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**Datasheet for the decision
of 14 January 2020**

Case Number: T 0032/16 - 3.2.06

Application Number: 10724890.8

Publication Number: 2440260

IPC: A61F13/00, A61F13/02

Language of the proceedings: EN

Title of invention:

HYDROGEL WOUND DRESSING FOR USE WITH SUCTION

Patent Proprietor:

Systagenix Wound Management, Limited

Opponent:

Smith and Nephew, Inc.

Headword:

Relevant legal provisions:

RPBA Art. 13(1)

RPBA 2020 Art. 11, 13(1), 25(1), 25(3)

EPC Art. 54, 56, 83, 123(2)

Keyword:

Late-filed auxiliary request - admitted (yes) - special circumstances of the case

Decisions cited:

G 0003/14

Catchword:

Art. 13(1) RPBA 2020 and Art. 13 RPBA 2007 both apply (Points 1.1 to 1.1.3 of the Reasons); Art. 11 RPBA 2020 - adaptation of the description is not 'further prosecution' (see Point 5 of the Reasons)



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Case Number: T 0032/16 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 14 January 2020

Appellant: Smith and Nephew, Inc.
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Memphis, TN 38116 (US)

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Respondent: Systagenix Wound Management, Limited
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 11 November
2015 rejecting the opposition filed against
European patent No. 2440260 pursuant to Article
101(2) EPC.**

Composition of the Board:

Chairman M. Harrison
Members: M. Hannam
E. Kossonakou

Summary of Facts and Submissions

I. An appeal was filed by the appellant (opponent) against the decision of the opposition division rejecting the opposition to European patent No. 2 440 260. It requested that the decision be set aside and the patent be revoked.

II. In its letter of response, the respondent (patent proprietor) requested that the appeal be dismissed, alternatively that the patent be maintained according to an auxiliary request.

III. The following documents, referred to by the appellant in its grounds of appeal, are relevant to the present decision:

E1 US-A-2009/0012441

E2 WO-A-2010/141271

E3 US-A-2008/0215020

E8 'Use of a hydrogel dressing for management of a painful leg ulcer', Wound Care, June 2006, S12 - S17

E9 'Gas permeation through water-swollen hydrogel members', Journal of Membrane Science 310 (2008), 66-75

E10 US-A-5 076 265

IV. The Board issued a summons to oral proceedings and a subsequent communication containing its provisional opinion, in which it indicated *inter alia* that the ground for opposition under Article 100(c) EPC appeared to prejudice maintenance of the patent as granted. It furthermore indicated that the objections under Article 100(b) EPC seemed unpersuasive and that the subject-matter of claim 1 appeared novel over E1 and E2.

V. With letter of 24 December 2019 the respondent submitted new auxiliary requests 1, 2, 3 and 5, renumbering the sole auxiliary request previously on file as auxiliary request 4.

VI. Oral proceedings were held before the Board on 14 January 2020, during which the respondent withdrew the main request and auxiliary requests 1, 2, 4 and 5. It also made previous auxiliary request 3 its main request.

VII. The requests of the parties were thus as follows:

The appellant requested that the decision under appeal be set aside and the European patent be revoked. The respondent requested that the patent be maintained according to the main request.

VIII. Claim 1 of the main request reads as follows:

"A wound dressing comprising:
an air-impermeable backing sheet having an aperture for attachment of a suction element;
an air-permeable screen layer on a wound facing side of the backing sheet; and
an air-impermeable, continuous hydrogel layer with no open area, extending across a wound facing side of said screen layer, and bonded in substantially airtight fashion to a periphery of said backing sheet around said screen layer, wherein the hydrogel layer has a thickness of 0.5mm to 20mm."

IX. The appellant's arguments may be summarised as follows:

The new main request should not be admitted. It was filed very late with the objections of added subject-

matter not having changed since the very start of the opposition. Also, the subject-matter of claim 1 still did not meet the requirement of Article 123(2) EPC. The paragraph on page 6, lines 17 to 23, from which the features 'bonded' and the 'hydrogel layer thickness' were taken for inclusion in claim 1, additionally disclosed that the bond between the hydrogel layer and the backing sheet periphery formed an airtight barrier between the wound and the suction aperture. The claim also lacked clarity due to the omission of this feature as had already been addressed with previous requests. Claim 1 had also been amended so as to extend the protection conferred since the introduction of the term 'bonded' required an adhesive element which had previously not been necessary due to the hydrogel layer and the backing layer as granted having simply been 'joined', such that a claim of contributory infringement against a supplier of adhesive for the wound dressing was now possible.

