

BESCHWERDEKAMMERN
DES EUROPÄISCHEN
PATENTAMTS

BOARDS OF APPEAL OF
THE EUROPEAN PATENT
OFFICE

CHAMBRES DE RECOURS
DE L'OFFICE EUROPEEN
DES BREVETS

Internal distribution code:

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

**Datasheet for the decision
of 20 November 2008**

Case Number: T 0976/04 - 3.3.07

Application Number: 97309700.9

Publication Number: 0852268

IPC: D01F 6/46

Language of the proceedings: EN

Title of invention:

Absorbent articles having improved separator layer

Patentee:

Fibertech Group, Inc.

Opponent:

The Procter & Gamble Company

Headword:

-

Relevant legal provisions:

EPC Art. 123(2), 104(1)

EPC R. 80

Relevant legal provisions (EPC 1973):

EPC Art. 56, 84

EPC R. 57(a)

Keyword:

"Disclosure - sufficiency - (yes)"

"Novelty (yes)"

"Inventive step (no) - obvious combination of known features
(all requests)"

"Clarity (yes) (first auxiliary request)"

"Amendments - added subject-matter (yes) (second auxiliary
requests)"

"Cost apportionment (no)"

Decisions cited:

-

Catchword:

-



Case Number: T 0976/04 - 3.3.07

DECISION
of the Technical Board of Appeal 3.3.07
of 20 November 2008

(Opponent)

The Procter & Gamble Company
One Procter & Gamble Plaza
Cincinnati, OHIO 45202 (US)

Representative:

Samuels, Lucy Alice
Gill Jennings & Every LLP
Broadgate House
7 Eldon Street
London EC2M 7LH (GB)

Respondent:

(Patent Proprietor)

Fibertech Group, Inc.
Weymouth Road and RR Boulevard
Landisville, NJ 08326 (US)

Representative:

Lyons, Andrew John
Marks & Clerk
Tower Building
Water Street
Liverpool L3 1BA (GB)

Decision under appeal:

Decision of the Opposition Division of the
European Patent Office posted 21 June 2004
rejecting the opposition filed against European
patent No. 0852268 pursuant to Article 102(2)
EPC.

Composition of the Board:

Chairman: S. Perryman
Members: B. ter Laan
G. Santavicca

Summary of Facts and Submissions

I. The appeal by the opponent lies against the decision of the opposition division to reject the opposition against European patent No. 0 852 268, based on European application No. 97 309 700.9, the mention of the grant of which was published on 21 August 2002.

II. The patent was granted on the basis of 11 claims, the independent claim reading:

"1. An absorbent layered article comprising a porous top sheet (10), an absorbent core (14) and a separator layer (12) disposed in contact between the top sheet (10) and the core (14):

CHARACTERIZED IN THAT

the separator layer (12) comprises a nonwoven fabric of at least 60% polymer fibers bonded by heat calendering; and

the fibers have a hydrophilic surface, an average fiber diameter of at least 28 microns and have at least five crimps per 2.54 cm (1 inch) of uncrimped length."

Claims 2 to 11 concerned preferred embodiments of the article according to claim 1.

III. A notice of opposition against the patent was filed on 21 May 2003, in which the revocation of the patent in its entirety was requested on the grounds of Article 100(a) EPC (lack of novelty as well as lack of an inventive step) and Article 100(b) EPC (insufficient disclosure). The opposition was, *inter alia*, supported by:

D1 US-A-4 783 231
D2 US-A-5 364 382
D3 EP-A-0 539 703
D4 US-A-4 377 615

Further documents filed after the lapse of the nine months opposition period were *inter alia*:

D5 WO-A-95/10996
D7 WO-A-96/33303
D8 US-A-5 522 810
D9 GB-A-2 214 201

The opposition division, in its decision posted on 21 June 2004, found that the invention was disclosed in a manner sufficiently clear and complete for it to be carried out by the skilled person (Article 83 EPC). As none of the cited documents disclosed all the features in the combination required by claim 1 of the patent in suit, Article 54 EPC was complied with. Regarding inventive step, starting from D7, which concerned a different problem as well as a differently structured article, that document contained no guidance of how to arrive at the claimed article, also not in combination with any of D3 and D8 which disclosed the layered structure of the present article, but not the requirements of the individual layers.

