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**Datasheet for the decision
of 23 May 2023**

Case Number: T 1690/19 - 3.4.01

Application Number: 10776886.3

Publication Number: 2496886

IPC: H05B6/12, F24C15/10, F24C15/00,
C03C15/00, C03C17/28,
C03C19/00, C03C17/30, H05B3/68

Language of the proceedings: EN

Title of invention:
COOKING APPLIANCE SURFACES HAVING SPILL CONTAINMENT PATTERN
AND METHODS OF MAKING THE SAME

Patent Proprietor:
SSW Holding Company, LLC

Opponent:
Eurokera S.N.C.

Headword:
Spill containment / SSW Holding Company

Relevant legal provisions:
EPC Art. 52(1), 54
RPBA 2020 Art. 25(1), 25(3), 13(1), 13(2)

Keyword:

Novelty - Main Request (no) - Auxiliary Requests V and IX (no)
Amendment after summons - Auxiliary Requests V a-d, IX a-d, X
taken into account (no)



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Case Number: T 1690/19 - 3.4.01

D E C I S I O N
of Technical Board of Appeal 3.4.01
of 23 May 2023

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
17 April 2019 concerning maintenance of the
European Patent No. 2496886 in amended form.**

Composition of the Board:

Chair P. Scriven
Members: T. Petelski
C. Almberg

Summary of Facts and Submissions

I. The opposition against the European patent was based on the grounds of lack of novelty and inventive step, insufficiency of disclosure, and added subject-matter (Articles 100(a), (b), and (c) EPC).

II. In its interlocutory decision, the Opposition Division held that the patent could be maintained on the basis of the (then) Auxiliary Request II, which was found to be novel and involve an inventive step over

A13: US 5 530 224 A.

The (then) Main Request and Auxiliary Request I were found not to be allowable for lack of novelty over

A9: EP 2 478 310 A2, identical to PCT-publication WO 2011/034835 A2.

III. Appeals were lodged against this decision by both the proprietor and the opponent.

IV. The proprietor requested that the appealed decision be set aside and the opposition rejected, which signifies the maintenance of the patent as granted (Main Request). In the alternative, the patent was to be maintained on the basis of one of ten auxiliary requests. Of those:

- (a) Auxiliary Requests I, II, and III were filed, for the first time, with the statement of grounds of appeal;
- (b) Auxiliary Requests IV, VI, VII, VIII, and IX were filed with the statement of grounds and are identical to claim requests filed during the opposition proceedings, except for amendments to the description and to the claims directed to manufacturing methods;
- (c) Auxiliary Request V was found allowable in the appealed decision (then labelled as Auxiliary Request II).

V. The opponent requested that the decision be set aside and the patent revoked, and argued that Auxiliary Requests I, II, and III should not be admitted.

VI. The Board's preliminary opinion, which was dispatched with a summons to oral proceedings, comprised, *inter alia*, the following:

- (a) claim 1 of the Main Request comprised added subject-matter and lacked novelty over A9;
- (b) Auxiliary Requests I, II, and III would, most probably, not be considered as *prima facie*, they comprised added subject-matter (Auxiliary Requests I), lacked clarity (Auxiliary Request II and III), and lacked novelty (Auxiliary Requests I to III);

(c) Auxiliary Requests IV to IX were not allowable for the same problem of added subject-matter as the Main Request; and

(d) A13 was relevant to the novelty of claim 1 of at least the Main Request.

VII. In response to the Board's preliminary opinion, the proprietor filed Auxiliary Requests II a-d, IV a-d, V a-d, VI a-d, VII a-d, VIII a-d, and IX a-d.

VIII. During the oral proceedings before the Board, the opponent challenged the consideration of the proprietor's new requests. After discussion of the Main Request, the proprietor withdrew Auxiliary Requests I, II, II a-d, III, IV, IV a-d, VI, VI a-d, VII, VII a-d, VIII, and VIII a-d. After a discussion on the remaining requests, the proprietor submitted a further Auxiliary Request, X. The proprietor also requested remittal to the Opposition Division to discuss the allowability of Auxiliary Requests V a-d or IX a-d, should the Board admit them into the proceedings, which the Board did not do.

