

**Internal distribution code:**

- (A) [ ] Publication in OJ  
(B) [ ] To Chairmen and Members  
(C) [X] To Chairmen  
(D) [ ] No distribution

**D E C I S I O N**  
**of 22 September 2003**

**Case Number:** T 0142/01 - 3.2.6

**Application Number:** 93108509.6

**Publication Number:** 0571981

**IPC:** A61F 13/56

**Language of the proceedings:** EN

**Title of invention:**

Absorbent article

**Patentee:**

KIMBERLY-CLARK WORLDWIDE, INC.

**Opponent:**

The Procter & Gamble Company  
McNeill-PPC, Inc.

**Headword:**

-

**Relevant legal provisions:**

EPC Art. 54, 56, 84, 123  
Art 11(3) RPA

**Keyword:**

"Lack of support in description arising out of amendments made  
in appeal proceedings (yes) (main and first auxiliary  
request)"

"Support in description (second auxiliary request) (yes)"

"Novelty" and "Inventive step (yes) (second auxiliary  
request)"

**Decisions cited:**

T 0409/91, T 0593/96, T 0301/87, T 0331/89, T 0056/87

**Catchword:**

-



Case Number: T 0142/01 - 3.2.6

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.6  
of 22 September 2003

**Appellant:** KIMBERLY-CLARK WORLDWIDE, INC.  
(Proprietor of the patent) 401 North Lake Street  
Neenah, Wisconsin 54956 (US)

**Representative:** Dixon, Philip Matthew  
Frank B. Dehn & Co.  
Holzstrasse 26  
D-80469 München (DE)

**Respondents:** The Procter & Gamble Company  
(Opponent 01) One Procter & Gamble Plaza  
Cincinnati, OHIO 45202 (US)

**Representative:** Kohol, Sonia  
Procter & Gamble  
European Service GmbH  
Sulzbacher Strasse 40-50  
D-65824 Schwalbach Am Taunus (DE)

(Opponent 02) McNeill-PPC, Inc.  
Van Liew Avenue  
Milltown, New Jersey (US)

**Representative:** Mercer, Christopfer Paul  
Carpmaels & Ransford  
43, Bloomsbury Square  
London WC1A 2RA (GB)

**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 1 December 2000  
revoking European patent No. 0571981 pursuant  
to Article 102(1) EPC.

**Composition of the Board:**

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

## Summary of Facts and Submissions

I. European Patent Nr. 0 571 981, granted on application Nr. 93 108 509.6, was revoked by the Opposition Division by decision posted on 1 December 2000. It based the revocation on the finding that the subject-matter of claim 1 of the patent as granted lacked novelty with respect to:

D1: US-A-4 589 876

It further considered that the subject-matter of claim 1 as amended according to the first auxiliary request did not present novelty over D1, that the subject-matter of claim 1 as amended according to the second auxiliary request did not present inventive step over the combination of the teachings of D1 and:

D5: US-A-4 701 178 and that

the patent according to the third auxiliary request did not fulfill the requirements of sufficiency of disclosure (Article 83 EPC), that its claims were not clear (Article 84 EPC) and that the subject-matter of claim 1 according to that request lacked inventive step over the combination of teachings of D1 and:

D9: US-A-4 862 574

From the opposition proceedings the following document was referred to:

D10: US-A-4 100 324.

- II. The Appellant (Patentee) both filed a notice of appeal against this decision and paid the appeal fee on 30 January 2001. On 28 March 2001 the grounds of appeal were filed with a set of claims which corresponded to the claims of the second auxiliary request as decided upon in the decision under appeal.
- III. In a communication in preparation of the oral proceedings according to Article 11(1) of the Rules of Procedure of the Boards of Appeal dated 7 August 2003, the Board gave its preliminary opinion on the case. In reply to this the Appellant filed a new main and three auxiliary requests, with letter of 27 August 2003.
- IV. Oral proceedings were held on 22 September 2003, at which the Appellant further modified its requests. Respondent 01 was absent. It had, however, withdrawn its request for oral proceedings with letter of 1 September 2003.

