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**Datasheet for the decision  
of 25 March 2021**

**Case Number:** T 0247/20 - 3.2.08

**Application Number:** 13728310.7

**Publication Number:** 2854723

**IPC:** A61F5/44, A61F5/445

**Language of the proceedings:** EN

**Title of invention:**  
COMFORT LAYER FOR A COLLECTING BAG

**Patent Proprietor:**  
Coloplast A/S

**Opponents:**  
Hollister Incorporated  
Salts Healthcare Limited

**Headword:**

**Relevant legal provisions:**  
EPC Art. 54  
RPBA 2020 Art. 13(2)

**Keyword:**

Specific arguments presented at the oral proceedings - no amendment to appeal case

Late-filed document - admitted (yes)

Novelty - main request (no) - auxiliary request (no)

**Decisions cited:**

**Catchword:**

Oral proceedings would serve no purpose if the parties were limited to present a mere repetition of the arguments put forward in writing. Instead, parties must be allowed to refine their arguments, even to build on them provided they stay within the framework of the arguments, and of course the evidence, submitted in a timely fashion in the written proceedings.



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Case Number: T 0247/20 - 3.2.08

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.08**  
**of 25 March 2021**

**Appellant:** Coloplast A/S  
(Patent Proprietor) Holtedam 1  
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**Respondent:** Hollister Incorporated  
(Opponent 1) 2000 Hollister Drive  
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**Representative:** FRKelly  
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**Respondent:** Salts Healthcare Limited  
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**Representative:** Forresters IP LLP  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 18 November  
2019 revoking European patent No. 2854723  
pursuant to Article 101(3)(b) EPC.**

**Composition of the Board:**

**Chairwoman**            P. Acton  
**Members:**            A. Björklund  
                             Y. Podbielski

## Summary of Facts and Submissions

I. The appeal was filed by the patent proprietor (appellant) against the decision of the opposition division to revoke the patent in suit (hereinafter "the patent").

The opposition division decided *inter alia* that the subject-matter of the claims as granted and according to auxiliary request F, amended during the opposition proceedings, was not novel over D1.

II. Oral proceedings by videoconference were held before the Board on 25 March 2021.

III. The appellant (patent proprietor) requested that the decision under appeal be set aside and the patent be maintained as granted or that the patent be maintained on the basis of auxiliary request F filed with the grounds of appeal dated 2 June 2020. Auxiliary requests G and H were withdrawn during the oral proceedings.

The respondents 1 and 2 (opponents 1 and 2) requested that the appeal be dismissed.

IV. Claim 1 of the main request (patent as granted), with the feature designations used by the appellant, reads:

- 1a "A collecting bag (1) for human body waste comprising
- 1b a barrier film (20a, 20b) covered by
- 1c a comfort layer,
- 1d wherein the comfort layer is a textile material (10) having a number of threads (15)

- each comprising a plurality of fibre filaments (17, 18), and
- 1e said textile material (10) is attached to said barrier film (20a, 20b)
- 1f in one or more zones of attachment
- characterized in that**
- 1g some but not all of the fibre filaments (18) of the textile material (10) in said zone(s) are embedded in the barrier film material (20a, 20b)."

Claim 1 of the first auxiliary request (request F), with the feature designations used by the appellant, differs from claim 1 of the main request in that the following features have been added at the end:

- 1h "...wherein the textile is a material made of threads interlacing in a structured way and
- 1i wherein the textile comfort layer is attached to the barrier film by a heat lamination process
- 1j such that the barrier film material at least partly flows into the interlaced fibre filament structure of the threads of the textile,
- 1k wherein the textile has a higher melting point than the barrier film."

V. The following documents are relevant to the decision:

- D1: US 2005/0273064
- D30: "Slides", 4 pages of figures filed by the appellant by letter of 25 January 2021
- D31: E. M. Petrie, "Handbook of adhesives and sealants", 2000

VI. The appellant's arguments can be summarised as follows:

*Admittance of D30 and alleged amendment of the appellant's case*

D30 was filed by the appellant with the letter of 25 January 2021 as a rebuttal of respondent 2's interpretation of paragraph [0018] of D1 and therefore relevant. The figures of D30 were illustrations supporting written and orally presented arguments, similar to drawings made on a flip chart in an oral proceeding in person. D30 did not constitute new evidence and should therefore be admitted into the proceedings.

