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**Datasheet for the decision
of 12 January 2023**

Case Number: T 0889/18 - 3.2.06

Application Number: 10169545.0

Publication Number: 2263627

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A61F13/536, A61F13/537,
A61F13/15

Language of the proceedings: EN

Title of invention:

Absorbent article having nonwoven lateral zones

Patent Proprietor:

The Procter & Gamble Company

Opponent:

Kimberly-Clark Worldwide, Inc.

Headword:

Relevant legal provisions:

EPC Art. 100(a), 100(b)
EPC R. 111(1), 116(1)
RPBA Art. 12(4)

Keyword:

Grounds for opposition - insufficiency of disclosure (no) -
lack of novelty (no)
Late-filed document - admitted (yes)
Remittal to the department of first instance
Remittal - (yes)

Decisions cited:

Catchword:



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Case Number: T 0889/18 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 12 January 2023

Appellant: Kimberly-Clark Worldwide, Inc.
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 31 January 2018
rejecting the opposition filed against European
patent No. 2263627 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman M. Harrison
Members: M. Hannam
J. Hoppe

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. 2 263 627. It requested that the decision under appeal be set aside and the patent be revoked.
- II. In its reply to the appeal, the respondent (patent proprietor) requested that the appeal be dismissed or, in the alternative, that the patent be maintained according to one of auxiliary requests 1 to 9.
- III. The following documents are relevant to the present decision:
- | | |
|----|----------------|
| D1 | EP-A-1 108 406 |
| D2 | US-A-5 609 588 |
| D3 | US-A-6 117 523 |
| D4 | US-A-5 961 505 |
| D8 | EP-A-0 432 882 |
- 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(b) EPC did not prejudice maintenance of the patent as granted. It further indicated that the subject-matter of claim 1 appeared novel but appeared not to involve an inventive step.
- V. In a letter of 27 September 2021 the respondent filed additional auxiliary requests 1a, 6a, 7a, 8a and 9a, requesting remittal of the case to the opposition division should the main request not be allowed. In a

further letter dated 16 December 2022, a replacement version of auxiliary request 9a was filed.

VI. With letter of 19 December 2022 the appellant indicated that it would not participate in the oral proceedings scheduled for 12 January 2023.

VII. Oral proceedings by videoconference were held before the Board on 12 January 2023 during which the respondent additionally requested the remittal of the case to the opposition division should D8 be admitted. At the close of the oral proceedings, the parties' requests were as follows:

The appellant requested (in writing) that the decision under appeal be set aside and the European patent be revoked.

The respondent (patent proprietor) requested that the appeal be dismissed or, as an auxiliary measure, to remit the case if D8 were to be admitted, or to remit the case if the main request was not allowed, or that the patent be maintained in amended form based on one of auxiliary requests 1, 1a, 2, 3, 4, 5, 6, 6a, 7, 7a, 8, 8a, 9, 9a, in the given order, whereby auxiliary requests 1 to 9 were filed with letter dated 15 October 2018, auxiliary requests 1a and 6a to 8a were filed with letter dated 27 September 2021 and auxiliary request 9a was filed with letter dated 16 December 2022.

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

"An absorbent hygiene article (10) for collecting

bodily fluid, said article comprising a body-facing surface (26), a garment-facing surface (28) and an absorbent structure (15) situated between said body-facing surface and said garment-facing surface, wherein said body-facing surface comprises:

- i) a central fluid acquisition zone (121),
- ii) a first hydrophobic lateral zone (161) situated on one side of the central fluid acquisition zone and,
- iii) a second hydrophobic lateral zone (181) situated on the opposite side of the central fluid acquisition zone,

wherein said first and second hydrophobic lateral zones (161, 181) are made of a nonwoven material (16, 18), and said first and second lateral zones are at least partially situated above the absorbent structure (15) and

wherein the absorbent structure comprises a gradient core."

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

Article 100(b) EPC

The skilled person would be unable to carry out the claimed invention. The test procedure for determining the hydrophobicity of the nonwoven substrate would not provide repeatable results. This was because para. [0087] disclosed the suggested procedure for measuring hydrophobicity to be "normally" carried out at 23 degC, the word "normally" introducing ambiguity.

Novelty

D1

The subject-matter of claim 1 lacked novelty over D1. Polyethylene was naturally hydrophobic and, lacking an indication that the material had been treated to impart

some hydrophilicity, had to be seen as hydrophobic.