The Appellant requested cancellation of the decision under appeal and maintenance of the patent according to either the main or the first or the second auxiliary request as filed in the oral proceedings.

The Respondents 01 and 02 (Opponents 01 and 02) requested dismissal of the appeal. Respondent 01 requested additionally, in its submission of 1 September 2003, that any substantive change to the claims filed by the Appellant with letter of 27 August 2003 be found inadmissible as late filed or that - in case the Board would admit them into the proceedings - the proceedings be continued in writing.

V. Claim 1 of the patent according to the **main request** of the Appellant reads:

"An absorbent article (10; 48; 54; 66; 80; 84) comprising:

- (a) a liquid-permeable cover (12), a liquid-impermeable baffle (14) and an absorbent (16) positioned between said cover (12) and said baffle (14) said cover (12), said baffle (14) and said absorbent (16) being coterminous and together forming a pad (18) having a uniform thickness, the absorbent (16) having a central portion with longitudinally extending sides and a pair of relatively stiff tabs (26, 28; 62, 64; 76, 78) extending laterally outward from said longitudinal sides, said tabs (26, 28; 62, 64; 76, 78) having a peak force value of 10 to 100 grams when determined in accordance with the test procedure defined herein and a length between 19 mm and 51 mm and a width between 13 and 38 mm, said absorbent (16) having a body-facing surface (32) and a garment-facing surface (34); and
- (b) adhesive means (36) for securing said absorbent (16) to an undergarment, said adhesive means being secured to said garment-facing surface (34) and being present on both of said tabs (26, 28; 62, 64; 76, 78); and
- (c) a single release paper (46) covering all of said adhesive means (36), said release paper (46) and said pad (18) having coterminous exterior peripheries."

Claim 1 according to the **first auxiliary request** differs from claim 1 of the main request only in that it is further specified that the cover (12) is a liquid-permeable **polypropylene** cover and that the baffle (14) is a liquid-impermeable **polyethylene** baffle.

Claim 1 according to the **second auxiliary request** is identical to claim 1 of the first auxiliary request, however further specifying that the absorbent (16) is **made from coform** and further limiting the feature of the size of the tabs to a **length of 40 mm and a width of 25.4 mm (1 inch)**.

VI. In support of his requests the Appellant argued essentially as follows:

The filing of amended claims, in a broader form than was initially requested with the statement of grounds of appeal, was admissible, as the Appellant had realized that the proposed claims were on the one hand unnecessarily restricted and on the other hand had to be amended in view of the objections of the Board in its communication of 7 August 2003.

Main and first auxiliary request:

Support for the feature of the tabs having a length between 19 and 51 mm and a width between 13 and 38 mm was to be found in the original application documents, page 9, lines 20 to 24. In view of this disclosure, even if it was not related to the size of the tabs used in the test prototypes, it should not be necessary to

limit claim 1 to the tab size actually used in the tests.

Second auxiliary request:

Sufficient support for this claim was now achieved by including the materials used for the cover and baffle (polypropylene and polyethylene respectively) of the prototypes tested as well as the actual size of the tabs of those prototypes.

The article according to claim 1 of this request was novel as none of the prior art documents disclosed all its features. It also involved inventive step as claim 1 now clearly related to an absorbent article comprising an absorbent made from coform, the cover, the baffle, the absorbent between the cover and baffle as well as the release paper were all coterminous, thus could be cut together in one die-cut operation. This provided important advantages in production. The only prior art coming close to such an article was to be found in D9, which, however, did not address the problem of having sufficiently stiff tabs so as to avoid them drooping, nor to have the release paper covering the whole article. In fact it went against the teaching of D9, which advocated the presence of the release paper only at the locations of the adhesive, so as to save material. The other available prior art provided no indications to design the tabs such that they had the required stiffness nor that the release paper should be single and coterminous with the cover, baffle and the absorbent. D1 required the tabs to be easily bent, not to be sufficiently stiff. D5 provided

for a single release paper, which, however, was not coterminous.

