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D E C I S I O N
of 6 June 2001

Case Number: T 0324/98 - 3.2.6

Application Number: 89122695.3

Publication Number: 0376022

IPC: A61F 13/15

Language of the proceedings: EN

Title of invention:

Absorbent article having unitary waistcap and waistband

Patentee:

The Procter & Gamble Company

Opponent:

Kimberly-Clark Corporation

Headword:

Waistcap/Waistband/PROCTER&GAMBLE

Relevant legal provisions:

EPC Art. 54, 111(1)

Keyword:

"Novelty (yes)"
"Remittal for further prosecution (yes)"

Decisions cited:

-

Catchword:

-



Case Number: T 0324/98 - 3.2.6

D E C I S I O N
of the Technical Board of Appeal 3.2.6
of 6 June 2001

Appellant: The Procter & Gamble Company
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 4 March 1998
revoking European patent No. 0 376 022 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: P. Alting van Geusau
Members: H. Meinders
M. Tardo-Dino

Summary of Facts and Submissions

I. European Patent No. 0 376 022, granted on application No. 89 122 695.3, was revoked by the Opposition Division by a decision announced on 16 February 1998 and posted on 4 March 1998. It based the revocation on the finding that claim 1 of the patent as amended in the opposition proceedings lacked novelty over the disclosure:

D1: EP-A-0 264 238.

II. The Appellant (Patentee) filed a notice of appeal against this decision on 24 March 1998 and paid the appeal fee on 31 March 1998. On 10 July 1998 the grounds of appeal were filed, with a main and three auxiliary requests.

III. In an annex to the summons to oral proceedings pursuant to Article 11(2) of the Rules of Procedure of the Boards of Appeal dated 9 February 2001 the Board expressed the preliminary opinion that the subject-matter of the main claim of all requests appeared to lack novelty over D1. Further, each of the main claims of the auxiliary requests appeared to lack clarity.

IV. Oral proceedings took place on 6 June 2001.

The Appellant requested cancellation of the decision under appeal and maintenance of the patent in amended form on the basis of claims 1 to 8 filed in the oral proceedings, or on the basis of one of three auxiliary requests filed with letter of 23 April 2001. It further submitted as an auxiliary request that the case be

remitted to the first instance if the novelty of the subject-matter of claim 1 was established.

The Respondent requested dismissal of the appeal and the revocation of the patent. It further submitted as an auxiliary request that the case be remitted to the first instance if the novelty of the subject-matter of claim 1 was established.

V. Claim 1 of the patent as amended according to the main request reads:

"An integral disposable absorbent Article (20) having longitudinal edges (30) and end edges (32), the absorbent Article comprising an absorbent core (44) having a garment surface and a body surface; a liquid impervious backsheet (42) positioned adjacent said garment surface of said absorbent core; a liquid pervious topsheet (38) positioned adjacent said body surface of said absorbent core; a waistcap/waistband (78) disposed adjacent at least one of the end edges (32) of the absorbent article, said waistcap/waistband (78) having an outward portion (80) associated with the absorbent Article adjacent said end edge and inward portion (82) contiguous with said outward portion, said inward portion having a proximal edge (84), a distal edge (86), and ends (92) being joined to the absorbent Article and said distal edge (86) being spaced inboard from said proximal edge, at least a portion of said distal edge (86) being unsecured to the underlying portion of the absorbent Article between said ends (92) so that said distal edge is spaced away from the liquid-receiving surface of the absorbent article, wherein the waistcap/waistband (78) is formed of a

single piece of elastomeric material serving both as the waistband and as the waistcap, characterised in that the outward portion is operatively associated in an elastically contractible condition with the absorbent Article adjacent said end edge (32), and the distal edge (86) of the inward portion (82) is operatively associated in an elastically contractible condition with the absorbent Article adjacent said ends (92) of the inward portion (82) and wherein the single piece of elastomeric material provides all the said elastic contractability."