The appellant had no objection to the admittance of D31.

The arguments concerning *inter alia* the interpretation of the claim in view of the figures of the patent and the disclosure of D1, which respondent 2 alleged to be an amendment to the appellant's appeal case, had either been part of the appellant's argumentation from the beginning or were rebuttals of the respondent's arguments from the written proceedings. They were therefore not an amendment to the appellant's case. Furthermore, it could not be that the oral presentation of the case was limited to the precise arguments made in the written submissions, since this would negate the reason for oral proceedings.

*Main request - novelty*

A collecting bag showing Features 1d, 1f and 1g in combination was not disclosed in D1. This was evident

by the many passages mosaicked together by the opposition division and the respondents.

The single explicit embodiment of the collection bag in D1 had a non-woven fabric layer, which was not a textile material in the meaning of Feature 1d . Contrary to the decision of the opposition division and the opinion of the respondents, a textile material according to Feature 1d was not explicitly or implicitly disclosed in paragraphs [0016] and [0041] either, since it could only be found by selection from two lists of some length.

The film layer of the collecting bag of D1 was described as being commercially available in paragraph [0003]. Paragraph [0027] described this film to have barrier properties and this was a barrier film in the meaning of the patent. However, the fabric was not embedded into the film itself, but attached to it by a separate adhesive layer which did not have any barrier properties and thus was not part of the barrier film material. Even if the adhesive layer in D1 was seen as part of the barrier film, it was not disclosed that the adhesive flowed into the fibre filaments of the fabric to embed them as required by Feature 1g. Instead it could be cured before attachment as disclosed in paragraph [0018] of D1 and corroborated by D31. The fabric would then only attach to the surface of the adhesive, as illustrated on page 3 of D30.

In view of paragraph [0013] of the patent, the skilled person would understand the attachment zones as the welding zones at the edges of the collecting bag. In contrast, the fabric layer in the bag of D1 was attached over the entire surface of the bag. D1 did thus not disclose Feature 1f.



The subject-matter of claim 1 of the main request was therefore novel.

*Auxiliary request F - novelty*

The additional Features 1h to 1k of claim 1 of auxiliary request F distinguished the claimed collecting bag from that of D1.

The non-wovens used in D1 were not interlaced. Furthermore, cotton or silk had no melting point as required by Feature 1k, they simply charred or burned. The claimed bag was thus required to have a textile made of synthetic fibres. A knit or woven fabric of material blends including cotton was not directly and unambiguously disclosed in paragraphs [0016] and [0041], but could only be found by combining three lists. Heat lamination with a melting and flowing of barrier material was not disclosed in D1, and hot melt adhesives were not suitable for a heat lamination as defined in Feature 1i due to the oils and waxes they contained. Thus, while the collecting bags of the claim may look similar to that of D1, it was different.

VII. The respondents' arguments can be summarised as follows:

*Admittance of D30, D31 and alleged amendment of the appellant's case*

D30 constituted new evidence which made assumptions of what happened in the production of the collecting bags of the patent and D1. Its relevance was not clear and it constituted a change of the appellant's case. D30 should therefore not be admitted into the proceedings.

D31 should be admitted due to its relevance of showing how hot melt adhesives work.

The appellant presented a number of new arguments concerning a synergy between Features 1d and 1g, the interpretation of the patent claim in view of figures 3a, 3b and 4 of the patent, the interpretation of the adhesive and fabric layer in paragraphs [0027], [0029], [0034] and [0035] of D1, and the use of a dictionary definition of the term "embedding". They had not been put forward in the written proceedings and thus were an amendment to the appellant's appeal case which should not be admitted into the proceedings.

*Main request - novelty*

The collecting bag disclosed in D1 deprived the subject-matter of claim 1 of novelty.

