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**Datasheet for the decision
of 3 July 2014**

Case Number: T 1235/12 - 3.2.06

Application Number: 00971773.7

Publication Number: 1231881

IPC: A61F13/494

Language of the proceedings: EN

Title of invention:

ABSORBENT ARTICLE

Patent Proprietor:

KAO CORPORATION

Opponents:

SCA Hygiene Products AB
The Procter & Gamble Company
KIMBERLY-CLARK WORLDWIDE, INC.

Headword:

Relevant legal provisions:

EPC Art. 123(2)
EPC 1973 Art. 54, 84, 100(c)
RPBA Art. 13(1)

Keyword:

Decisions cited:

Catchword:



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Case Number: T 1235/12 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 3 July 2014

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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted on
30 March 2012 concerning maintenance of the
European Patent No. 1231881 in amended form.

Composition of the Board:

Chairman M. Harrison
Members: M. Hannam
W. Sekretaruk

Summary of Facts and Submissions

- I. An appeal was filed by the appellant/proprietor (hereafter simply "proprietor") against the interlocutory decision of the opposition division in which it found that European patent No. 1 231 881 in an amended form met the requirements of the EPC. It requested that the interlocutory decision be set aside and that the patent be maintained as granted, auxiliarily that it be maintained according to one of auxiliary requests 1-12.
- II. Further appeals were filed by appellant/opponent I (hereafter OI) and appellant/opponent II (hereafter OII) against the above mentioned interlocutory decision. In support of their respective requests to revoke the patent, OI and OII submitted objections under *inter alia* Articles 54 and 123(2) EPC.
- III. Respondent/opponent III (hereafter OIII) submitted objections to the proprietor's requests under *inter alia* Articles 100(c), 123(2), 54 and 84 EPC.
- OI and OII also responded to the proprietor's requests with objections under these Articles.
- IV. The following documents are relevant to the present decision:

D1	WO-A-96/41603
Annex 1	Test method and results entitled 'Additional test on the effects of liquid shut-off of a hydrophobic region (as a test of D1)'

V. The Board issued a summons to oral proceedings including a communication containing its provisional opinion, in which it indicated *inter alia* that the objection under Article 100(c) EPC appeared to have merit with respect to claim 7 of the main request, and that the requirement of Article 123(2) EPC was seemingly not met by the independent method claim in each of the auxiliary requests 1-12. Regarding Article 54 EPC, the Board indicated that claim 1 of the main request seemingly lacked novelty over D1. The Board furthermore identified a possible lack of clarity with respect to the term 'hot-melt' present in a number of the auxiliary requests.

VI. In preparation for oral proceedings the proprietor filed further auxiliary requests 13 - 22 which differed from the main request and from auxiliary requests 1 - 9 solely through the deletion of the respective independent method claim. It furthermore filed copies of two web pages illustrating the use of the term 'hot-melt' in relation to hot-melt adhesives:

Exhibit 1 Webpage: hbfuller.com/cool-hot-melts

Exhibit 2 Webpage: henkelna.com/industrial/hot-melt-adhesives-14966.htm

VII. Oral proceedings were held before the Board on 3 July 2014, during which the proprietor withdrew auxiliary requests 1, 2, 10 - 12 and 17 - 22. Despite this withdrawal, the numbering of the maintained auxiliary requests remained unchanged.

The proprietor finally requested that the decision under appeal be set aside and that the European patent be maintained as granted, or on the basis of one of auxiliary requests 3-9, filed 3 August 2012, or on the

basis of one of auxiliary requests 13-16, filed 3 June 2014.

OI and OII each requested that the decision under appeal be set aside and that the European patent be revoked. OIII requested that the appeal of the proprietor be dismissed.

VIII. Claim 7 of the main request reads as follows:

"A method for manufacturing an absorbent article including a liquid permeable topsheet, a liquid impermeable backsheet and a liquid-retentive absorbent core interposed between said topsheet and said backsheet, said topsheet having an upstanding gather and a liquid shut-off region in a linear shape for preventing liquid migration within said topsheet, wherein said liquid shut-off region is independent from a joined section between said topsheet and a sheet material for forming the upstanding gather, said method comprising preliminarily forming said liquid shut-off region at said topsheet and then arranging said topsheet at a predetermined location of said absorbent article, said shut-off region being formed at an area outside the periphery of said absorbent core."

