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**Datasheet for the decision
of 22 January 2019**

Case Number: T 0964/15 - 3.2.06

Application Number: 07024333.2

Publication Number: 1941852

IPC: A61F13/15

Language of the proceedings: EN

Title of invention:

Individually packaged disposable absorbent article

Patent Proprietor:

The Procter & Gamble Company

Opponents:

Essity Hygiene and Health Aktiebolag
Infiana Germany GmbH & Co. KG

Headword:

Relevant legal provisions:

EPC Art. 100(b), 83, 114(2), 111(1)
RPBA Art. 12(4), 13(1)

Keyword:

Sufficiency of disclosure - main request (no) - completeness of disclosure - first auxiliary request (no) - third auxiliary request (no)

Late-filed auxiliary requests - auxiliary request 1 - admitted (yes) - auxiliary request 3 - request clearly allowable (no)

Evidence - burden of proof

Remittal to the department of first instance - (no)

Decisions cited:

Catchword:



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Case Number: T 0964/15 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 22 January 2019

Appellant: The Procter & Gamble Company
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
18 March 2015 concerning maintenance of the
European Patent No. 1941852 in amended form.**

Composition of the Board:

Chairman	M. Harrison
Members:	P. Cipriano
	E. Kossonakou

Summary of Facts and Submissions

- I. Appeals were filed by the appellant/patent proprietor and appellant/opponent 1 and appellant/opponent 2 against the interlocutory decision of the opposition division in which it found that European patent No. 1 941 852 in an amended form met the requirements of the EPC.
- II. The appellants/opponents 1 and 2 (hereinafter "opponent 1" and "opponent 2" respectively) each requested that the interlocutory decision be set aside and the patent be revoked in its entirety.
- III. With its appeal, the appellant/patent proprietor (hereinafter the "proprietor") requested that the decision under appeal be set aside and the patent be maintained as granted, subsidiarily that the patent be maintained in an amended form according to one of the first to ninth auxiliary requests.
- IV. The following documents are relevant for the present decision:

Test report filed by opponent 2 with its grounds of appeal on 28 July 2015

D2 EP 0 737 731 A2
- V. The Board issued a summons to oral proceedings including a communication containing its provisional opinion, in which it indicated *inter alia* that no specific examples of materials and/or ways of producing a flexible sheet material with the claimed properties seemed to be disclosed and that it therefore might require discussion as to whether the disclosure in the

patent, or the skilled person's general knowledge, gave the skilled person sufficient information on how the compositional and/or process parameters should be changed in order to obtain the results over the whole breadth of the claim. The Board also stated that it did not seem to be straightforward for the skilled person to produce a flexible sheet with the claimed maximum tensile strength of 6.5 N/cm over the whole breadth of the claim.

VI. With letter dated 21 December 2018 the proprietor filed ten auxiliary requests ("first" to "tenth") replacing all auxiliary requests on file.

VII. Oral proceedings were held before the Board on 22 January 2019, during which the second and the fourth to tenth auxiliary requests were withdrawn and a new auxiliary request 3 was filed. At the end of the oral proceedings the final requests were as follows:

The patent proprietor requested that the decision under appeal be set aside and the patent be maintained as granted or on the basis of the claims of the first or of the third auxiliary request filed with its submission of 21 December 2018 or of auxiliary request 3 filed at the oral proceedings before the Board.

The opponents' requests remained unchanged, namely that the decision under appeal be set aside and the patent be revoked in its entirety.

VIII. Claim 1 of the main request (patent as granted) reads as follows:

"An individually packaged absorbent article comprising an absorbent article having a body facing side, a garment facing side, two longitudinal sides and two

transverse ends, said absorbent article having an adhesive element on said garment facing side, a releasable wrapper overlaying said garment facing side of said article and releasably affixed to said adhesive element, said absorbent article and said wrapper being folded as a unit about at least one fold-axis to define a package comprising said absorbent article, said individually packaged absorbent article characterized in that said releasable wrapper comprises a flexible sheet material having:

a basis weight of 5-19 g/m², and a maximum tensile strength of at least 6.5 N/cm, wherein said material of said releasable wrapper is selected among polymeric films having a thickness of 6-20 μ, and wherein said film is a polyethylene film comprising at least 0.5% by weight, and less than 30% by weight polypropylene."