The invention could also not be carried out by the skilled person due to the terms 'air-impermeable' and 'no open-area' in relation to the hydrogel layer. Hydrogels always displayed a degree of air permeability (e.g. see E9) so the skilled person would not know how to interpret the claimed 'air-impermeable hydrogel layer'. Hydrogels also intrinsically had open pores so the skilled person would not know what limitation the feature 'no open area' introduced into claim 1.

The subject-matter of claim 1 lacked novelty over E1 and E2. E1 disclosed a wound liner with hydrogel coated on it which would be air-impermeable. The hydrogel layer thickness was also implicitly at least 0.5mm, as was evident from for example E10 which indicated that a hydrogel sheet would have a thickness of between

between 2 and 10mm. E2 disclosed a hydrogel sheet 356 in Fig. 4A which, similarly to E1, implicitly had a thickness of at least 0.5mm, also in order to be manipulated during manufacture. The hydrogel layer would implicitly also be air-impermeable if that were the case for the claimed hydrogel.

The subject-matter of claim 1 also lacked an inventive step starting from E8 in combination with the common general knowledge of the skilled person and a general reference to the prior art regarding low pressure removal of wound exudate. E8 concerned the use of hydrogel sheets for exudate removal from wounds. E8 failed to disclose the following features of claim 1:

- the backing sheet;
- the hydrogel bonded in an airtight fashion to the backing sheet;
- the air-impermeable nature of the hydrogel layer and its thickness.

In order to remove large amounts of wound exudate, an obvious set of modifications to E8 were available to the skilled person from their common general knowledge. It was implicit that hydrogel pores were air-impermeable since this nature of hydrogel was given in the patent. If wishing to extract exudate via suction, an air-impermeable backing sheet having to be bonded to the hydrogel layer was immediately evident as being a requirement. Positioning the suction aperture in an appropriate position would also be within the common general knowledge of the skilled person. The claimed hydrogel layer thickness was also obvious to enable manipulation of the layer without damage. As a result, the skilled person would carry out these modifications to E8 without exercising an inventive step.

The checking of any amendments made by the respondent

to bring the description into conformity with the new claims would require not inconsiderable time. Remittal for adaptation of the description was thus appropriate.

X. The respondent's arguments may be summarised as follows:

The (now) main request should be admitted. It was filed at the earliest possible opportunity after the Board's preliminary opinion had clarified the objections of added subject-matter against claim 1 as granted. In regard to the RPBA 2020, it might be discussed whether Article 13(1) RPBA 2020 applied in addition to Article 13 RPBA 2007. The amendments made were self-explanatory with respect to overcoming the Article 100(c) EPC objections and used clear language lacking any ambiguity; the appellant had also not raised any lack of clarity objection to the terminology introduced, which was notably plain language, so that a further statement from the respondent demonstrating the lack of any further objection under Article 13(1) RPBA 2020 would have been, in this special case where this was already apparent, superfluous. There was no requirement to include the feature of the airtight barrier between the wound and the suction aperture as this was already present in claim 1 upon sensible reading because it defined that the hydrogel layer was bonded in substantially airtight fashion. Additionally the air-impermeable backing sheet was defined as having an attachment for a suction element, which would also be nonsensical if the barrier were not airtight. The scope of protection as a result of the amendment from a 'joined' to a 'bonded' hydrogel layer was not extended; any argument of contributory infringement could equally have been made against the granted claim. Through limiting to a single new request, *prima facie*

overcoming the objections to granted claim 1 and not giving rise to further objections, the procedural economy had been improved.

The terms 'air-impermeable' and 'no open area' in relation to the hydrogel layer did not prohibit the skilled person from carrying out the invention. Hydrogels, despite generally having micropores in their structure, could be air-impermeable if chosen to be a suitable thickness and devoid of perforations, which was the case in the claimed invention.

