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**Datasheet for the decision
of 28 November 2025**

Case Number: T 0951/23 - 3.3.07

Application Number: 14715978.4

Publication Number: 2968648

IPC: A61L15/42

Language of the proceedings: EN

Title of invention:

WOUND DRESSING AND METHOD OF TREATMENT

Patent Proprietor:

Smith & Nephew plc

Opponent:

KCI Manufacturing Unlimited Company

Headword:

Wound dressing / SMITH & NEPHEW

Relevant legal provisions:

EPC Art. 123(2)

RPBA 2020 Art. 13(2), 13(1)

Keyword:

Amendments - added subject-matter (yes)

Late-filed auxiliary requests - admitted (no)



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Chambres de recours

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Case Number: T 0951/23 - 3.3.07

D E C I S I O N
of Technical Board of Appeal 3.3.07
of 28 November 2025

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
16 March 2023 concerning maintenance of the
European Patent No. 2968648 in amended form.**

Composition of the Board:

Chairman A. Usuelli
Members: E. Duval
L. Basterreix

Summary of Facts and Submissions

- I. An opposition was filed against European patent 2 968 648 (hereinafter "the patent") on the grounds that its subject-matter lacked novelty and inventive step, and it extended beyond the content of the application as filed.

Claim 1 as granted related to:

"A wound treatment apparatus for treatment of a wound site comprising:

a wound dressing for use in negative pressure wound therapy comprising

a backing layer having an upper surface and a lower surface and defining a perimeter configured to be positioned over skin surrounding a wound site, wherein the backing layer is configured to maintain negative pressure over the wound site;

a first portion underneath the backing layer comprising at least one material layer configured to transmit negative pressure to the wound site wherein the first portion comprises one or more of a transmission layer and an absorbent layer; and

a bridging portion underneath the backing layer comprising at least one material layer configured to transmit negative pressure from the first portion through the bridging portion, wherein the bridging portion has a width that is less than 1/3 the width of adjacent portions of absorbent material and/or one or more transmission layers of the first portion."

- II. The appeal was filed by the opponent (appellant) against the interlocutory decision of the opposition

division finding that, on the basis of auxiliary request 2, the patent met the requirements of the EPC.

The decision was based on the patent as granted as main request, and on auxiliary requests 1 and 2 filed during the oral proceedings on 7 February 2023.

Claim 1 of auxiliary request 2 differed from claim 1 as granted by the amendment "one or more of a transmission layer and wherein the first portion further comprises an absorbent layer" (addition emphasised by the Board) and the additional feature "wherein the apparatus further comprises a wound contact layer positioned below the backing layer, wherein the wound contact layer is sealed to the backing layer along a perimeter of the backing layer."

III. With regards to Article 123(2) EPC, the opposition division decided that the feature "the bridging portion has a width that is less than 1/3 the width of adjacent portions of absorbent material and/or one or more transmission layers of the first portion" did not introduce added subject-matter.

IV. With their reply to the appeal, the patent proprietor (respondent) defended their case on the basis of auxiliary request 2 (see II. above) and auxiliary request 3.

Claim 1 of auxiliary request 3 differed from claim 1 of auxiliary request 2 by the addition of the feature "wherein the bridging portion connects the first portion to an adjacent portion having a similar layered construction as the first portion".

V. The Board set out their preliminary opinion in a communication under Article 15(1) RPBA.

VI. By letter dated 24 September 2025, the respondent filed auxiliary request 4.

Claim 1 of auxiliary request 4 differed from claim 1 of auxiliary request 3 by the following deletion: "wherein the bridging portion has a width that is less than 1/3 the width of adjacent portions of absorbent material and/or one or more transmission layers ~~of the first portion~~".

VII. Oral proceedings were held before the Board on 28 November 2025.

VIII. The parties' requests at the end of the oral proceedings were the following:

(a) The appellant requested that the decision under appeal be set aside and that the patent be revoked in its entirety. The appellant further requested that auxiliary request 4 not be admitted into the proceedings.

(b) The respondent requested that the appeal be dismissed and the patent be maintained on the basis of auxiliary request 2 as allowed by the opposition division, or, alternatively, that the patent be maintained on the basis of one of auxiliary request 3 filed with the reply to the appeal and auxiliary request 4 filed on 24 September 2025.

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

- (a) The requirements of Article 123(2) EPC were not met by the feature relating to the width of the bridging portion. The passage in the application as filed cited in support (namely paragraph [0127]) did not refer to the first portion but was disclosed in the context of Figures 5A and 5B which both required one or more additional portions 540.
- (b) Auxiliary request 4 was not to be admitted, because its filing was not occasioned by exceptional circumstances, and because the deletion of the reference to the first portion was *prima facie* questionable under Articles 84 and 123(3) EPC.

