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**Datasheet for the decision
of 21 May 2015**

Case Number: T 1569/11 - 3.2.06

Application Number: 01944090.8

Publication Number: 1309302

IPC: A61F13/64

Language of the proceedings: EN

Title of invention:

BELTED ABSORBENT ARTICLE

Patent Proprietor:

SCA Hygiene Products AB

Opponents:

Attends Healthcare AB
KIMBERLY-CLARK WORLDWIDE, INC.
Ontex International N.V.

Relevant legal provisions:

EPC Art. 83, 107
RPBA Art. 13(1)

Keyword:

Admissibility of the appeal of the opponents (no)
Sufficiency of disclosure - enabling disclosure (no)
Admittance of auxiliary requests 4 to 7 (no)

Decisions cited:

T 0515/00, T 1018/05, T 0255/06



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Case Number: T 1569/11 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 21 May 2015

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 31 May 2011
revoking European patent No. 1309302 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman M. Harrison
Members: G. de Crignis
 W. Ungler

Summary of Facts and Submissions

- I. European patent No. 1 309 302 was revoked by the opposition division by way of its decision posted on 31 May 2011.
- II. The opposition division held first that the objections under Article 100(c) EPC did not prejudice maintenance of the patent but that the ground of opposition under Article 100(b) EPC was prejudicial thereto. It found *inter alia* that the invention as defined in claim 1 defined a single article but that the minimum average value of a parameter (average release time at various angles of a joint between a belt and the absorbent structure) defined therein could not be established for that single article.
- III. The patent proprietor filed an appeal against this decision and paid the appeal fee. A statement setting out the grounds of appeal was received at the European Patent Office on 30 September 2011 together with the request to set aside the decision of the opposition division and to maintain the patent as granted. The first, second and third auxiliary requests submitted with letter of 11 March 2011 to the opposition division were maintained.
- IV. The opponents OI and OIII also each filed an appeal against this decision and paid the respective appeal fees. Each of these opponents filed a statement setting out the grounds of appeal together with the request to allow the appeal and to set aside point 2 of the decision of the opposition division concerning Article 100(c) EPC and to revoke the patent in its entirety.

- V. With its communication annexed to a summons to oral proceedings, the Board indicated that the appeals of the opponents OI and OIII appeared to be inadmissible, that the finding reached by the opposition division concerning Article 100(c) EPC was considered correct but that it had serious doubts as to whether the requirement of sufficiency of disclosure (Article 100(b) EPC) was met.
- VI. With letter of 26 March 2015 the patent proprietor filed fourth to sixth auxiliary requests.
- VII. Oral proceedings before the Board were held on 21 May 2015.
- VIII. The appellant (patent proprietor) requested that the decision under appeal be set aside and that the patent be maintained as granted, or auxiliarily that the patent be maintained on the basis of auxiliary requests 1 to 3 filed with letter dated 11 March 2011, or on the basis of auxiliary request 4 filed with letter of 26 March 2015, or on the basis of auxiliary request 5 as filed during the oral proceedings of 21 May 2015, or on the basis of auxiliary requests 6 and 7 corresponding to auxiliary requests 5 and 6 filed with letter of 26 March 2015, or that the case be remitted to the department of first instance for the examination of novelty and inventive step. Furthermore, it requested that the appeals of opponents 1 and 3 be rejected as inadmissible.

Appellant-opponent I (hereafter: opponent I) requested that the proprietor's appeal be dismissed.

Respondent II (opponent II) and appellant-opponent III (hereafter: opponent III) did not attend the oral proceedings, as announced by letter of 15 April 2015

(opponent II) and by letter of 19 May 2015 (opponent III) respectively, but maintained their requests that the patent remain revoked.