D2

D2 was also prejudicial to novelty. The first and second lateral zones 69 were not disclosed to have undergone any surfactant treatment and thus had to be hydrophobic. In the Fig. 6 embodiment, the absorbent means 60 was constructed of a laminate formed of a hydrocolloid material positioned within a folded hydrophilic material which had to be seen as forming a gradient core.

D3

The subject-matter of claim 1 also lacked novelty over D3. The apertured film layer 80 located between the nonwoven strips 74, 76 was disclosed to be surfactant treated to make it more hydrophilic such that the nonwoven strips themselves had to be hydrophobic.

D4

D4 was also prejudicial to novelty. In view of material 3 in table 3 in col. 9 of D4, polypropylene which was 75% hydrophobic and 25% hydrophilic would exhibit hydrophobic properties overall.

Inventive step

Any of D1 to D4 could be taken as the starting point for an inventive step attack. If the problem to be solved were seen as being to reduce re-wet in the side regions of the pantiliner, the skilled person would modify any of D1 to D4 by making the lateral zones hydrophobic, thus reaching the claimed subject-matter while solving the posed problem without exercising an inventive step. It was common general knowledge that a hydrophobic topsheet would reduce re-wet. In D1 to D3 the central region of the pantiliner had been treated

with surfactant to render it more hydrophilic; the skilled person would thus understand that the absence of surfactant treatment in the side regions was intentional and it would be obvious not to incorporate any such treatment in this area.

As to the admittance of D8, the preliminary opinion of the opposition division had been that D1 to D4 disclosed hydrophobic lateral zones which opinion was changed at oral proceedings. The first opportunity to file a document proving that naturally hydrophobic materials would reduce re-wet was therefore on appeal. D8 should thus not be excluded from the proceedings. As to the relevance of D8, it proved that hydrophobic materials reduced re-wet. It described treating the central liquid receiving region of an article with surfactant in order to facilitate the passage of body fluids into the absorbent layer of the article. D8 additionally expressly disclosed that liquid was prevented from passing back through the porous layer over any portion not treated with the surface agent. Thus, starting from any of D1 to D4, D8 taught the skilled person that the nonwoven side regions would inhibit re-wet if provided in the naturally hydrophobic form of the materials described. No unexpected technical effect arose.

X. The respondent's arguments relevant to the present decision may be summarised as follows:

Novelty

D1

The subject-matter of claim 1 was novel over D1. As regards the hydrophobicity of the lateral zones of D1, the material of these was nonwoven spunbonded polyethylene (see para. [0101]) yet that did not

unambiguously disclose that the lateral zones would therefore be hydrophobic. As regards the presence of a gradient core in D1, the Fig. 3 embodiment of the pantiliner had a single layer core with no indication of any anisotropy within it, such that a gradient core could not be recognised.

D2

D2 was not prejudicial to the novelty of claim 1. In addition to the lateral zones not being hydrophobic, D2 failed to disclose the lateral zones being partially situated above the absorbent structure. Fig. 6 was to be seen as a schematic drawing and no technical significance was placed on the overlap of the lateral zone with the absorbent core. The drafter of the figure was rather wishing to exaggerate the overlap between the lateral zones 69 and the topsheet 67 to clearly depict the construction adhesive 65 joining the two layers. As regards the 'gradient core', this was a term understood in the art to imply a gradual, non stepwise change in properties of the core in the vertical direction. The skilled person would certainly interpret the term in this way.

D3 and D4

The subject-matter of claim 1 was also novel over both D1 and D4 as these documents similarly failed to unambiguously disclose the lateral zones of the absorbent article being hydrophobic.

Inventive step

Starting from any of D2 to D4 which failed to disclose the hydrophobic lateral zones of the pantiliner, the problem to be solved could be seen as how to reduce re-wet risk while not significantly impacting liquid acquisition performance. There was no link between

hydrophobicity and re-wet disclosed in any of D1 to D4 and this was also not common general knowledge. Even if the skilled person were to see hydrophobic lateral zones as reducing re-wet, this would also limit acquisition of fluids which ran counter to the function of a topsheet.