IV. On 3 August 2004, the opponents (appellants) lodged an appeal against the above decision. The prescribed fee was paid on the same day. With the statement setting out the grounds of appeal filed on 1 November 2004, arguments were submitted and a further document was cited: "EDANA test method 151.0-93" (D10). Further comments were filed by letter of 28 October 2008.

V. By letter dated 7 March 2005 the patent proprietors (respondents) filed comments on the grounds for the appeal as well as two sets of claims as first and second auxiliary requests, their claims 1 reading:

First auxiliary request:

"1. An absorbent layered article comprising a porous top sheet (10), an absorbent core (14) and a separator layer (12) disposed in contact between the top sheet (10) and the core (14):

characterized in that the separator layer (12)

comprises a nonwoven fabric of at least 60% polymer fibers bonded by heat calendering;

the fibers have a hydrophilic surface, an average fiber diameter of at least 28 microns and have at least five crimps per 2.54 cm (1 inch) of uncrimped length; **and the top sheet (10) is a nonwoven fabric comprising fibers having an average diameter less than the average diameter of the fibers of the separator layer (12).**"

(amendments indicated in bold by the Board.)

Second auxiliary request:

"1. An absorbent layered article comprising a porous top sheet (10), an absorbent core (14) and a separator layer (12) disposed in contact between the top sheet (10) and the core (14):

characterized in that the separator layer (12)

comprises a nonwoven fabric of at least 60%

polypropylene fibers bonded by heat calendaring,

the fibers have a hydrophilic surface, an average fiber diameter of at least 28 microns and have **about 7 to about 11** crimps per 2.54 cm (1 inch) of uncrimped length; **the balance of the nonwoven fabric comprising**

polyester, nylon, rayon acrylic or bicomponent fibers; and the top sheet (10) is a nonwoven fabric comprising fibers having an average diameter less than the average diameter of the fibers of the separator layer (12)."

(amendments indicated in bold by the Board.)

- VI. In preparation of the oral proceedings the Board sent a communication dated 18 September 2008, indicating the issues to be discussed. The parties' attention was drawn to the commercial diapers (Ultrathin Huggies for Him Step 3, Kimberly-Clark, Dallas, TX) mentioned in the examples of the patent in suit, which should also be considered as the closest prior art, hence a suitable starting point when applying the problem-solution approach regarding inventive step. The possible necessity of a discussion of Articles 123(2) and (3) and 84 EPC regarding the auxiliary requests was also pointed out.
- VII. Oral proceedings had been scheduled for 30 October 2008, but were postponed at the request of the appellants. A second postponement, again requested by the appellants, was refused. Oral proceedings before the Board were held on 20 November 2008 in the absence of the respondents, who had been duly summoned but had announced by letter of 17 November 2008 that they would not attend.
- VIII. The appellants' arguments given in writing can be summarised as follows:
- (a) Regarding sufficiency of disclosure, the term "hydrophilic" was relative and hence unclear, leading to insufficiency as the skilled person

could not choose a reasonable number of different embodiments of fibres having a hydrophilic surface for lack of information in the patent specification, where in fact only one type of fibre was described.

During the oral proceedings the further point was raised that the amount of nonwoven had not been specified, so that it was not clear in which range the invention worked.

- (b) As to novelty, according to the disputed decision, D7 disclosed a layer having the characterizing features of claim 1. Such layers were described in the context of a structure having a porous top sheet and an absorbent core with the relevant layer in contact between the top sheet and the absorbent core. At the time of publication of D7 disposable diapers always had a porous top sheet and an absorbent core. The "distribution layer" mentioned in D7 was therefore nothing else than a separation layer such as now claimed. Moreover, the test article in the examples of D7 was such a layered article (see D10). Therefore, the claimed subject-matter lacked novelty.

