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**Datasheet for the decision
of 13 June 2024**

Case Number: T 1213/22 - 3.2.06

Application Number: 14197944.3

Publication Number: 3034055

IPC: A61F13/514

Language of the proceedings: EN

Title of invention:

Absorbent articles with thinner backsheet

Patent Proprietor:

The Procter & Gamble Company

Opponents:

Ontex BV
Essity Hygiene and Health Aktiebolag

Headword:

Relevant legal provisions:

EPC 1973 Art. 123(2)
RPBA 2020 Art. 12(6)

Keyword:

Amendments - added subject-matter (yes)

Amendment to case - reasons for submitting amendment in appeal proceedings (yes)

Decisions cited:

Catchword:



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Case Number: T 1213/22 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 13 June 2024

Appellant: The Procter & Gamble Company
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 10 March 2022
revoking European patent No. 3034055 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman M. Harrison
Members: P. Cipriano
 W. Ungler

Summary of Facts and Submissions

- I. An appeal was filed by the appellant (patent proprietor) against the decision of the opposition division revoking European Patent No. 3 034 055.
- II. With its statement setting out the grounds of appeal, the appellant requested that the decision under appeal be set aside and the case be remitted to the opposition division on the basis of the main request or one of auxiliary requests 1 to 8, all submitted with the statement setting out the grounds of appeal.
- III. In their replies to the appeal, the respondents (opponent 1 and opponent 2) requested that the appeal be dismissed.
- IV. The Board issued a summons to oral proceedings and a subsequent communication containing its provisional opinion, in which it indicated *inter alia* that claim 1 of the main request did not appear to fulfil the requirement of Article 123(2) EPC and that auxiliary requests 1 to 8 did not seem to be allowable for the same reasons.
- V. Oral proceedings by videoconference were held before the Board.
- VI. Claim 1 of the main request reads as follows:
"An absorbent article (10) selected from a sanitary napkin, an incontinence pad, and a pantyliner, having a body-facing surface and a garment-facing surface, said absorbent article also having a longitudinal axis (I) and a transversal axis (II) and said article also having a front end portion (i), a rear portion (ii) and

a central portion (iii), said absorbent article comprising:

a topsheet layer;

a backsheet layer;

a fastening adhesive (PFA) applied on said backsheet garment facing surface;

wherein at least a portion of said PFA is applied in a pattern (30) where PFA is applied in a discontinuous application such that any portion of the application is greater than 1 mm and no more than 10 mm distant from another portion of the application where PFA is not applied, wherein the pattern is a striped pattern alternating PFA stripes and PFA free stripes, wherein the PFA free stripes have a width of 1 mm to 10 mm, wherein the PFA stripes have a width of 1 mm to 10 mm, and said backsheet layer is a plastic film having a basis weight of less than 22 gsm, wherein the plastic film is selected from polyethylene/polypropylene based films comprising more than 5% by weight of polypropylene."

VII. The wording of claim 1 of auxiliary requests 1 to 8 also contained the feature:

"a fastening adhesive (PFA) applied on said backsheet garment facing surface;

wherein at least a portion of said PFA is applied in a pattern (30) where PFA is applied in a discontinuous application such that any portion of the application is greater than 1 mm and no more than 10 mm distant from another portion of the application where PFA is not applied"

VIII. The appellant's arguments relevant to the present decision may be summarised as follows:

Main request - Article 123(2) EPC

The feature "where PFA is applied in a discontinuous application such that any portion of the application is greater than 1 mm and no more than 10 mm distant from another portion of the application where PFA is not applied" had no basis in the application as filed, but was technically meaningless. A technically meaningless feature did not impose any meaningful technical limitation and thus could not contain subject-matter which extended beyond the content of the application as filed.

The arguments of the respondents that the feature had a meaning should not be admitted into the proceedings, since they could have been raised earlier during the opposition proceedings.