IX. Claim 1 as granted (main request) reads:

"A belted absorbent article (10) comprising:
an absorbent structure (16) extending about a first longitudinal axis (18), said absorbent structure including a topsheet (20), a backsheet (22) and an absorbent batt (24) disposed between said topsheet and said backsheet, said absorbent structure having a transverse axis (T) dividing the absorbent structure into a front panel (26) terminating in a front end region (28) and a rear panel (30) terminating in a rear end region (32), said absorbent structure being delimited by opposed longitudinal edges (34) and opposed transverse edges (36), and
a pair of opposed belt halves (12, 14) attached to said absorbent structure (16) at said rear end region (32) of said rear panel (30) by a respective joint (50), each belt half extending about a second longitudinal axis (42) such that each belt half extends outwardly from a respective longitudinal edge (34) of the absorbent structure,
characterized in that
said joint (50) between each said belt half (12, 14) and said absorbent structure (16) is designed such that when each said belt half is subjected to a tension force of 35 N acting along said second longitudinal axis (42) and said second longitudinal axis creates an angle α to said transverse axis (T) of said absorbent structure, the following minimum average release times (t) of each belt half from said absorbent structure are attained:
when $\alpha = 10^\circ$, minimum t = 720 seconds;

when $\alpha = 20^\circ$, minimum $t = 330$ seconds;
when $\alpha = 25^\circ$, minimum $t = 240$ seconds;
when $\alpha = 30^\circ$, minimum $t = 180$ seconds; and
when $\alpha = 40^\circ$, minimum $t = 75$ seconds."

Claim 1 of auxiliary request 1 differs from claim 1 of the main request in that before the characterizing part the following has been added:

"with each belt half (12, 14) being substantially rectilinear,".

Claim 1 of auxiliary request 2 differs from claim 1 of auxiliary request 1 in that the following is added after the above insertion:

"each said belt half (12, 14) is attached to said absorbent structure (16) at said rear end region (32) between said topsheet (20) and said backsheet (22),".

Claim 1 of auxiliary request 3 differs from claim 1 of auxiliary request 2 in that the following is added after the above insertions:

"and said joint (50) between each said belt half and said rear end region further comprises at least one region of bonding between each said belt half and said topsheet (20),"

Claim 1 of auxiliary request 4 differs from claim 1 of the main request in that it is specified that the minimum average release times are attained "using the test method laid out starting in paragraph [0032] of the description".

Claim 1 of auxiliary request 5 differs from claim 1 of the main request in that the following wording is added:

"by securing a portion of the absorbent structure to a test rig (60) and the load of 35 N is applied to the belt half (16) whilst the belt half external of the absorbent structure (16) is maintained at the predetermined angle α to the transverse axis of the absorbent structure, with the time for the belt half to completely dissociate from the absorbent structure being measured".

Claim 1 of auxiliary request 6 corresponds to claim 1 of auxiliary request 4 except that it defines, at the start of the claim, a "set of fifty identical belted absorbent articles (10), each article comprising...".

Claim 1 of auxiliary request 7 differs from claim 1 of auxiliary request 6 in that the wording "each belt half from said absorbent structure" is replaced by "said joint (50) for said set of fifty identical belted absorbent articles".

X. The arguments of the appellant-proprietor, as far as relevant to the present decision, may be summarised as follows:

The opponents' appeals were inadmissible. They were not adversely affected by the decision. The submissions of the appellant-opponents in the grounds of appeal should be regarded as third-party observations.

The definition of the article as "a belted absorbent article" and the reference to values for a minimum average release time might possibly represent an inconsistency under Article 84 EPC. Thus, the objections related to clarity, which was not a ground of opposition, and not to sufficiency of disclosure. Due to the presence of the word "average" the skilled

person would regard claim 1 as relating to a particular "type" of belted absorbent article and not to a single article of that particular type, since an average required several articles to be tested. Also, the problem underlying the patent was clearly related to mass-produced articles, since no-one had any commercial interest in single articles or small runs of hand-made articles; the claim had to be read in the context of the whole specification with a mind willing to understand and in a way that a skilled person would read the specification. Consistently T 1018/05 stated that the skilled person would consider the scope of practical application of a claim and in view of the destructive test method, the claim would not be considered as pertaining to a single item.