The subject-matter of claim 1 was novel. E1 failed to disclose an air-impermeable continuous hydrogel layer with no open area and the hydrogel layer of a certain thickness being bonded in an airtight manner to the backing sheet. E2 *inter alia* failed to disclose the claimed thickness of the hydrogel layer. E10 was not mentioned in either E1 or E2, so that the appellant's reference to this to derive a thickness was mere speculation.

The subject-matter of claim 1 also involved an inventive step. Starting from E8, this solely disclosed the claimed wound dressing comprising a hydrogel layer and a screen layer. The plurality of features differentiating the subject-matter of claim 1 from E8 could not be reached from common general knowledge and a general reference to the cited prior art, without the exercise of an inventive step.

The adaptation of the description during the oral proceedings would avoid delay.

Reasons for the Decision

1. *Admittance of the main request*

1.1 The main request was originally filed as auxiliary request 3 in response to the preliminary opinion of the Board. Its submission at that stage constitutes an amendment of the party's case. Its admittance is thus at the discretion of the Board under Article 13(1) of the Revised Rules of Procedure of the Boards of Appeal (RPBA 2020) and Article 13 RPBA 2007.

1.1.1 The first issue in the present case was for the Board to establish that Article 13(1) RPBA 2020 was indeed applicable in addition to Article 13 RPBA 2007. Although the discussion of this matter during the oral proceedings was not controversial, the Board considers it useful to add some explanatory remarks on this issue due to the very recent entry into force of RPBA 2020.

1.1.2 Article 25(1) RPBA 2020 states that 'the revised version (*i.e.* RPBA 2020) shall apply to any appeal pending on...the date of the entry into force, subject to the following paragraphs'.

The transitional provision of Article 25(3) RPBA 2020 results in the fact that Article 13(2) RPBA 2020 does not apply in the present case, since the summons to oral proceedings was notified before the date of entry into force of the revised rules. Instead it is stated that Article 13 RPBA 2007 shall continue to apply.

Since no exclusion or transitional provision exists concerning Article 13(1) RPBA 2020, it therefore applies to this case (see e.g. CA/3/19, page 62, explanatory remarks to Article 25(2) RPBA 2020).

This results in both Article 13 RPBA 2007, including its particular version of Article 13(1), and Article 13(1) RPBA 2020 being applicable at the same time.

- 1.1.3 The Board cannot see any legal difficulty in such application, or that this might have been contrary to the intention of the legislator.

Additionally, no contradiction can be found in the wording of Article 13(1) RPBA 2020 compared to Article 13 RPBA 2007. Indeed, when compared, the revised wording in Article 13(1) RPBA 2020 is more detailed in listing out the requirements on the party making an amendment to its appeal case and the criteria to be used by the Board when exercising its discretion; the difference however merely reflects much of the case law developed under Article 13(1) RPBA 2007.

The revised provision *inter alia* requires the party (in this case the respondent) to provide reasons for submitting the amendment at this stage of the appeal proceedings. In exercising its discretion, the Board is to also consider whether the party has demonstrated that the amendment *prima facie* overcomes the issues raised by the appellant or by the Board and does not give rise to new objections. These are criteria and requirements that distill and crystallise the relevant case law since 2007 without altering the ambit of the provision.

- 1.2 In regard to the reasons for the request to have been submitted at this (late) stage of the appeal proceedings (Article 13(1) RPBA 2020, 3rd sentence) and the party's justification (Article 13(1) RPBA 2020, 1st sentence), and despite the appellant's objections

thereto, it must first be noted that the respondent's argument that the Board's preliminary opinion went against all findings regarding Article 123(2) EPC to date is in itself not a persuasive reason for not having filed an appropriate fall-back position with its response to the grounds of appeal.

- 1.3 An assumption by a party that a Board's findings will not differ from those of the opposition division, even with no substantial change to the arguments having been presented, and responding to this objection by simply filing arguments without adopting a fall-back position, may be open to risk in certain cases, as the Board is evidently not prevented from reaching a different conclusion on the same issue. Nonetheless, in the present case the Board's communication did crystallise for the first time what the Board itself had deduced to be the relevant elements of the appellant's lengthy arguments concerning its objections under Article 100(c) EPC. Although the appellant stated that its set of arguments was always supposed to have been understood in the way the Board had deduced, the Board's statement (in this context, and despite what the opposition division had concluded) that the claimed term 'joined' did in fact appear to be of broader scope than the disclosed term 'bonded', could be understood as having identified the salient argument for the first time. It is thus accepted by the Board that the respondent's first opportunity to reply to this specific argument was after receiving the Board's preliminary opinion. It is thus in the context of the very special circumstances of this particular case, that the respondent's reasons for submitting the (now) main request at such a late stage of the appeal proceedings can be accepted.