Claim 1 of the first auxiliary request differs from claim 1 of the main request in that the feature concerning the maximum tensile strength reads as follows:

- "a maximum tensile strength of at least 6.5 N/cm, evaluated according to the standard test method ASTM D 882-02, with the modifications as described in the section "Tensile Strength" herein"

Claim 1 of the third auxiliary request differs from claim 1 of auxiliary request 1 in that the features concerning the basis weight and the film thickness read as follows:

- "a basis weight of 10-16 g/m²"

- "wherein said material of said releasable wrapper is selected among polymeric films having a thickness of 11-17 μ "

Claim 1 of auxiliary request 3 differs from claim 1 of the third auxiliary request in that the features concerning the basis weight, film thickness and polypropylene read as follows:

- "a basis weight of 10-16 g/m²"
- "wherein said material of said releasable wrapper is selected among polymeric films having a thickness of 11-17 μ ", and
- "wherein said film is a polyethylene film comprising at least 15% by weight, and less than 30% by weight polypropylene"

IX. The arguments of the opponents may be summarised as follows:

Admittance of the test report

At the time of filing the opposition, there was firm belief that the written arguments would be enough to support the objection. The necessity of test results only became evident with the interlocutory decision of the opposition division, to which opponent 2 had reacted by filing the test report with its grounds of appeal.

The test results showed that a polymeric film with the claimed properties could not be produced by the skilled person without undue burden. Thus they were highly relevant.

The proprietor had had enough time (more than three years) since the filing of the test report to prepare its response and present counter evidence.

Main Request - sufficiency of disclosure

The patent as a whole did not sufficiently disclose how to manufacture a flexible sheet according to claim 1, since claim 1 relied on results to be achieved in the form of parameters for a flexible sheet material film of an individually packaged absorbent article. The patent only indicated in general terms in paragraphs [0041] and [0042] how the skilled person could produce the claimed sheet having the specified parameters, but gave no single embodiment of a material having the claimed parameters, nor did it give instructions on how to adjust the compositional and process parameters in order arrive at the claimed film sheet.

The tests carried out by opponent 2 also attested that the skilled person could not arrive at the claimed film sheet without undue burden.

Since claim 1 was not restricted to any particular method of measuring tensile strength, the tensile strength values tested were also valid. The tests had been conducted in a test laboratory at normal room temperature, which thus could not lead to any significant variation in the measured tensile strength.

The additive content and the method used to manufacture the film were not claimed and thus not part of the invention.

Even assuming that an increase in thickness of the tested films led to an increase in tensile strength,

the test report showed that throughout the large parts of the claimed ranges of thickness, basis weight and % by weight of polypropylene (PP), i.e. over the breadth of the claim, the invention could not be carried out without undue burden.

D2 also confirmed this, since it showed in the Examples and Comparative Examples in Tables 1 and 3 that only a much higher amount, 70% by weight of PP, actually achieved the claimed tensile strength.

First auxiliary request - admittance

The first auxiliary request should not be admitted as it could have been filed earlier, as it concerned an objection already made by opponent 2 with its letter dated 11 December 2015 (see point 3.6).

Further, a clarity problem had been introduced by the amendment to claim 1 due to the reference to the description.

In addition, all internationally recognized standard tests yielded the same results within reproducibility deviations, such that this amendment did not help the skilled person perform the invention over a bigger part of the range and thus it did not *prima facie* overcome the objection under Article 83 EPC.

First auxiliary request - sufficiency of disclosure

The difference between the tests to measure tensile strength lay within the limits of reproducibility deviations, i.e. there was no significant difference between the tests.

The burden of proof had been discharged and shifted to the proprietor, on whom it was then incumbent to prove that there was an actual difference between the test results.

Even assuming that the use of the modified ASTM test produced tensile strength results as much as 20% higher, which was hardly plausible, the invention could not be carried out over the whole scope of the claim. For example, the tested LDPE with 4.8% by weight PP and LLDPE II with 14.8% by weight polypropylene would still not be able to achieve a tensile strength of at least 6.5 N/cm.