VII. In essence the Respondents argued as follows:

The late filing of claims with the letter of 27 August 2003, in preparation of these oral proceedings, which were broader than those filed with the statement of grounds of appeal, completely changed the framework of the appeal and should be found inadmissible (see T 331/89) or should lead to the appeal proceedings being continued in writing.

The important factor of the tab size actually used in the tested prototypes was not mentioned in claim 1 of the main and first auxiliary request, although it was of critical importance for the test result. Claim 1 of the main request allowed any kind of material for the cover and the baffle, whereas the description only mentioned a polypropylene spunbond cover and a polyethylene baffle. Without such features in the claim the skilled person was at a loss what materials and what tab size to choose, so as to achieve the claimed peak force value. This meant that the patent insufficiently disclosed the invention as claimed in claim 1 of these requests (Article 83 EPC).

The present wording of claim 1 according to all requests left doubt as to whether the pad and the release paper on the one hand and the cover, absorbent and baffle on the other hand were actually coterminous.

The amendments to claim 1 as granted could only be derived from claim 11 as originally filed. However,



that claim referred to the **pad** as having the central portion as well as the garment facing surface (and not the absorbent as now claimed) and to the adhesive being additionally **present on that central portion** (not only on the tabs as now claimed). Thus the requirements of Article 123(2) EPC were not met. It could also not be remedied by referring for these features to the pad instead of the absorbent, as the claim as granted required the adhesive to be on the garment-facing surface of the absorbent.

Novelty of the subject-matter of claim 1 of the second auxiliary request was not challenged. Inventive step could, however, not be acknowledged for the following reasons:

An absorbent article with the required peak force value was known from D1, the problem with that article was the presence of three release papers on the adhesive, which made handling difficult. D5 showed that one release paper was a possible solution, thus only remained the question of how to produce such an article efficiently. For that problem D9 provided the solution in presenting a method to die-cut the articles, with the result that the cover, absorbent and baffle forming the pad as well as the release paper would all be coterminous. The fact that D9 presented only release paper which did not cover the entire article was due to the fact that the adhesive was only applied in certain locations. As soon as one applied the adhesive all over (as done in the patent) the release paper should also cover the entire article. The use of coform for the absorbent was known from D10.

## Reasons for the Decision

1. The appeal is admissible.
2. *Admissibility of the main and two auxiliary requests filed in the oral proceedings*
  - 2.1 At the start of the oral proceedings Respondent 02 objected to the filing of new requests (with letter of 27 August 2003) with claims which were substantially broader than the claims filed with the statement of grounds of appeal, which thus changed the framework of the appeal. The Appellant considered the modification of these claims admissible as it addressed points raised by the Respondents as well as by the Board in its preliminary opinion.
  - 2.2 Indeed, in accordance with the case law of the Boards of Appeal, amendments should be carried out at the earliest possible moment and late filed requests should only be admitted with good reasons for their delay (see T 95/83, OJ EPO 1985, 75),  
  
However, oral proceedings are not only meant to permit the parties to present their written case once more, orally, but also to react to the submissions made in the oral proceedings and the Board's reaction to these submissions by amending the claims.
  - 2.3 Claim 1 of the main request filed with the letter of 27 August 2003 was further limited in the oral proceedings by the addition of the size of the tabs as well as by the cover, baffle and absorbent being

coterminous (all requests), the materials used for the cover and the baffle (first and second auxiliary request) and the absorbent being made from coform (second auxiliary request).

The Board considers the further amendments to be in reply to objections made by the Board in its preliminary opinion as well as during the oral proceedings and by Respondent 02 during the oral proceedings. Furthermore, the amendments do not require extensive re-examination of the claimed subject-matter.

Insofar the Appellant's behavior cannot be seen as an abuse of proceedings.