IX. At the end of the oral proceedings, the proprietor confirmed their final claim requests to be the Main Request and Auxiliary Requests V, V a-d, IX, IX a-d, and X, whilst the opponent maintained the request that the patent be revoked.

X. Claim 1 of the Main Request reads:

A cooking appliance surface, comprising:

a top surface (10), wherein

at least a portion of the top surface (10) is adjacent to and adapted to be heated by a heating element, and at least a portion of the top surface (10) is non-hydrophobic; and

a spill containment pattern is disposed on the top surface (10), the spill containment pattern comprising a hydrophobic pattern (18) comprising a first portion bounding at least a portion of the non-hydrophobic region, the bounded non-hydrophobic region defining a non-hydrophobic spill containment region (20), and a second portion that surrounds the portion of the top surface (10) adapted to be heated by the heating element to repel spills away from the portion of the top surface (10) adapted to be heated by the heating element.

XI. Claim 1 of Auxiliary Request V differs from claim 1 of the Main Request in that the following feature is added at the end:

[... heating element],

wherein the cooking appliance surface further comprising a control unit (14a, 14b) disposed on the cooking appliance surface, wherein a portion of the

hydrophobic pattern (18) is disposed adjacent to the control unit (14a, 14b) and is arranged to repel spilled liquids away from the control unit (14a, 14b).

XII. Claim 1 of Auxiliary Request IX reads (amendments with respect to claim 1 of the Main Request underlined by the Board):

A cooking appliance comprising:

a cooking appliance surface; and

at least one heating element disposed on or adjacent to the cooking appliance surface, and a control unit (14a, 14b) disposed on the cooking appliance surface, wherein the

cooking appliance surface, comprising:

a top surface (10), wherein

at least a portion of the top surface (10) is adjacent to and adapted to be heated by the heating element, and at least a portion of the top surface (10) is non-hydrophobic; and a spill containment pattern is disposed on the top surface (10), the spill containment pattern comprising a hydrophobic pattern (18) comprising a first portion bounding at least a portion of the non-hydrophobic region, the bounded non-hydrophobic region defining a non-hydrophobic spill containment region (20), and a second portion that surrounds the

portion of the top surface (10) adapted to be heated by the heating element to repel spills away from the portion of the top surface (10) adapted to be heated by the heating element,

wherein a portion of the hydrophobic pattern (18) is disposed adjacent to the control unit (14a, 14b) and is arranged to repel spilled liquids away from the control unit (14a, 14b).

XIII. Claim 1 of each of Auxiliary Requests V a and IX a adds, to claim 1 of the respective Auxiliary Requests V and IX, the further specification of the second heating portion:

[... adapted to be heating by the heating element], wherein the second portion is provided offset inwardly within the first portion,

XIV. Claim 1 of each of Auxiliary Requests V b and IX b differs from claim 1 of the respective Auxiliary Request V and IX by a further definition of the first portion and an amended definition of the spill containment region (amendments underlined by the Board):

[... non-hydrophobic region], the first portion being a continuous border located near the perimeter of the top surface and the bounded non-hydrophobic region defining a single and coherent non-hydrophobic spill

containment central region (20) within said border, [and a second portion ...].

XV. Claims 1 of Auxiliary Requests V c and IX c combine the amendments of the respective versions a and b.

XVI. Claim 1 of each of Auxiliary Requests V d and IX d adds, to the end of claim 1 of the respective version c, the feature:

[... away from the control unit (14a, 14b)], wherein the hydrophobic pattern (18) comprises a frit disposed on and bonded to the top surface (10) and a hydrophobic compound disposed on the frit, and optionally the frit is a ceramic frit, a porcelain frit, or a combination thereof.

XVII. Claim 1 of Auxiliary Request X differs from claim 1 of Auxiliary Request IX in that the above cited feature of Auxiliary Request IX d, which defines a frit, is added at the end of the claim, but without the amendments from Auxiliary Requests IX a, b, or c.