Claim 1 also lacked novelty over D1 and D9, which both disclosed all the features of the claimed article.

- (c) As regards inventive step, during the written proceedings, D7, D5 and D8 were mentioned as possible closest prior art documents. However during the oral proceedings the appellants

considered the commercial product ("Huggies") described in the examples of the patent in suit to be the most suitable starting point.

- (d) According to the patent in suit, the problem to be solved was to reduce rewet. That problem was however not solved over the whole scope of claim 1, because, amongst other things, a number of essential features (crimp, fibre size, porosity) were lacking in the claim. Also, the commercial product showed the best results at the first and second insult, so that there was no improvement. No relationship existed between the claimed combination of features and any advantage shown in the examples since the examples did not specify the fibres used, such as their material or their surface treatment. The choice of the values indicated in the claims was completely arbitrary. Therefore, the problem to be solved should be defined as to provide alternative absorbent articles to those of the prior art.

- (e) The commercial product "Huggies" possessed the required structure of a nonwoven fabric top sheet and an absorbent core with a separation layer between them. For the absorbent to work one needed relativity between the layers, in order that the liquid could flow into the absorbent.

D7 taught the inclusion of a "distribution layer", for which it was standard to be placed directly underneath the porous top sheet and above the absorbent core. Moreover, D2, D3, D5 and in particular D8 described a "surge management" or

"separation" layer between a porous top sheet and an absorbent core. D8 also described heat calendering and the use of 100% polymer for the fibres. The layers of D7 exhibited properties that made them suitable for application as the surge management or separation layer of D2, D3 and D8 as well as the "Huggies". It was therefore obvious to substitute layers according to D7 in those structures if the skilled person was looking for an alternative.

- (f) Regarding the auxiliary requests, they did not comply with the requirements of Article 123(2) EPC since the incorporation of the subject-matter of original claim 10 into claim 1 changed the dependencies of the other claims in a way that had not been originally disclosed. Also, now that a second fibrous sheet was defined, it was not clear anymore to which fibres the requirements applied. The objections regarding disclosure, novelty and inventive step raised against the main request, were also valid for the auxiliary requests.

- (g) The appellants requested an apportionment of costs because the respondents had only announced their absence at the oral proceedings at the very last moment, two days before the oral proceedings, so that the appellants did not have the opportunity anymore to reconsider their own presence and were deprived of the possibility to request a second postponement of the oral proceedings themselves. The appellants had incurred extra costs in preparing to attend oral proceedings at a date inconvenient to them, which might have been

avoided if the respondents had indicated at an earlier stage that they would not be represented.

IX. The arguments of the respondent given in writing can be summarized as follows:

- (a) As to sufficiency of disclosure, the term "hydrophilic" had a well recognized meaning, as agreed by the examining and the opposition divisions; the skilled person, with his general knowledge, was capable of producing the articles as claimed.
- (b) As regards novelty, according to D7, the nonwoven was intended to be placed in contact with the skin, i.e. as a top layer, not as a separator layer between top and absorbent layer. The filter paper used in the examples, to which the appellant referred as the top layer, did not form part of the article and could therefore not be considered to be the top sheet of the article.

The same was valid for D1 which described a nonwoven top layer, not a separator layer.

The absorbent layer according to late filed D9 could comprise more than one layer, but D9 did not describe a separate layer between the top and the absorbent layer. Moreover, the polymer fibres were not heat bonded as now required.

Therefore, none of the documents described the combinations of all the features of the articles now being claimed, which hence were novel.

- (c) As regards inventive step, the problem to be solved by the patent in suit was to provide a layered article that had significantly reduced re-wet with a moderate strike-through rate. That problem was solved by the incorporation of a separator layer as defined, as shown by the examples.

