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**Datasheet for the decision
of 4 April 2023**

Case Number: T 1609/19 - 3.2.06

Application Number: 06813007.9

Publication Number: 2086486

IPC: A61F13/49, A61F13/15,
A61F13/514, B32B37/20,
A61F13/511

Language of the proceedings: EN

Title of invention:

ABSORBENT ARTICLE COMPRISING AN ELASTIC LAMINATE MATERIAL

Patent Proprietor:

Essity Hygiene and Health Aktiebolag

Opponent:

Ontex BV

Headword:

Relevant legal provisions:

EPC Art. 84, 100(a), 100(b), 111(1), 123(2)

RPBA Art. 12(4)

RPBA 2020 Art. 13(2)

Keyword:

Novelty - main request (yes)

Inventive step - main request (no)

Sufficiency of disclosure - (yes)

Late-filed auxiliary requests - justification for late filing
(yes)

Remittal to the department of first instance - (yes)

Decisions cited:

Catchword:



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Case Number: T 1609/19 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 4 April 2023

Appellant: Ontex BV
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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted on 5 April 2019 rejecting the opposition filed against European patent No. 2086486 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman M. Dorfstätter
Members: M. Hannam
W. Ungler

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. 2 086 486. 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 11 or according to one of auxiliary requests 2' to 6' or 8' to 11'.
- III. The following documents are relevant to the present decision:
- D1 WO-A-2006/093439
D2 CA-A-2 829 700
D5 WO-A-2007/133127
- 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 grounds for opposition under Article 100(b) EPC and under Article 100(a) in combination with Article 54 EPC seemed not to prejudice the maintenance of the patent as granted. Conversely, it provisionally saw the ground for opposition under Article 100(a) in combination with Article 56 EPC to prejudice maintenance of the patent as granted.
- V. Oral proceedings were held before the Board on 4 April 2023, during which the respondent filed auxiliary

request 12. At the close of the oral proceedings the requests of the parties were as follows:

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

The respondent requested that the appeal be dismissed and the patent be maintained as granted (main request) or, that the patent be maintained in amended form according to auxiliary request 12 as filed during the oral proceedings of 4 April 2023, or according to any of auxiliary requests 1 to 11, 2' to 6' or 8' to 11' all filed with the reply to the statement of grounds of appeal. Furthermore, the respondent requested remittal of the case to the opposition division for further prosecution on the basis of the new auxiliary request 12.

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

"A pant type absorbent article (1) such as a pant diaper, a sanitary pant or incontinence pant, said article having a core region (3) comprising an absorbent core (2) and a chassis (4) surrounding the core region, said chassis comprising front, back and waist regions (5, 6 and 7), while the core region is located at least in a crotch portion (19) of the article, a liquid impermeable backsheet (9) is arranged at least in the core region (3) on the garment-facing side of the absorbent core (2) and a liquid permeable topsheet (8) is arranged at least in the core region (3) on the wearer-facing side of the absorbent core (2), said article having a longitudinal (y) and a transverse direction (x), said article in at least a part of the chassis region (4) comprising a coversheet (10) in the form of an elastic laminate (10) composed

of at least two web shaped material layers in the form of nonwoven and/or film layers, at least one of said web shaped materials being an elastic material, said elastic laminate constituting the sole component of the chassis in at least 20% of the total surface area of the article,

characterized in that said elastic laminate having:

a) a tensile strength of at least 15 N/25 mm both in the longitudinal (y) and the transverse (x) direction of the article;

b) a tensile strength in transverse direction (x) of the article which is no more than 2.5 times and preferably no more than 2 times higher than the tensile strength in the longitudinal direction (y) of the article; and

c) wherein the force required to extend the elastic laminate 10% in the longitudinal direction (y) of the article is no more than 5N/25mm as measured by the Tensile Strength test method disclosed herein, and further in that said elastic laminate material (10) is non-elastic and extendible in the longitudinal direction (y) of the article and has a permanent deformation of more than 10% after having been stretched to a stretched width which is 30% greater than the original unstretched width according to the Elasticity Test described herein, wherein the elastic laminate (10) is composed of first and second layers of fibrous material (11,12) and an elastic film layer (13) located between said first and second fibrous layers and,