- 1.4 It is also noted that the amended requests, which included the (now) main request as auxiliary request 3, were submitted on the day the Board's preliminary opinion was received by the respondent. It had thus responded without delay to the objections once these had been identified. It is furthermore noted that the respondent, after discussing the added subject-matter objections to claim 1 as granted (see minutes of oral proceedings) withdrew all its auxiliary requests save for the (now) main request, such that the respondent is found to have behaved in a procedurally economic fashion.

- 1.5 As regards the exercise of the Board's discretion concerning whether the respondent has demonstrated that the amendment *prima facie* overcomes the issues raised by the appellant or by the Board and does not give rise to new objections (as stated in Article 13(1) RPBA 2020 last sentence), this has also been taken into account as follows.
 - 1.5.1 The main request directly addressed the objections of added subject-matter presented in writing by the appellant against claim 1 as granted. The amendments to replace the word 'joined' with 'bonded' and to include the hydrogel layer thickness of 0.5mm to 20mm in claim 1 were, despite the somewhat diffuse arguments around this, those features identified by the appellant as missing in claim 1 as granted and giving rise to its objections under Article 100(c) EPC against the subject-matter of claim 1 as granted.

 - 1.5.2 In its written response, the respondent also stated from where the amendment was taken (Article 12(4) RPBA 2020, 2nd sentence), it being noted that the introduced terminology is an explicit recitation of the language

used. Demonstration of how these amendments overcame the objection, as argued by the respondent, were thus, in this particular case where the lacking features as such had at least already been identified by the appellant, self evident in the amendments made. The amendments were also not complex (Article 13(1) RPBA 2007; Article 13(1) RPBA 2020 2nd sentence reference to Article 12(4) RPBA 2020) in any sense, nor was this argued to be the case.

1.5.3 The appellant's objection under Article 123(2) EPC that the feature 'an airtight barrier between the wound and the suction aperture in the backing sheet' also needed to be included in claim 1 to make the amendment *prima facie* allowable, is not accepted. This feature would be understood by the skilled person as already included in claim 1 by way of the requirement for a substantially airtight bond between the hydrogel layer and the backing sheet. In particular, this feature would be technically nonsensical in context if the backing sheet did not provide an airtight barrier between the wound and the suction aperture since the airtight bond between the hydrogel layer and the backing sheet would then be functionally pointless, air being able to ingress to the inside of the wound dressing by way of an opening between the backing sheet and the hydrogel layer (which the appellant had explained using the analogy of a sheet of paper incompletely covering the lip of a glass). The appellant's objection under Article 123(2) EPC to the subject-matter of claim 1 was thus not persuasive.

1.5.4 The appellant's further contention that claim 1 had been amended so as to extend the protection conferred, contrary to Article 123(3) EPC, is also not accepted. As granted, the hydrogel layer was 'joined' to the

backing sheet in an airtight fashion, which terminology was of broader scope than the amendment to 'bonded'. Even considering the issue of possible contributory infringement whereby the term 'bonded' encompassed the use of an adhesive, this situation was unchanged from the possibility of adhesive also being used in the as granted 'joined' wording. The objection under Article 123(3) EPC is thus not persuasive.

1.5.5 Claim 1 of this request was also clear (Article 84 EPC), with the terms 'bonded' and 'layer thickness' having an unambiguous meaning to the skilled person. This was also not contested by the appellant, its sole objection under Article 84 EPC being that without claim 1 defining that an airtight barrier existed between the wound and the suction aperture, the function of the wound dressing to allow suction to be applied to a wound could not be understood. Such an argument, even if it were substantively agreed with by the Board, which it is not, has anyway not introduced a lack of clarity as a result of the amendment made to claim 1 as granted; G3/14 (see catchword) clearly prohibits the examination of clarity (Article 84 EPC) under such conditions. Claim 1 thus also meets the clarity requirement of Article 84 EPC as no lack of clarity has been introduced by the amendment.