D7 concerned the problem of loss of hydrophilicity, which was something entirely different. D7 suggested that its nonwoven material would provide strike-through and re-wet properties not suitable for the present article, leading away from the present solution. A combination with any of D2, D3 or D8 would not lead the skilled person to an absorbent layered article as defined in claim 1. In particular the absorbent material of D8 had poor re-wet properties. Also D5 concerned a different problem and did not teach the use of the high levels of crimped fibre now required.

In view of the above, the claimed subject-matter was inventive.

- (d) The respondent did not give any comments regarding "Huggies" as the closest prior art.

X. The appellants (opponents) requested that the decision under appeal be set aside and that the patent be revoked, and requested an apportionment of costs.

The respondents (patent proprietors) had requested in writing to dismiss the appeal, or, alternatively, to

maintain the patent on the basis of one of the two auxiliary requests filed with letter of 7 March 2005.

Reasons for the Decision

1. The appeal is admissible.

Sufficiency of disclosure

2. The appellant has raised the objection of insufficiency of disclosure on the basis that a skilled person would not be able to carry out the invention and obtain the benefits which are the stated object of the inventions, in the absence of any precise guidance as to what is meant in claim 1 by "fibers have a hydrophilic surface", and also on the basis that in the absence of any quantification of the amount of specific non-woven fibers to be used in the separator layer, the skilled person would not obtain the advantages said to be achieved by the claimed subject matter.
 - 2.1 The term "hydrophilic" having regard to fibres used for the production of absorbent layered articles of the type now being claimed, is also used in a number of the documents cited against the patent in suit (e.g. D2, D3, D9 and D7 which is specifically mentioned in the patent specification paragraph [0005]). Thus it is apparent that the skilled person in this art can attribute some meaning to it. The Board would agree with the appellants that the term "hydrophilic" covers a range of different degrees of hydrophilicity, and thus the claim encompasses a range of possible fiber surfaces. The precise choice of fiber surface can be expected to

affect the properties of the article. But it is not a feature required by the claim that the article have particular advantageous properties. The Board can see no reason to assume that the skilled person cannot make something meeting the requirements of the claim. That the claimed feature "have a hydrophilic surface" is broad and covers a range of possibilities may be taken into account when considering the problem that can be taken as solved by the claimed subject matter, but does not serve to make out an objection that the skilled person cannot carry out the invention as claimed.

- 2.2 The choice of the amount of non-woven fibers to be used in the separator fabric, while likely to affect the properties of the final article, does not appear to the Board to be so difficult as to prevent the skilled person from making something meeting the requirements of the claim. That the claim leaves the amount of non-woven fibers open means that the claim is broad in this respect. But the board can see no reason to assume, given that the prior art acknowledged in the patent in suit had such separator layers and given that the claim does not require any particular desired properties to be achieved, that the skilled person cannot produce some sort of article meeting the requirements of the claim. The issue of the amount of non-woven is rather a question to be dealt with under inventive step when the problem to be solved is defined and the question has to be answered if that problem is solved over the whole scope of the claim.

Therefore, there can be no doubt that the skilled person is capable of preparing articles in accordance

with the claims, so that requirements of Article 83 EPC are fulfilled.

- 2.3 The Board concludes that no case of insufficiency of the disclosure has been made out.

Novelty

3. The appellant argued a lack of novelty in view of D7, D1 and D9.

3.1 D7 relates to rewettable thermobondable polyolefin-based synthetic fibres treated with hydrophilic spin finishes, suitable for the preparation of hydrophilic nonwoven materials which are required to be able to maintain a substantial degree of wettability after one or, preferably, several wettings, e.g. for use as a topsheet or distribution layer in disposable diapers (page 1, lines 7 to 11).

3.2 In Example 11 (page 25/26) of D7, polypropylene filaments were coated with a spin finish having hydrophilic components, and crimped. The fibres had about 10 to 13 crimps/cm and a fineness of 6.7 dtex, which corresponds to about 33 μm . Nonwovens were prepared by thermal bonding. Hence, the nonwoven of Example 11 of D7 fulfils the requirements for the separator layer of the presently claimed article.