wherein the first layer of fibrous material (11) and the elastic film layer (13) form parts of a first elastic laminate (10) that has been rendered elastic by incremental stretching and partial tearing of the first layer of fibrous material and in that said first elastic laminate has been bonded to the second layer of

fibrous material (12) while in a stretched state, whereby the laminate is elastically stretchable, or wherein the first layer and second layers of fibrous material (11,12) have been bonded to the elastic film layer (13) while this is in a stretched state, whereby the laminate is elastically stretchable."

Claim 1 of auxiliary request 12 reads as per claim 1 of the main request except for the very start of claim 1 which reads:

"A method of producing a pant type absorbent article"

and the following features which have been appended to the claim:

"wherein the method comprises

that the first layer of fibrous material (11) and the elastic film layer (13) form parts of a first elastic laminate (10) that is rendered elastic by incremental stretching and partial tearing of the first layer of fibrous material and that said first elastic laminate is bonded to the second layer of fibrous material (12) while in a stretched state, whereby the laminate is elastically stretchable,

or

that the first layer and second layers of fibrous material (11, 12) are bonded to the elastic film layer (13) while this is in a stretched state, whereby the laminate is elastically stretchable."

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

Main request

Claim 1 could not be carried out by the skilled person without undue burden. The patent failed to describe the %wt of styrene of the apertured styrene based elastic

films used in the 3 samples in paragraphs [0064] to [0066] despite %wt of styrene having a significant impact on elongation and tensile strength results. The skilled person would consequently be unable to reliably achieve the tensile strength parameters a) and b) and the elongation parameter c) of claim 1. The patent also provided only a very limited number of materials that, when used to form an elastic laminate, satisfied the parameters a) to c). The breadth of claim 1 included many more possible materials than those of the examples. The skilled person was also unable to predict the properties of the materials that would result from the process steps recited in claim 1. Tensile strength was also strongly dependent on the basis weight of the elastic laminate. As points 1.3 to 1.5 of the letter of 22 March 2023 showed, there was an upper limit of basis weight for parameter c) to be achievable which the basis weight values in paragraph [0048] of the patent exceeded. The skilled person would thus not know which maximum basis weight of the elastic laminate to follow when selecting appropriate spunbond layers and elastic films.

The subject-matter of claim 1 lacked novelty over D1. Page 8, lines 14 to 20 of D1 disclosed a method of manufacturing an elastic laminate identical to that in paragraph [0049] of the patent such that the laminate disclosed in D1 must also meet the claimed parameters a) to c). The parameters a) to c) were unusual and so could not differentiate claim 1 over D1 without further justification on the part of the proprietor. As regards the method steps in claim 1, these could only differentiate claim 1 from the prior art to the extent of the physical properties of the article which result from carrying out the method steps. Claim 1 was not limited to the supply of untorn nonwovens to

provide the claimed laminate. Providing a partially torn nonwoven as one of the outer layers of the laminate of D1 would result in a laminate displaying the same physical features of the article as that produced by the first method step of claim 1. For similar reasons D2 also deprived the subject-matter of claim 1 of novelty.

D5 should be admitted as it was filed at the first possible occasion with the grounds of appeal. The opposition division's position that D1 failed to disclose parameters a) to c) was reasoned for the first time in its decision such that the filing of D5 was a direct response to this. D5 disclosed parameters a) to c) of the claimed laminate.

The subject-matter of claim 1 lacked an inventive step. No data or evidence was provided that the parameters provided a technical effect, even in combination. There was also no indication of the chosen parameters being better than neighbouring values such that the claimed parameters had to be seen as being merely arbitrary. D1 was a usable pant and no disadvantage was indicated in the acknowledgement of D1 in the patent. In the absence of a technical effect, it thus followed that the subject-matter of claim 1 could not involve an inventive step.

