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D E C I S I O N
of 29 August 2002

Case Number: T 0219/99 - 3.2.6

Application Number: 88117256.3

Publication Number: 0312118

IPC: A61F 13/15

Language of the proceedings: EN

Title of invention:
Absorbent article

Patentee:
KIMBERLEY-CLARK WORLDWIDE, INC.

Opponent:
The Procter & Gamble Company

Headword:
-

Relevant legal provisions:
EPC Art. 100(c), 123(2)

Keyword:
"Sufficient disclosure in the application as originally
filed - yes"
"Remittal to the first instance - yes"

Decisions cited:
T 0284/94, T 0296/96

Catchword:
-



Case Number: T 0219/99 - 3.2.6

D E C I S I O N
of the Technical Board of Appeal 3.2.6
of 29 August 2002

Appellant: KIMBERLEY-CLARK WORLDWIDE, INC.
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Decision under appeal: Interlocutory decision of the Opposition Division
of the European Patent Office posted
22 December 1998 concerning maintenance of
European patent No. 0 312 118 in amended form.

Composition of the Board:

Chairman: P. Alting Van Geusau
Members: G. C. Kadner
R. T. Menapace

Summary of Facts and Submissions

- I. The mention of the grant of European patent No. 0 312 118 in respect of European patent application No. 88 117 256.3 filed 17 October 1988 and claiming a US-priority from 16 October 1987 was published on 14 February 1996.

Claim 1 reads as follows:

"An absorbent article (10, 40), comprising: an absorbent body (16), composed of substantially hydrophilic material which is capable of absorbing liquid; and a fibrous, liquid permeable topsheet layer (14) superposed in facing relation with said absorbent body; and a liquid permeable transport layer (18) which is located between said topsheet layer (14) and said absorbent body and composed of a fibrous material wherein

said absorbent body (16) includes a hydrophilic wrapsheet (30) which has a portion thereof located on a body-side of said absorbent body (16) adjacent said transport layer (18), said bodyside wrapsheet (30) having an effective average pore size therein and being configured to provide a wicking layer for rapidly distributing liquid into the fibrous material of said absorbent body; and

said topsheet layer (14) has a selected average pore size therein;

characterized in that

said liquid transport layer (18) is composed of a fibrous material which is less hydrophilic than said absorbent body (16);

that fibrous material of said transport layer (18) is composed of fibers having a denier within the range of 1.5 to 6;

and that said transport layer (18) is constructed with an effective average pore size therein which is smaller than said topsheet layer (14) pore size and larger than said wrapsheet (30) pore size."

II. Notice of opposition was filed on 8 November 1996 by the Respondent (Opponent), on the grounds of Art 100(a), (b) and (c) EPC.

III. By decision of the Opposition Division announced during the oral proceedings on 26 November 1998 and posted on 22 December 1998 the main request and first auxiliary request (both filed with letter dated 13 October 1998) were rejected, and the patent was maintained as amended according to the second auxiliary request filed during the oral proceedings.

The Opposition Division was of the opinion that claim 1 of the main request and of the first auxiliary request violated Article 100(c) EPC whereas the subject-matter of the second auxiliary request met the requirements of this provision and was also novel and inventive when compared with the state of the art according to documents D1 to D9.

IV. On 26 February 1999 notice of appeal was lodged against this decision by the Patentee together with payment of the appeal fee. The statement of grounds of appeal was filed on 26 April 1999.

V. In a communication dated 19 June 2002 the Board pointed out that it preliminarily did not see a reason to change the Opposition Division's decision.

VI. Oral proceedings were held on 29 August 2002.

The Appellant (Patentee) requested that the decision under appeal be set aside and that the patent be maintained on the basis of main or first or second auxiliary request filed together with the statement of the grounds of appeal.

The Respondent requested that the appeal be dismissed or that the case be referred to the first instance in case the Board considered the claims in accordance with the main or first auxiliary request to comply with Article 123 (2) EPC.

VII. In support of its requests the Appellant essentially relied upon the following submissions:

Claim 1 as granted complied with Article 123(2) EPC because all its features were disclosed in the application as originally filed. It was composed of original claims 1, 19 and 22, the latter two claims being dependent from claim 1, and an additional functional feature which was clearly disclosed in the description (A2-document, page 5, lines 20 and 21).

There was no inconsistency of the nature raised by the Opposition Division because the wrapsheet's property in relation to the pore size gradient (A2-document, page 5, lines 13 to 16) did not exclude that the same wrapsheet was used in the embodiment providing a distinctive wicking layer. On the contrary, the skilled person would

immediately understand that the wrapsheet described "in one aspect" worked in the manner as defined "in yet another aspect" since, when used as a distinctive wicking layer, that effect depended on its absorbing property following from its effective pore size described "in one aspect". Thus it was clear that the feature of the wrapsheet's effective pore size was related to the pore size gradient within the absorbent article, and its function of providing a wicking layer which helped to rapidly distribute liquid into the absorbent body did not concern an alternative subject-matter which would exclude the other, but was intended to be combined in the form of a preferred further embodiment.