Claim 7 of auxiliary request 3 reads as per claim 7 of the main request with the insertion after '
'... preventing liquid migration within said topsheet,'
of:
"wherein said topsheet extends outward beyond a basal end of said upstanding gather,"
and the addition at the end of the claim of:
"on the extended section of said topsheet".

Claim 7 of auxiliary request 4 reads as per claim 7 of auxiliary request 3 with the insertion after '...

beyond a basal end of said upstanding gather,' of:
"at least a part of the extended section of said
topsheet is joined to said backsheet,".

Claim 7 of auxiliary request 5 reads as per claim 7 of
auxiliary request 4 with the addition at the end of the
claim of:

"wherein the topsheet is a sheet of nonwoven fabric and
the liquid shut-off region is formed by impregnating a
hot-melt into the fiber voids of the nonwoven fabric."

Claim 7 of auxiliary request 6 reads as per claim 7 of
auxiliary request 5 with the addition at the end of the
claim of:

"wherein the quantity of the hot-melt is 20 to 100
g/m²."

Claim 7 of auxiliary request 7 reads:

"A method for manufacturing a disposable diaper
including a liquid permeable topsheet, a liquid
impermeable backsheet and a liquid-retentive absorbent
core interposed between said topsheet and said
backsheet, said topsheet having an upstanding gather
and a liquid shut-off region in a linear shape for
preventing liquid migration within said topsheet,
wherein said liquid shut-off region is independent from
a joined section between said topsheet and a sheet
material for forming the upstanding gather, said method
comprising preliminarily forming said liquid shut-off
region at said topsheet and then arranging said
topsheet at a predetermined location of said diaper,
said shut-off region being formed at an area outside
the periphery of said absorbent core, wherein an
extended section (2a) of the liquid-permeable topsheet
(2) is present at the back side of that portion of the
sheet material (61) for forming an upstanding gather

which is located outside the basal end (63) in the widthwise direction."

Claim 7 of auxiliary request 8 reads as per claim 7 of auxiliary request 7 with the addition at the end of the claim of:

"and wherein the topsheet is a sheet of nonwoven fabric and the liquid shut-off region (21) is formed by impregnating a hot-melt into the fiber voids of the nonwoven fabric."

Claim 7 of auxiliary request 9 reads as per claim 7 of auxiliary request 8 with the addition at the end of the claim of:

"and wherein the quantity of the hot-melt is 20 to 100 g/m²."

Claim 1 of auxiliary request 13 reads:

"An absorbent article including a liquid-permeable topsheet (2), a liquid-impermeable backsheet (3) and a liquid-retentive absorbent core (4) interposed between said topsheet (2) and said backsheet (3), said absorbent article being vertically elongated and having an upstanding gather (6), characterized in that said topsheet (2) has a liquid shut-off region (21) in a linear shape which prevents liquid migration within said topsheet (2), and said liquid shut-off region (21) is located at an area outside the periphery of said absorbent core (4) and is independent from a joined section (S) between said topsheet (2) and a sheet material (61) for forming said upstanding gather (6)."

Claim 1 of auxiliary request 14 reads as per claim 1 of auxiliary request 13 with the following addition at the end of the claim:

"and wherein the topsheet is a sheet of nonwoven fabric

and the liquid shut-off region (21) is formed by impregnating a hot-melt into the fiber voids of the nonwoven fabric."

Claim 1 of auxiliary request 15 reads as per claim 1 of auxiliary request 14 with the following addition at the end of the claim:

"wherein the quantity of the hot-melt is 20 to 100 g/m²."

Claim 1 of auxiliary request 16 reads as per claim 1 of auxiliary request 13 with the following addition at the end of the claim:

"and wherein said topsheet (2) extends outward beyond a basal end (63) of said upstanding gather (6) and said liquid shut-off region is located on the extended section of said topsheet (2)."