Auxiliary request 12

This should not be admitted. Throughout the opposition proceedings to date the opponent's position had been that method steps i) and ii) were known. The outcome of the novelty and inventive step discussion was thus always a possibility and should thus have resulted in an auxiliary request to overcome this outcome at an earlier stage of the proceedings. The alleged

completely new line of argument resulting in the novelty and inventive step outcome was simply a development of the appellant's case and did not justify the filing of a new request at this very late stage of the appeal proceedings.

Claim 1 of this request offended both Articles 84 and 123(2) EPC.

The product by process features were maintained in the new process claim 1 and were repeated as process steps in the present tense which led to a lack of clarity. The present tense used in the method steps was not active language such that the method steps to render the laminate elastic could also have been carried out before assembly of the absorbent article, rather than as part of the claimed method, which also led to a lack of clarity of claim 1.

The application as filed included no disclosure of the invention relating to a method of production of an article. The claims as filed were solely directed to an article, not a method. The disclosure of a 'spunbond' material did not disclose the spinbonding process. Similarly, the indication that a laminate was 'rendered elastic' did not disclose this process.

Should the Board admit auxiliary request 12 and find it to meet the requirements of Article 84 and 123(2) EPC, the case should be remitted for further prosecution.

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

Main request

The skilled person understood how the material properties and the claimed parameters related to one another and would thus not be hindered from carrying out the invention as claimed. There was no contradiction between the claimed parameters and

paragraph [0048] of the patent since different materials could be used for each embodiment disclosed. The skilled person would, for example, select an alternative material with a lower strength for the higher basis weight laminates.

Claim 1 was novel over D1. The patent described several methods of manufacturing the laminate but no link between any of these methods and the claimed parameters was provided. Just because D1 also disclosed a pant did not implicitly result in the claimed parameters. The starting materials would have a significant impact on the parameters, and these were not given in D1 such that no unambiguous disclosure of the parameters could be recognised.

Even though the laminate produced in D1 (see page 8, lines 10 to 20) may have resulted in some 'crinkling' of at least one of the nonwoven layers of the laminate, the fibers in the outer nonwoven layers of the laminate of D1 were torn due to the action of the inter-meshing gears. In contrast, at least one of the nonwoven layers of claim 1 would be fully intact with no tearing of the fibres. The action of the inter-meshing gears of D1 would also produce crinkles in the nonwoven layers in a distinct, regular, linear and repeating pattern which would be distinguishable from the irregular crinkling occurring in one of the nonwoven layers according to the first method step of claim 1. Using a partially torn nonwoven to provide the laminate of D1 was inappropriate since the same starting materials should be used to those of the patent.

D5 should not be admitted. It could and should have been filed already before the opposition division. The novelty objection based on D1 relied on the claimed parameters being implicitly disclosed. It should thus have been anticipated that the opposition division

would not find this persuasive and a stronger document should have been sought.

Claim 1 involved an inventive step. The invention lay in providing a combination of suitable parameters which gave the pant its desirable strength in the longitudinal direction whilst not unnecessarily oversizing the material tensile strength in the transverse direction, thereby allowing a cost efficient article to be produced. The technical problem to be solved was thus to provide a cost efficient article with appropriate strength in the longitudinal and transverse directions.

Auxiliary request 12 should be admitted. The respondent was taken by surprise with the new line of argument submitted at oral proceedings that a pre-torn nonwoven sheet could be used in the laminate of D1. As this had been decisive in the Board's conclusion regarding both novelty and inventive step, an exceptional circumstance justifying the filing of a new request should be recognised.

The subject-matter of claim 1 met the requirement of Article 123(2) EPC. Basis was in a combination of claims 1, 5, 7, 8 and 10 as filed, the product by process features being changed into process based features. The passages bridging pages 10 and 11 as filed disclosed method steps in the production of the article such that the skilled person would find basis for method claim 1.