- 2.4 The decision cited by Respondent 02 (T 331/89) is not relevant for the present situation as it concerned a case where the Patentee filed the request to maintain the patent as granted only at the oral proceedings, where it had - 33 months earlier with its statement of grounds of appeal- requested maintenance in an amended form.

In the present case the requests as filed with letter of 27 August 2003 and those filed in the oral proceedings do not involve a return to the claims of the patent as granted, but to claims which are further limited. In any case, the claims filed with letter of 27 August 2003 were received well in advance of the date of two weeks before the oral proceedings which the Board had set the parties as ultimate date for submissions.

2.5 Respondent 01 requested in its letter of 1 September 2003 that claims filed by the Appellant after those filed with letter of 27 August 2003 and which involved a substantive change in the independent's claim scope (e.g. broadening) should not be admitted or, if admitted, should lead to a continuation of the proceedings in writing, so as to guarantee Respondent 01's right to be heard.

Due to the addition, during the oral proceedings, of further limiting features to claim 1 of the main request filed with letter of 27 August, see point 2.2 above, the scope of the independent claim known to Respondent 01 at the time of making this request is substantively changed, but not to the detriment of Respondent 01, as it is more limited than before and is not considered as taking Respondent 01 by surprise.

In any case, by withdrawing its request for oral proceedings and by deciding not to attend the oral proceedings before the Board, Respondent 01 cannot claim that its right to be heard on claims filed only at the oral proceedings be guaranteed by a continuation of the appeal proceedings in writing. Article 11(3) of the Rules of Procedure of the Boards of Appeal, applicable as of 1 May 2003, quite clearly states that "The Board shall not be obliged to delay any step in the proceedings, including its decision, by reason only of the absence at the oral proceedings of any party duly summoned who may then be treated as relying only on its written case."

3. *Amendments (Article 84 EPC) - main and first auxiliary request*

- 3.1 When amendments are made to a patent during opposition and opposition-appeal proceedings, Article 102(3) EPC requires consideration by either instance as to whether the amendments result in a contravention of any requirement of the Convention, including Article 84 EPC.

Case Law of the Boards of Appeal suggests that Article 102(3) EPC does not allow objections to be based upon Article 84 EPC if such objections do not arise out of the amendments made (see T 301/87, OJ EPO 1990, 335).

Leaving aside whether such a conclusion applies under all circumstances, the present case is one in which the amendments lead to the question whether there is adequate support in the description and drawings for the claimed subject-matter as amended.

- 3.2 In the statement of grounds of appeal the Appellant argued, among others, that the absorbent article according to the patent in suit distinguished itself from the article disclosed in D1 because the bending resistance of the tabs defined by the "peak force value" was determined by means of a different test procedure. With the statement of grounds of appeal claim 1 as granted was amended so as to make clear that the cover and the baffle extended together with the absorbent into the tabs, by defining them as being coterminous and forming a pad of uniform thickness.

In its reply to the communication of the Board of 7 August 2003 the Appellant further amended this claim

in respect of the peak force value for the tabs by incorporating "when determined in accordance with the test procedure defined herein".

As will become apparent in the discussion of inventive step, the peak force value of the tabs is an important feature for distinguishing over the prior art, as was also argued by the Appellant.

3.3 These amendments give rise to the following objections pursuant to Article 84 EPC (support in description):

3.3.1 The description of the patent relating to the tests performed on the tabs, according to the test procedure referred to in claim 1, mentions **all** prototypes as having a tab size of 40 mm length and 25.4 mm width. For those prototypes peak force values were determined ranging between 13.6 and 99.3 grams (see table 2 of the patent on suit). No other tab sizes were used in the prototypes subjected to the test procedure.

In claim 1 the peak force value claimed is in the range of 10 to 100 grams. The Board considers this claimed range sufficiently supported by the above mentioned actual values obtained in the test procedure (13.6-99.3 grams).

It, however, has to be examined whether the description provides adequate support for the tabs **having a length between 19 and 51 mm and a width between 13 and 38 mm** as claimed in claim 1 according to the main and first auxiliary request.