IX. The proprietor's arguments relevant to the decision may be summarised as follows:

Regarding the main request, an objection under Article 100(c) EPC was unfounded since the skilled person would look at the claim as a whole, not the feature of the 'topsheet having an upstanding gather' in isolation, whereby it would be clear that the upstanding gather included an additional sheet rather than being comprised in the topsheet itself. This was further supported by page 2, lines 10-14, page 7, lines 2-10 and page 5, lines 26-30 of the A-publication which described a separate sheet material attached to the topsheet, which would be non-sensical if the topsheet and sheet material of the upstanding gather were one and the same. The word 'having' should be interpreted as 'supporting' or 'carrying' as suggested by the Oxford English Dictionary and as understood in the

expression 'a table having a microphone', in which the microphone is clearly not comprised in the table. Claim 7 also included all structurally and functionally interrelated features of Figs. 6 and 7, such that a basis for the claim could be found in these figures.

Claim 7 of auxiliary request 3 was based on a combination of claims 1 and 2 as originally filed and was further supported by page 8, lines 8-10. The omitted features of claim 2 were not structurally or functionally related to those adopted into the claim.

Claim 7 of auxiliary request 4 was based on a combination of all features of claims 1 and 2 as originally filed and thus met the requirement of Article 123(2) EPC.

Page 8, lines 8-13 provided the basis for claim 7 of auxiliary request 7. The sketch in OIII's letter of 25 March 2013 did not fall within the scope of this claim, as in that sketch an elastic sheet was required to form the upstanding gather. This sketch thus did not represent an embodiment covered by the scope of the present claim, and no comparison should be made with the sketch, as it also did not represent subject-matter originally disclosed.

Regarding the novelty of the subject-matter of claim 1 of auxiliary request 13, D1 failed to disclose a liquid shut-off region. This term very clearly defined the function of the region as being to completely stop the transfer of liquid through the topsheet. D1 aimed to establish marginal regions which were sufficiently hydrophobic, yet the hydrophobic fibres did not block the liquid flow; the capillaries would still transport fluid, so that "preventing" wicking of liquids

concerned a relative property in D1 and did not imply an absolute shut-off. Conversely, paragraph [0030] of the patent required a sufficient impregnation of the topsheet to achieve the liquid shut-off region, which was a physical barrier to liquid flow. The feature of claim 1 'said liquid shut-off region is located at an area outside the periphery of said absorbent core' should be interpreted as referring to a region which was located 'exclusively outside the periphery of the absorbent core'. D1 failed to disclose this.

Auxiliary request 14 should be admitted as it represented a simplification of auxiliary request 1 due to the deletion of the independent method claim and could thus not be regarded as presenting the opponents with any new, complex subject-matter to deal with. Claim 1 of this request was also clear, the term 'hot-melt' meaning 'hot-melt adhesive' as could be understood from exhibits 1 and 2. It was also possible to recognise in a manufactured article whether a hot-melt had been used in its manufacture. Nothing was to be added with regard to auxiliary request 15.

The subject-matter of claim 1 of auxiliary request 16 was novel (Article 54 EPC) over D1 since the basal end of the upstanding gather in D1 was indicated as the proximal edge 17. The liquid shut-off region M in D1 was thus not located on the extended section (beyond the basal end of the upstanding gather) of the topsheet.

X. The arguments of the opponents OI, OII and OIII relevant to the decision can be summarised as follows:

Claim 7 of the main request was open to objections under Article 100(c) EPC due to the introduction of the

feature 'the topsheet having an upstanding gather'. This terminology was not disclosed in the application as filed, nor was it implicit therefrom. It included for example an embodiment where the upstanding gather was comprised in the material of the topsheet itself, which was not part of the application as filed. The understanding of other situations in which the word 'having' might be used, such as a 'table having a microphone', were influenced by the specific subject-matter concerned, and so did not provide guidance as to how to interpret the expression added to claim 7.

Auxiliary request 3 failed to meet the requirement of Article 123(2) EPC since, despite taking various features from granted claim 2 into claim 7, the embodiment in which the topsheet comprised the upstanding gather was still included in the scope of the claim.

Auxiliary requests 4-6 all included within the scope of their respective claim 7 (for example) embodiments which were not originally disclosed, thus extending the subject-matter of the claim beyond the content of the application as originally filed, contrary to the requirement of Article 123(2) EPC.

Regarding auxiliary request 7, the sketch on page 2 of OIII's letter dated 25 March 2013 clearly showed an arrangement falling under the scope of claim 7, which was however not part of the content of the application as originally filed. Page 8, lines 8-13 could not be seen in isolation when considering the alleged source for 'the extended section', since page 3, lines 9-13 provided further technically related features of the extended section.