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

- (a) Paragraph [0127] compared the width of the bridge portion to the width of "adjacent portions of absorbent material and/or one or more transmission layers" and thus with the first portion which also comprised one or more transmission layers and an absorbent layer (see claims 1, 3 and 5 as filed). Furthermore, claim 1 as filed specified that the bridging portion was smaller in dimension than a corresponding dimension of the first portion. Paragraph [0127] provided the specific width ratio of such comparison, namely less than 1/3. Hence the definition of the width ratio by reference to the first portion complied with Article 123(2) EPC.
- (b) Auxiliary request 4 was responsive to the Board's objection under Article 123(2) EPC against auxiliary request 3, raised for the first time as a distinct added subject-matter issue and in relation to auxiliary request 3. Furthermore, the amendment

was a simple one and did not infringe Article 123(3) EPC, because the adjacent portions necessarily included the first portion.

Reasons for the Decision

1. Auxiliary request 2, Article 123(2) EPC
 - 1.1 Claim 1 of auxiliary request 2 relates to a wound treatment apparatus comprising a wound dressing for use in negative pressure wound therapy comprising essentially
 - a backing layer;
 - a first portion underneath the backing layer comprising one or more of a transmission layer and further comprising an absorbent layer; and
 - a bridging portion underneath the backing layer comprising at least one material layer configured to transmit negative pressure from the first portion through the bridging portion, "wherein the bridging portion has a width that is less than 1/3 the width of adjacent portions of absorbent material and/or one or more transmission layers of the first portion", and
 - a wound contact layer.

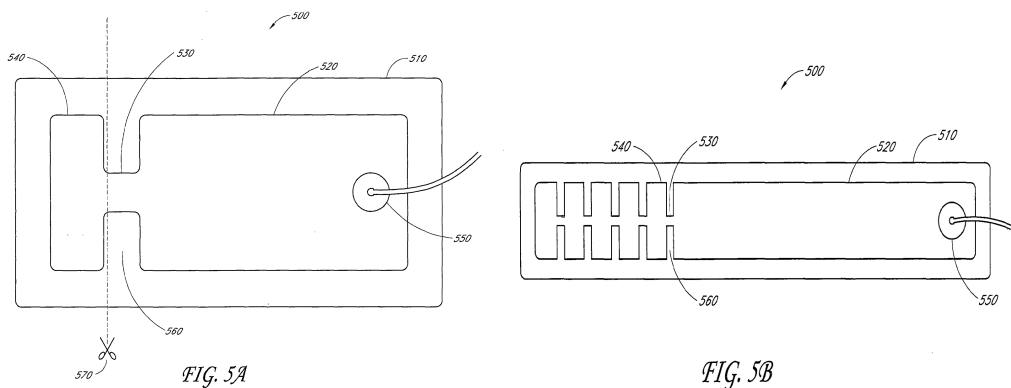
The question is whether the feature "wherein the bridging portion has a width that is less than 1/3 the width of adjacent portions of absorbent material and/or one or more transmission layers of the first portion" remains within the limits of what a skilled person would derive directly and unambiguously, using common general knowledge, from the application as filed as a whole (following the gold standard of G 2/10).

1.2 According to the appellant, the passage in the application as filed cited in support (namely paragraph [0127]) does not refer to the first portion and is disclosed in the context of Figures 5A and 5B which both require one or more additional portions 540.

The respondent relies on paragraph [0127] as basis, together with paragraph [0125] and claims 1, 3, 5, 17 and 18 for the omission of the additional portions.

Paragraph [0127] of the application as filed reads "The bridge portion 530 in Figures 5A and 5B creates a continuous path for negative pressure delivery between multiple portions of the dressing. The bridge portion 530 may have a width that is less than 1/8, 1/4, or 1/3 the width of adjacent portions of absorbent material and/or one or more transmission layers."

Figures 5A and 5B are reproduced below:



1.3 The Board firstly notes that claim 1 of auxiliary request 2 is somewhat contradictory in referring both to adjacent portions and to the first portion ("less than 1/3 the width **of adjacent portions** of absorbent

material and/or one or more transmission layers **of the first portion**", emphasis added by the Board).

According to the respondent, in claim 1 of auxiliary request 2, the width of the bridge portion is compared (solely) to the first portion (see page 2 of the reply to the appeal). The Board considers that claim 1 can be interpreted in such a way. However, taking into account this interpretation, the Board considers that the feature does not find support in the application as filed. The only mention of a width ratio of 1/3 appears in paragraph [0127], which defines the width of the bridge portion by reference to the width of adjacent portions (plural), and not by reference to the first portion.

In this respect, it cannot be ascertained whether the expression "adjacent portions" is even meant to include the first portion. This expression appears e.g. in paragraph [0035] of the application as filed (see the last two sentences), where it relates to portions of the wound dressing which are separate from the first portion. The respondent's statement that the adjacent portions of paragraph [0127] must relate to portions which are adjacent to the bridge portion is not unambiguously supported by the application as filed. These portions might equally be adjacent to the first portion or between themselves.

The respondent argues that paragraph [0127] refers to "adjacent portions of **absorbent material and/or one or more transmission layers**" and thus refers to the first portion which also comprises one or more transmission layers and an absorbent layer, as expressed in claims 1, 3 and 5 as filed. This is not convincing, because the adjacent (i.e. additional) portions may also have a

similar layered construction as the first portion (see claim 17).