VI. In support of its request, the Appellant argued essentially as follows:

The outward portion of the waistcap/waistband disclosed in D1 was not operatively associated in an elastically contractible condition with the absorbent article, nor was the distal edge of the inward portion associated with the absorbent Article in such a way. The single piece of elastomeric material (elastic foam), even if chosen for the waistcap/waistband as disclosed in D1, did not provide all the elastic contractibility, because it needed elastic bands 60 and 77 to achieve this effect.

VII. The Respondent contended that if an elastic foam was used for the waistcap/waistband as indicated in D1, of necessity the outward portion and the distal edge of the inward portion of the waistcap/waistband were connected in an elastically contractible condition to the absorbent Article adjacent the end edge and the ends of the inward portion respectively.

Further, in the embodiment of D1 with the elastic

members 60 associated with the outward portion and the elastic members 77 associated with the inward portion, these portions were connected in an elastically contractible condition to the absorbent Article by these elastic members.

Finally, the patent in suit allowed for the "single piece of elastomeric material" of the waistcap/waistband to be a laminate of an elastomeric film and a coverstock layer. It did not exclude embodiments in which the elastomeric material was not coextensive with the coverstock layer or was not continuous in respect of the coverstock layer. The elastic members 60 and 77 were disclosed in D1 as elastomeric material and thus could be considered as the elastomeric material as claimed. The single piece of material 270 forming the waist barrier cuff as well as the waist gasketing cuff and associated with the elastic members 60 and 77 would then constitute the coverstock layer, which according to the patent in suit could be chosen from a wide range of materials like foams, apertured plastic films, natural or synthetic fibers, nonwovens. D1 discloses the material of the waistcap/waistband in identical terms, namely as: polypropylene, rayon, polyester, nylon, foams, plastic films, formed films and elastic foams.

Reasons for the Decision

1. The appeal is admissible.
2. *Amendments (Article 123 EPC)*
 - 2.1 The amendments in claim 1 can be derived from the

original application documents:

page 7, line 10; page 20, line 17 ("formed of a single piece of elastomeric material"),

page 20, lines 6 and 7 ("serving both as the waistcap and as the waistband"),

page 7, first paragraph and fig. 3 ("wherein the single piece of elastomeric material provides all the said elastic contractability").

In claims 5 to 8 the term "unitary" was deleted, which was superfluous in view of the expression "is formed of a single piece of elastomeric material serving both as the waistcap and as the waistband":

2.2 In the oral proceedings the Respondent no longer maintained its objections under Article 123(2) EPC. In view of the above the Board is satisfied that the amendments are in accordance with Article 123(2) EPC.

2.3 The amendments amount to a limitation of the subject-matter of granted claim 1, thus the requirements of Article 123(3) EPC are also fulfilled.

3. *Novelty (Article 54 EPC)- Main request*

3.1 The closest prior art according to both the parties and the Opposition Division is D1. The Board sees no reason to disagree with this.

There is no difference of opinion between the parties that D1 discloses an integral disposable absorbent Article according to the preamble of claim 1, with a

waistcap/waistband formed of a single piece of material (see column 17, lines 42 to 47 and figure 3) serving both as the waistcap 262 and as the waistband 258. The Board shares that view. D1 discloses as one of the possible choices for the material of the waistcap/waistband: "elastic foam", which can be considered identical with "elastomeric material" (column 14, line 12).

3.2 The subject-matter of claim 1 differs from the disclosure in D1 principally in that the single piece of elastomeric material serving as the waistcap and as the waistband provides all the elastic contractability as defined in the claim, namely that of the outward portion as associated with the absorbent Article adjacent its end edge and of the distal edge of the inward portion as associated with the absorbent Article adjacent the ends of the inward portion.

As opposed to the subject-matter of claim 1, the outward portion of the waistcap discussed in D1 needs the addition of an elastic member 60 to be operatively associated in an elastically contractible condition with the waistflap to form a waist gasketing cuff (see column 11, line 50 to column 13, line 24). The distal edge of the inward portion of the waist barrier cuff further needs the elastic member 77 to provide the operative association in an elastically contractable condition with the absorbent Article (see column 6, lines 10 to 24 and column 14, lines 1 to 8).