Regarding auxiliary request 13, the expression 'liquid shut-off region' was simply a label for the region of the absorbent article which prevented liquid migration. Exactly this was disclosed in D1 in which page 2, last 3 lines stated that the marginal regions were 'sufficiently hydrophobic ... to prevent wicking of liquids'. A complete shut-off of liquid was not achieved in the examples 1-4 in the patent either, so no distinction compared to D1 could be drawn. The subject-matter of claim 1 thus lacked novelty (Article 54 EPC).

Regarding auxiliary request 14, this should not be admitted into the proceedings. It could have been submitted before the opposition division, if not with the grounds for appeal, and it changed the focus of the claims completely relative to auxiliary request 1 on which it was based.

The term 'hot-melt' was unclear and did not benefit from the information in exhibits 1 and 2 which, exclusively relating to hot-melt adhesives, would provide no hint to the understanding of the expression hot-melt without any reference to adhesives.

The subject-matter of claim 1 of auxiliary request 16 lacked novelty over D1, with the basal end of the upstanding gather 15 being where this met the topsheet, such that the liquid shut-off region M extended beyond the basal end.

Reasons for the Decision

1. Main request

1.1 Article 100(c) EPC 1973 - claim 7

The ground for opposition under Article 100(c) EPC 1973 is prejudicial to the maintenance of the patent due to the subject-matter of claim 7 extending beyond the content of the application as filed.

1.1.1 At least the added feature 'said topsheet having an upstanding gather' extends the subject-matter of claim 7 beyond the content of the application as filed. This feature is not to be found *expressis verbis* in the application as filed, rather it is the absorbent article which is explicitly disclosed as having the upstanding gather (see claim 1 as originally filed). The limitation in claim 7 of the topsheet having the upstanding gather is not to be found in the application as filed, nor is it implicit.

1.1.2 The expression 'said topsheet having an upstanding gather' can logically be interpreted such that the topsheet itself comprises the upstanding gather i.e. that the material of the topsheet has the upstanding gather formed in it (hereinafter referred to as the 'first interpretation'). This valid interpretation of the expression is not an embodiment derivable from the application as filed, in which the absorbent article generally, rather than the topsheet specifically, is disclosed as having the upstanding gather. It thus follows that claim 7, in this first interpretation of the above expression, encompasses an embodiment that is not directly and unambiguously derivable from the application as filed.

1.1.3 If the skilled person were to consider an alternative interpretation (hereinafter referred to as the 'second interpretation') of the expression 'said topsheet

having an upstanding gather' in the sense of the topsheet simply having an upstanding gather in some way associated with it, this is not disclosed in such generality in the originally filed application. Fig. 3 of the application as filed discloses an upstanding gather 6 associated with the topsheet insofar as a joined section S is provided between the topsheet and the sheet material for forming the upstanding gather (see page 5, lines 26-30 of the PCT publication, which corresponds to the application as originally filed). Figs. 6 and 7 of the application as filed disclose an upstanding gather 6 associated with the topsheet by way of an adhesive agent 7a joining the sheet material 61 for forming an upstanding gather and the topsheet 2 together (see page 11, lines 1-4 of the PCT-publication). However, these figures all show a number of further features in combination with those identified above relating to the upstanding gather's association with the topsheet, for example the separate sheet used to form the upstanding gather being joined specifically to the upper surface of the topsheet and being coterminous therewith. It is thus apparent that, in this interpretation of the expression 'said topsheet having an upstanding gather', the upstanding gather is associated with the topsheet in combination with a plurality of further technical features depicted in Figs. 3, 6 or 7 and the related paragraphs of the description. It thus follows that, in the general interpretation of the expression 'said topsheet having an upstanding gather' in which the upstanding gather is simply associated in some way with the topsheet, the extraction of this feature alone from embodiments in which this feature is disclosed solely in combination with a number of further technically or functionally related features, presents the skilled person with new information in the form of a new combination of

features which is not directly and unambiguously derivable from the application as originally filed.