Reasons for the Decision

The invention

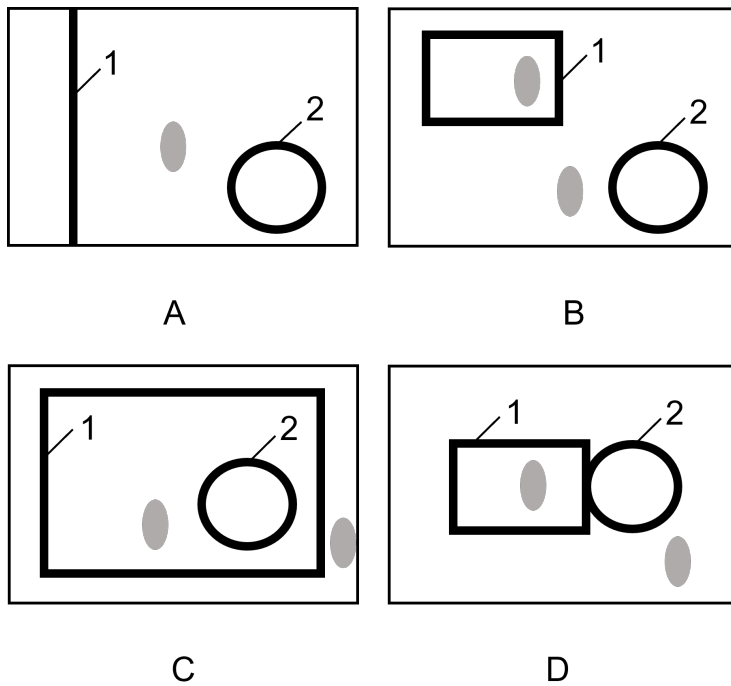
1. The invention is about containing spills on the surface of a cooking appliance. The idea lies in providing a

hydrophobic pattern on the otherwise non-hydrophobic surface, such that spills are contained within a spill containment region. The hydrophobic pattern is arranged to repel spills away from the heating zones and prevent the spills from leaking across the edges of the surface.

Main Request - understanding of claim 1

2. According to claim 1, the hydrophobic pattern comprises
 - (a) a first portion bounding a non-hydrophobic region of the surface, the bounded region defining a spill containment region, and
 - (b) a second portion surrounding a portion of the surface adapted to be heated.

3. The appellant argued that the skilled person would understand that the spill containment region was fully bounded, in the sense that it was surrounded by the first portion of the hydrophobic pattern, because spills could not be contained if the boundary were not complete. Further, the second portion necessarily had to lie within the first portion of the hydrophobic pattern. This followed from the spills being repelled away from the region to be heated by the second portion (into the spill containment region) and contained in the spill containment region by the first portion of the hydrophobic pattern. This interpretation equates to drawing C, below, in which 1 denotes the first and 2 the second portion of the hydrophobic pattern.



4. However, contrary to the appellant's view, the arrangements shown in the above drawings A, B, and D also fall within the scope of claim 1, as will be explained in the following.

5. First, "bounding" is not the same as "surrounding". The expression "bounding" does not mean more than that the first portion of the hydrophobic pattern extends along at least a part of the boundary of the spill containment region. Although the expression "spill containment region" implies containment of spills, it does not imply that this containment is caused exclusively by the first portion of the hydrophobic pattern. Other parts of the border might be defined by other means, for example, by walls of the cooking appliance at the edges of the surface. Hence, the linear first portion 1, in the above drawing A, also serves (partially) to contain spills, illustrated by a grey blob, in the spill containment region to its right.

6. Further, claim 1 leaves open whether the second portion lies inside or outside the first portion. By its nature, the hydrophobic pattern will always repel spills away from entering any region which it surrounds and contain the spills that are within. Hence, even for a second portion 2 that lies outside the first portion 1, as shown in above Figures B and D, spills from outside the region surrounded by the second portion will be repelled away from entering it, and spills from inside the region bounded by the first portion will be contained by the bounding first portion.