3.3.2 The Appellant argued that the mention of these values in the description as filed, page 9, lines 20 to 24, provided the necessary support for this claimed range of tab sizes.

The Board cannot concur with this view. The scope of the patent monopoly should correspond to the applicant's contribution to the prior art (see e.g. T 409/91, OJ EPO 1994, 653, point 3.3 of the Reasons).

In the present case the contribution to the prior art is, according to this Board, what the patent in suit discloses as absorbent articles actually fulfilling the parameter conditions claimed, i.e. the peak force value for the tabs ranging from 10 to 100 grams **as determined by the test procedure**. The embodiments fulfilling those requirements have tabs of only one size, namely 40 mm length and 25.4 mm width. There are no test results available for other tab sizes, thus the skilled person is not provided with information on how to achieve the claimed peak force values with tab sizes different from the above.

Furthermore, the part of the description cited by the Appellant as forming the basis for the presently claimed range of tab sizes is considered by the Board to rather be a description of what tab sizes can generally be found in sanitary napkins and panty liners than that it concerns the actual absorbent article according to the invention, i.e. one which has the required peak force, established by the test procedure as described in the patent in suit.

3.3.3 It could be argued that in formulating the claims, the applicant should be able to do so in terms as broad as possible, as most claims are generalizations of one or more particular examples.

In this respect the Board finds that the extent of generalization depends on what is the actual extent of the patent's contribution to the state of the art. In this context the Board supports the idea that, as the Guidelines for Examination in the EPO suggest (C-III, 6.2): "An invention which opens up a whole new field is entitled to more generality in the claims than one which is concerned with advances in a known technology. .... In particular, if it is reasonable to predict that all the variants covered by the claims have the properties or uses the applicant ascribes to them in the description, he should be allowed to draw his claims accordingly." (see also T 593/96, not published, point 5 of the Reasons).

However, the Board cannot see that the present invention "opens up a whole new field of technology", as the bending stiffness of the tabs is a feature which has already been discussed before in this field. Relevant prior art like D5 mentions the general problem of tabs being too flexible (column 2, lines 33, 34) and D1 discusses the bending resistance of 76 mm length tab with bending resistance values (25-200 grams) generally covering the present claimed range (10-100 grams).

3.3.4 Further, in view of the wide spread in the actual peak force values achieved for one and the same kind of prototype, see for instance the value spread of 15.3-32.7 grams for a 190 gsm prototype with an average



thickness of 1.68 mm, which is more than a 100% difference between the minimum and the maximum value, it cannot be predicted from the information given in the patent in suit that all tabs will have peak forces in the claimed range, in essence irrespective of their tab size, because the claimed wide range of 19-51 mm length and 13-38 mm width for the tabs applies to all available absorbent articles with tabs.

- 3.3.5 This is in particular evident for a narrow width of the tab, like the lowest value (13 mm width) presently claimed in claim 1. According to the test procedure described in the patent in suit the pin used to deflect the tab from a 90° angle further downward, towards the garment facing surface, should be  $11.0 \pm 0.5$  mm from that surface. With a tab of only 13mm the pin will slip off the tab soon after it has started bending downward, thus long before the tab has been bent through the required further 90° as required by the test procedure.

Thus the contribution to the state of the art is limited to what has been disclosed for the tab width and length of the prototypes subjected to the test procedure as described in the patent in suit.

- 3.4 Claim 1 of the main request and the first auxiliary request, claiming a wider range of tab sizes, therefore does not fulfill the requirements of Article 84 EPC (support in description). These requests are therefore to be refused.

4. *Amendments (Articles 84 and 123 EPC) and sufficiency of disclosure (Article 83 EPC) - second auxiliary request*

4.1 Claim 1 of the second auxiliary request now involves the materials used for the cover and the baffle (polypropylene and polyethylene respectively), the absorbent being made from coform, and the tab size now being limited to 40 mm length and 25.4 mm width.