1.6 In view of all the above considerations, the Board sees the very special circumstances of the present case as allowing it to exercise its discretion in admitting the main request into the appeal proceedings.

2. *Article 83 EPC*

The invention of claim 1 is disclosed in a manner sufficiently clear and complete for it to be carried

out by a person skilled in the art.

2.1 The appellant's contention that the skilled person would not know how to interpret the term 'air-impermeable' in relation to hydrogels is not accepted. E9, referred to by the appellant in its submission, relates to thin hydrogel membranes (20-30 μ m; see page 68) at significant pressures (e.g. 500kPa; see page 70) and under these specific conditions it can be accepted that a hydrogel would in fact be gas-permeable. However, the hydrogel of the present invention ranges in thickness from 0.5mm to 20mm and would be subject to differential pressures over it at most of 0.95 bar (\approx 95kPa; see [0041] of the patent) under which conditions the skilled person would understand a hydrogel layer to be air-impermeable; no evidence to the contrary was provided by the appellant. The appellant's assertion that air-(im)permeability is a relative term, and the fact that the patent did not define the level of air-(im)permeability, does not affect the Board's finding. At best, this objection relates to the breadth of the terminology used (i.e. a matter of clarity as such), rather than anything hindering the skilled person from carrying out the invention. Thus in as far as the objection can be understood to relate to the requirements of Article 83 EPC, in the context of wound dressings, as per claim 1, a skilled person would understand what air-(im)permeable means when recognising that hydrogels certainly of the order of 0.5 mm and above are already considered impermeable unless perforated (e.g. mechanically) in some way. Application of a vacuum to a wound dressing, via the aperture for attachment of a suction element (as defined in claim 1), would certainly be instructive to a skilled person of the

level of pressure to be considered (see also above).

2.2 The expression 'no open-area' is also not seen to be a hindrance to carrying out the invention. Both parties concurred that the skilled person would understand a hydrogel layer to include certain pores in its structure. However, such pores would not be of a dimension significant enough to render a hydrogel layer of at least 0.5mm thickness air-permeable. Apertures rendering a hydrogel layer air-permeable are disclosed, for example, in Fig. 4B of E2. On page 13, lines 17 to 19, these 'apertures' are dimensioned at 1mm to 10mm which would evidently provide an air-permeable hydrogel layer. The 'no open-area' limitation in claim 1 is clearly understood as defining that no such apertures or discontinuities were present in the hydrogel layer which, if present, would render the layer air-permeable.

2.3 The objections under Article 83 EPC do not therefore hinder the skilled person from carrying out the invention.

3. *Novelty (Article 54 EPC)*

The subject-matter of claim 1 is novel over the cited prior art.

3.1 As regards E1, this document fails to disclose the following features of claim 1:

- an air-impermeable continuous hydrogel layer with no open area;
- the hydrogel layer being bonded in an airtight manner to the backing sheet; and
- the claimed hydrogel layer thickness of 0.5mm to

20mm.

- 3.1.1 The appellant's argument that the air-impermeable hydrogel layer was anticipated by the material encouraging directional flow on the wound liner 102 is not accepted. The wound liner 102 of E1 is disclosed typically to be porous (achieved through small perforations - see [0022]) in order to create sub-atmospheric pressure at the wound. Since sub-atmospheric wound treatment is at the heart of the E1 wound dressing (see [0002]), any hydrogel provided on the wound liner 102 to encourage directional flow of wound fluid would necessarily also be air-permeable. Providing a hydrogel which is air-impermeable, as defined in claim 1, on the wound liner would negate the entire function of the treatment of E1 and render it unable to provide sub-atmospheric treatment of the wound. Thus, the Board can find no explicit or implicit disclosure of the air-impermeable hydrogel layer as claimed.
- 3.1.2 Nothing in E1 suggests that the hydrogel coated on the wound liner is bonded in an airtight manner to the backing sheet. Indeed, referring to Fig. 1, the hydrogel must be located on the wound liner 102 such that it contacts the wound bed. Even if the hydrogel coating were to extend to the ends of the wound liner (depicted on the skin beside the wound), which is anyway not disclosed, the hydrogel would still not be in contact with the backing sheet 108 not least due both to the interposition of the depicted adhesive 106 between the backing sheet 108 and the wound liner 102, and that the hydrogel would be coated on the side of the wound liner 102 distant from the backing sheet. E1 thus fails to disclose a hydrogel layer in contact with the backing sheet, let alone one being bonded in an

airtight fashion therewith.

