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D E C I S I O N
of 11 January 2001

Case Number: T 0056/99 - 3.2.6

Application Number: 91908548.0

Publication Number: 0527171

IPC: A61F 13/15

Language of the proceedings: EN

Title of invention:

Sanitary napkin having improved flap disposition

Patentee:

The Procter & Gamble Company

Opponents:

Kimberly-Clark Corporation
SCA Molnlycke AB
Johnson & Johnson
Paul Hartmann AG

Headword:

Change of claim category: from sanitary napkin to method of installing a sanitary napkin in an undergarment/PROCTER & GAMBLE

Relevant legal provisions:

EPC Art. 123(2)(3), 56, 112

Keyword:

"Referral to Enlarged Board (no)"
"Amendments - change of category from product claim to process claim "
"Main request: extension of protection (yes)"
"Auxiliary request: novelty (yes), inventive step (no)"

Decisions cited:

G 0002/88, T 0378/86, T 0744/94

Catchword:

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Case Number: T 0056/99 - 3.2.6

D E C I S I O N
of the Technical Board of Appeal 3.2.6
of 11 January 2001

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Decision under appeal: Interlocutory decision of the Opposition Division
of the European Patent Office posted 21 December
1998 concerning maintenance of European patent
No. 0 527 171 in amended form.

Composition of the Board:

Chairman: P. Alting van Geusau
Members: H. Meinders
R. T. Menapace

Summary of Facts and Submissions

- I. The appeals are from the interlocutory decision of the Opposition Division announced on 20 November 1998 and sent to the parties on 21 December 1998 maintaining European Patent No. 0 527 171 in amended form.
- II. In its decision the Opposition Division considered that the subject-matter of claim 1 of the main request and the first and second auxiliary requests lacked novelty over the disclosure:

D1: EP-A-0 347 319.

However, the subject-matter of claim 1 according to the third auxiliary request filed at the oral proceedings held on 20 November 1998 was considered to meet the requirements of the EPC.

In addition to D1 the following documents from the opposition proceedings are relevant for the present appeal proceedings:

D5: US-A-3 672 371

D7: EP-A-0 345 703

D11: GB-A-1 377 575.

- III. Against this decision an appeal was filed by the Patentee (Appellant I) on 11 January 1999, with payment of the appeal fee on that day. Together with the statement of grounds of appeal, new requests were filed on 20 April 1999.

Opponent 01 (Appellant II) lodged an appeal on 17 February 1999, with payment of the appeal fee on the same day. The statement of grounds of appeal was filed on 28 April 1999.

Opponent 02 (Appellant III) lodged an appeal on 4 February 1999, with payment of the appeal fee on the same day. The statement of grounds of appeal was filed on 26 April 1999.

Opponent 03 (Appellant IV) lodged an appeal on 18 February 1999, with payment of the appeal fee on the same day. The statement of grounds of appeal was filed on 20 April 1999.

- IV. In preparation of oral proceedings the Board, pursuant to Article 11(2) of the Rules of Procedure of the Boards of Appeal, sent a communication to the parties setting out its preliminary opinion on the case.

The further written proceedings resulted in the Appellant I filing a main, an alternative main request and five auxiliary requests with letter of 2 January 2001.

- V. Oral proceedings were held on 11 January 2001. Appellant I requested setting aside the decision of the Opposition Division and maintenance of the patent in amended form according to the main request based on claims 1 to 4 of the fourth auxiliary request filed with letter of 2 January 2001 or the auxiliary request based on the set of claims of the fifth auxiliary request filed with that same letter.

Claim 1 of these requests reads as follows:

Main request:

"A method of installing, in an undergarment, a sanitary napkin (20) having two longitudinal side margins (30) and two lateral side margins (32), and comprising a liquid pervious topsheet (22), an absorbent core (26) and a liquid impervious backsheet (24) at least partially peripherally joined to the topsheet (22) thereby capturing said core (26) between the topsheet (22) and the backsheet (24) as a unitary assembly having a first major face defined by the topsheet (22) and a mutually opposed, second, major face defined by the backsheet (24), the backsheet of the assembly comprising further an outwardly oriented face on which a pressure sensitive adhesive (42) is disposed, and two flaps (28) which comprise a laminate of integral and contiguous extensions of the topsheet (22) and the backsheet (24), one flap (28) extending outwardly from each longitudinal side margin (30), characterised in that the method comprises, in sequence, providing the napkin arranged with the flaps (28) folded over the topsheet (22) of the assembly to cover a portion of that topsheet and with the flaps releasably maintained folded over the topsheet (22) by a unitary release strip (46') which bridges and covers adhesive patches (40) which are disposed on the backsheet (24) of each of the flaps (28), attaching to the crotch of the undergarment the pressure sensitive adhesive (42) which is disposed on the backsheet (24) of the assembly, peeling off said release strip (46') which maintains

the flaps folded over the topsheet,
folding the flaps (28) around the edges of the crotch
of the undergarment, and
attaching the flaps (28) to the outside of the
undergarment using the flap adhesive (40)."