In some passages of the application as filed, the width or dimension of the bridging portion, or parts thereof, is defined to be smaller than (parts of) the first layer, see e.g. paragraph [0035] ("In some embodiments, the layer(s) in the bridging portion have a smaller width than the layer(s) in the first portion") or claim 1 as filed ("the at least one material layer in the bridging portion has a smaller dimension or a different material structure than a corresponding dimension or material structure of the first portion"). But none of these passages discloses a width ratio of 1/3. As explained above, the only mention of a ratio of 1/3 appears in paragraph [0127] by reference to adjacent portions. Amending the reference for this ratio of 1/3 from adjacent portions to the first portion represents added subject-matter.

- 1.4 The parties furthermore debated whether the presence of adjacent portions, which is not required by claim 1 of auxiliary request 2, is disclosed as optional in the application as filed, taking in account in particular paragraphs [0118] and [0119]. This question can however be left undecided, because the feature relating to a width ratio of 1/3 already adds subject-matter as a result of its definition by comparison with the first portion.
- 1.5 Accordingly, auxiliary request 2 does not comply with Article 123(2) EPC.
2. Auxiliary request 3, Article 123(2) EPC

Claim 1 of auxiliary request 3 additionally mandates that "the bridging portion connects the first portion to an adjacent portion having a similar layered construction as the first portion" (based on claim 17 as filed). This amendment does not address the fact that paragraph [0127] makes no specific reference to the first portion. Claim 1 still defines the bridge width in relation with the width of "adjacent portions of absorbent material and/or one or more transmission layers of the first portion" (see 1.3 above), whereas paragraph [0127] defined the width in comparison with the width of adjacent portions only.

Accordingly, auxiliary request 3 also infringes Article 123(2) EPC.

3. Auxiliary request 4, admittance

3.1 In claim 1 of auxiliary request 4, as compared with auxiliary request 3, the reference to first portion in the width ratio is deleted ("the bridging portion has a width that is less than $1/3$ the width of adjacent portions of absorbent material and/or one or more transmission layers ~~of the first portion~~").

Auxiliary request 4 was submitted by letter dated 24 September 2025, and thus after notification of the Board's communication under Article 15(1) RPBA. Under Article 13(2) RPBA, this amendment to the respondent's appeal case shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.

According to the respondent, auxiliary request 4 is responsive to the Board's objection under Article

123(2) EPC against auxiliary request 3, raised for the first time in this way (i.e. as a distinct added subject-matter issue compared with the omission of the feature pertaining to the presence of adjacent portion(s)) and in relation to auxiliary request 3. Furthermore, despite the deletion of the reference to the first portion, this amendment did not infringe Article 123(3) EPC, because the width ratio of 1/3 was still defined by reference to the adjacent portions which necessarily included the first portion.

- 3.2 The Board firstly does not consider that exceptional circumstances are present in the case at hand. The argument that, in paragraph [0127], "there is no specific reference here to the first portion. In fact, the aforementioned sentence of paragraph [0127] explicitly refers to adjacent portions (plural)" was already raised in the appellant's statement setting out the grounds of appeal (see §6.1.3). In addition, the respondent itself precisely addressed the issue of basis for the comparison to the first portion in their reply to the appeal (see page 2), noting with respect to paragraph [0127] that "it is clear that such a paragraph compares the width of the bridge portion to the first portion, which is what is currently claimed, and hence there is basis for such a feature". The relevant arguments were thus in the appeal proceedings from the start, and the mere presentation of the objection of added subject-matter as two issues does not represent exceptional circumstances, nor does the fact that the Board's opinion on this matter departs from the finding of the opposition division.

The appellant did not raise the Article 123(2) EPC objection against auxiliary 3 in their ground of appeal, since the appealed decision did not cover

auxiliary request 3 but allowed the higher ranking auxiliary request 2. Nonetheless, the respondent must expect that an objection held valid against a higher ranking request will be examined for lower ranking requests.

3.3 Furthermore, the admittance of auxiliary request 4 is additionally subject to the provisions of Article 13(1) RPBA, which require that such amendment, *prima facie*, overcomes the issues raised and does not give rise to new objections. However, by deleting the reference to the first portion in the expression "wherein the bridging portion has a width that is less than 1/3 the width of adjacent portions of absorbent material and/or one or more transmission layers ~~of the first portion~~", the amendment is *prima facie* questionable under article 123(3) EPC. The claims as granted were limited by the upper limit for the width ratio compared to the first portion. Considering that the expression "adjacent portions" does not necessarily include the first portion (see 1.3 above), it is not established that the amended claims still require the bridging portion width to be less than 1/3 of the first portion. The compliance with Article 123(3) EPC is thus questionable.

3.4 For the above reasons, the Board did not admit auxiliary request 4 into the appeal proceedings.

Order

For these reasons it is decided that:

The decision under appeal is set aside.

The patent is revoked.

The Registrar:

The Chairman:



A. Vottner

A. Uselli

Decision electronically authenticated