7. The claim also leaves open whether portions of the top surface adapted to be heated overlap or even coincide with the non-hydrophobic portion. Provided that the spill containment region is adapted to be heated (for example, because the entire top surface consists of the same heat resistant material), every non-hydrophobic portion that is surrounded by a portion of the hydrophobic pattern is both a portion adapted to be heated and also a spill containment region. Hence, the two surrounded regions in the above drawings B and D are interchangeable.

8. Claim 1 is directed to a "cooking appliance surface" that comprises a "top surface", on which the hydrophobic pattern is arranged. According to the opponent, the top surface was a different element from the cooking appliance surface. However, the opponent's understanding is not technically meaningful and does not follow from the wording of the claims. The cooking appliance surface defined by claim 1 is a physical entity, for example, in the form of a glass plate that acts as a stovetop cooking surface (see claim 7). The skilled person understands that the top surface is merely a geometrical designation of the upper side of

the cooking appliance surface. Both expressions describe the same surface of the cooking appliance, which is the one that is seen when viewed from above. The claims are further evidence of this understanding, because they do not distinguish between the two surfaces. According to claim 1, the top surface has at least a portion adapted to be heated, and according to claim 9, it is the cooking appliance surface that has a plurality of regions adapted to be heated. Hence, the skilled person understands that there is no distinction between the two surfaces other than their designation.

Main request - novelty over A9

9. A9 is about containing spills on a surface with the help of a hydrophobic pattern. It could be the top surface of a refrigerator shelf, for example. The pattern is designed to contain spilled liquids within one or more spill containment regions.
10. The Opposition Division, in its decision, found the subject-matter of claim 1 to be anticipated by the disclosure of A9.
11. According to the proprietor, the subject-matter of claim 1 differed from A9, in particular from the embodiments illustrated by Figures 5 and 6, in the following:
 - (a) A portion of the surface was adjacent to and adapted to be heated by a heating element.
 - (b) A first portion of the hydrophobic pattern bounded at least a portion of a non-hydrophobic spill containment region.

- (c) A second portion of the hydrophobic pattern surrounded the portion adapted to be heated to repel spills away from it.

12. On these questions, the Board agrees with the assessment of the Opposition Division:

- As to point (a): claim 1 defines a surface. The reference to the external heating element merely restricts the surface as far as that it must be suitable for being arranged adjacent to a heating element and adapted to be heated by it. That means, the surface must withstand the typical heat encountered on a stovetop. According to paragraph [0037], the surface 1023 in A9 can be used as a stovetop or cooktop. This implies an arrangement of the surface adjacent to a heating element and an adaptation to be heated, the latter also being evidenced by paragraph [0048].
- As to point (b): figure 5 of A9 shows a first portion 1021a-d, which bounds the entire inner non-hydrophobic spill containment region. The fact that this region is further subdivided into several sub-regions 1025a-i is similar to some embodiments of the patent in suit, in which each of Figures 1 to 5 shows subdivisions of the surface into several sub-regions. All such regions, whether in the patent in suit or in A9, will contain spills. In Figure 6 of A9, the first portion is designated with reference signs 1017.
- As to point (c): in Figure 5 of A9, the inner grid-like portion 1021e-h of the hydrophobic pattern 1021 surrounds region 1025e and repels spills to where they come from. Any of the regions 1025a-i is

adapted to serve as a heating region. Similar to the patent in suit, the hydrophobic pattern surrounding a region to be heated will repel spills away from entering the region but will also contain spills within it. In Figure 6, portion 1019 surrounds a region that is adapted to be heated. Figure 6 shows a drop (part of spill 1028) that is repelled by portion 1019 from entering the region that is suitable for being heated and that is contained by portion 1017.

13. It follows that each of the embodiments illustrated by Figures 5 and 6 of A9 discloses all features of claim 1.
14. Hence, the main request is not allowable for lack of novelty (Articles 52(1) and 54 EPC).