IX. The respondents' arguments relevant to the present decision may be summarised as follows:

Main request - Article 123(2) EPC

The argument that the feature is technically meaningless was new in the appeal proceedings and should therefore not be admitted into the proceedings.

There was no reason to ignore the requirement of Article 123(2) EPC for technically meaningless features but the feature was anyway not technically meaningless and simply had no basis in the application as filed.

The amendments to auxiliary requests 1 to 8 did not overcome this objection.

Reasons for the Decision

1. Main request - Article 123(2) EPC
 - 1.1 The following feature was added to claim 1 during examination:

"where PFA is applied in a discontinuous application such that any portion of the application is greater than 1 mm and no more than 10 mm distant from another portion of the application where PFA is not applied"
 - 1.2 The appellant had argued during the opposition proceedings that page 13, lines 5-8 and page 15, lines 1-3, of the application as originally filed provided the basis for this amendment. However, the opposition division concluded in items 2.1.2.3 and 2.1.2.5 of its reasons that this was not the case.
 - 1.3 The reasons of the opposition division contain the following paragraph (see item 2.1.2.3, page 9):

"In that respect, it must further be stressed that, from a technical point of view, there can be no other minimal distance than 0 mm between any portion of the application where PFA is applied and another portion of the application where PFA is not applied, since the portions of the PFA stripes at the borderline between the PFA area and the PFA free area are necessarily and inevitably less than 1 mm distant from the PFA free areas. It is the Division's view that it does not make sense to introduce a lower distance of "greater than 1 mm" to the disclosure at page 13, lines 5-8 of the

application documents. Otherwise, what would be present in the transition area between the PFA areas and the PFA free areas ?".

1.4 In the appeal proceedings however, the appellant did not contest the finding that there was no basis for this amendment in the application as originally filed (see item 21 of its grounds of appeal) and argued only that, whilst it agreed with the opposition division's understanding (see item 1.3 above) that the feature was technically meaningless, such a feature did not contain any additional technical limitation and thus could not contain subject-matter which extended beyond the content of the application as filed under Article 123(2) EPC.

1.4.1 The Board does not accept this argument, at least because it finds that the feature added to claim 1 is not technically meaningless in the context of the claim, even though the application as filed did not disclose such embodiments and even if such embodiments may not even have been initially intended.

As also argued by respondent 2 (see pages 6 and 7 of its reply to the grounds of appeal), a skilled person reading the claim would conclude that the feature for example defines a further region/portion extending by more than 1 mm between any point with PFA and the closest point to it without PFA, which region/portion is not a region/portion of the backsheet garment facing surface. A void in the backsheet surface between the portion of pattern application of PFA and the portion of the application where PFA is not applied greater than 1 mm would correspond to this feature of claim 1.

- 1.5 The appellant argued that claim 1 defined the pattern as a striped pattern alternating PFA stripes and PFA free stripes, such that no other areas could be between them.

The Board does not accept this argument. The term "alternating" only defines that two stripes of the same type cannot appear in the pattern without one of the other type between them but does not exclude that the pattern can be formed with further types of areas. A backsheet having voids between the portion of pattern application of PFA and the portion of the application where PFA is not applied would still be considered as a striped pattern alternating free PFA stripes and PFA free stripes as defined in claim 1.

- 1.6 The appellant argued that such a void would also correspond to a portion of the application where PFA is not applied as defined in claim 1 and thus would not be at a distance of more than 1 mm from the portion where PFA is applied. In any event, the skilled person would not contemplate making a hole through the backsheet as the backsheet would lose its technical function.

These arguments are, however, not persuasive. As stated in paragraph [0032] of the patent, the backsheet can be a composite material such as a laminate of a film, and can thus have several layers. Since claim 1 defines that the fastening adhesive is *applied* on said backsheet garment facing surface, it makes technical sense for the skilled person reading the claim to consider that the portions of application (where PFA is applied and where PFA is not applied) on said backsheet garment facing surface are both on the outer layer of the laminate.