1.1.4 The proprietor's argument that it was clear from the claim as a whole that the upstanding gather included an additional sheet, rather than being comprised in the topsheet itself, is unconvincing. Whilst the proprietor's preferred interpretation of the claim is one of the possibilities (referred to as the second interpretation in point 1.1.3 above), the Board finds that an alternative interpretation of the claim, the first alternative referred to in point 1.1.2 above, is equally possible. The wording in claim 7 'said topsheet having an upstanding gather' can, simply through the understanding of the word 'having', be interpreted as the topsheet itself comprising the upstanding gather, and it is precisely this subject-matter which is not originally disclosed. Even though the proprietor pointed to several passages of the description supporting the separate sheet embodiment of the upstanding gather, these passages simply confirmed that such an embodiment (the second interpretation) was indeed originally disclosed. However, it is the amendment made to claim 7 by way of insertion of the feature 'the topsheet having the upstanding gather' that allows an alternative interpretation (i.e. the first interpretation), which includes subject-matter that is not disclosed in the originally filed documents.

1.1.5 The proprietor's argument that the word 'having' should be interpreted as 'supporting' or 'carrying' as suggested by the Oxford English Dictionary and as understood in the expression 'a table having a microphone' is not accepted. As also pointed out by OII, the interpretation of such examples are all

influenced by the skilled person's understanding of the subject-matter involved. Thus, in the case of a table having a microphone, it is very unlikely for the material comprising the table to include a microphone within the material itself, such that this would be interpreted within the typical understanding of such an arrangement, whereby the microphone is supported in some way from the table. Conversely in claim 7, the skilled person would be aware of absorbent articles in which the topsheet does indeed comprise an upstanding gather (as e.g. depicted in the sketch on page 2 of OIII's letter dated 25 March 2013) as well as articles in which the upstanding gather comprises a separate sheet to the topsheet. When considering claim 7, therefore, the skilled person would not be restricted to just a single interpretation of the claim, as is perhaps the case for the example with the table and microphone, rather both interpretations of the expression in the claim would be regarded as equally valid. In this way the introduced expression 'topsheet having an upstanding gather' does introduce an interpretation of claim 7 which relates to subject-matter not present in the originally filed documents.

- 1.1.6 The proprietor's further argument that claim 7 included all structurally and functionally interrelated features of Figs. 6 and 7, such that a basis for the claim could be found in these figures, is also not accepted. As stated in point 1.1.2 above, it is the first interpretation of the claim in which the topsheet itself comprises the upstanding gather i.e. that the material of the topsheet has the upstanding gather formed in it, which is found not to have been originally disclosed. The above argument of the proprietor addresses the problem of an unambiguous disclosure for the second interpretation of the

topsheet having an upstanding gather, which has no bearing on the first interpretation for which there is no basis.

1.1.7 The ground for opposition under Article 100(c) EPC 1973 is therefore prejudicial to the maintenance of the patent according to the main request, so that this request is not allowable.

2. Auxiliary request 3

2.1 Article 123(2) EPC - claim 7

The subject-matter of claim 7 fails to meet the requirement of Article 123(2) EPC.

2.1.1 The features added to claim 7 fail to exclude the first interpretation of claim 7 identified above, that the topsheet itself comprises the upstanding gather i.e. that the material of the topsheet has the upstanding gather formed in it. The basal end of the upstanding gather is identified with reference sign 63 in each of Figs. 3, 6 and 7, i.e. at that point where the upstanding gather separates away from the essentially horizontally depicted topsheet. Thus, also for an upstanding gather formed in the topsheet material itself, the basal end of such an upstanding gather would be located at the point where it separates away from the otherwise horizontally extending topsheet. In this interpretation of claim 7 the topsheet may still extend outward beyond a basal end of the upstanding gather and the liquid shut-off region can be located on the extended section of the topsheet. For a visualisation of such an interpretation, reference can be made to the sketch on page 2 of OIII's letter dated 25 March 2013, where an additional sheet acts on the

topsheel so as to raise it and thereby form a standing gather therein. This first interpretation of claim 7 is thus still included within the scope of claim 7, and thus defines subject-matter which is not disclosed in the originally filed application.

2.1.2 The proprietor's argument that claim 7 of auxiliary request 3 was based on a combination of claim 1 and 2 as originally filed, is not persuasive regarding the subject-matter of the claim meeting the requirement of Article 123(2) EPC. These arguments pertain to the second interpretation of the expression 'topsheel having an upstanding gather' which is not decisive for the objection to the present claim. At issue is the first interpretation of the expression, in which the material of the topsheel itself has the upstanding gather formed in it. This interpretation remains a valid interpretation of the claim which was not disclosed in the application documents, the interpretation of which is unaffected by the arguments or by the amendments made.