Auxiliary Request V - novelty over A13

15. Auxiliary Request V (Auxiliary Request II of the appealed decision) was found allowable by the Opposition Division, because it involved an inventive step over A13.
16. The opponent challenged the novelty of claim 1 in view of A13.
17. The proprietor presented the following arguments in favour of novelty:
 - (a) A13 did not disclose a hydrophobic spill containment pattern disposed on the top surface, as defined in claim 1. The silicone seal in A13 was hydrophilic and was glued to the exterior and

interior frame members. It was not used for sealing but served only the purpose of fixing the glass ceramic plates such that they did not break. Hence, the silicone seal in A13 was not suitable for containing spills.

(b) Claim 1 implied that the pattern was printed on the top surface and formed part of it, whereas the pattern on A13 was part of the frame members but not of the top surface.

(c) A13 did not disclose a control unit and the circles visible in Figure 1 did not symbolize one. Moreover, there was no disclosure of a combination of the cooking surface of Figures 3 to 7 with the prior art stove of Figure 1. Such a combination was also not implicit in A13, because it would have brought about serious problems. First, because an electronic connection between the new cooking appliance surface and the control unit of A13 was hardly possible, and second, because the metal top surface of Figure 1 had protruding heating elements, which could not easily be replaced by a smooth glass ceramic surface. Even if a combination of the retrofitting top surface with the stove of Figure 1 had been disclosed by A13, and even if Figure 1 were to be understood as showing a control unit, there would have been no cooking appliance surface that comprised both the retrofitted top surface and the control unit. Further, the control unit would have been at a higher level than the top surface and there would be no need for a hydrophobic pattern to repel spills away from it.

18. However, in view of the disclosure of A13, these arguments cannot stand.

19. A13 is concerned with retrofitting existing cooktops with a ceramic glass cooking surface (column 1, lines 15 - 18). Figure 1 shows an existing cooking apparatus, which has the problem that the cooking surface is difficult to clean from baked-on food particles (column 1, lines 37 - 48). Rather than employing the known solution of exchanging the existing cooktop of Figure 1 with a smooth ceramic stovetop, as is illustrated by Figure 2 (column 1, lines 49 - 60), A13 proposes to add a heat-transmitting ceramic glass surface on top of the existing stovetop, without removing it (column 1, line 61 to column 2, line 10, and column 3, lines 27 - 40). This means that the stove of Figure 1, which may well have a metal surface with protruding heating elements as argued by the proprietor, is one example of a stove that can be retrofitted by the proposed ceramic glass surface. This also means that the control unit of the retrofitted stove, which is sketched on the right-hand side of Figure 1 (it can be nothing else), remains unchanged and need not be connected to any element of the retrofitted surface. The retrofitted surface and the control unit on the old stove form part of the new cooking appliance surface, which is exposed to the user.
20. The ceramic glass surface, which is fitted on top of the existing stove of Figure 1, consists of four panels 42 held in place by a frame (Figure 4). The exterior frame members 30 (Figure 5) and the interior frame members 44 (Figure 7) have seals 54 and 72 glued to them. It is implicit that the seals, true to their name, serve to seal any gaps that would allow spills from dripping onto the underlying surface and baking to it, because it is the central point of D1 to prevent exactly that. This also means that the silicone seal that is employed (column 3, lines 58 - 61 and column 4,

lines 7 - 9) must be hydrophobic, which is the common condition of silicone seals. The seals enclose the respective edges of the panels on three sides, and consequently the upper parts of the seals are disposed on the top surface of the retrofitting cooking appliance surface. Claim 1 does not require that the hydrophobic pattern be firmly bonded to the surface.

21. The seals in A13 contain spills on each of the four panels. Thereby, they also repel spills from entering the neighbouring panels, from reaching the control unit, or from escaping the surface at all. Hence, each of the four panels is a spill containment region, and a region adapted to be heated. In one understanding, the L-shaped parts of the silicone seals 54 that confine the lower left panel (in the view of Figure 4) can be seen as a first portion of the pattern that bounds the lower left spill containment region, those parts of the silicone seals 54 and 72 that completely surround the upper right panel 42 can be understood as a second portion that surrounds a portion of the top surface to be heated, and those parts of the seals 54 that confine the right panels at their right-hand sides can be seen as a further portion of the pattern that repels spills away from the control unit.
22. This means that A13 discloses all features of claim 1.
23. Hence, Auxiliary Request V is not allowable for lack of novelty (Articles 52(1) and 54 EPC).