The above is not affected even if one agreed with the Opposition Division's reasoning in the decision under appeal that the spacing elastic members 76 in the **first** barrier cuffs (i.e. the leg barrier cuff at right

angles to the waistband/waistcap) would be providing the elastically contractable condition of the association with the absorbent Article via the connection points 78 of the distal edges of the inward portions with the first barrier cuffs. In that case again additional elastic members (the spacing elastic members 76) are needed.

- 3.3 The Respondent further argued that the reference to the use of an elastomeric foam for the waistcap/waistband in D1 itself made it evident that the operative association of the entire waistcap/waistband with the absorbent Article would be in an elastically contractable condition.

However, there is no disclosure whatsoever in D1 indicating that the waistcap/waistband could **by itself** be associated with the absorbent Article in an elastically contractable condition. There is no mention of the waistband/waistcap as such being stretched while being associated with the absorbent article, the waist edge of the absorbent Article being shirred during association with the waistband/waistcap, nor of the waistband/waistcap on its own being treated in such a way as to be elastically contractable after having been associated with the absorbent article. All references to the elastically contractable condition are related to the use of additional elastic members 60 and 77.

- 3.4 The Respondent finally argued that according to the description of the patent in suit (see column 16, lines 25 to 36) the elastomeric material could be formed from a laminate of at least one coverstock layer and an elastomeric film. As the patent in suit, including claim 1, did not limit this laminate solely

to one in which the elastomeric film was continuous or contiguous with the coverstock layer, it could involve a laminate in which the elastomeric film consisted of discrete strips arranged in the direction of the required elastic contractability. In that sense the subject-matter of claim 1 was not new in respect of D1 as the elastic members 60 and 77 could be formed of a plurality of elastic strips ("one or more elastic members 60": column 3, line 30 and column 11, line 58 of D1; "one or more spacing elastic members 77": column 14, line 3 of D1) formed of elastomeric film (see column 13, lines 39 and 40 and column 20, lines 30 and 31 of D1). The coverstock layer would then be the material of the second barrier cuff 262 extending continuously from the distal edge 266 to the terminating edge 32 of the waistcap/waistband as shown in Figure 3 of D1.

The Board disagrees with the Respondent on this point; claim 1 is worded such that the single piece of elastomeric material serving both as the waistcap and as the waistband (thus continuously extending from the distal edge of the inward portion to the terminating edge) provides **all** the elastic contractability. This does not allow for more than one elastomeric material being present in the waistcap/waistband, thus excluding the at least two elastic members (60 and 77) necessarily involved in the arrangement as derived by the Respondent from D1.

3.5 The Board therefore reaches the conclusion that the subject-matter of claim 1 is novel over D1 (Article 54 EPC).

3.6 None of the remaining available documents discloses a

waistcap/waistband formed of a single piece of material, and thus cannot put into question the novelty of the subject-matter of claim 1.

3.7 The subject-matter of dependent claims 2-8 being for preferred embodiments of the absorbent Article of claim 1, they too are novel.

4. *Inventive step (Article 56 EPC)*

In the decision under appeal the Opposition Division has not discussed the question of inventive step.

Both the Respondent as well as the Appellant having requested remittal of the case back to the first instance should the Board come to the conclusion that the subject-matter of claim 1 is novel and no reasons being apparent why the Board should finally deal with the case, the Board considers that remittal to the first instance for further prosecution, pursuant to Article 111(1) EPC, is appropriate.

5. *Further remarks*

In view of the fact that the case is remitted back to the first instance for further prosecution, the Board has deemed it unnecessary to discuss the adaptation of the description to the amended wording of claim 1.

However, if in the further proceedings the patent is maintained, it is to be observed that the fact that the waistcap/waistband is formed of a single piece of elastomeric material serving both as the waistcap and the waistband excludes the possibility of more than one elastomeric material being present in the

waistcap/waistband. This has an effect on at least the passages of column 15, line 54 and column 23, line 11.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the first instance for further prosecution.

The Registrar:

The Chairman:

M. Patin

P. Alting van Geusau