2.1.3 Auxiliary request 3 is thus not allowable due to the subject-matter of claim 7 not meeting the requirement of Article 123(2) EPC.

3. Auxiliary request 4

3.1 Article 123(2) EPC - claim 7

The subject-matter of claim 7 fails to meet the requirement of Article 123(2) EPC.

3.1.1 The feature added to claim 7 fails to exclude the first interpretation of claim 7 given above. An upstanding gather formed in the topsheel material is in no way

prevented by an extended section of the topsheet being joined to the backsheet (see also the sketch on page 2 of OIII's letter dated 25 March 2013 referred to above). The first interpretation of claim 7 is thus still included within the scope of claim 7, yet the subject-matter covered is not disclosed in the originally filed application.

3.1.2 The arguments presented by the proprietor, similarly to those presented in support of auxiliary request 3, pertained to support in the originally filed documents for the second interpretation of the expression 'topsheet having an upstanding gather'. As found for that request, the features added to claim 7 of this auxiliary request also have no bearing on the validity of the first interpretation of the above expression, such that claim 7 fails to meet the requirement of Article 123(2) EPC.

3.1.3 Auxiliary request 4 is thus not allowable.

4. Auxiliary requests 5 and 6

4.1 Article 123(2) EPC - claim 7

4.1.1 The addition of features relating to forming the liquid shut-off region by impregnating (20 to 100 g/m² of) a hot-melt into a nonwoven topsheet changes nothing relating to the possibility of interpreting claim 7 according to the first interpretation given above. The proprietor also conceded this to be the case.

The subject-matter of claim 7 of both auxiliary requests 5 and 6 thus fails to meet the requirement of Article 123(2) EPC for the same reasons as given *supra*.

5. Auxiliary request 7

5.1 Article 123(2) EPC - claim 7

The subject-matter of claim 7 fails to meet the requirement of Article 123(2) EPC.

5.1.1 The subject-matter of claim 7 still fails to exclude the first interpretation of claim 7 whereby the topsheet itself comprises the upstanding gather i.e. that the material of the topsheet has the upstanding gather formed in it. The sketch on page 2 of OIII's letter of 25 March 2013 depicts how this interpretation reads on to claim 7, with the upstanding gather formed in the topsheet itself and a sheet of elastic fulfilling the feature of the 'sheet material for forming an upstanding gather'. This first interpretation of claim 7 is thus still included within the scope of claim 7, and covers subject-matter which is not disclosed in the originally filed application.

5.1.2 The proprietor's opinion that the elastic sheet depicted in OIII's sketch resulted in this article not falling under the scope of claim 7 is not accepted. The expression 'sheet material for forming the upstanding gather' in claim 7 does not exclude an element assisting the forming of the gather (in the case of OIII's sketch, the elastic sheet which is attached to the topsheet material thus raising it). The above expression simply defines that there is a sheet material suitable for forming the upstanding gather, be that upstanding gather in the sheet material itself, or be the upstanding gather spatially arranged by way of the sheet material. It thus follows that OIII's sketch depicts subject-matter which logically falls under the scope of claim 7, yet was not originally disclosed in

the application as filed, thus resulting in the subject-matter of claim 7 not meeting the requirement of Article 123(2) EPC.

5.1.3 Auxiliary request 7 is thus not allowable.

6. Auxiliary request 8 and 9

6.1 Article 123(2) - claim 7

6.1.1 As is the case for auxiliary requests 5 and 6, the addition of features relating to forming the liquid shut-off region by impregnating (20 to 100 g/m² of) a hot-melt into a nonwoven topsheet in auxiliary requests 8 and 9 changes nothing in relation to the finding in regard to auxiliary request 7, in which the subject-matter of claim 7 could be interpreted according to the first interpretation given above. The proprietor also conceded this to be the case.

6.1.2 These requests are thus not allowable, as the subject-matter of claim 7 of both auxiliary requests 8 and 9 thus fails to meet the requirement of Article 123(2) EPC.

7. Auxiliary request 13

7.1 Novelty - claim 1

The subject-matter of claim 1 lacks novelty (Article 54 EPC 1973) over D1.

