. Apart from the fact that these grooves are provided in an end portion of the napkin and not in a central region, these grooves are provided on one or both sides of the absorbent material, the integrated layer of the absorbent material and the blood-impermeable layer, or the whole structure of the napkin (see D12, page 2, lines 15 to 26).

Consequently, also this document does not disclose a napkin having a separately identifiable deformation element having the characteristics specified in Claim 1.

3.5 The elastically bendable lattice supporting the **incontinence** napkin disclosed in document D14 consists of a plurality of transversally extending strips 5 between two longitudinally extending strips 6. The transversal strips have a greater flexure resistance than the longitudinal strips and are embedded between the absorbent core 2 and a foam plastic sheet 8. In use, the lattice of the napkin creates through its transversal strips an arch giving a portion of the body surface 8 a convex upward configuration toward the genital organ due to the lateral pressure exerted by the inside of the thighs. The napkin, including the absorbent core and the lattice, is made of two separate elements.

This lattice, which could be considered to be a moisture stable deformation element associated with the

absorbent means, is however, devoid of flexure hinges for inducing the body surface and the absorbent core of a central region of the napkin to have a W-shape configuration when the napkin is subjected to lateral compressive forces.

- 3.6 It results from the above that there is no document disclosing in combination all the features specified in Claim 1.

Therefore, the subject-matter of Claim 1 is new within the meaning of Article 54 EPC.

4. The patent was revoked through the decision under appeal decided on the sole ground of lack of novelty. The patent thus has not yet been tested against the further two grounds of opposition (insufficient disclosure and lack of inventive step) on which the respondents had originally based their oppositions. In order not to deprive the parties of the opportunity to have these issues examined by two instances, the Board makes use of the power conferred on it by Article 111 EPC and remits the case to the Opposition Division.

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 on the basis of the request of the appellant.

The Registrar:

The Chairman:

S. Fabiani

W. D. Weiß