Paragraphs [0016] and [0041] disclosed different fabrics which all fell under claim 1 of the main request. While synthetic materials were described as preferable, natural materials like cotton or blends of them with synthetic material were also listed in the paragraphs as suitable. Woven or knit fabrics could only be made from threads spun of multiple cotton fibres, due to the short fibre length or the blend with synthetic fibres. This was a textile material according to Feature 1d.

Feature 1f defined that the textile material was attached in one or more attachment zones. This did not differ from the bag of D1 where the fabric was attached to the surface of the whole bag.

The barrier film of the patent could have multiple layers, the outer comprising EVA and having a low melting point but no barrier properties, as described in paragraphs [0030], [0031] and [0033] of the patent. The combination of the adhesive layer and film layer of the collecting bag in D1 was also a multi-layer barrier film within the meaning of the patent. Furthermore, hot melt adhesives were generally in hot and flowable states during attachment, as corroborated by D31, top of page 403. The adhesive would therefore flow between the threads and into the fibre filaments. This was affirmed by paragraph [0032] of D1 which disclosed that there was a penetration bonding of the adhesive to the fabric layer. The figures of D30 presented by the appellant therefore described the laminating procedure of D1 incorrectly. Furthermore, the adhesive layer was not thick enough for it to reach the outer surface of the fabric layer. The adhesive thus embedded some, but not all of the fibre filaments of the textile material as required by Feature 1g.

*Auxiliary request F - novelty*

Features 1h, 1j and 1k were results of Features 1d and 1g which were disclosed in D1 as set out with regard to the main request.

Feature 1i was a product-by-process feature. The onus of proof that the claimed collecting bag was different from that in D1 was on the appellant, but they had not explained or proven any difference. In any case, the finished collecting bag of claim 1 did not differ from that disclosed in D1. Already the title of D1 was "laminated material...". Since a hot melt adhesive was used in the material, the lamination was based on heat and consequently a heat lamination. The adhesive had to

have a lower melting temperature than the textile, otherwise there could be no penetration bonding. Furthermore, neither the temperature nor the pressure of the heat lamination process were defined in claim 1, so the resulting collecting bag could not differ from that of D1.

### **Reasons for the Decision**

1. Admittance of D30, D31 and alleged amendment of the appellant's case

1.1 The respondents regard D30 - filed by the appellant with letter dated 25 January 2021 - as new evidence which should not be admitted into the proceedings under Article 13(2) RPBA 2020.

D30 contains figures which illustrate the appellant's interpretation of the production processes of the collecting bags of the patent and D1. Similar illustrations are often made on flip charts in oral proceedings *in situ* in order to clarify arguments which may be difficult to formulate in words. The figures are not regarded as evidence, or a change of the appellant's appeal case, but as supportive information of the appellant's oral presentation, albeit filed in advance of the oral proceedings. They were thus part of the appeal proceedings and the Board had no discretion not to admit them pursuant to Article 13(2) RPBA 2020.

1.2 During the oral proceedings, none of the parties objected to the admittance of D31, which was also filed by the appellant with their letter of 25 January 2021.

This is a textbook excerpt documenting the skilled person's common general knowledge regarding of hot melt adhesives. The Board saw no reason not to consider it, especially in view of the fact that its content was undisputed, even if the consequences derived therefrom by the parties were not.

- 1.3 In the course of the oral proceedings the appellant made submissions regarding novelty of the subject-matter of claim 1 of the main request in view of D1. Respondent 2 requested that the following parts of these submissions should not be taken into account pursuant to Article 13(2) RPBA 2020: arguments concerning a synergy between Features 1d and 1g, the interpretation of the patent claim in view of figures 3a, 3b and 4 of the patent, the interpretation of the adhesive and fabric layer in paragraphs [0027], [0029], [0034] and [0035] of D1, the oral reference to a dictionary definition of the term "embedding" and the interpretation of the barrier film as being "commercially available barrier film".

It is undisputed that for the assessment of that request the relevant legal provision is Article 13(2) RPBA 2020.