7.1.1 D1 discloses the following features of claim 1, the references in parentheses referring to D1:

An absorbent article (1; see Figs. 1 and 3) including a

liquid-permeable topsheet (5), a liquid-impermeable backsheet (3) and a liquid-retentive absorbent core (7) interposed between said topsheet (5) and said backsheet (3), said absorbent article being vertically elongated and having an upstanding gather (15), wherein said topsheet (5) has a liquid shut-off region (M; page 2, last 3 lines; page 11, lines 5-12) in a linear shape (see Fig. 1; the region bounded by the crotch edge of the absorbent core and the outer edge of the marginal region M has a linear extension in the direction of vertical elongation) which prevents liquid migration (marginal regions, M, are stated as being "sufficiently hydrophobic to prevent wicking of liquids via the topsheet" - see page 2, last 3 lines) within said topsheet (5), and said liquid shut-off region (M) is located at an area outside the periphery of said absorbent core (7; see Fig. 1) and is independent from a joined section (see Fig. 3, where the barrier cuff first meets the topsheet 5) between said topsheet (5) and a sheet material (see Fig. 3; page 11, lines 2-5) for forming said upstanding gather (15).

7.1.2 The proprietor's argument that D1 failed to disclose a liquid shut-off region as claimed in claim 1 is not accepted. In claim 1 the liquid shut-off region is said to 'prevent liquid migration within said topsheet', yet precisely this verb is used on page 2, last 3 lines to describe the rendering hydrophobic of the topsheet in D1: '.. to prevent wicking of liquids via the topsheet..'. A difference in function of the liquid shut-off region in claim 1 and D1 is thus not to be recognised.

7.1.3 Regarding the proprietor's further argument that establishing sufficiently hydrophobic marginal regions, as in D1, did not compare with impregnating the

topsheet in order to block the liquid flow, as in the patent, is not persuasive - particularly in view of page 2, last 3 lines of D1. Here it is stated that the marginal regions of the absorbent article are 'sufficiently hydrophobic to prevent wicking of liquids via the topsheet', from which the skilled person would understand that if the marginal regions are rendered hydrophobic enough, they will act to prevent (i.e. block) the liquid flow. A region effective to block the flow of liquid through the topsheet, or a liquid shut-off region (in the terminology of claim 1), is thus present in D1.

- 7.1.4 The proprietor's reference to Annex 1 showing that the hydrophobic region of D1 is not a liquid shut-off region is not accepted. From the wording of D1 on page 2, last 3 lines, it can only be concluded that the samples tested in Annex 1 were simply not rendered 'sufficiently hydrophobic' to prevent the wicking of liquids via the topsheet.
- 7.1.5 The proprietor's suggestion that the feature of claim 1 'said liquid shut-off region is located at an area outside the periphery of said absorbent core' should be interpreted as 'exclusively outside the periphery of the absorbent core' is also not accepted. In D1, the liquid shut-off region realised by the marginal region M (see Fig. 3) is located at an area both inside and outside the periphery of the absorbent core 7. With no basis to interpret the claim in a more limited way, as suggested by the proprietor, D1 anticipates the claimed feature of the liquid shut-off region being located outside the periphery of the absorbent core.
- 7.1.6 The subject-matter of claim 1 is thus not novel over D1 (Article 54 EPC 1973) and auxiliary request 13 is

therefore not allowable.

8. Auxiliary request 14

8.1 Admittance of the request into the proceedings

The Board exercised its discretion to admit this request into the proceedings (Article 13(1) RPBA).

8.1.1 Despite having been filed only one month prior to the oral proceedings, this auxiliary request was based on auxiliary request 1, with the independent method claim present in that request having been deleted. As such, the present request comprised only subject-matter which had already been filed by the proprietor with the grounds of appeal. The request could thus not be regarded as being of such complexity that it could not be reasonably dealt with by the opposing parties, nor could it be regarded as being of a nature prejudicial to procedural economy since the opponents had been faced with the claims in this request since the start of the appeal procedure and had addressed these claims in detail.

8.1.2 OII's argument that auxiliary request 14 changed the focus of the invention entirely relative to auxiliary request 1 on which it was based, is unconvincing. The opponent had already presented arguments on these claims. This cannot be regarded as a change of focus nor an unexpected shift in the proprietor's position detrimental to an opponent. Further, all objections under Article 123(2) EPC against claim 7 were thereby obviated.