D8 should not be admitted. Despite the opposition division's preliminary opinion, the proprietor had always argued that D1 to D4 failed to disclose hydrophobic lateral zones such that D8 should have been filed shortly after the proprietor's response to the notice of opposition. At the latest, D8 should have been filed within the Rule 116(1) EPC time limit. As regards the relevance of D8, this disclosed a single layer topsheet rather than the hybrid topsheets of D1 to D4 and so would not be considered by the skilled person as providing a teaching of how D1 to D4 could be modified. D8 also failed to teach making lateral zones hydrophobic. In addition, the lateral zones of D1 to D4 had a liquid acquisition function and so would not be made hydrophobic by the skilled person even in the light of the problem to be solved. They were also added there to provide a soft layer against the skin.

Remittal

If D8 were admitted, the case should be remitted to the opposition division for further prosecution to allow the respondent to fully consider its options and develop its arguments in the light of D8.

Reasons for the Decision

1. *Article 100(b) EPC*

1.1 The ground for opposition under Article 100(b) EPC is not prejudicial to maintenance of the patent as granted.

1.2 The appellant's contention that the test procedure for determining the hydrophobicity of the nonwoven substrate would not provide repeatable results due to the temperature at which it should be carried out being undefined is not accepted. No evidence has been provided that the measured contact angle in the hydrophobicity test procedure defined in paras. [0087 - 0088] was strongly dependent on temperature. A specific temperature of 'normally at room temperature (23°C)' at which to carry out the test is provided, the qualifier 'normally' indicating to the skilled person that temperature would not make a significant difference to the tested angle (and thus hydrophobicity measured). Even if a significant difference in contact angle were measured dependent upon temperature, the skilled person would simply revert to precisely that temperature suggested in the test procedure disclosed in the patent, i.e. 23°C.

1.3 Since the above was the only objection under Article 100(b) EPC, the Board finds that the skilled person has sufficiently clear and complete information to carry out the invention claimed, such that the ground for opposition under Article 100(b) EPC is not prejudicial to maintenance of the patent as granted.

2. *Article 100(a) EPC in combination with Article 54 EPC*

The ground for opposition under Article 100(a) EPC with regard to novelty is not prejudicial to maintenance of the patent as granted.

2.1 D1

2.1.1 The following features of claim 1 are known from D1 (see Fig. 3 embodiment and para. [0101]):

An absorbent hygiene article (see para. [0001]) for collecting bodily fluid, said article comprising a body-facing surface (topsheet 3), a garment-facing surface (backsheet 6) and an absorbent structure (absorbent core 5) situated between said body-facing surface and said garment-facing surface, wherein said body-facing surface comprises:

- i) a central fluid acquisition zone (20),
- ii) a first lateral zone (21) situated on one side of the central fluid acquisition zone (20) and,
- iii) a second lateral zone (22) situated on the opposite side of the central fluid acquisition zone (20),

and said first and second lateral zones (21, 22) are at least partially situated above (see Fig. 3) the absorbent structure (5).

2.1.2 The respondent also contended in writing (in its reply of 15 October 2018 item "(13)" second bullet point), that the first and second lateral zones (21, 22) being made of a nonwoven material was not known from D1, albeit in item "(17)" of that reply it also stated that the two strips 21 and 22 were of nowwoven material and indeed that they were "nonwoven strips 21, 22." Since it is nowhere explained how these might not be nonwoven strips, the Board can only understand the respondent's argument to mean that the strips are not disclosed as being hydrophobic and nonwoven in the same embodiment.

This does not however need to be decided as such, since as will be seen below the Board concludes that inter alia the nonwoven strips 21, 22 are indeed not disclosed as being hydrophobic.

2.1.3 D1 thus at least fails to disclose:

- The first and second lateral zones of a nonwoven material are hydrophobic;
- The absorbent structure comprises a gradient core

2.1.4 As regards the hydrophobicity of the lateral zones of D1, it is noted that the material of these is stated to be nonwoven spunbonded polyethylene (see para. [0101]). The appellant's argument that polyethylene is naturally hydrophobic and, lacking a treatment to impart some hydrophilicity, must be seen as hydrophobic, is not accepted. Topsheets of absorbent articles are typically hydrophilic since their function is to allow liquids to access the underlying absorbent core. Para. [0041] of D1 underlines that the disclosed topsheet can be hydrophilic. Para. [0046] further discloses that the lateral strips 21, 22 of nonwoven material can be placed on top of the apertured layer 3 'with its superior fluid handling properties' which again indicates that the strips have a degree of fluid handling capability i.e. are not hydrophobic. Consequently, there is no unambiguous disclosure of the lateral zones in D1 being hydrophobic.