Third auxiliary request - sufficiency of disclosure

As with the first auxiliary request, the resulting tensile strength for at least LDPE with 4.8% by weight PP and LLDPE II with 14.8% by weight PP would still be below 6.5 N/cm.

Auxiliary request 3 - admittance

Auxiliary request 3 should not be admitted as it did not overcome the objections raised for the previous requests.

Requests for remittal

The Board should not remit the case to the opposition division for re-examination of a point that has already been dealt with by the opposition division.

- X. The arguments of the proprietor may be summarised as follows:

Admittance of the test report

The test report should have been filed earlier, at the latest in response to the positive preliminary opinion of the opposition division relating to Article 100(b) EPC. The evidence was produced at such a late stage that it did not allow the proprietor to respond adequately.

Further, the test report was not relevant, since it was not verifiable and failed to disclose information regarding many factors, such as the additives used, the room temperature, the grip separation or the average molecular weight of each composition tested.

Main request - sufficiency of disclosure

The invention underlying claim 1 was sufficiently disclosed. Paragraphs [0041] and [0042] together with common general knowledge gave the skilled person sufficient information to enable a flexible sheet material according to the invention to be manufactured.

Paragraph [0041] taught that a polypropylene content between 0.5 and 30% by weight provided good tensile strength at relatively low basis weights and thicknesses, while paragraph [0042] referred to the parameters by which polymers are commonly characterized. The skilled person using their common general knowledge knew the interrelationship between these parameters and how to adapt these in order to arrive at the claimed results.

The results of the test report could not be compared to the invention due to the different conditions and measurement methods used in each, since:

- unlike the claimed invention and against the teaching of the patent in paragraph [0042] to reduce the additive content, the tested films used a polyethylene blend comprising 4.9% additives, the effect of which was unknown.
- The patent disclosed in paragraph [0052] that the test should be carried out with an initial grip separation of 51mm but the initial grip separation in the test report was unknown.
- The room temperature at which the tests were performed was also unknown.
- The tensile strength was measured according to the DIN EN 527-3 norm and not according to the ASTM D 882-02 with the modifications explained in paragraphs [0047] to [0058], which possibly led to different values in tensile strength.

Even if the results of the test report supplied by opponent 2 were taken into account, the tested films were all 16 μm thick, a value within the claimed thickness range of 6 to 20 μm . Since the skilled person knew that tensile strength increased approximately in proportion to thickness, if tested films with 20 μm thickness had been used, five out of six films would have achieved the required tensile strength, thus clearly showing that the invention could be carried out.

Further, all the tested samples were manufactured with a blown method but paragraph [0042] also foresaw a cast method, which the skilled person using their common general knowledge recognized as leading to higher tensile strengths.

The Examples and Comparative Examples in D2 showed that the additive content influenced the results and thus the latter could not be compared to the claimed film.

First auxiliary request - admittance

The amendment was a reaction to the communication from the Board regarding the validity of the test report - see point 1.1, second paragraph.

Claim 1 was now limited to the tensile strength test used in the patent, which differed from the one used in the test report and rendered the results from the latter incomparable to those defined in claim 1.

The amendment did not render claim 1 unclear, since this was the only reasonable way of making reference to the modified standard test.

First auxiliary request - sufficiency of disclosure

The introduction of the tensile strength measuring test in claim 1 overcame the objection of insufficiency of disclosure.

It was for the opponent to show that the method used in the test report to measure tensile strength led to results which were comparable to those claimed.

Whilst possibly not every possible combination of claimed parameters could be carried out by the skilled person, the invention did not need to be able to be carried out at the extremes of every parameter at the same time.

Third auxiliary request - sufficiency of disclosure

The limitation introduced allowed the skilled person to carry out the invention over the whole range claimed.

Auxiliary request 3 - admittance

With the % by weight PP range reduced to values of at least 15%, it was not possible to conclude with any certainty that the difference between the tensile strength values could not be ignored if the skilled person changed other parameters such as the additive content, the extrusion method or the average molecular weight.

Requests for remittal

The case should be remitted to the opposition division in order to ensure consideration of the test report (i.e. the one newly admitted into the proceedings) by two instances.