8.1.3 The request was thus admitted into the proceedings.

8.2 Clarity - claim 1

The subject-matter of claim 1 lacks clarity (Article 84 EPC 1973).

8.2.1 At least the term 'hot-melt' present in claim 1 is unclear. 'Hot-melt' is not a clearly understood structural feature, particularly with examples of a hot-melt in the patent specification including a solvent and a viscous agent. Whilst 'hot-melt adhesive' is a well known expression in the art of absorbent articles comprising the term hot-melt, there is no explicit recitation of this expression in the patent specification and thus no basis for limiting the vague scope of the term hot-melt to the very specific feature of hot-melt adhesive. Furthermore, the description discloses the hot-melt forming the liquid shut-off region solely in relation to the process of impregnating the hot-melt into the fiber voids of the nonwoven fabric (see para. [0030]). It is thus not clear what structural feature of the claimed absorbent article is necessarily implied by the process step of hot-melt impregnation.

8.2.2 The proprietor's reference to Exhibits 1 and 2 fails to challenge this finding. Notwithstanding the fact that these exhibits were published well after the filing date of the underlying application, these exhibits each specifically concern hot-melt adhesives, such that any reference simply to hot-melts within the documents are unambiguously using this expression as a succinct way of referring to the hot-melt adhesives already mentioned. The documents certainly provide no teaching that the term 'hot-melt' in general will always mean hot-melt adhesive.

8.2.3 The further argument of the proprietor that it would be clear from the manufactured article that a hot-melt adhesive had been used to create the liquid shut-off region is not accepted. As also argued by the opponents, the presence of a solvent can lower the thermoplastic glass transition temperature making it impossible to tell from the final product whether a hot-melt adhesive had been used to form the liquid shut-off region or not. The presence of the term 'hot-melt' in claim 1 is thus prejudicial to clarity (Article 84 EPC 1973).

8.2.4 Auxiliary request 14 is thus not allowable.

9. Auxiliary request 15

9.1 The subject-matter of claim 1 of auxiliary request 15 also includes the term 'hot-melt'. With no additional arguments in support of the clarity of the claim submitted by the proprietor over those already presented for auxiliary request 14, the Board finds, similarly to that request, that the subject-matter of claim 1 of this request lacks clarity (Article 84 EPC 1973).

10. Auxiliary request 16

10.1 Novelty - claim 1

The subject-matter of claim 1 lacks novelty (Article 54 EPC 1973) in view of the disclosure of D1.

10.1.1 As stated in points 7.1.1 to 7.1.5 above, D1 discloses all features that claim 1 of auxiliary request 13 and claim 1 of the present auxiliary request 16 have in common. D1 furthermore discloses the following features

of claim 1 of the present request, the reference signs in parentheses referring to D1:

said topsheet (5) extends outward beyond a basal end (the point in Fig. 3 where the upstanding gather 15 separates away from the otherwise horizontally extending topsheet 5) of said upstanding gather (15) and said liquid shut-off region (M) is located on the extended section of said topsheet (5; see Fig. 3 which shows the region M extending to the right of the basal end of the upstanding gather 15).

10.1.2 The proprietor's contention that the basal end of the upstanding gather in D1 is to be seen as the proximal edge 17 is not accepted. The proximal edge 17 may be regarded as the basal end of the sheet material which comprises the upstanding gather 15, but not the basal end of the upstanding gather itself. The basal end of the upstanding gather 15 can only reasonably be regarded as being at the base of the upstanding gather 15 where it separates away from the otherwise horizontally extending topsheet 5 (see e.g. Fig. 3). It is thus evident that the liquid shut-off region M in D1 is, at least partially, located on the extended section (beyond the basal end of the upstanding gather) of the topsheet. Even though it is correct, as argued by the proprietor, that the extent of the connection means used to attach the material piece forming the upstanding gather to the topsheet is not indicated, it is evident from practical considerations that it must have a finite extent. Thus, even if the connection means only started at the laterally outermost edge of the material piece (indicated by the lead-line from reference numeral 17, which overlies the boundary of shut-off region M), it would then necessarily also

extend into the shut-off region M.

10.1.3 The subject-matter of claim 1 thus lacks novelty (Article 54 EPC 1973) in view of D1. Auxiliary request 16 is thus not allowable.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The European patent is revoked.

The Registrar:

The Chairman:



M. H. A. Patin

M. Harrison

Decision electronically authenticated