2.1.5 As regards the presence of a gradient core in D1, the Fig. 3 embodiment of the pantiliner has a single layer core with no indication of any anisotropy within it, such that a gradient core cannot be recognised. The appellant's reference to the primary or secondary distribution layers (e.g. para. [0074]) and non-homogeneous distribution of superabsorbent materials

(e.g. paras. [0077 - 0088]) do not disclose a gradient core in the same embodiment as the lateral zones being formed of nonwoven material i.e. in combination with the Fig. 3 embodiment. The gradient core thus also differentiates claim 1 from D1.

2.2 D2

2.2.1 The following features of claim 1 are known from D2 (see Fig. 6 embodiment, col. 9, line 19 onwards):
An absorbent hygiene article (50) for collecting bodily fluid, said article comprising a body-facing surface (67), a garment-facing surface (76) and an absorbent structure (60) situated between said body-facing surface and said garment-facing surface, wherein said body-facing surface comprises:
i) a central fluid acquisition zone (122),
ii) a first lateral zone (69) situated on one side of the central fluid acquisition zone and,
iii) a second lateral zone (69) situated on the opposite side of the central fluid acquisition zone, wherein said first and second lateral zones (69) are made of a nonwoven material (col. 13, lines 40 to 41), and said first and second lateral zones are at least partially situated above the absorbent structure (see Fig. 6) wherein the absorbent structure comprises a gradient core (see col. 12, lines 24 to 28).

2.2.2 D2 thus fails to disclose
- the first and second lateral zones being hydrophobic.

2.2.3 The appellant's argument that the first and second lateral zones 69 are not disclosed to have undergone any surfactant treatment and thus must be hydrophobic is not accepted. This is not an unambiguous teaching that the lateral zones 69 are consequently hydrophobic.

Indeed, col. 11, lines 3 to 6 of D2 indicates the second material 69 (corresponding to the claimed first and second lateral zones) having the ability to allow fluid to pass down through it, such that no conclusion can be reached that it is hydrophobic. Furthermore, in column 11, lines 6 to 10 the second material 69 is stated to have an "absorbency rate" which is about equal to or less than the first material, such absorbency hence being a clear indicator that even the material of the lateral zone is hydrophilic.

- 2.2.4 The respondent's contention that D2 additionally failed to disclose the lateral zones being partially situated above the absorbent structure is not accepted. While Fig. 6 can indeed be seen as a schematic drawing, that does not imply that all features depicted therein can be dismissed as not being intentional. The overlap of the lateral zone 69 and the topsheet 67 on both sides of the article is depicted similarly extensively. The proximal edge of the lateral zone 69 also extends significantly inboard of the central absorbent zone 122 further suggesting this not being an insignificant or coincidental aspect of the depicted article. Col. 16, lines 36 to 56 also describes the central absorbent zone 122 being the thickest and stiffest portion of the article, which the overlapping portion of the lateral zone 69 with the zone 122 further contributes to. Additionally, the zone 122 is designated by specific vertical limit lines which essentially intersect the depicted lateral zones in the centre of the horizontally extending parts thereof, while also coinciding with the lateral edges of the absorbent structure 60 and the transfer layer 66. Thus, despite various aspects of the drawing (e.g. exaggerated thickness of the various layers etc.) being schematic, the clear intention to designate the limits of the zone

122, and the elements within it, is unambiguous. Consequently, the depiction of the lateral zone 69 being at least partially situated above the absorbent structure 60 is found to be a deliberate feature of the Fig. 6 embodiment of D2.

2.2.5 The respondent's further argument that the term 'gradient core' was understood in the art to imply a gradual change in properties of the core, as opposed to a stepwise change, in the vertical direction is also not accepted. No evidence of this contention was provided by the respondent. The Board rather sees the term in its broadest technically reasonable interpretation, the gradient thus relating to any of e.g. thickness, density, capillarity, and in any direction x, y or z. The respondent's reference to para. [0058] of the patent as providing a definition of the term 'gradient core' is also not persuasive. Whilst such a 'definition' is usually applicable to questions of clarity rather than novelty, para. [0058] does not provide a definitive indication of how the term is to be understood. Rather para. [0058] discloses a gradient core to designate an absorbent structure 'usually' obtained by an airlaid process thus providing anisotropic properties in the vertical direction, this being 'generally achieved' by providing a unitary article with a gradient of density or capillarity in the vertical direction. Thus, the very 'definition' in para. [0058] is itself only a preferred way of understanding the term 'gradient core' and thus lacks the definitive statement sought by the respondent. The Board consequently finds the term 'gradient core' to be broader. The skilled person would thus interpret the term in its broadest, technically reasonable manner which would include an absorbent core as disclosed in D2 with a hydrocolloidal material enveloped within a

hydrophilic material, such an absorbent core having a density gradient at least in the vertical direction.

