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D E C I S I O N
of 29 March 2001

Case Number: T 1115/96 - 3.2.6

Application Number: 89308361.8

Publication Number: 0359410

IPC: A61F 13/15

Language of the proceedings: EN

Title of invention:

Absorbent article with elastic liner for waste material
isolation

Patentee:

THE PROCTER & GAMBLE COMPANY

Opponent:

Mölnlycke AB

Headword:

-

Relevant legal provisions:

EPC Art. 54(2), 56

Keyword:

"Novelty (yes)"

"Inventive step (yes, after amendments)"

Decisions cited:

-

Catchword:

-



Case Number: T 1115/96 - 3.2.6

D E C I S I O N
of the Technical Board of Appeal 3.2.6
of 29 March 2001

Appellant: Mölnlycke AB
(Opponent) S-405 03 Göteborg (SE)

Representative: Harrison, Michael Charles
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Respondent: THE PROCTER & GAMBLE COMPANY
(Proprietor of the patent) The Procter & Gamble Company
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Representative: Bottema, Johan Jan
Procter & Gamble GmbH
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 5 November 1996
rejecting the opposition filed against European
patent No. 0 359 410 pursuant to Article 102(2)
EPC.

Composition of the Board:

Chairman: P. Alting van Geusau
Members: M. Bidet
M.-B. Tardo-Dino

Summary of Facts and Submissions

- I. The respondent is proprietor of European patent No. 0 359 410.

Claim 1 of the patent reads:

"A disposable absorbent Article (10) having a longitudinal axis, said article comprising:
- a urine impervious backsheet (14);
- a longitudinally elastically contractible liner (12,30,32,34,36,38,40) having at least one passageway (22) through said liner adapted to permit waste materials to pass through said liner (12), said liner being at least partially peripherally affixed to said backsheet (14); and an absorbent core (18) intermediate said liner (12) and said backsheet (14), characterised in that said liner (12) is formed at least in part of an elastic fabric and is foreshortened relative to said backsheet (14) to form a void space (28) in registry with said passageway (22), and disposed intermediate said liner (12) and said backsheet (14)".

- II. The patent was opposed by the appellant on the grounds of Article 100(a) EPC in that the subject-matter of Claim 1 was not novel (Article 54 EPC) or at least lacked an inventive step (Article 56 EPC).

The following state of the art was essentially relied upon:

D1: US-A-4 662 877

D2: AU-87/ 70 495

D3: US-A-4 107 364.

III. The Opposition Division rejected the opposition by decision announced on 15 October 1996 and posted on 5 November 1996. It was of the opinion that the subject-matter of claim 1 of the patent as granted differed from the closest prior art as represented by D1 in that the liner was formed at least in part of an elastic fabric. Furthermore, since the documents D2 and D3 did not concern disposable absorbent articles, the subject-matter of claim 1 was deemed to be novel.

Inventive step of the subject-matter of claim 1 had to be acknowledged since there was neither a disclosure nor an indication to be found toward the use of the elastic composite web disclosed in D2 in the disposable absorbent article according to D1 with a view to solving the problem of avoiding faecal material reaching the skin of the wearer of the disposable absorbent article. Even if a combination of D1 with D2 were envisaged, the skilled person was not led to the solution according to claim 1 of the patent in suit, simply because D2 as well as D3 were not concerned with the above problem or disposable absorbent articles.

IV. On 17 December 1996 the appellant lodged an appeal against this decision, the appeal fee being paid the same day.

In its statement of grounds of appeal, which was filed on 17 March 1997, the appellant maintained the view that the requirements of novelty and of inventive step when compared to D1 to D3 were not met. In order to support the lack of novelty of the subject-matter of claim 1, the following document was filed:

D4: GB-A-1 471 721.

It was further submitted that because the decision was not based on grounds or evidence on which the opponent had had a proper opportunity to present its comments a substantial procedural violation had been made, which demanded reimbursement of the appeal fee.

V. In a communication dated 13 June 2000, pursuant to Article 12 of the Rules of Procedure of the Boards of Appeal, the Board expressed the provisional opinion that the subject-matter of claim 1 appeared to be novel because there was no teaching derivable from D1 that the liner itself should have been foreshortened relative to the backsheet to form a void space as defined in the last feature -referred to as feature g) according to the decision under appeal- of claim 1 of the patent in suit.

Furthermore, due to the difference in functioning between a liner having a constant length and being fitted with elastic bands according to D1 when compared to a diaper with an elastic liner in accordance with claim 1 of the patent in suit, also the feature (referred to as feature f), according to which the liner was formed at least in part of an elastic fabric, was not derivable from D1.

As regards inventive step of the subject-matter of claim 1 as granted, the problem of providing another contractive means for tensioning the liner to conform to the body of the wearer, would appear to arise from the structure of D1. The skilled person facing this problem would have found in D2 various hints towards the use of elastic composites in the disposable

absorbent article according to D1, so that he would have arrived in an obvious manner at the subject-matter of claim 1 of the patent as granted.