Article 13(2) RPBA 2020 provides that: *"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."*

The test under Article 13(2) RPBA 2020 is a two-fold one. The first question is whether the submission objected to is an amendment to a party's appeal case.

If that question is answered in the negative, then the Board has no discretion not to admit the submission. If, however, that question is answered in the positive, then the Board needs to decide whether there are exceptional circumstances, justified by cogent reasons, why the submission is to be taken into account.

The RPBA 2020 contain no definition of what amounts to an "amendment to a party's appeal case". However, they assist in what is meant by an "amendment" and by "a party's complete appeal case". Article 12(3) RPBA 2020 requires that the statement of grounds of appeal and the reply must contain "a party's complete appeal case". This means that the party must set out why the decision under appeal should be reversed, amended or upheld, and should specify expressly *"all the requests, facts, objections, arguments and evidence relied on"*. Article 12(4) RPBA 2020 defines what is meant by an amendment vis-à-vis the first instance proceedings, namely everything that does not comply with Article 12(2) RPBA 2020. In effect, an amendment is - apart from a clearly defined exception - what is not *"directed to the requests, facts, objections, arguments and evidence on which the decision under appeal was based."*

The Board thus concludes that an amendment to a party's appeal case is a submission which is not directed to the requests, facts, objections, arguments and evidence relied on by the party in its statement of grounds of appeal or its reply. In other words: it goes beyond the framework established therein.

In the present case the appellant identified in its grounds of appeal features 1d, 1f and 1g of claim 1 as not disclosed in D1. Central to the discussion of those

distinguishing features in the grounds of appeal and reply were the nature of the fabric layer, its attachment to a barrier film, the embedding of fibre filaments of the fabric layer in the barrier film, and whether claim 1 required a direct securing to the barrier film material by embedding without any other element being present. In the grounds of appeal the appellant referred to numerous parts of the patent, including to figure 4, as well as to numerous passages of D1, including paragraph 35.

The arguments presented by the appellant during the oral proceedings to which respondent 2 objected were all aimed at illustrating, refining or further developing the arguments already presented with the grounds of appeal and to counter the arguments of respondent 2 made in this context. To the extent that additional passages or figures were referred to this merely served that purpose. The Board notes that no additional pieces of evidence were introduced and that the patent as well as D1 are very concise documents. The Board takes the view that the arguments presented by the appellant and objected to by respondent 2 do not amount to an amendment of the appellant's appeal case. Therefore, the Board has no discretion not to admit them into the proceedings.

The above approach takes account of the fact that oral proceedings form an important part of proceedings before the Boards of Appeal. Their prominence is underlined by the absolute right of a party to oral proceedings under Article 116 EPC. They serve to discuss the matters pertinent to the decision of the Board. Oral proceedings would serve no purpose if the parties were limited to present a mere repetition of the arguments put forward in writing. Instead, parties

must be allowed to refine their arguments, even to build on them provided they stay within the framework of the arguments, and of course the evidence, submitted in a timely fashion in the written proceedings.

2. Main request - novelty

Figures 1 and 2 of D1 disclose a collecting bag for human body waste having a barrier film ("film layer") 16, a textile layer ("fabric") 14 and an adhesive layer 18 in-between.

The parties dispute whether Features 1d, 1f and 1g are disclosed in combination in D1.

2.1 The appellant submitted that Features 1d and 1g were not disclosed in combination in D1 since a large number of paragraphs were combined to find an embodiment falling under claim 1.

However, that a large number of paragraphs have been cited does not in itself mean that they do not describe one embodiment. The passages cited by the opposition division and the respondents all concern the same collecting bag. They explicitly disclose a collecting bag with a knit or woven fabric of cotton, or cotton blends with synthetic fibres, and the use of hot melt adhesive for binding the fabric to the barrier film of the bag. They therefore describe one embodiment which for the reasons set out below shows Features 1d, 1f and 1g in combination.

2.2 Feature 1d requires that the comfort layer is a textile material having a number of threads each comprising a plurality of fibre filaments.