VIII. The submissions of the Respondent are summarised as follows:

The wording of the description "in one aspect" and "in yet another aspect" indicated clearly that the two paragraphs were related to alternative embodiments. The provision of funnels or quilts in order to direct liquids into the fibrous mass of the absorbent core was fully independent of the properties concerning the effective pore size of the wrapsheet, and therefore the skilled person would identify two different solutions to the underlying problem which were included in the application. According to the case law of the Boards of Appeal (see for instance decisions T 0284/94 and T 0296/96) it was not admissible to combine isolated features of one embodiment with the features of an alternative embodiment thus creating a construction which contained subject-matter extending over the application as originally filed.

Reasons for the Decision

1. The appeal is admissible.

2. *Main request*
 - 2.1 The Opposition Division held that the amendments to claim 1 as granted "... said bodyside wrapsheet (30) having an effective average pore size therein and being configured to provide a wicking layer for rapidly distributing liquid into the fibrous material of said absorbent body ..." were not clearly derivable from the application as originally filed in this context. These amendments include the feature of an effective pore size related to the pore size gradient within the absorbent article and the functional property of the wrapsheet being configured to provide a wicking layer for rapidly distributing liquid into the fibrous material.

 - 2.2 The first of these features is disclosed in original claim 19 (corresponding with the description, A2-document page 5, lines 13 to 16), whereas the second one is not the subject of any original claim but was introduced from the description of the application (A2-document page 5, lines 20 to 21). Under these circumstances, a careful examination is necessary in order to establish whether the incorporation into a claim of isolated technical features, having a literal basis of disclosure but being disclosed in a specific technical context, results in a combination of technical features which is clearly derivable from the application as filed, the technical function of which contributes to the solution of a technical problem.

- 2.3 In the present case the crucial issue is whether the properties of the wrapsheet described "in one aspect of the invention" and "in another aspect of the invention" provide different technical effects which exclude one another, as estimated by the respondent, or whether it is evident beyond any doubt to a skilled person reading the original description that the other aspect of the invention concerns a preferred further embodiment of the subject-matter of the first aspect which would result in an admissible combination of the features.
- 2.4 When reading the general description according to the application as originally filed it is evident that the main objective is the provision of an absorbent article having layers of an effective pore size therein which decreases from the outside layers towards the inside layers. By this construction it is intended to increase the rate of liquid absorption and to reduce the flowback of absorbed liquid against the skin of the wearer (A2-document page 2, lines 44 to 46).
- 2.5 The wrapsheet is firstly introduced in the detailed description (A2-document page 2, line 11) helping to maintain the integrity of the airlaid fibrous structure of the absorbent core. Its effective pore size is selected in a dimension such that the wrap generally provides a substantial continuation of the pore size gradient established by transport layer. This property is summarized "in one aspect".
- 2.6 According to the following paragraph "in another aspect" the wrapsheet is configured to provide a distinctive wicking layer which helps to rapidly distribute liquid into the absorbent body. A detailed embodiment is then described wherein wrapsheet material on one side of the

absorbent body is bonded to the wrapsheet located on the opposite side at discrete regions thus forming funnels or quilts.

- 2.7 The skilled person having in mind the contribution of the wrapsheet to the pore size gradient and reading the following paragraph dealing with the further properties achievable by forming funnels or quilts is well aware that this embodiment does not require a different wrapsheet than that used in the first embodiment. On the contrary, there is no indication that this wrapsheet of the first embodiment has different components or properties than that of the second embodiment. Consequently, when reading the disclosure of features in their context, no alternative wrapsheet is understood, and no inconsistency can be seen which would exclude that the wrapsheet with its features "in one aspect" could additionally comprise the features and properties disclosed "in yet another aspect". Therefore the skilled person would immediately recognize that the description of these features of the wrapsheet disclosed in two different embodiments includes their combination because the wrapsheet providing different effects is always the same.

Also when considering other passages of the description in which the wording "aspect of the invention" is used one is not lead to the conclusion that alternatives are addressed but, to the contrary, additional features of preferred embodiments are described.

- 2.8 Summarising, the combination of features of claim 1 "... said absorbent body (16) includes a hydrophilic wrapsheet (30) which has a portion thereof located on a body-side of said absorbent body (16) adjacent said

transport layer (18), said bodyside wrapsheet (30) having an effective average pore size therein and being configured to provide a wicking layer for rapidly distributing liquid into the fibrous material of said absorbent body ..." is disclosed in the application as filed. The continuation in pore size gradient of the wrapsheet in vice versa relation, but in the same sense as disclosed in original claim 19 is expressed by the last feature of claim 1 "... that said transport layer (18) is constructed with an effective average pore size therein which is ... larger than said wrapsheet (30) pore size".

Consequently this claim 1 meets the requirements of Article 123(2) EPC, and the objection under Article 100(c) EPC is therefore not justified.

Since the substantive examination in respect of novelty and inventive step of claim 1 according to the main request has not yet been carried out by the Opposition Division, the case has to be remitted to that department of first instance for further prosecution as it was also requested by the respondent.

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 continuation of the opposition proceedings.

The Registrar:

The Chairman:

M. Patin

P. Alting van Geusau