- 3.1.3 Contrary to the appellant's argument, E1 also fails to disclose the hydrogel layer having the claimed thickness. Paragraph [0023] of E1 discloses the hydrogel being bonded or coated on the wound liner 102 yet provides absolutely no indication of a thickness. Even if the hydrogel were realised as a discrete layer in E1 (again, also not disclosed), nothing suggests it therefore unambiguously having a thickness of at least 0.5mm. The appellant's suggestion that the layer must implicitly have a thickness of a sheet of paper in order to be separately manipulated in a wound dressing construction would also not anticipate the claimed thickness, even if such manipulation issues had been mentioned in E1; a piece of paper of 80gsm has a thickness of less than 0.1mm i.e. a factor of 5 thinner than the minimum value of the claimed thickness range.
- 3.1.4 The appellant's further reference to E10, in which a hydrogel layer thickness of 2 to 10mm was exemplified, does not provide a disclosure that the hydrogel layer in E1 too must unambiguously be of this order. Firstly, E1 fails to make reference to E10. Secondly E1 fails to indicate that a 'sheet-like' hydrogel was appropriate for the coating of the disclosed wound liner, such that the skilled person would not see the disclosure of hydrogel sheet thickness in E10 as being of any relevance to E1.
- 3.1.5 The subject-matter of claim 1 is thus novel over E1.
- 3.2 As regards E2, this is a document considered as prior art under Article 54(3) EPC. This document also fails at least to disclose the claimed thickness of the

hydrogel layer.

- 3.2.1 In the Fig. 1 embodiment of E2, the hydrogel is disclosed to be a coating 128 on the struts 124 of the manifold member. The method of coating the hydrogel on the struts is disclosed as being by immersion into liquefied hydrogel, yet nowhere is any indication given as to what thickness of coating is achieved. It is technically reasonable for such a hydrogel coating, functioning as a storage member for wound exudate, to have a thickness less than 0.5mm, such that the claimed thickness is not unambiguously known from this embodiment.
- 3.2.2 As regards the Figs. 4A to 4C embodiment of E2, a hydrogel sheet 356 is disclosed (see [0048] - [0049]), yet again absolutely no indication is provided of its thickness. The appellant's contention that it must be at least 0.5mm thick in order for the layer to be separately manipulated is not accepted. As indicated in 3.1.3 above, a layer enabling such manipulation, even if disclosed as needing to meet this requirement, can reasonably have significantly less thickness than 0.5mm. The mention of a 'sheet-like' hydrogel in E10 of 2 to 10mm thickness also fails to provide an unambiguous disclosure that the hydrogel of E2 must be of similar thickness (see point 3.1.4 above).
- 3.2.3 The subject-matter of claim 1 is thus novel over E2 at least due to the hydrogel layer thickness not being unambiguously disclosed therein.
- 3.3 No further documents were cited against the novelty of the subject-matter of claim 1.

4. *Inventive step*

The subject-matter of claim 1 involves an inventive step over the cited prior art.

4.1 Starting from E8, proposed by the appellant as the most promising starting point for an inventive step attack, this discloses a gas permeable hydrogel layer dressing (ActiFormCool) usually placed directly on the wound surface for wound exudate absorption and retention (see page S14). Over this dressing, an absorbent pad may be placed. E8 thus fails to disclose the following features of claim 1:

- an air-impermeable backing sheet having an aperture for attachment of a suction element;
- an air-impermeable hydrogel layer;
- the hydrogel being joined in an airtight fashion to the backing sheet; and
- the hydrogel layer having a thickness of 0.5mm to 20mm.

4.2 Based on these differentiating features, the objective technical problem to be solved may be seen as 'to provide a wound dressing allowing effective wound exudate management'.