- 2.2.1 Both paragraphs [0016] and [0041] of D1 disclose different types of fabrics and suitable materials for the fabrics.

According to the appellant, the skilled person would have to make a selection from two lists of "some length" disclosed in these paragraphs to arrive at a textile material according to Feature 1d. In accordance with the case law of the Boards of Appeal, such a specific combination would not be directly and unambiguously disclosed to the skilled person. These paragraphs would teach the skilled person to use synthetic materials rather than cotton or cotton blends. Furthermore, the single specific embodiment in paragraph [0035] had a non-woven fabric.

- 2.2.2 It is correct that paragraphs [0016] and [0041] of D1 describe synthetic fibres or filaments as preferred materials for the fabric and that the fabric of the single specific embodiment in paragraphs [0035] is a non-woven comprising polyethylene. However, cotton and blends thereof, including synthetic fibres or filaments, are disclosed as alternative materials suitable for the fabric layer.

Paragraphs [0016] and [0041] also disclose three types of fabric which are usable. Two of the three choices, knit and woven fabrics, are textiles also in the appellant's view. Therefore, even if the list of materials of the fabric was considered to have "some length", the list of the types of fabric amounts to merely two alternatives, non-wovens and knit/woven fabrics, the latter being textile materials.

Paragraphs [0016] and [0041] of D1 thus directly and unambiguously disclose knit or woven fabrics of cotton or cotton blends with synthetic fibres or filaments.

- 2.2.3 Since cotton fibres are short they must be spun into threads, each comprising a plurality of fibres, before a woven or knit fabric can be made thereof. A woven or knit fabric made of cotton, or a cotton blend, thus inevitably has a number of threads each comprising a plurality of fibre filaments.

D1 thus discloses Feature 1d.

- 2.3 Feature 1g requires that some but not all of the fibre filaments of the textile material are embedded in the barrier film material in the one or more attachment zones where the textile material is attached to the barrier film.

- 2.3.1 The collecting bag of D1 has a film layer 16 which serves as a gas and odour barrier, see paragraphs [0003] and [0027]. An adhesive layer 18 which provides bulk to the barrier film 16 is disposed on the film layer, see paragraph [0029].

The appellant submitted that the adhesive layer 18 of the collecting bag of D1 does not form part of the barrier material since it is a separate entity and since it has no barrier properties.

However, paragraph [0031] of the patent describes embodiments with multi-layer barrier films. The outermost layer in the film contains EVA. This outer layer is not described as having any barrier properties but acts as a bonding layer with a lower melting point than the odour barrier layer and the textile material,

see paragraph [0033] of the patent. The patent does therefore not require that all parts of the barrier film have barrier properties, but this may be a function of one internal layer of the barrier film while outer layers serve as bonding layers.

Thus, neither claim 1 of the main request, nor any other part of the patent contains a definition of the barrier film which distinguishes it from the combination of the film layer 16 and the adhesive layer 18 of the collecting bag of D1.

2.3.2 The appellant also submitted that since D1 did not disclose that the adhesive was hot when the fabric was applied, the document did not disclose that the adhesive material embedded fibre filaments making up threads of the fabric. The adhesive could have been cured to be less flowable before the fabric was attached. The adhesive would then only attach to the surface of the filaments, as illustrated in the figures on page 3 of D30, and not embed the fibre filaments.

However, paragraph [0018] of D1 discloses that the adhesive layer preferably is formed of a hot melt thermoplastic adhesive. Such adhesives are heated to melt when they bond substrates and set when they cool down, see also top of page 403 of D31. The adhesive will thus be in a hot and flowing state when it contacts the fabric. There is no disclosure in D1 which suggests that the fabric would be applied to an already cooled and set hot melt adhesive which would just bind to the surface of the fibre filaments as illustrated on page 3 of D30. On the contrary, paragraph [0032] of D1 describes that the adhesive will secure surface bonding to the film layer 16 as well as penetration bonding to the fabric layer 14. This means that the adhesive layer

is in a flowable state when the fabric layer is being attached. When the fabric is knitted or woven from cotton or cotton blends, the adhesive will consequently also flow to embed fibre filaments of the threads of the fabric. As also described in paragraph [0032], the laminated material exhibits excellent "hand" or "feel" since the thickness of the adhesive layer is insufficient to permit adhesive to reach the outer surface of the fabric layer. This means that the adhesive will embed some, but not all fibre filaments of the fabric layer in the attachment zone.