Reasons for the Decision

1. Admittance of the test report
 - 1.1 Opponent 2 filed a test report with its grounds of appeal. The test report contains *inter alia* the results of tensile strength tests carried out according to the standard DIN EN ISO 527-3 for several polyethylene blends having different % by weight of polypropylene using samples with a thickness of 16 µm.

- 1.2 Article 12(4) RPBA requires the Board to take into account everything presented by the parties under Article 12(1) RPBA if and to the extent that it relates to the case under appeal and meets the requirements in Article 12(2) RPBA. However, according to Article 12(4) RPBA, the Board has the discretionary power to hold inadmissible facts, evidence and requests that could have been presented or were not admitted in the first instance proceedings.

- 1.3 The Board does not accept the argument from the proprietor that the test report should have been filed earlier (i.e. with the notice of opposition or at the latest after the positive preliminary opinion of the opposition division with regard to the objection made under Article 100(b) EPC).

 - 1.3.1 In its preliminary opinion the opposition division had considered the objection ("the skilled person cannot practice the invention without undue burden and certainly not over the whole scope claimed") to relate to clarity rather than sufficiency. It was only through its interlocutory decision (see point 3.4.2, first and second paragraphs) that the opposition division took the position that even if the manufacturing of a polymeric film meeting all the claimed requirements might represent an undue burden, the opponent had failed to substantiate its allegations by presenting corroborating evidence "in the form, for instance, of some test results".

 - 1.3.2 Opponent 2 then proceeded by filing such tests at the next suitable opportunity, i.e. with the grounds of appeal, as a legitimate reaction to the decision of the opposition division. The Board thus finds that, given the particular course of the proceedings in the case at

hand, this was a reasonable response and that there was no requirement to present this evidence earlier. Thus, the Board sees no reason to exercise its discretion to hold the evidence inadmissible in accordance with Article 12(4) RPBA.

1.3.3 The report is thus in the proceedings.

1.4 Further, the Board finds, contrary to the argument of the proprietor, that the three and a half years that elapsed between the filing of the test report and the date of the oral proceedings gave the proprietor adequate time to react to this new evidence and present its counter-arguments or even counter-evidence.

1.5 With reference to Article 114(2) EPC, the proprietor also argued that the test report was not relevant, it was not verifiable and did not disclose information in regard to certain factors, such as the additives used, the initial grip separation, the room temperature or the average molecular weight of each composition tested. It should therefore be disregarded.

1.5.1 The Board however does not accept this.

Article 114(2) EPC allows facts and evidence not submitted in due time to be disregarded, a procedural aspect that is specifically addressed in Article 12(4) RPBA for the appeal procedure and was considered and decided accordingly by the Board in the present case as set out in point 1.3.2 above.

1.5.2 Regarding the proprietor's argument concerning the test report's lack of relevance, whilst relevance influences the judgement of the timeliness of submission, it is principally the main criterion for the substantive

evaluation of evidence. Under this proviso, the following considerations apply.

The test report is a *bona fide* attempt to support the opponent's case that a person skilled in the art cannot manufacture a polyethylene film with the claimed combination of properties - basis weight, tensile strength, thickness and % by weight of polypropylene.

Whilst it is true that the other factors mentioned by the proprietor, such as the average molecular weight, additive content, room temperature, and initial grip separation, are not discussed in the test report, they are also not discussed in detail in the patent either. Paragraph [0042] of the patent refers generally to tailoring the average molecular weight and additive content but does not explain how such a tailoring should be performed or would affect the results. The initial grip separation is mentioned briefly in paragraph [0052] but without any explanation as to whether or how it would affect any resulting film property. The room temperature is not disclosed in the patent as a whole. Without any further evidence or technically plausible explanation, these parameters are seemingly of minor importance and would not be expected to significantly affect the test results, giving the Board no reason to doubt the results of the test report. The proprietor also had more than three years to prove the contrary.

- 1.5.3 Given that all the claimed parameters are present in the test report, and regardless of any further factors that could possibly affect the test results, the Board finds that the test results serve as both reliable and highly relevant evidence of what the skilled person could carry out without undue burden. The way in which

the evidence is to be regarded as highly relevant will also be seen from the reasoning *infra*.