3.3 On page 24, D7 describes the rewet test according to D10, used to measure the ability of the nonwoven to act as a barrier against the transport of liquid from a nearly saturated absorbing material to a dry absorbing material. The absorbing material under the nonwoven is

85% saturated with a liquid, and after a compression time of 3 min., a piece of filter paper is placed on top of the nonwoven and a weight is placed on top of the filter paper. After 2 min. the weight is removed and the weight gain of the filter paper is recorded. The appellant argued that D7 thus described a three layer structure as now claimed. However, a piece of filter paper that does not form an integral part of the structure cannot be seen as part of that structure. The structure tested in D7 has only two layers: the absorbent layer and on top of it the nonwoven. The test only concerns the properties of the nonwoven and does not describe a three-layered structure as now being claimed.

- 3.4 The brief reference at lines 10 to 11 of page D7 to the fibres being suitable for use as a topsheet or distribution layer in disposable diapers was taken by the appellants as referring to two different possibilities, namely a first in which the fibres serve both as topsheet and distributor, and a second in which the fibres are in a diaper as an intermediate layer, as required by the present claim, with a separate topsheet. The respondents submitted that this wording referred only to a single possibility, with the words topsheet and distributor referring to two functions of same the fibres. Both views seem possible. On the strict standard for lack of novelty adopted in the case law, the Board can however not conclude that there is a clear and unambiguous disclosure in this passage of D7 of a topsheet separate from the fibres which serve as a distributor.

- 3.5 For the above reasons, D7 cannot be taken as destroying the novelty of the claimed subject-matter now being claimed.
- 3.6 Of the other documents relied on as destroying novelty, D1 does not show all the features of claim 1, since there is no clear and unambiguous disclosure of a separator layer between topsheet and absorbent layer.
- 3.7 Likewise, while D9 discloses an absorbent structure especially suitable for acquiring and distributing aqueous fluids throughout such a structure, there is no clear and unambiguous disclosure in combination of a separator layer between topsheet and absorbent layer, but rather it would be necessary to pick and choose amongst all the possibilities indicated in D9 in order to arrive at the combination of properties now being claimed.
- 3.8 Hence, none of D7, D1 or D9 can be regarded as a clear and unambiguous disclosure of the combination of features required by claim 1, so this can be treated as meeting the requirements of Article 54 EPC.

Inventive step

Closest prior art

4. The patent in suit concerns absorbent articles having an improved separator layer. According to paragraph [0007], the problem to be solved is to provide layered absorbent articles capable of retaining liquid insults to be absorbed by the core and also providing good separation and a significantly reduced amount of liquid

or urine rewet to the topsheet. In accordance with that, the properties tested in the examples are strike-through and rewet.

- 4.1 The closest state of the art taken as the starting point for assessing the presence of an inventive step, is normally a document describing something made for the same purpose or aiming at the same objective as the patent in suit and requiring the minimum of structural modifications (Case Law of the Boards of Appeal of the European Patent Office, 5th edition, 2006, I.D.3.1). Such closest prior art need not be a document. A commercial product identified in the patent as having the relevant properties may also serve as a proper starting point.
- 4.2 D7, taken as the starting point in the appealed decision, is not directed principally at a complete article of the type now claimed but is specifically concerned with making fibres for use in this type of article. For that reason it is not a suitable starting point if there is other prior art relating to the complete article.
- 4.3 In the examples of the patent in suit, specific reference is made to commercial diapers "Huggies" (Ultrathin Huggies for Him Step 3, Kimberly-Clark, Dallas, TX). Those have a top spunbonded nonwoven cover fabric having a basis weight of 22 g/m² and a lofty sublayer of through-air bicomponent nonwoven fabric having a basis weight of 60 g/m² as well as a core containing a high ratio of superabsorbent polymer to pulp (paragraph [0023] of the patent specification). Hence the "Huggies" have the same structure of topsheet,

sublayer and absorbent core as now being claimed, serving the same purpose. These are thus treated in the patent as a suitable starting point, and the comparisons made are with these.