The reference in claim 1 of the main request to the minimum average release times would be understood by the skilled person as being limited to data obtained from the test method defined in the specification. Although there was no explicit reference to the test method in claim 1, implicitly and as a logical consequence, the skilled person could only come to this conclusion. The test method in the patent description involved the use of fifty articles and accordingly there was no problem in determining the minimum average release time for the given set of angles. According to decision T 0255/06 it was already stated that the test method would need to be carried out by the skilled person. Additionally T 0515/00 stated that it was not necessary to define in a claim more than a single unity although multiple unities might necessarily be implied.. Accordingly the wording "minimum average release time" would be understood by the skilled person as being related to the disclosed test method. The

invention defined in claim 1 should not be read in isolation but in the context of the specification.

Auxiliary request 4 should be admitted into the proceedings. Claim 1 of this request included the test method disclosed in the description which referred to fifty identical articles. Thus, the determination of the minimum average release times had to be done accordingly. The skilled person understood that the wording "identical articles" referred to articles which were of the same type (brand name) and size and also to articles which were made from the same materials and made by the same manufacturing process or the same product specification "Identical" in this sense obviously could not mean exactly identical; there were always small differences in manufacturing. It was however not a problem for the skilled person, asked to obtain fifty identical articles, to buy and then test fifty such mass-produced articles. The variance shown in the disclosed tested example merely reinforced the need to perform the test with fifty articles, and there was no evidence that the standard deviations which resulted were in any way abnormal for such articles. The purpose of the 6-months requirement in the test was to assist the skilled person in carrying out appropriate tests due to the fact that older articles might have weakened joints. An article which was older than 6 months and met this requirement would have met this requirement when being less than 6 months old since the joint strength deteriorated over time. Also, no hindrance was present for the skilled person to take articles older than 6 months and re-manufacture a new set of fifty articles and thus establish whether such an article met the claimed requirement.

Auxiliary request 5 should be admitted into the proceedings. The claim included all relevant steps of the test method. There was no need to claim further features. The skilled person was capable of determining the minimum average release times of each belt half when merely following those steps. The requirement of Article 123(2) EPC was thus met.

The sixth and seventh auxiliary requests addressed the issue of a minimum average value which would be obtained according to the patent by using fifty articles, where each of the articles fulfilled the conditions given.

XI. The arguments of the opponents, as far as relevant to the present decision, can be summarized as follows:

The opponents' appeals were admissible. The patent should be revoked in its entirety, also based on Article 100(c) EPC.

The invention was concerned with the function of the absorbent article and its belt joined to the structure whereby the joint should be "satisfactorily strong" in different directions. It was not disclosed how release times according to claim 1 could be achieved such that they exhibited the specific relationship between release times and angle α for a single article. The "minimum average release" time was an ill-defined parameter since there was no definition disclosed and no standard test was available either. The test method in the description only resulted in data for an average release time when considering release as complete dissociation of the joint. Therefore the disclosed test method could not lead to a "minimum" average release

time but to an average release time for complete dissociation of the joint.

Concerning auxiliary request 4, *prima facie* objections concerning Article 84 EPC and Article 83 EPC were present. Claim 1 lacked clarity *inter alia* with regard to the need to test fifty "identical" articles. In particular in view of the significant differences of the results obtained from the samples shown in the example in the patent in suit, it was not clear in what sense the articles were indeed "identical". Although the proprietor had argued that this meant that the articles should essentially be of the same size, type and manufactured by the same method, this was not stated in the patent.

With regard to auxiliary request 5, *prima facie* objections *inter alia* concerning Article 123(2) EPC arose. The added wording did not define the test method as disclosed; the test method disclosed in the description referred (with regard to the determination of the minimum average release times) *inter alia* to the use of particular cut-out sections of fifty absorbent articles, which were in some undefined way identical, and to the repetition of the procedure ten times in order to establish the average of each angle. In the absence of such features, the requirement of Article 123(2) EPC was not met.