Auxiliary Request IX - consideration

24. Auxiliary Request IX was filed with the statement of grounds of appeal in 2019. The opponent does not

question its admission, and the Board sees no reason to disregard it (Articles 12(4) RPBA 2007 and 25(2) RPBA 2020). Thus it is taken into account.

Auxiliary Request IX - admission of novelty objection

25. According to the proprietor, the objection that the subject-matter of claim 1 of auxiliary request IX lacked novelty over A13 was first raised during the oral proceedings before the Board. Since claim 1 of Auxiliary Request IX was a combination of granted claims 1, 10, and 11, the opponent had had the opportunity of attacking this subject-matter from the beginning of the opposition, but had not done so. Point 11.1 of the opponent's reply to the proprietor's appeal did not contain a sufficiently substantiated argument, concerned inventive step and not novelty, and was directed to Auxiliary Request VIII and not to Auxiliary Request IX.

26. In contrast to the proprietor's view, the Board holds that the subject-matter of claim 1 of Auxiliary Request IX has been attacked for lack of novelty in view of A13 throughout the proceedings:
 - (a) In the notice of opposition, under point 5.6, the subject-matters of granted claims 1, 10, and 11, which correspond to the subject-matter of claim 1 of Auxiliary request IX, were attacked for lack of novelty in view of A13.

 - (b) In the opponent's statement of grounds of appeal, under point 4, the subject-matter of claim 1 of Auxiliary Request V (Auxiliary Request II as underlying the appealed decision) was attacked for

lack of novelty in view of A13. Under points 4.5 and 4.6, and the related drawing on page 8, the opponent stated that the top surface in A13 was part of a cooking appliance with heating elements, which were the features by which claim 1 of Auxiliary Request IX differed from Auxiliary Request V.

- (c) Point 7 of the opponent's reply to the proprietor's appeal, filed on 13 January 2020, refers to the arguments made under point 4 of the statement of grounds for establishing the lack of novelty of Auxiliary Request V in view of A13. Point 11 of the same reply deals with Auxiliary Request IX and refers to the argumentation made with regard to Auxiliary Request V. In addition, point 11 explicitly states that the prior art, which must be A13, comprises a cooking appliance with heating elements, which is the feature that distinguishes claim 1 of Auxiliary Request IX from claim 1 of Auxiliary Request V. The further reference to Auxiliary Request VIII under point 11 is unambiguously recognizable as a typing error, because of the heading ("REQUETE SUBSIDIAIRE 9"), and because Auxiliary Request VIII is dealt with in detail, under the previous point 10. It is also understandable that the sub-heading 11.1, which refers to a lack of inventive step, should have referred to a lack of novelty, considering the content of the argument.

27. It follows that an objection of lack of novelty over A13 against subject-matter that corresponds to the subject matter of claim 1 of Auxiliary Request IX was already raised during opposition proceedings and maintained in appeal proceedings. The Board, therefore,

takes this objection into account (Article 12(4) RPBA 2007).

Auxiliary Request IX - novelty over A13

28. Further to claim 1 of Auxiliary Request V, claim 1 of Auxiliary Request IX is directed to an entire cooking appliance, which comprises the cooking appliance surface defined in claim 1 of Auxiliary Request V, and at least one heating element.
29. The proprietor referred to their arguments with regard to Auxiliary Request V. They did not contest that the stove of Figure 1 of A13, when retrofitted with the proposed ceramic glass surface, was a cooking appliance that also comprised at least one heating element.
30. It has been established above that A13 discloses all features of the cooking appliance surface defined by claim 1 of Auxiliary Request V. Since A13 also discloses the retrofitting of the cooking appliance surface of Figures 3 to 7 to the stove of Figure 1, the surface is part of a cooking appliance with heating elements. Hence, A13 also discloses all features of claim 1 in combination.
31. Therefore, Auxiliary Request IX is not allowable for lack of novelty (Articles 52(1) and 54 EPC).