- 4.4 To depart from the starting point mentioned in the patent, there has to be some good reason such as there being other prior art material which is closer to the claimed structure than the prior art starting point in the patent. While D5 and D8, mentioned as possible appropriate starting points by the appellant, also describe multilayered absorbent articles having much of the structure required by present claim 1, these articles do not appear closer to the claimed article than the "Huggies". The Board thus considers it appropriate to choose "Huggies" as the starting point for the assessment of inventive step.

Problem and solution

5. The problem to be solved according to the patent in suit, is to provide layered absorbent articles capable of retaining liquid insults to be absorbed by the core and also providing good separation and a significantly improved rewet (see point 4 above). From the examples it can be seen that the rewet properties at the first insult of the articles now being claimed (examples 4 to 6) are not as good as those of the "Huggies" (example 1) or those of the "Huggies" with the topsheet replaced by the one used in the test articles of examples 4 to 6, the only difference thus being the separator layer (example 2). At the second insult the "Huggies" are still better. Only at the third insult can a slightly improved rewet be seen for example 4, while for

examples 5 and 6 the result is somewhat better. However, the strike-through properties seem worse over the whole range. Therefore, not even for the examples of the patent can it be said that the articles made are improved in the combination of strike-through and rewet properties.

5.1 Further the examples in the patent do not give details of the precise treatment by which the fibers have been treated with a surface active agent or surfactant to render them more hydrophilic. Yet from the material before the Board, such as document D7, and the arguments of the appellant, it appears that such treatment will be critical in how good the strike-through and rewet properties will be after several insults. Given that the claim requires no particular levels of these properties to be achieved, the lack of information on the hydrophilic treatment may not found an objection of insufficiency, (see point 2.1 above) but leads the Board to conclude that the subject-matter of the claim cannot be regarded as solving any more ambitious problem than providing an alternative to the prior art "Huggies".

6. It appears to the Board from the evidence that the precise the strike-through and rewet properties of an absorbent product will depend on numerous factors, such as the precise hydrophilic treatment of the separator fibers and the amount used which are not mentioned in the claim, as well as on factors which are mentioned in the claim. Further, for example, the relative properties of separator layer and topsheet will influence how a satisfactory a result is achieved (see

paragraph [0019] of the patent specification), but are not reflected in the claim.

- 6.1 The problem to be solved is thus taken as to provide further layered absorbent articles capable of retaining liquid insults to be absorbed by the core. That problem can be regarded as solved, as shown by the examples.

Obviousness

7. The question remains to be answered if the solution to the problem as defined in the claims was obvious from the cited prior art.
 - 7.1 For producing a further layered absorbent article, D7 suggests itself to the skilled person as it states (page 1, lines 7 to 11) that the fibres it produces are suitable for the preparation of hydrophilic nonwoven materials which are required to be able to maintain a substantial degree of wettability after one or, or preferably, several wettings, e.g. for use as a topsheet or distribution layer in disposable diapers. The skilled person starting from "Huggies" which have the three layer structure required by claim 1, would see the fibres of D7 as an obvious alternative to try instead of the material used in the "Huggies" as separator layer.

Example 11 of D7 describes nonwovens that fulfil the requirements for the separator layer of the present article, and the skilled person choosing these as an alternative to the separator layer material used in the "Huggies" will arrive in an obvious manner at an article falling within the subject-matter of claim 1,

which thus does not fulfil the requirement for inventive step (Article 56 EPC).

First auxiliary request

Amendments

8. Claim 1 of the first auxiliary request is a combination of original claim 1 with original claim 10 (claim 11 as granted). By the reference to "any preceding claim" present in original claim 10 as well as in the other dependent claims as originally filed, the combination of those embodiments can be considered to have been disclosed in the application as filed, so that the requirements of Article 123(2) EPC are complied with.
9. The requirement regarding the topsheet is added at the end of the claim, so that there can be no doubt that the previous features regarding fibres refer to the fibres of the separator layer, not to the topsheet. Article 84 EPC is complied with.