There is thus no reason either under Article 114(2) EPC and Article 12(4) RPBA or under the general principles of evidence evaluation (relevance) for the Board to exercise its power of discretion to disregard the test report.

1.6 The test report is thus to be considered in the proceedings.

2. Main request - sufficiency of disclosure

2.1 Claim 1 of the main request defines a flexible sheet material having:

- a basis weight of 5-19 g/m², and
- a maximum tensile strength of at least 6.5 N/cm,
- wherein said material of said releasable wrapper is selected among polymeric films having a thickness of 6-20 μ , and
- wherein said film is a polyethylene film comprising at least 0.5% by weight, and less than 30% by weight polypropylene.

2.2 The proprietor argued that paragraphs [0041] and [0042] together with common general knowledge provided the skilled person with sufficient information to enable them to manufacture a flexible sheet material according to the invention.

Whilst the Board agrees that paragraph [0041] indicates that a polypropylene content between 0.5 and 30% by weight provides good tensile strength at relatively low basis weights and thicknesses, paragraph [0042] merely

lists several compositional (e.g. average molecular weight, density, molecular branching degree, polypropylene content and reduced additive content) and process parameters (e.g. type of extrusion, cooling, stretching) that may be modified or selected to adapt the properties of the polymeric film. Paragraph [0042] does not provide any information how these parameters should be selected or adapted by the skilled person in order to arrive at the claimed invention.

Further, the proprietor argued that the skilled person using their common general knowledge knows generally, and even in isolation, how the compositional and process parameters listed in paragraph [0042] would affect tensile strength, thickness and the basis weight of a polymeric material. However, to manufacture a polymeric film with the specific claimed combination of thickness, basis weight values and % by weight values achieving the claimed tensile strength, the Board finds that such common general knowledge does not suffice. Several of the parameters interact with one another and in particular with the claimed parameters of the resulting film (e.g. the average molecular weight and density affect the claimed basis weight) in ways that cannot be predicted by the skilled person without more specific instructions or examples than merely the generic allusions to compositional and process parameters found in paragraph [0042] or indeed in any other part of the patent.

The test report filed by opponent 2 also confirms that by simply working in the claimed ranges of % by weight of polypropylene, thickness and basis weight (as suggested in paragraph [0041]), the skilled person does not arrive at the claimed tensile strength. None of the sample films tested in the test report, despite having

different % by weight of polypropylene distributed from the lower part to just above the claimed range and having a thickness of 16 µm falling in the upper part of the claimed thickness range, achieves the claimed (minimum value of) tensile strength.

Comparative Example 2 in D2 also underlines this, since it discloses a film with 1,5% by weight PP and 12 µm thickness (both within the claimed range) but having a tensile strength of 2.26 N/cm (vastly below the minimum claimed value).

2.3 The proprietor argued that the results of the test report could not be compared to the invention due to the different conditions and measurement methods used in both. The Board however does not accept this argument.

2.3.1 Contrary to the argument of the opponent, the additive content is not relevant since it is not part of the polymeric film claimed.

Paragraph [0042] (the sole passage in the whole patent referring to additive content) does not teach the skilled person to reduce the additive content of the polymeric film, nor does it imply that the additive content of the invention is somehow lower than the 4,9 wt% used in the tested films of the test report or the 1,5 wt% in Comparative Example 2 of D2. This passage simply employs the adjective "reduced" to state that the additive content is smaller than the "possible polypropylene content" mentioned immediately before. This is also the case in the test report, where the % by weight of polypropylene in the tested films reaches values of up to 30% for LDPE. The skilled person would thus not consider that the results of the test report or Comparative Example 2 of D2 could not serve as a

basis for comparison due to different % by weight of additive content.