Auxiliary Requests V a-d and IX a-d - admission

32. Auxiliary Requests V a-d and IX a-d were filed after notification of the Board's summons to oral proceedings.

33. The proprietor justified the late submission by the necessity of reacting to the Board's preliminary opinion, which was sent with the summons. The Opposition Division, in their decision, had recognized an inventive step of claim 1 of Auxiliary Request V over A13. Hence, there was no need for the proprietor to file new claim requests on appeal that would further distinguish the subject-matter of the claims from A13. It was only from the Board's preliminary opinion that the proprietor learnt, for the first time, that A13 was regarded as novelty-destroying for the subject-matter of claim 1 of at least the Main Request. Auxiliary Requests V a-d and IX a-d were therefore filed at the first opportunity.
34. Further, the proprietor argued that the Board informed them of the interpretation of the expression "bounding" in claim 1 for the first time during the oral proceedings. This would have justified the filing of new requests even during the oral proceedings before the Board (if Auxiliary Requests V a-d and IX a-d had not addressed this issue incidentally).
35. The proprietor also drew attention to the fact that, at the time of the appeal, the previous version of the Rules of Procedure of the Boards of Appeal (RPBA 2007) was in force, which did not necessitate the preventive filing of requests. After receipt of the Board's preliminary opinion, the proprietor was suddenly faced with the revised RPBA (RPBA 2020), which made the filing of further claim requests more difficult. Hence, applying the new rules to this case would be unjust, and RPBA 2007 should apply.
36. Lastly, the proprietor was of the opinion that the claims of the newly filed requests were clearly

allowable, because by their more specific definition of the pattern geometry, they brought about a further distinction with respect to A13.

37. These arguments are not persuasive.
38. RPBA 2020 entered into force on 1 January 2020 and apply to any appeal pending on that date, including the present one (Article 25(1) RPBA 2020). The summons to oral proceedings was notified in 2023, well after the entry into force of RPBA 2020. Therefore, the exception governed by the transitional provision according to Article 25(3) RPBA 2020 does not apply to Auxiliary Requests V a-d and IX a-d. It follows that the consideration of these requests is governed by Article 13 RPBA 2020 in its entirety, in particular by Article 13(2).
39. The retroactive effect of Article 25(1) RPBA 2020 in respect of appeals pending on the date of the entry into force of RPBA 2020 is balanced by the the two articulate exceptions in Articles 25(2) and (3). A balancing of this kind is part of the nature of transitional regimes such as the one laid down in Article 25 RPBA 2020. The proprietor's argument that it would be unjust to apply the revised RPBA to their appeal, that was filed when the previous RPBA were in force, defies the transitional regime as such, and is not convincing.
40. Regarding the admission of late filed requests, the primary object of the appeal proceedings is judicially to review the decision under appeal (Article 12(2) RPBA 2020), not to reopen or prolong the first instance proceedings. The statement of grounds of appeal and the reply must, therefore, contain a party's complete

appeal case, including an express specification of all requests relied upon (Article 12(3) RPBA 2020). In assessing the case put before it, the Board draws its own conclusions, which may deviate from the findings in the appealed decision. If that were not possible, appeal proceedings would be meaningless.

41. Hence, a deviation from the findings of the Opposition Division is a normal, even common occurrence. It is not an exceptional circumstance. In the present case, the proprietor should not have been surprised that the Board (preliminarily) agreed with the opponent's arguments on the relevance of A13, and they should not have waited for the Boards' opinion before filing claim requests. The arguments relating to A13 were known to the proprietor from as far back as the opponent's notice of opposition, point 5.6, and the opponent's statement of grounds of appeal, point 4.