Auxiliary requests 6 and 7 had been amended to define "a set of fifty identical belted articles". Claim 1 of these requests lacked clarity (Article 84 EPC) due to the terminology "identical... articles", as already discussed with regard to auxiliary request 4. Therefore, these requests were at least *prima facie* not

allowable and should not be admitted into the proceedings.

Reasons for the Decision

1. *Admissibility of the appeals of the opponents I and III*

1.1 An appeal is open to any party adversely affected by a decision (Article 107 EPC). The decision of the opposition division was to revoke the patent. In this sense the decision was fully consistent with the request of the opponents in the opposition procedure that the patent be revoked in its entirety. The opponents I and III were thus not adversely affected by the decision. Therefore, the appeals of opponents I and III are inadmissible.

1.2 It may be noted that it is irrelevant in this context that maintenance of the patent was not found to be prejudiced by the ground of opposition under Article 100(c) EPC, on which the opponents had failed to convince the opposition division, since it was found to be prejudiced by the ground of opposition under Article 100(b) EPC. Thus, the opponents I and III do not seek to challenge the decision of the Opposition Division (i.e. revocation of the patent) but the reasons within the decision. In particular, the opponents wish to see the patent found invalid under Article 100(c) EPC. In doing so they misunderstand the nature and purpose of opposition appeal proceedings which are not to re-examine a patent but to decide whether or not a first instance decision is correct (cf. T 854/02 point 3.2 of the reasons; T 437/98, OJ 2001, 231, point 2.2 of the reasons; T 193/07, point 2.3 of the reasons).

1.3 However, all the opponents have the status of respondents (parties as of right) in accordance with Article 107 EPC. Although the opponents OI and OIII had filed their submissions as grounds of appeal, and ultimately these appeals were found to be inadmissible by the Board, does not detract from the fact that the essence of the opponents' submissions is unambiguous in challenging a particular part of the decision where the opposition division had found in favour of the proprietor. As stated in the Board's communication issued under Article 15(1) RPBA, the objections made by the opponents OI and OIII (in their status as respondents) are simply to be considered as those of respondents in the admissible appeal of the proprietor.

2. *Main request - Article 100(b) EPC*

2.1 Claim 1 refers to a belted absorbent article and requires each of the joints between the belt halves and the absorbent structure to attain a set of specific "minimum average release times". The minimum average release times for the specific angles α are not limited in claim 1 to being established according to a particular test method. Accordingly, any test method is to be used within the scope of claim 1 since claim 1 is not limited to the method in the description.

2.2 The appellant (patent proprietor) however considered the test method disclosed in paragraph [0032] as being implicitly the only one which the skilled person would apply and therefore that the requirement of Article 83 EPC was met.

2.3 The test method disclosed in paragraph [0032] refers to the use of cut-out sections from fifty absorbent

articles which cut-out sections include the joints between belt halves with the absorbent structures. Test rigs are used whereupon the cut-out sections are clamped in a specific manner. The results concern complete dissociation of the belt halves from the absorbent structure under an applied force of 35 N.

2.4 Hence, the test method is related to the determination of specific average release times.

2.4.1 For a skilled person in the art, the term "release time" encompasses various other forms of release such as for example initial loosening or partial separation of the belt half from the absorbent structure; there is no requirement in claim 1 of the release time involving complete dissociation of the belt half from the absorbent structure. This complete dissociation is the specific type of release which is envisaged in the description. Accordingly, the skilled person would not exclude other test methods. However, since the parameter is an unusual parameter, the details of any such test methods are unknown to the skilled person.