These are the actual features of the prototypes on which the test procedure has been performed as described in the patent in suit, page 8, lines 22 to 48. Thus support in the description is now guaranteed (Article 84 EPC).

4.2 Claim 1 as granted has been amended by the inclusion of the following features (in brackets the reference to the original application documents):

- liquid-permeable polypropylene cover, liquid-impermeable polyethylene baffle and coform absorbent positioned between the cover and the baffle, all three being coterminous and together forming a pad of uniform thickness (page 10, second paragraph; page 21, line 36 to page 22, line 17),

- the peak force value being determined in accordance with the test procedure defined in the patent (page 21, line 36 to page 23, line 31,

- the securing means being an adhesive (page 11, third paragraph),

- a single release paper covering all of the adhesive means, the release paper and the pad having coterminous exterior peripheries (page 11, last paragraph and page 12, first paragraph).

These features thus find a proper basis in the application documents as originally filed (Article 123(2) EPC).

These features further limit the subject-matter of claim 1 as granted, thus also the requirements of Article 123(3) are fulfilled.

The objections of the Respondents pursuant to Article 83 EPC, in that the skilled person could not carry out the invention for lack of sufficient information regarding the materials used for the cover, baffle, absorbent, the tab size involved and how to achieve a pad with uniform thickness, are also overcome by these amendments.

The amendments to the description are necessary to comply with the requirements of Article 84 EPC (consistency between claims and description) and Rule 27(1)(b) EPC (mention of closest prior art).

- 4.3 The Respondents argued that it was not evident that the pad with the release paper on the one hand and the cover, absorbent and baffle on the other all had the same coterminous exterior peripheries.

The Board cannot subscribe to this opinion as according to claim 1 on the one hand the cover, baffle and absorbent are coterminous and together form a pad

having a uniform thickness, and on the other hand the pad and the release paper have coterminous exterior peripheries. This can only mean that they all have the same coterminous exterior peripheries.

- 4.4 The Respondents further argued that the subject-matter of claim 1 had been extended contrary to Article 123(2) EPC as the basis for the present amendments could be found only in claim 11 as originally filed, which, however, claimed the **pad** as having the central portion and the garment facing surface, instead of the absorbent as presently claimed, In addition, the adhesive was mentioned in that claim as being present also on the central portion.

The Board cannot share this opinion. Now that the claim specifies the baffle, cover and the absorbent as being on the one hand coterminous and on the other together forming the pad, it is evident to the skilled reader that if the pad has a central portion the same applies to the absorbent.

As concerns the garment facing surface, not only the wording of originally filed claim 11 counts as a basis for disclosure; page 8, lines 1 and 2 of the description as originally filed mentions the absorbent as having such a surface.

The same applies to the location of the adhesive on the article; claims 1 and 4 as originally filed mention the means for securing the absorbent to an undergarment as being only present on the tabs.

4.5 Thus there are no formal objections against claim 1 of the second auxiliary request.

5. *Novelty and inventive step (Articles 54 and 56 EPC)*

5.1 The novelty objections maintained from the opposition proceedings were not produced in respect of claim 1 according to the second auxiliary request. The Board verified whether one single document of the available prior art disclosed all features of present claim 1, which was not the case.

5.2 The absorbent article according to present claim 1 has as important feature the coterminous exterior peripheries of the baffle, cover, absorbent (together forming the pad with a uniform thickness) as well as of the single release paper. This allows for an efficient production of these articles, as they can be produced by die-cutting a laminate of these materials.

Closest prior art for such an article is D5, disclosing in its figures 4a and 4b (see also column 5, line 54 to column 6, line 32) an absorbent article which has a liquid-permeable cover 116, a thin layer absorbent material underlying the absorbent element 112 and a liquid-impermeable barrier 118. The cover, barrier and thin layer absorbent material are coterminous and form a pad having two flaps extending from a central portion. On the central portion as well as on the tabs there are adhesive means secured to the garment facing surface of the absorbent. The adhesive on the central portion is covered by a single release paper and the flaps are folded back, with their adhesive means, onto the release paper.