- 2.3.2 The measurement of the claimed parameters is also not limited to any particular room temperature or grip separation. As explained above under point 1.5.2, 2nd paragraph, the skilled person would not recognize any particular importance of room temperature or initial grip separation in the measurement of the tensile strength from the complete disclosure of the invention and generally knows how to set them up appropriately.
- 2.3.3 Whilst it is true that the DIN EN ISO 527-3 standard test method employed in the test reports is not the same as the modified method disclosed in the patent in paragraphs [0047] to [0058] based on the ASTM D 882-02, the tensile strength defined in claim 1 is not limited to any test procedure. The skilled person may thus employ any test procedure suitable and commonly used to measure the claimed tensile strength when attempting to carry out the invention according to claim 1 and is not limited to the one exemplified in the patent.
- 2.3.4 The argument that all the test samples used in the test report had a thickness of 16 µm and that, if tested films with 20 µm thickness had been used, five out of six films would have achieved the required tensile strength, thus clearly showing that the invention can be carried out, is not accepted by the Board. Even considering that tensile strength increases approximately in direct proportion to thickness (other dimensions remaining the same) and would thus increase by roughly 25% (20/16 - ratio between the thicknesses) when using a thicker film, such hypothetical interpolated test values would only show that the skilled person can carry out the invention towards the

upper limit of the claimed thickness and basis weight ranges and not over the whole breadth of the claim.

2.3.5 On the one hand, paragraph [0042] of the patent discloses that several types of extrusion may be selected and suggests cast and blown extrusion as non-limiting examples ("e.g."), but, on the other hand, it also states claim 1 is not limited to any specific type of extrusion process. Thus, contrary to the argument from the proprietor, films produced through blow moulding reasonably fall under the scope of the invention as claimed, which is not limited to cast extrusion.

2.4 At least for the reasons stated above, the skilled person would not be able to perform the invention over the whole scope of claim 1 and the ground of opposition pursuant to Article 100(b) EPC is therefore prejudicial to maintenance of the patent as granted. Thus the main request is not allowable.

3. First auxiliary request - admittance

3.1 Claim 1 of auxiliary request 1 was amended after the communication of the Board was issued and now further defines (in regard to claim 1 of the main request) the standard test method for measuring tensile strength in the following way:

"a maximum tensile strength of at least 6.5 N/cm, evaluated according to the standard test method ASTM D 882-02, with the modifications as described in the section "Tensile Strength" herein".

3.2 According to Article 13(1) RPBA, any amendment to a party's case after it has filed its grounds of appeal

or reply may be admitted and considered at the Board's discretion. The discretion shall be exercised in view of *inter alia* the complexity of the new subject-matter submitted, the current state of the proceedings and the need for procedural economy.

- 3.3 The Board finds that the amendment to claim 1 is a promising attempt at overcoming the objection that had been explicitly formulated by the Board and not by the opponents (who had argued that the objection was initially made by opponent 2 with its letter dated 11 December 2015). Also, the amendment appears to address the objection in a suitable manner, in the sense that it limits the claim to the measurement of values in the way intended by the proprietor. Further, the Board cannot ascertain *prima facie* that there is no difference in the tensile strength results between the standard tests, as argued by the opponents.
- 3.4 The letter from the proprietor dated 11 December 2015 mentions in point 3.6 that the test procedure for measuring tensile strength in the test report is not the same as the one specified in the patent. However, this observation can only be seen as an attempt to show that the tested films in the test report could not be compared with the ones of the patent and not a concession from the proprietor that the claim was not limited to the modified test procedure ASTM D 882-02 since the latter was not explicitly claimed. It was only when the Board pointed out that (in reaction to the argument from the proprietor) it did not interpret the claim as being limited to any test procedure, that the necessity for any amendment made to claim 1 of auxiliary request 1 became apparent. Thus contrary to the argument from the opponents, this request could not reasonably have been presented earlier.

3.5 The Board also does not accept the argument from the opponents that a clarity problem had been introduced by the amendment to claim 1 through the reference to the description "with the modifications as described [...] herein". The modifications to the standard test procedure ASTM D 882-02 explained in paragraphs [0047] to [0058] of the patent are so extensive that their introduction into claim 1 would render it inconcise and difficult to understand. The Board thus finds that in this case a reference to the description as foreseen under Rule 43(6) EPC is both suitable and allowable to make the claim more readable, and does not give rise to a new objection.

3.6 For the reasons mentioned above, the Board exercised its discretion under Article 13(1) RPBA to admit the first auxiliary request into the proceedings.