2.4.2 Additionally, claim 1 requires the determination of the minimum average release times of five angles α for "a belted absorbent article". Considering the fact that each article includes only two joints for the belt halves, a destructive test appears not to be suitable in that an average release time could only be established for one angle α when using both joints for such determination. The further four claimed minimum average release times for the other four angles could not be established for the article. Therefore, the claimed set of five "minimum average release times" cannot be established for one single article when applying the disclosed test method. Possibly with a

different method, for example some non-destructive method (which is however not disclosed in the patent), this might be established. Even when considering the minimum number of two determinations for establishing an average as being sufficient, at least ten articles would need to be tested.

- 2.4.3 The test method as disclosed in the patent in suit refers to a set of fifty absorbent articles to be tested. Accordingly, the test method is not applicable for a single article. Hence, the skilled person would not know how to establish "minimum average release" times for five angles α of an absorbent belted article.
- 2.5 In the absence of any suitable test method being either disclosed or being known in the form of a standardized test method (and disregarding the issue of whether it would be possible or not to establish average data from one article as this is not disclosed), the skilled person would not be capable of identifying a test for obtaining a "minimum" average "release" time for the joints of the belt halves. Hence, the invention as set out in claim 1 is not disclosed in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art.
- 2.6 The Board thus concludes that the subject-matter of claim 1 of the main request does not meet the requirement of Article 100(b) EPC. The appellant's main request is therefore not allowable.
- 2.7 The appellant's reference to decision T 0255/06 (related to the examining division's refusal of the patent application of the current patent in suit), in which the same Board in another composition had included in its decision a paragraph that the

instructions concerning the test method would need to be carried out by the skilled person, concerns however the context of clarity (Article 84 EPC). No particular evaluation of sufficiency of disclosure was made. Therefore, the reference to this decision as a support for the appellant's argument that the requirement of Article 83 EPC was found to be met is found unconvincing.

2.8 The appellant's reference to decision T 0515/00 is found to lack relevance to the present case. This decision concerns the issue of whether the invention could be carried out other than by using multiple arrangement memories for each printing line since a single arrangement memory would not be sufficient. The subject-matter of the claim was a tape printing device and its means for printing lines of characters at different positions across the width of a print medium tape were defined. No clear association to the current issues can be recognized since in the present case, each absorbent article can be used independently on any other such article.

2.9 The appellant argued that claim 1 should be understood as referring to a "type" of article and not to a single article, because protection for a single article was not desired and no skilled person would ever consider a single article only as being the subject of protection. Similarly the appellant argued that the article must be a mass-produced article such that the average values determined on the basis of a set of articles would be valid for a mass-produced article. In this context the appellant also referred to decision T 1018/05 as stating that the application of the claimed subject-matter by the skilled person would be done by using common general knowledge, which in the current case

would mean considering the claim as pertaining to the "type" of articles since the destructive testing as disclosed would not be possible when pertaining to a single unit.

2.10 However the Board does not accept this. First, nothing in the claim relates to a product which must be mass-produced, albeit that such products are often mass-produced. This was also mentioned in the Board's communication pursuant to Article 15(1) RPBA. Further, the claim provides protection for a single article as well as a plurality of articles and, as discussed during the oral proceedings before the Board, the invention had to be carried out over its whole scope and this included one single article.

2.11 Thus, given the fact that claim 1 covers a single article and yet is unspecific about which test should be used to arrive at any such minimum average release time, the Board finds that the ground of opposition under Article 100(b) EPC is prejudicial to maintenance of the patent.

2.12 In view of the main request not being allowable for these reasons, there is no need to give any reasoning regarding the opponents' additional objection concerning Article 100(c) EPC with respect to this request (which the Board had incidentally concluded in oral proceedings did not prejudice maintenance of the patent).

3. *Auxiliary requests 1 to 3*

The amendments included within claim 1 of auxiliary requests 1 to 3 do not alter the above finding, since the amendments address only other issues. Thus, the

Board concludes that the subject-matter of claim 1 of auxiliary requests 1 to 3 does not meet the requirement of Article 83 EPC for the same reasons that apply to claim 1 of the main request. The appellant also stated in oral proceedings before the Board that it did not wish to make further arguments in regard to these requests.