Articles such as known from D5 have the disadvantage that the flaps are rather flexible, such that they can easily fold (back) down onto the garment-facing side of the article, where they can get stuck on the adhesive (see D5, column 2, line 33 and the patent in suit, page 2, lines 33 and 34) when the release paper has been taken off.

5.3 The subject-matter of claim 1 of the second auxiliary request distinguishes itself from the absorbent article disclosed in D5 **at least** by the following features:

- (a) the pad has a uniform thickness,
- (b) the absorbent is made from coform,
- (c) the tabs have a peak force value of 10 to 100 grams when determined in accordance with the test procedure as defined in the patent and have a length of 40 mm and a width of 25.4 mm,
- (d) the single release paper covers the entire adhesive and has an outer periphery which is coterminous with the outer periphery of the pad.

5.4 With features (a), (b) and (d) the absorbent article can be more efficiently and economically produced (see patent in suit, page 5, lines 13 to 16), as it can be formed from a laminate of the absorbent coform, the cover, the baffle and the release paper and be die cut.

The above features **together** with feature (b) have the additional objective that the tabs have a certain

bending resistance, which prevents them from sticking onto the adhesive, once they are freed from the release paper.

- 5.5 None of the documents available as prior art provides an indication to this combination of features.

The Respondents argued that D1 provided the information on the stiffness necessary for the tabs, D9 concerned die-cutting of laminate absorbent articles and D10 the use of coform in such articles. In D9 the release paper was only used at the locations of the adhesive, i.e. only at the tabs. However, if it was preferred to have adhesive all over the article, i.e. also in the central portion, it did not involve inventive skills to provide the release paper over the whole surface and making it coterminous with the exterior periphery of the pad.

- 5.6 The Board considers that the distinguishing features mentioned above should not be considered in isolation, particularly since the fact that the pad comprising the cover, baffle and coform absorbent has a uniform thickness will have an influence on the flexibility of the tab.

It is further established case law of the Boards of Appeal that the technical disclosure in a prior art document should be considered in its entirety, as it would be done by a person skilled in the art. It is not justified arbitrarily to isolate parts of such documents from their context in order to derive from them technical information which would be distinct from or even in contradiction with the integral teaching of

the document (see T 56/87, OJ EPO 1990, Reasons point 3.1).

Thus, application of the peak force feature known from the article disclosed in D1 necessarily involves applying also the construction features of the pad disclosed therein. This results in an absorbent article having a pad of uniform thickness as shown in figure 2 of D1, but without the absorbent being coterminous with the baffle and the cover, nor with an absorbent made from coform, as presently claimed in claim 1.

- 5.7 The same considerations apply when starting from the absorbent article disclosed in D9.

Starting from D1 it would have to be obvious to the skilled person to apply the combined teachings of D10 (use of coform for the absorbent), of D9 (as regards die-cutting absorbent articles made from a laminate, but in isolation from the actual construction of the laminate), as well as that of D5 (as regards the remark in column 2, lines 22 to 34 that one single release paper could be used, but deliberately not taking account of the discouraging remark that this would be wasteful of material). The Board considers that in view of the lack of a specific direction of development this would involve too many technical changes in the construction of the absorbent article disclosed D1, so that the skilled person would not contemplate applying these teachings.

- 5.8 The Board therefore considers inventive step to be present in the subject-matter of claim 1 of the second auxiliary request.



This is not different when starting from D1 as closest prior art.

- 5.9 The subject-matter of dependent claims 2 to 23 concerns preferred embodiments of the absorbent article according to claim 1 (Rule 29(3) EPC), thus it also fulfils the requirements of novelty and inventive step.

## 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 with the order to maintain the patent on the basis of the following documents:
  - description, pages 2 to 9 and
  - claims 1 to 23 of the second auxiliary request, filed during oral proceedings,
  - drawings, figures 1 to 9 as granted.

The Registrar:

The Chairman:

E. Görgmaier

P. Alting van Geusau