On the other hand, any void greater than 1 mm on the outer layer of said laminate would expose a surface other than that to which the adhesive is applied and would thus not be considered by the skilled person as a "portion of the application". In addition, since only the outer layer of the laminate is missing, the backsheet would still be able to perform its technical function.

The skilled person would therefore come to a logical interpretation of the claim which includes all the features of the claim, i.e. the feature is not technically meaningless. Yet, as uncontested by the appellant, there is no disclosure of such an embodiment in the application as filed.

- 1.7 The question as to whether a technically meaningless feature in a claim would still be required to fulfil the requirement of Article 123(2) EPC was addressed in the Board's provisional opinion, but is ultimately not decisive for this case and will thus be left unanswered.
- 1.8 Claim 1 of the main request does not fulfil the requirement of Article 123(2) EPC. The main request is therefore not allowable.
- 2. *Admittance of the parties' cases concerning whether a feature is technically meaningless*
- 2.1 The appellant and respondents requested that each other's cases concerning whether a feature is technically meaningless should not be admitted into the proceedings.

2.2 Since claim 1 of the main request does not fulfil the requirement of Article 123(2) EPC even when taking into consideration all the arguments of the appellant (see item 1. above), the question regarding the admittance of the appellant's case can be left undecided.

2.3 Regarding the respondents' cases, the appellant argued that the technical interpretations given by the respondents to show that the feature was technically sensible (such as the interpretation discussed above) constituted a change of case and should not be admitted into the proceedings. According to the appellant, these interpretations should have been submitted during the opposition proceedings, since the burden was on the respondents to substantiate their Article 123(2) EPC objections from the outset of the opposition proceedings. The respondents should allegedly have submitted these interpretations at the latest when the matter was discussed during oral proceedings before the opposition division.

2.3.1 These arguments are, however, not persuasive. Irrespective of when the appellant may have made its own submissions in this regard before the opposition division (which is not evident from the minutes or the decision), the latter merely gave its reasons concerning Article 123(2) EPC in the contested decision.

The explanation that the feature (which was not disclosed) would also be meaningless, was stated by the opposition division in its decision in the last paragraph of item 2.1.2.3 to conclude its reasoning on this aspect. Whatever the appellant's submission may have been during the oral proceedings, this evidently did not lead the opposition division to conclude that

the subject-matter of claim 1 fulfilled the requirement of Article 123(2) EPC. Thus, there was no need for the respondents to argue any further to convince the opposition division at the time on the matter of Article 123(2) EPC, i.e. the respondents' arguments were sufficient for the opposition division to revoke the patent.

2.3.2 In its grounds of appeal, the appellant then specifically directed its arguments to that last paragraph of item 2.1.2.3, in which the opposition division reasoned why the added feature was meaningless. The Board therefore finds the respondents' replies to the appellant's line of argument that a technically meaningless feature does not add subject-matter, by supplying arguments as to why the features are not technically meaningless, to be a normal development of their cases and finds that these arguments should not reasonably have been made earlier.

2.4 There was therefore no reason for the Board not to admit the respondents' arguments into the proceedings under Article 12(6) RPBA. They were thus taken into consideration (see above).

3. Auxiliary requests 1 to 8

3.1 The Board stated in its preliminary opinion that all the auxiliary requests contained the added feature discussed above and thus would not be allowable for the same reasons as the main request.

3.2 The appellant did not provide any further comments on the auxiliary requests such that the Board sees no reason to deviate from this opinion, which is hereby confirmed.

- 3.3 Auxiliary requests 1 to 8 are therefore not allowable since claim 1 of each of these requests respectively does not fulfil the requirement of Article 123(2) EPC.
4. In the absence of an allowable request, on the basis of which the proceedings could be further prosecuted, there is also no reason to remit the case to the opposition division. The Board thus rejected the appellant's request for remittal.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



D. Grundner

M. Harrison

Decision electronically authenticated