2.3 D3

2.3.1 The following features of claim 1 are known from D3 (see Fig. 1 embodiment):

An absorbent hygiene article (20) for collecting bodily fluid, said article comprising a body-facing surface (30), a garment-facing surface (50) and an absorbent structure (60) situated between said body-facing surface and said garment-facing surface, wherein said body-facing surface comprises:

- i) a central fluid acquisition zone (80, between lateral strips 70),
- ii) a first lateral zone (70; strip 74) situated on one side of the central fluid acquisition zone and,
- iii) a second lateral zone (70; strip 76) situated on the opposite side of the central fluid acquisition zone,

wherein said first and second lateral zones (70) are made of a nonwoven material (col. 3, lines 37 to 38), and said first and second lateral zones are at least partially situated above the absorbent structure (60).

2.3.2 The respondent argued (in writing) that D3 also failed to disclose an absorbent article where the absorbent structure comprises a gradient core. However, it was not necessary for the Board to decide on this particular feature to establish novelty of the claimed subject-matter over D3, albeit the Board notes that similar considerations would arise with regard to the disclosure in D3, col. 7, lines 30 to 38.

2.3.3 D3 thus at least fails to disclose:
- the first and second lateral zones being hydrophobic.

2.3.4 Similarly to its contention with respect to D1 and D2, the appellant's argument that the nonwoven outer layer, being untreated with surfactant, must be hydrophobic is not accepted. The apertured film layer 80 located between the nonwoven strips 74, 76 is disclosed to be surfactant treated to make it "more hydrophilic" (see e.g. col. 6, lines 2 to 5), yet this allows nothing to be unambiguously implied regarding the hydrophobicity of the strips 74 and 76 of the nonwoven outer layer.

2.4 D4

2.4.1 The following features of claim 1 are known from D4 (see Fig. 1):

An absorbent hygiene article (10) for collecting bodily fluid, said article comprising a body-facing surface (24; facing up in Fig. 1), a garment-facing surface (24; facing down in Fig. 1) and an absorbent structure (12) situated between said body-facing surface and said garment-facing surface, wherein said body-facing surface comprises:

- i) a central fluid acquisition zone (26),
- ii) a first lateral zone (30) situated on one side of the central fluid acquisition zone and,
- iii) a second lateral zone (30) situated on the opposite side of the central fluid acquisition zone, wherein said first and second lateral zones (30) are made of a nonwoven material (col. 6, lines 23 to 24), and said first and second lateral zones are at least partially situated above the absorbent structure (see Fig. 1).

- 2.4.2 As above in 2.3.2, the Board did not need to decide whether a gradient core was present or not in order to establish novelty, albeit the same considerations would apply to the disclosure in D4, col. 8, lines 17 to 20.
- 2.4.3 D4 at least fails to disclose:
- the first and second lateral zones being hydrophobic.
- 2.4.4 The appellant's reference to table 3, material 3 in col. 9 of D4 to argue that polypropylene which is 75% hydrophobic and 25% hydrophilic would overall exhibit hydrophobic properties is not unambiguously the case. This passage fails to indicate how the polypropylene fibres are distributed; are they homogeneously mixed or are they arranged in layers? These different options would result in different behaviour in respect of liquid impacting the surface of the material layer. It is also ambiguous whether such a substrate would measure as 'hydrophobic' using the test procedure disclosed in paras. [0087 - 0088] of the patent. The low re-wet values for "Material 3" disclosed in Table 3 also fail to assist in this regard, there being no relationship between these values and hydrophobicity as measured according to the test in the patent.
- 2.5 None of the cited documents D1 to D4 thus deprive the subject-matter of claim 1 of novelty such that Article 100(a) EPC in combination with Article 54 EPC is not prejudicial to maintenance of the patent as granted.
3. *Article 100(a) in combination with Article 56 EPC*
- 3.1 Any of D1 to D4 in combination with common general knowledge.