Claim 1 was also clear. It was not uncommon to recite an action and the result thereof. The final features are clearly action steps, being prefixed with 'wherein the method comprises' such that no confusion between these features and those going before could be seen.

Auxiliary request 12 should be remitted to the opposition division for further prosecution.

Reasons for the Decision

Main request

1. *Article 100(b) EPC*

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

1.1 The appellant's argument that the patent failed to describe the %wt of styrene of the apertured styrene based elastic films used in the 3 samples in paragraphs [0064] to [0066] despite %wt of styrene having a significant impact on elongation and tensile strength results, does not convince the Board that this hindered the skilled person from carrying out the invention. The parameters a), b) and c) in claim 1 relate to the elastic laminate as a whole, not just the elastic film. Consequently, the appellant's burden of proof to show that the invention cannot be carried out has not been satisfied. To this preliminary opinion included in the Board's communication under Article 15(1) RPBA 2007 (see item 1.1), the appellant offered no counter arguments at oral proceedings. The Board thus confirms its opinion on this argument herewith.

1.2 The appellant's argument that the examples provided only a limited number of materials satisfying the claimed parameters is also not found to hinder the skilled person from carrying out the invention. The skilled person appreciates the type, physical

characteristics and behaviour of common materials used in the field such that the examples disclosed in the patent would enable them to carry out the invention across its breadth (see also the Board's communication, item 1.2).

1.3 The appellant's contention that the skilled person was unable to predict the properties of the materials that would result from the process steps recited in claim 1 is not accepted. The two alternative process steps included at the end of claim 1 relate to well understood and relatively simple process steps i.e. incremental stretching to tear a layer of fibrous material and stretch bonding. With the skilled person understanding how the nonwoven webs of the laminate primarily dictate the strength properties of the laminate while the elastic film primarily dictates its elasticity, they would not be hindered by these simple alternative process steps from carrying out the invention according to claim 1 (see also the Board's communication, item 1.3).

1.4 As regards the appellant's argument that there was an upper limit of basis weight for parameter c) to be achievable, which the basis weight values in paragraph [0048] of the patent exceeded, this is not accepted. As the respondent also argued, the higher basis weights of the laminate given in paragraph [0048] did not necessarily use the same spunbond layers and elastic film as those used in the appellant's calculations such that no contradiction existed for appropriately selected materials. As indicated in point 1.2 above, the skilled person was aware of the typical materials and their properties used in absorbent articles such that selection of appropriate nonwoven layers and elastic film to satisfy the claimed parameters would be

within their knowledge and experience.

- 1.5 In summary, therefore, none of the appellant's arguments is persuasive that the claimed invention could not be carried out by the skilled person. The ground for opposition under Article 100(b) EPC is thus not prejudicial to maintenance of the patent as granted.
2. *Article 100(a) in combination with Article 54 EPC*
 - 2.1 *Novelty over D1*
 - 2.1.1 The subject-matter of claim 1 is novel over D1.
 - 2.1.2 D1 fails to explicitly disclose the parameters a) to c) of claim 1. The appellant's argument that D1 implicitly disclosed these is not accepted. Whilst page 8, lines 14 to 20 of D1 indeed discloses a method of manufacturing an elastic laminate identical to that in paragraph [0049] of the patent, there is no link suggested in the patent between a specific method of manufacture of the laminate and the parameters a) to c) being achieved. It is accepted that the method on page 8 of D1 may result in a laminate satisfying the parameters a) to c) of claim 1, yet there is no direct and unambiguous disclosure that this is the case.
 - 2.1.3 Moreover, parameters a) and b) relate to tensile strength of the laminate whilst parameter c) relates to an extension under a particular force, all of which can be understood to be highly dependent on the material characteristics of the selected nonwoven layers and elastic film of the laminate, such as for example layer/film thickness. Absent guidance in D1 as to the specific materials to be used in conjunction with the

method of, for example, page 8, lines 14 to 20, there is no unambiguous disclosure of the claimed parameters being achieved when carrying out this method.