42. Moreover, the allegedly new interpretation of the expression "bounding" was been inconsequential for the Boards findings on Auxiliary Request IX. The interpretation of "bounding" was given, by the Board, merely to illustrate the full scope of claim 1 (the the above drawings A to D). The reasons for the lack of allowability of Auxiliary Request V and IX, which have been known to the proprietor from as far back as the opponent's notice of opposition (see above point 26.), do not rely on this interpretation (see reasoning further above). Hence, even a new and surprising interpretation of "bounding" could not have justified exceptional circumstances for taking into account a new request. It is additionally noted that claim 1 (of each claim request) of the patent uses the expression "bounding" in relation to the first portion of the hydroscopic pattern as distinct from the expression

"surrounding" that is used in relation with the second portion of the hydrophobic pattern. Meanwhile, in the description of the patent, the expression "completely bounding" (for example: [0016], [0018]) is used for describing the complete encirclement shown in the figures. Therefore, it should not have come as a surprise that the expression "bounding" was understood differently from "surrounding" or "completely bounding". This would also have spoken against the presence of exceptional circumstances, even if the interpretation had been relevant.

43. Hence, there are no exceptional circumstances justifying consideration of Auxiliary Requests V a-d and IX a-d (Article 13(2) RPBA 2020).

44. In addition, claim 1 of each of these requests raises, prima facie, new issues of clarity (Article 84 EPC):

(a) It is not clear what is meant by "the second portions are provided offset inwardly within the first portion" in the request version a, c, and d, considering that the first portion need not be a closed loop and so does not necessarily have an interior. Even if the term "inwardly" could be taking as implying a closed loop, it would remain unclear whether the second portions should match the shape of the first portion or whether they could be of any shape. It is also not clear whether grid-like second portions like those in Figures 2A and 2B of the patent would fall within the scope of the claim or not.

(b) Request versions b, c, and d define "a single and coherent non hydrophobic spill-containment central region". It is not clear what is meant by "single

and coherent", in particular when considering spill-containment regions such as those illustrated by Figure 2 to 5 of the patent. In such arrangements, it is questionable whether the entire (single) non-hydrophobic region that is enclosed by the outer first portion is "coherent", because there is a pattern subdividing it. It is, therefore, not apparent from the claim whether arrangements with subdivisions of the spill containment region fall within the scope of the claim or not.

45. These new objections are a further reason for not admitting Auxiliary Requests V a-d and IX a-d (Article 13(1) RPBA 2020, which also applies when Article 13(2) RPBA 2020 does).
46. Consequently, Auxiliary Requests V a-d and IX a-d are not taken into account (Article 13 RPBA 2020).

Auxiliary Request X

47. Auxiliary Request X was filed late in oral proceedings before the Board. Again, Article 13(2) RPBA 2020 applies.
48. The proprietor sought to justify exceptional circumstances by pointing to their comments on the surprising novelty attack against Auxiliary Request IX based on A13 (see point 25. above): since this objection was first raised during the oral proceedings before the Board, the proprietor's right to be heard had to allow a response in the form of new request. Also, claim 1 of Auxiliary Request X was foreseeable: claim 1, as compared to Auxiliary Request IX,

additionally included the definition of claim 4 of the patent, which had never been attacked for lack of novelty over A13. For the same reason, the subject-matter of claim 1 was also prima facie allowable.

49. It was shown, in the context of Auxiliary Request IX (point 26. above), that the subject-matter of claim 1 was attacked for lack of novelty over A13 throughout the entire opposition and appeal proceedings.
50. Hence, the proprietor cannot have been surprised by this objection being mentioned during the oral proceedings before the Board. It follows that there are no exceptional circumstances, let alone any cogent reasons, justifying consideration of Auxiliary Request X.
51. Therefore, Auxiliary Request X is not taken into account (Article 13(2) RPBA 2020).

Conclusions

52. The Main Request and Auxiliary Request V and IX are not allowable for lack of novelty.
53. Auxiliary Requests V a-d, IX a-d, and X are not taken into account.

Order

For these reasons it is decided that:

54. The decision under appeal is set aside.

55. The patent is revoked.

The Registrar:

The Chair:



D. Meyfarth

P. Scriven

Decision electronically authenticated