D1 thus discloses Feature 1g.

- 2.4 The fabric of the collecting bag of D1 is attached to the outer surface of the bag via the adhesive layer.

The appellant submitted that the skilled person would interpret the term "attachment zones" of Feature 1f as meaning the welding zones at the edges of the collecting bag in view of paragraph [0013] of the patent.

However, the description of the patent does not change the meaning of the clear wording of Feature 1f, which merely requires that the textile material is attached in one or more attachment zones. The outer surface of the collecting bag of D1 is such an attachment zone.

D1 thus discloses Feature 1f.

- 2.5 The subject-matter of claim 1 of the main request is thus not novel over the collecting bag disclosed in D1.

3. Auxiliary request F - novelty

3.1 The appellant submitted that Feature 1h clarified that the textile material is not a non-woven.

However as set out in point 2.2.2 above, paragraphs [0016] and [0041] disclose that the fabrics of the bag of D1 are knitted or woven, and made of blends of cotton with synthetic fibres or filaments. These fabrics have threads interlacing in a structured way.

D1 thus discloses Feature 1h.

3.2 As set out above in point 2.3.2, the hot melt adhesive 18, which is part of the barrier film material of the collecting bag of D1, binds the fabric layer 14 to the film layer 16 in a hot and flowable state. As submitted by the respondents, the title of D1 is "Laminated material...". The fabric is therefore attached by a heat lamination process.

The appellant submitted that the oils and waxes which were part of hot melt adhesives, such as those used in D1, were not suitable for the high temperatures used in heat lamination. The product resulting from the process of heat lamination in Feature 1i would therefore differ from the laminated material of the collecting bag of D1 in the composition of the barrier film material.

However, Feature 1i does not define the temperature or pressure at which the heat lamination is carried out. It is therefore not required that the lamination temperature is higher than what is suitable for a hot melt adhesive. Furthermore, the embodiment of the patent described in paragraph [0031] has an outer layer containing EVA. The melting point of this layer depends

e.g. on the specific content of EVA, see paragraph [0033] of the patent. Neither the claim, nor the description disclose any process parameters which would distinguish the collecting bag resulting from the product-by-process Feature 1i from the laminated product of D1 where the textile is attached by a hot melt adhesive.

D1 thus discloses Feature 1i.

- 3.3 As set out above in point 2.3.2, the hot melt adhesive of D1 is in a hot and flowable state during attachment of the fabric layer and embeds some but not all fibre filaments of the threads. This means that it partly flows into the interlaced fibre filament structure of the threads of the textile.

D1 thus discloses Feature 1j.

- 3.4 The appellant submitted that cotton does not have a melting point but chars or burns instead of melting, and further that the melting point of a textile was not always higher than that of the material to which it was heat laminated. D1 did thus not disclose Feature 1k.

However, the synthetic fibres of the cotton blend of the fabric layer of the bag in D1 have a melting point. Hot melt adhesives are normally chosen to have a lower melting point than the parts they bond and D1, paragraph [0032], describes the hot melt adhesive as binding to the fabric layer by penetration. The skilled person would not understand a fabric having melted fibres as having been bonded by penetration by the hot melt adhesive. It is therefore implicit that the synthetic fibres or filaments of the cotton blend of

the fabric have a higher melting point than the adhesive layer.

D1 thus discloses Feature 1k.

3.5 Since Features 1h to 1k of claim 1 of auxiliary request F are also disclosed in D1, the subject-matter of claim 1 of auxiliary request F is not novel.

## Order

**For these reasons it is decided that:**

The appeal is dismissed

The Registrar:

The Chairwoman:



C. Moser

P. Acton

Decision electronically authenticated