Inventive step

10. The added requirement regarding the relationship between the diameters of the fibres of the top sheet and the separator layer seems to have been added to avoid an objection as regards insufficiency, in view of the patent itself (paragraph [0019]) stating that the diameter of the fibers of the separator relative to the top sheet fibres is important (as well as the degree of crimp) to provide an acceptable rate of transfer of liquid toward the core and inhibiting flow back. The numerical values given in the detailed description of

the patent suggest that the diameter of the separator fibers should be some three times greater than the diameter of the topsheet fibers. This added requirement however does not change anything in the conclusions drawn from the information in the examples, so that the formulation of the problem to be solved is still the same: that formulated in point 6.1 above. Therefore, for the same reasons as given in point 7.1 above, the skilled person would arrive in an obvious manner at something falling within the subject-matter of claim 1 of this request, so that the request must be refused.

Second auxiliary request

Amendments

11. Claim 1 of the second auxiliary request is a combination of original claim 1 with original claim 10 (claim 11 as granted) and additionally contains the requirement that "the separator layer (12) comprises a nonwoven fabric of at least 60% **polypropylene** fibers having **about 7 to about 11 crimps** per 2.54 cm (1 inch) of uncrimped length; **the balance of the nonwoven fabric comprising polyester, nylon, rayon acrylic or bicomponent fibers**; and the top sheet (10) is a nonwoven fabric comprising fibers having an average diameter less than the average diameter of the fibers of the separator layer (12).

The basis for the polypropylene fibres can be found in original claim 8. However, a basis for "the balance" cannot be found in the original application. Original claim 5 (claim 6 as granted) discloses "less than 40%". As the reason for the change in wording would not

appear to be occasioned by any ground for opposition, the requirements of Rule 80 EPC (Rule 57a EPC 1973) are not fulfilled.

The respondent has failed to indicate a basis for the amendment regarding the minimal amount of crimps. The only instance where from 7 to 11 crimps appear to be used are the examples. However, normally the specific context of the examples cannot be used for the generalisation of one of the aspects there described and the Board sees no reason why such a generalisation would be allowable in the present case.

For those reasons, the claims of the second auxiliary request are not allowable (Article 84 EPC).

12. Moreover, regarding inventive step, as the fibres of Example 11 of D7 meet the requirements of this amended claim, the same arguments for obviousness apply as for the main and the first auxiliary requests.
13. The second auxiliary request is thus not allowable.
14. In view of the above, it is concluded that the main request (Article 56 EPC), the first auxiliary request (Article 56 EPC) and the second auxiliary request (Rule 80 EPC, Article 123(2) EPC, Article 56 EPC) do not comply with the requirements for patentability, so that the appeal must be allowed and the patent revoked.

Apportionment of costs

15. The appellants requested an apportionment of costs because the respondents had only announced their

absence at the oral proceedings three days before the actual date set. The appellants had incurred extra costs in meeting a date of oral proceedings inconvenient to them.

16. The general principle laid down in Article 104(1) EPC is that each party to the opposition proceedings shall bear the costs it has incurred unless for reasons of equity a different apportionment is ordered (see Case Law of the Boards of Appeal, 5th edition 2006, VII.C.8). An appellant seeking to overturn the decision under appeal is generally taken as attending oral proceedings in his own interests, irrespective of whether the respondent intends to appear, and this Board would have maintained the date for oral proceedings even if the respondents had indicated much earlier that they would not be represented. That the date was inconvenient for the appellants is unfortunate, but seems no reason for the respondents to pay any costs. The Board cannot here recognize any reasons of equity to depart from the normal rule that each party shall bear its own costs. Therefore, the request for an apportionment of costs has to be refused.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.
3. The request for an apportionment of costs is refused.

Registrar

Chairman

S. Fabiani

S. Perryman