- 2.1.4 As to the appellant's argument presented in writing that the parameters a) to c) were unusual and so could not differentiate claim 1 over D1 without further justification on the part of the proprietor, this is not accepted. As indicated in the Board's preliminary opinion, tensile strength is a known characteristic of materials and the units of N / 25mm used in the parameters are those produced by ASTM D 882, referenced on page 9 of the patent. Consequently the parameters cannot be seen as unusual in the field of absorbent articles.
- 2.1.5 D1 thus fails to disclose parameters a) to c) of claim 1.
- 2.1.6 As regards the product by process steps included in claim 1, it was accepted by both parties that these could only differentiate claim 1 from the prior art to the extent that the physical properties of the article resulting from carrying out the method steps were not known.
- 2.1.7 In the written submissions of the parties prior to oral proceedings, a significant difference in opinion emerged as to whether the laminate produced by the method according to D1 would display some 'crinkling' of at least one of the nonwoven layers of the laminate. The respondent's arguments developed during oral proceedings to accept that 'crinkling' may also occur in D1, but that the action of the inter-meshing gears of D1 would produce crinkles in the nonwoven layers in a distinct, regular, linear and repeating pattern which

would be distinguishable from the irregular crinkling occurring in one of the nonwoven layers according to the first method step of claim 1. The respondent further argued for the first time that at least one of the nonwoven layers of D1 would be untorn whilst, having passed through the inter-meshing gears, the fibres of the nonwoven layers of D1 would be torn. The Board saw all this as a reasonable development of the respondent's appeal case since it hinged around the surface properties of the nonwoven layers of the laminates of D1 and of claim 1 which had been widely discussed in the written submissions to date.

2.1.8 In response to these arguments, the appellant contended that claim 1 was not limited to the supply of untorn nonwovens to provide the claimed laminate. Providing a partially torn nonwoven as one of the outer layers of the laminate of D1 would result in a laminate displaying the same physical features of the article as that produced by the first method step of claim 1 (the first method step reading "wherein the first layer of fibrous material and the elastic film layer form parts of a first elastic laminate that has been rendered elastic by incremental stretching and partial tearing of the first layer of fibrous material"). The Board concurs with this contention. Despite not having been argued prior to the oral proceedings, the Board sees this argument of the appellant as a reasonable development of its appeal case, not least in response to the new arguments presented by the respondent as detailed in point 2.1.7 above.

2.1.9 In response to the substance of the appellant's new argument, the respondent argued that the use of a partially torn nonwoven to provide the laminate of D1 was inappropriate since the same starting materials

should be used to those of the patent. This is not accepted. Claim 1 places no restriction on whether a torn or untorn nonwoven layer is used to form the elastic laminate. Indeed, since the method steps in claim 1 could differentiate claim 1 over the prior art only in respect of physical features resulting therefrom, if the use of a partially torn nonwoven met the physical characteristics of the nonwoven layer of the elastic laminate, this was a perfectly reasonable basis on which to find these physical characteristics of claim 1 to be known. In view of the 'product by process' feature in question in claim 1 (i.e. the first method step of claim 1; see citation in point 2.1.8 above), the physical features of the elastic laminate resulting from the process step are clearly also met through the use of a suitably pre-torn nonwoven layer.

2.1.10 It thus follows that the physical features resulting from the first process step of claim 1 were known from D1.

2.1.11 D1 thus discloses all features of claim 1 save for the parameters a) to c).

2.2 *Novelty over D2*

2.2.1 The subject-matter of claim 1 is novel over D2.

2.2.2 Both parties relied upon their arguments with respect to D1 in order to furnish their respective case regarding novelty over D2. In its communication the Board indicated its preliminary opinion that any conclusion with respect to D1 would thus seemingly apply also to D2. Neither party presented any counter-arguments in this respect such that the Board confirms its preliminary opinion herewith, that the subject-

matter of claim 1 is novel over D2 for the same reasons as those given for D1.