4. First auxiliary request - sufficiency of disclosure

4.1 The proprietor argued that the introduction of the tensile strength measuring test into claim 1 overcame the objection of insufficiency of disclosure. The tensile strength in amended claim 1 now explicitly has to be measured according to the modified ASTM D 882-02 standard and results from the test report (produced with a different standard test) were thus allegedly not relevant.

4.2 The Board does not accept this argument. Whilst the tensile strength test method of the patent differs from the one used in the test report and can result in different values of tensile strength, the Board is not convinced that the simple adoption of a different test

method could render plausible that the invention can be carried out over the whole range claimed.

The tensile strength is a common and well-known physical parameter for which different countries have established different measuring tests. Even if the differences between the modified ASTM and the DIN EN ISO test standards accounted consistently for tensile strength values as much as *arguendo* 20% higher using the modified ASTM test, as assumed during the discussion in oral proceedings, only a part of polymeric films from the test report would fall within the claimed range - namely all polymeric films with a % by weight of polypropylene of at least 14.8% with the exception of LLDPE II.

For example, for LDPE with 4.8% by weight PP and LLDPE II, both with a thickness of 16 μm , the extrapolated tensile strength would be 6.05 and 6.43 N/cm, respectively, i.e. still below the minimum 6.5 N/cm.

The Board also notes that the claimed % by weight PP and thickness (thus correspondingly also basis weight) ranges can respectively be as low as 0.5% and 6 μm , when considering the whole scope of the claim, which would lead to even lower tensile strength results than the ones shown in "Tabelle II" of the test report carried out with a minimum of 4.8% by weight PP and a thickness of 16 μm .

The Board thus finds that the test report establishes an unambiguous basis on which the skilled person would conclude that the values of tensile strength cannot differ (based purely on the test used) to the extent that the tensile strength could be above 6.5 N/m over

the whole claimed range of thickness, basis weight and % by weight polypropylene.

- 4.3 It is inappropriate here for the proprietor to merely claim the benefit of the doubt that differences in measuring tensile strength could plausibly be larger than even 20%. Instead, in a case such as this where the skilled person knows that standard test procedures are normally expected to produce approximately similar results for measurements of well known standard parameters, it is incumbent upon the proprietor to demonstrate that the method to measure the tensile strength would actually produce tensile strength results falling within the scope of the claim over the whole range claimed.

None of the parties argued that the tests results would reasonably be expected to differ by an amount as high as 20%, let alone more, the opponents notably arguing that 20% was far higher than would be expected. Contrary to the argument of the proprietor, since the patent does not contain detailed information of how to put the invention into practice and in the face of a test report filed by opponent 2 that raises serious doubts that the invention can be carried out by the skilled person over the whole range claimed, the proprietor in this case bears the burden of establishing the contrary assertion that common general knowledge would indeed enable the skilled person to carry out the invention and why the results from the test report would not be applicable to show that the skilled person cannot carry out the invention.

- 4.4 The argument from the proprietor that the invention did not need to be able to be carried out at the extremes of every parameter at the same time, is not found

persuasive either. From the discussion above it is clear that, regardless of the test method used, the invention cannot be carried out over large parts of the claimed ranges of % by weight PP, thickness and basis weight.

- 4.5 The invention according to claim 1 of the first auxiliary request therefore does not fulfil the requirement of Article 83 EPC. The first auxiliary request is thus not allowable.
5. Third auxiliary request - sufficiency of disclosure
- 5.1 Claim 1 of the third auxiliary request has been amended with regard to claim 1 of the first auxiliary request such that the thickness and basis weight ranges have been limited to
- "a basis weight of 10-16 g/m²"
 - "wherein said material of said releasable wrapper is selected among polymeric films having a thickness of 11-17 μ".
- 5.2 For the same reasons as given above under point 4.2, the invention cannot be carried out over the whole range claimed even when considering a situation, to the proprietor's advantage, where a measurement with the modified ASTM method would result in an increase of as much as 20% in the tensile strength measured.

Even though the claimed ranges of thickness and basis weight are reduced, the resulting tensile strength for LDPE with 4.8% by weight PP and LLDPE II would still fall outside the claimed range (see point 4.2). Taking into account that the minimum claimed thickness lies at 11 μm and the minimum basis weight at 10 g/m², the

skilled person infers from the test report that the invention cannot be performed for LDPE and LLDPE II films from at least 0.5 to at least 4.8% by weight of PP for thicknesses between 11 and 16 μm , i.e. the invention cannot be performed over the whole range claimed.