- 3.1.1 With D2 failing to disclose solely the hydrophobic lateral zones of claim 1, D3 and D4 at least failing to disclose this feature and D1 additionally failing to disclose the gradient core, the most promising starting point for an inventive step attack is any of D2 to D4. The Board will take D2 as representative of each of these most promising starting points.
- 3.1.2 The technical problem posed by the respondent when starting from D2 of 'how to reduce the re-wet risk in part of the surface layer whilst not significantly impacting acquisition performance' is not found to be objective due to the inclusion of the condition 'not significantly impacting acquisition performance'. The central fluid acquisition zone of claim 1 can comprise just 25% of the article's surface area (see page 4, lines 50 to 52 of the patent). Thus, considering the breadth of claim 1, the fluid acquisition zone can be reduced in area relative to that of D2 such that the fluid acquisition performance would indeed be expected to be negatively impacted. The objective technical problem to be solved when starting from D2 is thus seen to be 'how to reduce the re-wet risk in part of the surface layer'. In such a way, the problem also does not point to the lateral zones being the area where the re-wet risk should be reduced (i.e. no pointer towards the solution in claim 1 is given).
- 3.1.3 The Board concurs with the respondent's argument that hydrophobicity is not unambiguously linked to prohibiting re-wet. No evidence has been presented that such understanding is part of common general knowledge, a textbook rather than patent documents usually being the required standard to prove such. Consequently, although contended by the appellant to be the case, it has not been shown that common general knowledge would

provide a hint to the skilled person as to how to modify D2 in order to solve the problem posed in order to reach the claimed subject-matter.

3.1.4 The Board concurs with the appellant that in D2 the central region of the pantiliner has been treated with surfactant to render it more hydrophilic. However, the lateral zones therefore being less hydrophilic did not have as a consequence that the skilled person would make these regions hydrophobic in the way defined in the patent (see paras. [0087 - 0088]) in order to solve the posed technical problem, since no immediate link between hydrophobicity and avoiding re-wet would be recognised by the skilled person. This is even more so since the lateral zones 69 of D2 are specifically disclosed to allow fluid to pass through in order to increase fluid acquisition (see e.g. col. 11, lines 3 to 6); rendering the lateral zones hydrophobic would thus not follow the disclosure of D2, possibly dissuading the skilled person from making such a modification. Thus without any teaching of common general knowledge that a re-wet problem is solved in a part of the topsheet by using a hydrophobic substrate, the Board cannot conclude that inventive step would be lacking.

3.1.5 Therefore, starting from D2 (or indeed any of D1 to D4) and wishing to solve the posed objective technical problem, the skilled person would not be guided to the subject-matter of claim 1 without exercise of an inventive step.

4. *Admittance of D8 - Article 12(4) RPBA 2007*

4.1 According to Article 12(4) RPBA 2007, the Board may hold inadmissible evidence which could have been

presented in the first instance proceedings. The respondent argues that this provision should result in the Board holding D8 inadmissible.

- 4.2 D8 was filed for the first time with the appellant's grounds of appeal with the argument that it disclosed non surfactant-treated portions of a porous layer inhibiting the passage of liquid back through the porous layer i.e. it taught that a hydrophobic layer inhibited re-wet. As regards its admissibility, the question to be answered is whether it could (and should) have been presented already before the opposition division.
- 4.3 In its preliminary opinion, the opposition division had considered that both D1 and D4 disclosed hydrophobic lateral zones of the article's body facing surface. Consequently at this juncture there had been no need to file a document disclosing hydrophobic portions of a body-facing layer inhibiting passage of liquid back through the layer i.e. inhibiting re-wet. At oral proceedings, the opposition division then changed its preliminary opinion in this regard, such that, at that point in time, no document disclosing hydrophobic portions of a body-facing layer was on file. Being presented with this situation at oral proceedings and having no real opportunity to search for a document filling the gap, it is thus apparent that the first opportunity for the opponent to file such a document was with its grounds of appeal, which is indeed when D8 was filed.
- 4.4 The respondent's argument that it had always argued D1 to D4 not to disclose hydrophobic lateral zones and that D8 should therefore have been filed shortly after the proprietor's response to the notice of opposition,