2.3 *Admittance of D5 for a novelty attack*

2.3.1 According to Article 12(4) RPBA 2007, a Board has the power to hold inadmissible facts, evidence or requests which could have been presented in the first instance proceedings. Claim 1 of the present main request corresponds to claim 1 as granted such that D5 indeed could and should have been presented in a novelty attack already before the opposition division. However, it was first filed with the appellant's grounds of appeal.

2.3.2 As regards the appellant's argument that the opposition division's position that D1 failed to disclose parameters a) to c) was reasoned for the first time in its decision, this does not justify the admittance of D5 on appeal. The nature of appeal proceedings is to allow a review of the impugned decision in a judicial manner. This can manifestly not occur if parties are able to freely file new documents on appeal. In the present case the Board sees it as inconsequential as regards the admittance of D5 that the opposition division detailed why D1 failed to disclose parameters a) to c) for the first time in its decision. The proprietor had argued this position from the outset of the opposition proceedings and the opponent thus had motivation to file a more promising document (such as D5, perhaps) already at this juncture of the proceedings. Its failure to do so can then not be remedied through filing such document on appeal.

2.3.3 The appellant's argument that D5 clearly disclosed parameters a) to c) of the claimed laminate is not a

persuasive reason for D5 to be admitted. With the present claim 1 corresponding to claim 1 as granted, D5 could and should have been filed already before the opposition division.

- 2.3.4 The Board thus exercised its discretion under Article 12(4) RPBA 2007 to hold the novelty attack based on D5 inadmissible to the appeal proceedings.
- 2.4 Absent a persuasive novelty attack, the Board finds the subject-matter of claim 1 to be novel.
3. *Article 100(a) in combination with Article 56 EPC*
 - 3.1 *Inventive step starting from D1*
 - 3.2 As found above, D1 fails to disclose the parameters a) to c) of claim 1. In order to support the recognition of an inventive step in the subject-matter of claim 1, the differentiating features of claim 1 over D1, i.e. parameters a) to c), must make a technical contribution, either independently or in combination with other features of claim 1, over the prior art. The appellant alleged that this contribution was missing in respect of parameters a) to c) as no technical effect was attributable to them.
 - 3.3 The respondent's argument that the parameters themselves provided a technical contribution since they defined concrete values of physical characteristics of the laminate is not persuasive for an inventive step to be recognised. The patent as a whole fails to disclose any technical effect of the individual parameters claimed. In writing the respondent referred to the technical problem being to provide 'a chassis material which promotes comfort, fit and soft feel and which has

a cloth-like appearance while having sufficient strength to avoid that the chassis material breaks when putting on the absorbent article' (see page 9, second full paragraph on page 9 of its reply to the grounds of appeal). No link can be seen, nor was any alleged to be present by the respondent, between the claimed parameters and the chassis material promoting comfort, fit, a soft feel or a cloth-like appearance; the technical effect of the parameters can therefore not be seen in these characteristics. As regards the sufficient strength to avoid breaking the chassis material, no data or evidence has been provided by the respondent that the specifically claimed parameters have either individually or in combination a particularly beneficial impact on the chassis (i.e. elastic laminate) strength.

- 3.4 The absence of a technical effect of the claimed parameters is still further underlined when considering the appellant's argument regarding values just outside the claimed parameter ranges. For example, parameter a) claims a tensile strength of the laminate of at least 15N / 25mm both in the longitudinal and the transverse direction of the article. No evidence is included in the patent, nor has it been provided during the opposition/appeal proceedings, of a particular advantage of this claimed range over tensile strength values outside this range, e.g. 10N / 25mm. This observation applies to each of the claimed parameters a) to c) with no evidence being on file of a particular advantage of the claimed parameter ranges over values just outside these ranges. Consequently, the claimed parameter ranges a) to c) cannot be credited with having a technical effect which can be considered for recognition of an inventive step in the subject-matter

of claim 1.