VI. The respondent submitted an auxiliary request on 21 March 2001.

VII. Oral proceedings took place on 29 March 2001 during which the respondent filed an amended version of the auxiliary request.

The appellant (opponent) requested that the decision under appeal be set aside and that the European patent be revoked. He withdrew the request for reimbursement of the appeal fee.

The respondent (patent proprietor) requested that the appeal be dismissed and that the patent be maintained as granted (main request) or on the basis of the amended documents presented during the oral proceedings (auxiliary request).

Claim 1 according to the auxiliary request comprises all features of claim 1 of main request with the additional features that:

the liner (12) comprises a trisection (32) encompassing the passageway (22) made of a first material and two panels (30) made of a second material, the trisection (32) being longitudinally centered intermediate the panels (30), the second material being of the elastic fabric, and the first material being substantially non-elastic.

VIII. The arguments of the appellant in support of its

request can be summarised as follows:

According to D1 a flexible facing sheet was used which consisted in an apertured polyethylene film and which by nature also had the characteristic of being elastic. Namely, in this respect D4 (page 4, lines 28 to 34; page 5, lines 1 to 17), showed that such a film could be stretched to 30% or 55% and returned substantially to its original length, so that consequently the apertured polyethylene film of D1 was not only flexible but also elastic. In addition also feature g) was disclosed in D1, since the presence of a void was a consequence of the foreshortening process relative to the backsheet. For these reasons the subject-matter of claim 1 lacked novelty.

As regards inventive step, the problem to be solved in view of D1 was to be seen in providing other means for foreshortening the liner to form a void and to enhance conformability of the liner to the wearer's body. The skilled person would have taken D2 into consideration when faced with this problem. He would have used the composite web comprising an elastic film between a first and a second web in order to obtain an elastic composite web and considered particularly suitable for use in diapers as a liner in the disposable absorbent article according to D1 and thus would have arrived at the subject-matter of claim 1 of the patent in suit.

The auxiliary request filed at oral proceedings should not be accepted since the reasons for late-filing the auxiliary request as well as the purpose of the amendments were not given (see Rule 71a). Furthermore, this request would give rise to an additional search and should be considered as an abuse of proceedings.

IX. The respondent (patent proprietor) contested the opponent's arguments and argued as follows:

Novelty of the subject-matter of claim 1 according to the main request was evident since even when taking into account the teachings of D4, the film properties would be dependent upon various conditions of fabrication and also on the concentration of the apertures. There was no clear evidence that any apertured polyethylene film should be inherently elastic.

The problem arising from D1 was to improve the property of isolating faecal material from the skin of the wearer. The solution did not result from the combination of D1 with D2 since there was no indication on what would have prompted the skilled person to replace the liner by the sheet of D2, and if ever how and where the laminate should be located at the topsheet of D2, which flexibility should be used to obtain the elastication. The teaching of D2 never suggested replacing the facing sheet of D1 which was highly resistant to the penetration of fluids with the elastic material of D2 having different properties.

Concerning the late filed auxiliary request, the claimed subject-matter related to one of the specific embodiments (according to Figure 4), namely that the trisection encompassing the passageway, being longitudinally centered intermediate the two panels of elastic fabric, was substantially non-elastic. This request in fact concerned the subject-matter of granted claims 1 and 2.

The features of claim 1 according to the auxiliary

request amended during the oral proceedings which were novel in view of D1, concerned firstly the use of a liner formed at least in part of elastic fabric and secondly the specific trisection - which encompassed the passageway - was longitudinally centered intermediate the two panels made of elastic fabric, the central section being substantially non-elastic. Not only novelty was acknowledged but also an inventive step was required to arrive at the claimed subject-matter since there was no disclosure in the available documents of the above trisection which permitted enhanced transmission of faecal material to the absorbent core.

Reasons for the Decision

1. The appeal is admissible
2. *Main request*
 - 2.1 Novelty
 - 2.1.1 It was not disputed that the features of the preamble of claim 1 relating to the longitudinally elastically contractible liner forming a passageway through the liner adapted to permit waste materials to pass through the liner partially affixed to a backsheet of a disposable absorbent article, are disclosed in D1.

D1 shows that the elasticity for tensioning the facing sheet (liner) in D1 is provided by elastic bands 14, 16 which urge the facing sheet away from the underlying absorbent structure against the body of the wearer. There is neither a need nor a suggestion derivable from

the structure of D1 that the liner itself should be foreshortened relative to the backsheet as defined in the characterising portion of claim 1 of the patent in suit. Moreover, the difference in functioning between a liner comprising a constant length on which elastic bands are provided for gathering and shaping the diaper when compared to a diaper with an elastic liner also leads to the conclusion that the liner in D1 is not necessarily made of an elastic fabric.

2.1.2 As regards the appellant's submissions according to which the use of an apertured polyethylene film as material for the flexible facing sheet according to D1 necessarily led to the inherent property of elasticity, the Board is of the opinion that elasticity of the material disclosed in D1 is dependent on the specific steps in the manufacturing process and on other conditions to give an elasticity in the range required by the functioning as a elastically contractible liner in accordance with claim 1 of the patent in suit. D1 fails to show any of these steps, so that novelty of the subject-matter of claim 1 is therefore concluded.