It follows that auxiliary requests 1 to 3 are also not allowable for the same reasons as apply to the main request.

4. *Admittance of auxiliary request 4*

4.1 The request was filed in reply to the communication of the Board annexed to the summons to oral proceedings (i.e. after the appellant had stated its complete case in accordance with Article 12(2) RPBA). According to Article 13(1) of the Rules of Procedure of the Boards of Appeal (RPBA), it lies within the discretion of the Board to admit an amendment to a party's case after it has filed its grounds of appeal or reply. In order to be admitted at such a late stage of proceedings and thus be procedurally economical, the request should normally be clearly allowable at least in the sense that it overcomes the objections raised and does not give rise to new objections, which however is not the case for claim 1 of the present request as set out below.

4.2 Claim 1 has been amended to include the test method disclosed in paragraph [0032] of the description. The amendment limits the method for determination of the "minimum average release times" to this specific test method. This test method specifies *inter alia* that

- "sections are cut out from fifty **identical** absorbent articles".
- 4.3 Accordingly, it has to be established in which way the absorbent articles to be tested can be understood to be "identical".
- 4.4 The appellant considered the articles to be identical by having the same size, the same materials and by being made in the same way. Such articles would be obtained by the skilled person, if asked to do so, by for example buying several bags of a (brand name) type of article of the same size. There would be no need for the articles to be "exactly" identical, because then there would be no need to test fifty articles and to determine the average values. The appellant also argued that no evidence of an abnormal standard deviation had been presented by the respondents.
- 4.5 These arguments are not accepted. The patent does not specify the way in which such absorbent articles might be considered "identical".
- 4.6 Absorbent articles of the same kind with regard to type (brand name), size and material may well be manufactured on different (e.g. parallel) manufacturing lines or even different manufacturing locations/factories. This is well known to the skilled person, and this was not contested by the appellant when the Board mentioned this during the oral proceedings. Therefore, variations of all kinds are conceivable and it is not clear in which way the claimed articles are to be understood as being "identical".
- 4.7 These considerations apply *a fortiori* in view of the example given in paragraph [0036] in the patent in

suit. The results given in the table of this paragraph are reported as being conducted on "a belted absorbent article". No type, brand name, age, size, material or production line identification (lot number) of the belted absorbent article is given. Therefore, any evaluative control of the test results to determine the extent to which identity might be recognised is impossible. Quite the contrary appears to be the case - the results for the claimed angles α (10, 20, 25, 30 and 40°) for ten samples show that the samples are not at all identical. When comparing for example samples 2, 9 and 7, the results for the individual release times differ significantly (up to 69%). Similarly, sample 2 at 40° provides an individual release time of 112 seconds, whilst example 9 requires only 46 seconds (i.e. 243% difference). Therefore, it is not clear in what sense or on which basis these samples can be understood to be "identical".

- 4.8 The appellant argued that no evidence of the standard deviation shown for this example being abnormal would have been presented.
- 4.9 The argument is however to be considered in the other direction, namely that there is no evidence of such standard deviation (up to 27%) being normal, considering that it is the appellant that has provided the request at such a late stage of proceedings. The feature concerning the test method was added only in reply to the communication of the Board annexed to the summons to oral proceedings. Accordingly, the claimed subject-matter now relies on a new and unfamiliar test procedure and it would be the task of the appellant in this case to provide evidence that the very significant standard deviations given in the example can be considered as usually applying to a test procedure

related to "identical" articles. No such evidence has been provided. No comparative data concerning the prior art have been provided either. Thus, at least no clear disclosure is present of what is to be understood under the wording "fifty identical absorbent articles".

4.10 Although the appellant argued that all the articles in the example had been from a specific pre-release run, this is in no way evident from the patent and not supported by evidence. Even if this were shown to be the case, this still does not overcome the foregoing objection to the meaning of the term "identical" in this technical context.