- 3.5 The respondent's contention that the technical effect of the invention lay in the combination of the claimed parameters is not accepted. Absent any evidence of the beneficial impact the claimed parameters have on, for example, the tensile strength in the longitudinal direction of the article over neighbouring parameter values, no technical effect of the parameters a) to c) can be recognised.
- 3.6 The respondent's reference to paragraph [0014] and [0061] of the patent and the argument that the combination of claimed parameters provided a desirable balance between tensile strength in the longitudinal direction whilst not unnecessarily oversizing the material tensile strength in the transverse direction, thereby allowing a cost efficient article to be produced, is also not persuasive for a technical effect to be recognised. As indicated in points 3.4 and 3.5 above, no evidence has been provided that shows the claimed parameters achieving this technical effect and values outside of the claimed ranges failing to do so.
- 3.7 Absent a technical effect imparted by the parameters a) to c) for the claimed article, the objective technical problem may be seen as 'to provide a pant-type absorbent article comprising an alternative elastic laminate material'.
- 3.8 With the claimed parameter ranges a) to c) lacking a technical effect, the parameters cannot be seen as anything but arbitrarily chosen and consequently cannot provide the basis for an inventive step to be recognised in the subject-matter of claim 1. To this finding presented preliminarily at oral proceedings,

the respondent submitted no counter arguments.

- 3.9 The subject-matter of claim 1 thus does not involve an inventive step when starting from D1 and combining with common general knowledge. The ground for opposition under Article 100(a) EPC in combination with Article 56 EPC thus prejudices the maintenance of the patent as granted. The main request is consequently not allowable.

Auxiliary request 12

4. *Article 13(2) RPBA 2020*

- 4.1 According to Article 13(2) RPBA 2020, any amendment to a party's appeal case made after notification of a summons to oral proceedings shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.

- 4.2 The Board found that exceptional circumstances were indeed present which justified the respondent filing a new auxiliary request at oral proceedings. As indicated in 2.1.8 above, the appellant's arguments had developed at oral proceedings to finally contend that a pre-torn sheet could be used as a feedstock to manufacture the laminate of D1. This argument was seen to not only be persuasive in the Board's finding that any structural feature resulting from method step i) was equally achieved by the method of D1 when using a pre-torn sheet, but moreover it was decisive in the Board reaching its final conclusion on novelty, and consequently also on inventive step. It was thus appropriate for the respondent to be able to react to this new line of argument as it could not have

anticipated this and reacted at an earlier time. This was seen by the Board as an exceptional circumstance which exempted auxiliary request 12 from not being taken into account.

4.3 The appellant's argument that it had, throughout the opposition proceedings, held method steps i) and ii) to be known is not contested by the Board. However, the Board did not accept that the respondent should thus have filed auxiliary request 12 at an earlier point in the procedure. The respondent could not reasonably have anticipated the way in which the appellant's arguments with respect to claim 1 of the main request and D1 developed in the course of the oral proceedings. Prior to this the respondent had argued the existence of structural differences between the article produced by method step i) of claim 1 and the article of D1. Only as a consequence of the new argument of the appellant, that D1 could have a pre-torn sheet as a feedstock to the production of the article, had these structural differences ceased to be technically persuasive.

4.4 The appellant's further contention that its allegedly new argument had simply been a development of its case and so the outcome should have been anticipated by the respondent is not accepted. Even if the contention regarding the use of a pre-torn sheet in D1 to anticipate method step i) of claim 1 is accepted as a development of the appellant's argument, this had been decisive in the Board's conclusion that method step i) was indeed known from D1. A party's argument developing in such a way as to be decisive in the decision on the request, yet not being seen as a change of the party's case, is seen to be an exceptional circumstance which in the present case justified auxiliary request 12 not

being excluded from being taken into account.