is not persuasive. The opponent had always maintained that D1 and D4 already disclosed hydrophobic lateral zones and this had been confirmed by the opposition division in its preliminary opinion. Admittedly, there is always a question of when it is incumbent on a party to file further evidence when its submission in opposition is contested, understanding that the opposition division may always alter its provisional opinion. On the other hand, in this case the opposition division had stated in some detail why it considered D1, D3 and D4 to disclose a hydrophobic material, concluding that at least these three documents were considered prejudicial to novelty. Under such circumstances it can be understood why the opponent felt assured that its contention was more than well accepted by the opposition division. There was thus no clear need for a further document proving this to be filed at any time in advance of the oral proceedings before the opposition division, this being the first time that such a document became important with the reversal of the preliminary opinion of the opposition division on this issue, which the Board can understand in the present case could have been considered unexpected.

- 4.5 The respondent's contention that D8 should have been filed at the latest within the Rule 116(1) EPC time limit is not persuasive. As indicated in point 4.4 above, at no time prior to the oral proceedings did a clear need exist for a further document disclosing hydrophobic portions of a body-facing layer inhibiting passage of liquid back through the layer to be filed; D1, D3 and D4, in the view of both the opponent and the opposition division, disclosed this feature. Therefore, at the final date for making submissions prior to oral proceedings under Rule 116(1) EPC, there was no

indication that a further document would be necessary. Consequently, the first opportunity for the opponent to address the lack of a document disclosing hydrophobic portions of a body-facing layer inhibiting passage of liquid back through the layer was on appeal, which was indeed when D8 was filed by the appellant in its grounds of appeal.

4.6 The Board also considers, *prima facie*, that D8 is highly relevant to the question of inventive step when starting from e.g. D2 as the closest prior art, when recognising the sole difference identified in the foregoing and taking account of the disclosure of D2 in col. 11, lines 1 to 20. D8 appears *prima facie* (see e.g. column 1, line 37 to column 2, line 4) highly relevant to the objective problem to be solved starting from D2, and appears to disclose a layer where a particular portion of the permeable layer is treated to allow fluid to pass more readily therethrough to the absorbent layer, while prevention or inhibition of fluid passing back through that layer at a different area is discussed. Similarly, D8, column 3, lines 27 to 30 relates to a particular embodiment where the fluid is prevented or inhibited from passing back through areas which are seemingly positioned laterally of a central zone. Further, the first paragraph of D8 seems *prima facie* not to limit the disclosure in D8 to a diaper as shown in the embodiment. Whether any constructional differences between the topsheet structures of D8 and e.g. D2 might be important in regard to the objective problem to be solved has not been considered in detail by the Board.

4.7 In exercising its discretion under Article 12(4) RPBA 2007, the Board thus decided not to exclude D8 from the

proceedings.

5. *Remittal according to Article 111(1) EPC*

5.1 According to Article 111(1) EPC, when deciding on an appeal, the Board may either exercise any power within the competence of the department which was responsible for the decision appealed or remit the case to that department for further prosecution.

5.2 In the exercise of such discretion, in the present case an important aspect is that D8 appears to be highly relevant to the question of whether or not the subject-matter of claim 1 involves an inventive step when starting from D2 and wishing to solve the posed objective technical problem of 'how to reduce the re-wet risk in part of the surface layer' (see point 3.1.2 above).

5.3 It is evident that the Board has overturned certain conclusions in the opposition division's decision, not least regarding which features are known from D2. The opposition division also did not address the presence of an inventive step in the subject-matter of claim 1 starting from e.g. D2 as the closest prior art. If additionally the high relevance of D8 were substantively confirmed, this may take away the entire basis for the opposition division's decision and require the proprietor to consider its requests in the light of this new situation. Remittal would allow both parties to develop their arguments with respect to this changed situation and further provide the parties the opportunity of having an examination of any new requests before two instances.

5.4 The Board is aware that the patent expires latest in 2026, but considers the need for the parties to develop their arguments in light of the Board's findings to outweigh this, noting that the opposition division was not presented with D8 prior to reaching its decision. The Board also takes into account the fact that the respondent requested remittal in the case that D8 is not excluded from the proceedings.

5.5 The Board thus avails itself of its power under Article 111(1) EPC to remit the case back to the opposition division for further prosecution.

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 for further prosecution.

The Registrar:

The Chairman:



D. Grundner

M. Harrison

Decision electronically authenticated