2.2 *Inventive step*

2.2.1 Starting from the closest prior art represented by D1, the underlying technical problem to be solved by the subject-matter of claim 1 of the patent in suit is to be seen in an improvement of the structure known from D1 to provide a liner with improved capacity to conform to the body of the wearer and thereby obviate the problem related to faecal matter reposing against the skin of the wearer (column 1, lines 45 to 48).

2.2.2 The respondent argued that improved conformation to the

body was not a technical benefit as such but rather a means to protect the skin from being soiled with faecal material. Hence the objective problem was only to avoid faecal material pressing against the skin of the wearer.

However, the Board considers that the skilled person is well aware of the direct relationship between conformity of the liner with the body shape and avoidance of soiling the skin of the wearer at that area, so that merely an interrelated issue is addressed.

2.2.3 The skilled person facing this problem derives from D2 that the gathered elastic material disclosed therein is exceptionally useful for facing sheets in disposable diapers, (page 44, lines 21 to 32). It is the degree of elasticity of the composite fabrics which assists in conforming it to the body of the wearer (see page 23, lines 22 to 29).

2.2.4 Therefore the skilled person would find in D2 sufficient support towards the use of the elastic composites in a disposable absorbent article according to D1 to solve the technical problem of finding another way of applying the tensioning contracting forces to the liner of the diaper in order to improve conformity to the body contour of the wearer. For these reasons the subject-matter of claim 1 of the patent is not acceptable for lack of inventive step.

3. *Admissibility of auxiliary request*

3.1 Reference to Rule 71a(1) EPC is not relevant since this rule does not apply in appeal proceedings (see G 6/95).

However, according to the case law of the Board of Appeals, new claims cannot be filed at any time irrespective of the stage of appeal proceedings and this, due to the general principle that proceedings before EPO should be speedily concluded in the interests of the general public and of the parties involved (see T 153/85, T 833/90 and "Guidance for Appellants and their representatives"). It is at the discretion of the Board to appreciate according to the special circumstances of the case whether amended claims should or should not be admitted, especially in respect of the circumstance that the amendment aims to overcome an objection raised during the proceedings and therefore should be or should have been expected by the respondent(s) (see T 95/83).

3.2 On the basis of these principles and corresponding case law and further considering that the matter to be dealt with was merely related to a combination of granted claims 1 and 2 and could therefore have been expected, the Board decided that consideration of the auxiliary request was acceptable.

4. *Auxiliary request*

4.1 Claim 1 according to the auxiliary request mainly concerns a combination of the subject-matter of the originally filed claims 1 and 2, or granted claims 1 and 2, respectively.

No objection under the provision of Article 123(2) and (3) EPC arise.

4.2 Novelty

Since the subject-matter of claim 1 of the patent as granted was considered to be novel in view of the nearest prior art document D1, the subject-matter of claim 1 according to the auxiliary request is also novel according to Article 54 EPC.

4.3 Inventive step

4.3.1 According to the additional features, the liner comprises a front and rear panels 30 made of elastic material and a longitudinally non-elastic trisection 32 centered intermediate the elastic panels, the trisection encompassing the already provided passageway 22 which, taking account of the last feature of claim 1 according to the main request, is in registry with the void space 28 formed by the elastic part of the liner.

This structure provides the advantage that the central inelastic liner panel 32 adjacent the passageway 22 may be stiffened, when used, to maintain the passageway 22 in an open condition, so that the passageway does not collapse and ensures waste materials to be transferred through the liner to the absorbent core thereby enhancing the isolation effect from the skin of the wearer.

4.3.2 Starting from the state of the art disclosed in D1 the objective to be achieved by the claimed subject-matter is to be seen in a further improvement of avoiding faecal material reposing against the skin of the wearer of the disposable absorbent article, thus giving a better isolation effect.

4.3.3 The provision of a non-elastic central part of the liner between the two elastic panels to form a

trisection is not disclosed in any of the documents of the available state of the art.

4.3.4 The appellant argued that from the text in column 1, lines 45 to 50 and column 2, lines 27 to 31, it could be derived that the zones of elastication could be selected in accordance with prevailing circumstances and that the selection defined in the auxiliary request was obvious. However, the Board considers that D1 and in fact the entirety of the available documents lack any indications towards a liner having three discrete sections with the claimed properties. In fact D1 does not go further than suggesting different arrangements of the elastic strips with respect to a one-piece liner.

4.3.5 Therefore, the Board comes to the conclusion that the subject-matter of claim 1 of the auxiliary request is not disclosed and can also not be derived in an obvious manner from the cited documents. Accordingly it is novel and involves an inventive step (Articles 54 and 56 EPC).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The main request is rejected.
3. The case is remitted to the first instance with the order to maintain the patent on the basis of:

- claims 1 to 5
- description columns 1 to 9
- Figures 1 to 4, all submitted during oral proceedings.

The Registrar:

The Chairman:

M. Patin

P. Alting van Geusau