4.5 The Board thus found that, in view of the specific circumstances of the case and the way in which the arguments had developed, exceptional circumstances justified auxiliary request 12 being taken into account (Article 13(2) RPBA 2020).

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

5.1 According to Article 111(1) EPC 1973, 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 both parties requested remittal should auxiliary request 12 be admitted. In the present case, if the Board itself carried out the examination as to patentability, the parties would lose the opportunity of having an examination of the claimed subject-matter before two instances. Also, at present, the parties have not yet had the opportunity to develop their arguments with respect to the subject-matter of claim 1 of auxiliary request 12. Nonetheless, as is standard practice, objections under Articles 84 and 123(2) EPC are considered before any decision to remit is taken.

5.3 Article 84 EPC

5.3.1 The appellant's argument that the product by process features were maintained in the new process claim 1, and were repeated as process steps in the present tense, which led to a lack of clarity is not accepted.

Even though there is a degree of repetition in claim 1 insofar as the previously included process steps (interpreted in the main request as product-by process features) are maintained in addition to the newly included process steps themselves, the Board cannot recognise a lack of clarity resulting therefrom. The method steps are clearly introduced with the wording 'wherein the method comprises' such that no doubt can exist for a skilled reader as to what should be viewed as the features of the method rather than the features of the absorbent article being produced.

5.3.2 The appellant's further argument that the use of the present tense in the method steps was not active language, such that the method steps to render the laminate elastic could also have been carried out before assembly of the absorbent article is not accepted. Irrespective of the merit of the argument relating to use of the present tense, claim 1 specifically indicates which method steps are comprised in the claimed method of producing the article, these being introduced with 'wherein the method comprises'. The subsequently quoted method steps are thus clearly an integral part of the claimed method. There is also no requirement for the method steps to be carried out in a continuous process; the method steps being carried out before assembly of the absorbent article would still form part of the claimed method.

5.3.3 No argument of the appellant thus persuasively questions the clarity of claim 1. The Board thus finds claim 1 to meet the clarity requirement of Article 84 EPC.

5.4 Article 123(2) EPC

- 5.4.1 The appellant's argument that the application as filed included no disclosure of the invention relating to a method of production of an article is not accepted. At least page 10, lines 32 to page 11, line 6 of the application as filed discloses the method steps i) and ii) of the present claim 1. The preceding paragraphs also address methods of manufacturing an elastic laminate according to WO 03/047488. The suggestion that the application as filed included no disclosure of the invention relating to a method of production is thus incorrect. Indeed, the skilled person would see the application as filed as providing direct and unambiguous disclosure of the invention also relating to a method of production of an absorbent article.
- 5.4.2 As regards the appellant's analogy that disclosure of a 'spunbond' material did not disclose the spinbonding process, this is not analogous to the claimed laminate being 'rendered elastic'. The use of 'spunbond' in the term 'spunbond material' is an adjective describing the nature of the material. It is thus evident that the spinbonding process itself is not disclosed by the disclosure of a spunbond material. Conversely, a laminate having been 'rendered elastic' includes reference to the 'rendering' that has occurred, rather than simply to an 'elastic' laminate. Moreover, as indicated in 5.4.1 above, exemplary method steps for rendering the laminate elastic are disclosed from page 10, lines 32 to page 11, line 6 of the application as filed, such that disclosure of a method of production of an absorbent article is seen to be directly and unambiguously disclosed to the skilled person.
- 5.4.3 The Board thus finds that the objections to the subject-matter of claim 1 under Article 123(2) EPC are not persuasive such that the subject-matter of claim 1

meets the requirement of Article 123(2) EPC.

5.5 In view of no objections to auxiliary request 12 under Articles 84 or 123(2) EPC being persuasive and the requests for remittal being of sound basis, the Board avails itself of its power under Article 111(1) EPC to remit the case to the department of first instance 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 department of first instance for further prosecution.

The Registrar:

The Chairman:



D. Grundner

M. Dorfstätter

Decision electronically authenticated