5.3 The invention according to claim 1 of the third auxiliary request therefore does not fulfill the requirements of Article 83 EPC. The third auxiliary request is thus not allowable.

6. Auxiliary request 3 - admittance

6.1 Claim 1 of auxiliary request 3 differs from claim 1 of the third auxiliary request in that the feature concerning the % by weight PP now reads

"wherein said film is a polyethylene film comprising at least 15% by weight, and less than 30% by weight polypropylene"

6.2 The request was filed during the oral proceedings. 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 any amendment to a party's case after it has filed its grounds of appeal or reply. In order to be admitted, such a request should be clearly allowable at least in the sense that it overcomes the objections raised and does not give rise to new objections, in order that procedural economy is respected. However, this is not the case for claim 1 of this request.

6.3 The amendment restricts the % by weight PP range to values of at least 15%. Although this is a reaction to

the objection that the invention cannot be performed in the lower part of the % by weight PP range as explained above under points 4.2 and 5.2, it does not address the fact that at the lower part of the claimed thickness and basis weight ranges (i.e. close to 11 μm and 10 g/m^2 , respectively) the tensile strength would still be considerably lower than for a thickness of 16 μm and corresponding basis weight of 15 g/m^2 .

Bearing in mind that, even when assuming a consistent 20% increase in tensile strength measurement with the modified ASTM standard, the tensile strength for the tested LLDPE II at 14.8% by weight PP and 16 μm would still be below the lower limit of 6.5 N/cm (6.43 N/cm) and that the corresponding value for tested LDPE would be only slightly above (6.77 N/cm), the Board is not convinced that the tensile strength drop for thickness values around the claimed lower limit 11 μm (almost a third lower than the tested 16 μm) would plausibly result in values of at least 6.5 N/cm.

- 6.4 The proprietor argued that it was not possible to conclude with any certainty that the difference between the tensile strength values between the test methods could be ignored, since the skilled person could change other parameters such as the additive content, the extrusion method or the average molecular weight to come within the range claimed. This argument, however, is not found persuasive. The patent does not disclose a single example or give any instructions on how these parameters should be changed by the skilled person in order to arrive at the claimed invention. Thus, merely arguing that several parameters can be varied to allow the skilled person to fall within the required limits of the claim, without however providing any guidance on how to vary these appropriately, cannot account for the

large difference in the values of tensile strength that the skilled person is required to obtain to carry out the invention over its entire claimed scope.

Thus, the request does not overcome the objections which the Board found to be present with regard to the previous request.

6.5 Accordingly, the Board exercised its discretion under Article 13(1) RPBA not to admit auxiliary request 3 into the proceedings.

7. Requests for remittal

7.1 The proprietor requested remittal of the case to the opposition division on two occasions (with respect to the first auxiliary request and the third auxiliary request) in order to allow the evidence (i.e. the test report filed by opponent 2) to be considered by two instances.

7.2 However, the admittance of the test report did not fundamentally change the objection of lack of sufficiency already on file. As discussed under points 1.3.1 and 1.4, the test report came to support an objection already discussed extensively during the opposition proceedings and, in addition, the proprietor had had more than three years to both respond adequately and present arguments relating to the points (dealt with by way of this decision) regarding the test report. The Board thus finds that there is no reason to prolong the proceedings further on this issue by remitting the case.

7.3 The proprietor's argument that consideration of the evidence by two instances should be ensured was also

not found persuasive. First, there is no absolute right to have each aspect of a case heard at two instances, the decision to remit the case being at the discretion of the Board (see Article 111(1) second sentence, EPC). In the present case, as indicated in point 7.2 above, the Board saw no compelling reason to remit the case, since the objection under Article 83 EPC had remained essentially unchanged throughout the proceedings and the proprietor had had adequate time to prepare its response.

7.4 The Board thus rejected the requests to remit the case to the department of first instance.

Order

For these reasons it is decided that:

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

The Registrar:

The Chairman:



M. H. A. Patin

M. Harrison

Decision electronically authenticated