4.11 Accordingly, claim 1 of the auxiliary request 4 at least *prima facie* lacks clarity (Article 84 EPC) and the Board thus exercised its discretion under Article 13(1) RPBA not to admit this request into the proceedings.

5. *Admittance of auxiliary request 5*

5.1 Since this request was filed during the oral proceedings, the requirement of the Board to use its discretion under Article 13(1) RPBA as set out under point 4.1 above applies here as well.

5.2 Claim 1 of this request has been amended to include details of a test method for determining the minimum average release times for the claimed angles α . The details of the test method include the test rig (60), the force of 35 N to be applied (which has been set out in claim 1 and thus is duplicated), and the fact that complete dissociation from the absorbent structure has to apply for the release times.

- 5.2.1 For disclosure of this test method, the appellant referred to page 5, lines 4 to 8 and to page 11, lines 20 to page 12, line 7 of the WO-publication.
- 5.2.2 The reference to page 5, lines 4 to 8 indicates that a force of 35 N should be applied when trying to establish the minimum average release times of the joint at different angles. This force is already referred to in claim 1 of the foregoing requests. No additional information is thus included in the claim by inserting it a second time.
- 5.2.3 The reference to page 11, line 20 to page 12, line 7 concerns a section under the heading of "detailed description of preferred embodiments" and thus is not clearly related to a generally applicable situation. More importantly, this section refers to the test procedure "which will be explained in greater detail below". Accordingly, this reference clearly cannot be read alone but only, in context, with establishing the results for the minimum average release times in the way set out on page 13, line 9 to page 14, line 26.
- 5.3 The Board thus concludes that by including only a portion of the complete disclosure of the test method (i.e. without including the complete test method as disclosed at least on page 13, line 9 to page 14, line 26) Article 123(2) EPC has been contravened.
- 5.4 The Board thus concludes, that absent any further indication that the test can be performed without resorting to the specific test details as disclosed, the subject-matter of claim 1 *prima facie* fails to meet the requirement of Article 123(2) EPC. Although the amendment includes the reference to the release time concerning complete dissociation of the belt half from

the absorbent structure and that a test rig should be used to secure a portion of the absorbent structure during the test procedure, for obtaining the results, the disclosure in the specification relies explicitly upon the minimum average release times as being established such as set out in paragraphs [0027] to [0035] (corresponding to page 13, line 9 to page 14, line 26). The details included therein refer additionally *inter alia* to

- the use of fifty identical absorbent articles;
- the cut-out sections being secured in a defined manner between clamps of a test rig;
- the number of repetitions (which is ten) for establishing for each of the five angles α the average release time.

5.5 Hence, when amending claim 1 to include only some specific features of the test method isolated from the remaining features, the Board concludes that the subject-matter of claim 1 at least *prima facie* contravenes Article 123(2) EPC. The Board thus exercised its discretion under Article 13(1) RPBA not to admit the appellant's fifth auxiliary request into the proceedings.

6. *Auxiliary requests 6 and 7*

The amendments included within claim 1 of auxiliary requests 6 and 7 do not alter the above finding with respect to auxiliary request 4 (see point 4 above), since the amendments address only other issues. The appellant also did not argue that the objections to auxiliary request 4 would be overcome in some way by the amendments in this request. Thus, the Board concludes that the subject-matter of claim 1 of auxiliary requests 6 and 7 *prima facie* lacks clarity

(Article 84 EPC) for the same reasons that apply to claim 1 of auxiliary request 4 and the Board thus exercised its discretion under Article 13(1) RPBA not to admit auxiliary requests 6 and 7 into the proceedings.

7. In conclusion, the appellant's main request and auxiliary requests 1 to 3 are not allowable (Article 83 EPC), auxiliary requests 4 to 7 are not admitted into the proceedings.

Order

For these reasons it is decided that:

The proprietor's appeal is dismissed.

The Registrar:

The Chairman:



G. Rauh

M. Harrison

Decision electronically authenticated