4.3 The skilled person's common general knowledge and a general reference to the cited art regarding low pressure removal of exudate fails to provide the hint as to how to modify E8 in order to reach the claimed subject-matter while solving the objective technical problem.

4.4 As for providing an air-impermeable backing sheet with a suction aperture, the cited prior art does disclose

such arrangements although generally in applications where low pressure at the wound bed is required in order to remove exudate from the wound (see e.g. E3, para. [0023]; Fig. 1). Taking E3 as an example of the typical low pressure wound treatment in the cited prior art to which the appellant made only a general reference, the wound dressing of E3 does employ an air-impermeable backing sheet (60), yet fails to clearly disclose an aperture therein for attachment of the suction element, the drains (30, 50) of E3 being connected to a sump (and further to a vacuum pump) without any clear aperture in the backing sheet for attachment of the drains to the sump (see Fig. 1). It is further noted that, wishing to apply a low pressure to the wound bed, the hydrogel layer in contact with the wound bed must be air-permeable, this being contrary to the claimed requirement of the hydrogel layer being air-impermeable. Consequently, even if the drain arrangement of E3 were adapted to pass through the back sheet and be used to modify the dressing of E8, the hydrogel layer would still be air-permeable rather than air-impermeable as claimed. Nothing in E3 would motivate the skilled person to make such a modification to provide an air-impermeable hydrogel layer. The same problem exists with the general reference made by the appellant to the further cited art since, notably also not counter-argued by the appellant, these documents would not lead the skilled person to providing an air-impermeable hydrogel layer in combination with a suction aperture arrangement in the wound dressing.

4.5 The appellant's argument that the skilled person would appropriately apply suction to the wound dressing of E8 using their common general knowledge does not make the specific location claimed obvious. A backing sheet, let

alone an air-impermeable backing sheet, is not included in the wound dressing of E8. Providing a suction aperture to the dressing of E8, already modified to include a backing sheet, would thus already involve two not insignificant modifications. With the objective problem being to improve wound exudate management, the prior art in this area for example seems to indicate a different option, namely applying suction in direct proximity of the wound bed rather than simply at the backing sheet, as claimed. The claimed location of the aperture for attachment of a suction element would therefore not be obvious to the skilled person in view of their common general knowledge.

4.6 The appellant's suggestion that hydrogel pores could also be regarded as air-impermeable since otherwise the claimed hydrogel could not be air-impermeable does not address the finding that E8 discloses solely a gas-permeable hydrogel. As already indicated in point 2.1, hydrogel pores are not decisive as to whether a hydrogel is gas-permeable or not, rather this depends upon the layer thickness and the possible presence of perforations in the layer. Thus, the statement that the hydrogel layer of E8 is gas-permeable (E8, S14, right column) can not simply be disregarded with a reference to the hydrogel layer as defined in present claim 1, in which its air-impermeable nature is achieved by way of a minimum thickness of 0.5mm and a lack of open areas. Such features are notably absent in the wound dressing of E8.

4.7 Therefore, starting from E8 and wishing to solve the posed objective technical problem, the skilled person would be unable to reach the claimed subject-matter without exercise of an inventive step.

4.8 In the absence of further attacks against the presence of an inventive step, the Board finds that the subject-matter of claim 1 involves an inventive step over the cited prior art and the arguments forwarded by the appellant in this regard. The requirement of Article 56 EPC is therefore fulfilled. The main request is thus allowable.

5. Regarding adaptation of the description to the new claims, the respondent's preference to perform this at oral proceedings was not followed. The required amendments to the description were seen to be of not inconsiderable scope and the appellant indicated its need to fully consider any amendments made without being under time pressure. Under these circumstances, the Board thus decided to remit the case to the opposition division under Article 111(1) EPC for the description to be adapted to the claims found allowable. In regard to Article 11 RPBA 2020, it is noted that remittal of a case for adaptation of the description is not a remittal for "further prosecution" (this also being clear from e.g. CA/3/19, page 30, explanatory remarks to Article 11 RPBA 2020, second paragraph), such that no "special reasons" need to be present.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division with the order to maintain the patent on the basis of the claims of the main request, filed as third auxiliary request with the letter of 24 December 2019, and a description to be adapted thereto.

The Registrar:

The Chairman:



M. H. A. Patin

M. Harrison

Decision electronically authenticated