Auxiliary request:

"A process for making a packaged sanitary napkin (20)
comprising providing a sanitary napkin having two
longitudinal side margins (30) and two lateral side
margins (32), said sanitary napkin (20) comprising
a liquid pervious topsheet (22),
an absorbent core (26) and
a liquid impervious backsheet (24) at least partially
peripherally joined to said topsheet (22) thereby
capturing the core between the topsheet and the
backsheet as a unitary assembly having a first major
face defined by the topsheet and a mutually opposed,
second, major face defined by the backsheet; and
two integral and contiguous extensions of a laminate of
the topsheet (22) and the backsheet (24), one extension
extending outwardly from each longitudinal side margin
(30) of said sanitary napkin (20) and wherein the
extensions are flaps;
characterised in that the process comprises
folding the said flaps over the first major face of the
assembly whereby they cover a portion of the topsheet
which defines that major face and
releasably maintaining the flaps (28) folded over the
topsheet (22), whereby they cover the said portion of
the topsheet (22), by applying adhesive patches (40)
and a unitary release strip (46') to the flaps (28)
wherein an adhesive patch (40) is applied to the
backsheet (24) of each flap (28) and the unitary

release strip (46') bridges and covers said adhesive patches (40) by providing a longitudinally trisectioned roll (116) comprising a release strip (46', 46") having opposed first and second faces, said first face having two outboard trisections (122), each with a release coating thereon, a central trisection intermediate (124) said outboard trisections (122), and two longitudinally oriented adhesive segments, one overlying each said outboard trisection (122); cutting said trisectioned roll (116) to a predetermined length, and generally contemporaneously applying said adhesive (40) and said release strip (46', 46") to the backsheet (24) of said flaps (28) with said adhesive (40) in contacting relationship with the backsheet of the flaps (28)."

VI. Appellant I requested the following question to be referred to the Enlarged Board of Appeal, in case the main request was to be rejected for the reason indicated:

"Is Article 123(3) violated by a change of claim type from a product claim to a process claim defining process steps which result in a change to the product."

Appellants II-IV requested setting aside the decision under appeal and revocation of the patent in its entirety.

Appellants III and IV requested to refuse the request for referral to the Enlarged Board.

The respondent (Opponent 04) requested that the appeal of the patentee be dismissed.

VII. The arguments of Appellant I can be summarised as follows:

Main request:

The change of claim category from a claim to a product to a claim for the method of installing that product in an undergarment should be considered allowable pursuant to Article 123(3) EPC as it was identical to a "use claim" of the product "for instalment in a garment".

If the Board would consider this change not allowable, the question (*vide supra*) should be referred to the Enlarged Board of Appeal, as there was no case law of the Boards of Appeal regarding this question.

Auxiliary request:

Novelty of the subject-matter of claim 1 of this request over D1 was already achieved by the distinguishing feature of the flaps covering only part of the topsheet; the extensions on the longitudinal sides of the sanitary napkin of D1, including the pull-away tabs, consisted of a laminate of topsheet and backsheets and covered the whole of the topsheet. Further, D1 did not disclose the claimed procedure of having the adhesive patches already as two sections on the release strip thus forming a tri-sectioned roll, cutting the strip to a predetermined length and applying the cut length of the strip and the patches generally contemporaneously to the sanitary napkin.

Inventive step should be recognised in that although the application of cut lengths of release strip provided with adhesive patches was already generally

known (as acknowledged in the patent in suit) long before the filing date of the patent, nobody thought of providing the release strip with the adhesive patches as a trisectioned roll and applying the latter as cut lengths to **flaps**, as did the invention. There was anyway no particular incentive for the skilled person to do away with first applying the adhesive to the flaps and covering it with the release strip, as according to D2 this was still done in 1979.

The acknowledgement of the process for applying adhesive to a sanitary napkin via a release strip applied only to the method of cutting and placing such prepared strips, not to using a trisectioned roll therefor.

VIII. The main arguments against the allowability of claim 1 of the main request under Article 123(3) EPC were put forward by Appellant IV being:

By installing the sanitary napkin in an undergarment the subject-matter originally claimed in the product claim 1 as granted underwent a broadening of its technical features, because the means for maintaining the flaps in the topsheet facing relationship were now no longer present, the release strip (46') which maintained the flaps folded over the topsheet having been peeled off to liberate the flaps for fixing to the undergarment.

Neither could granted claim 7 for the process of applying adhesive and a release strip to a sanitary napkin provide support for this change of claim category, as this claim related to a process for producing a product, not to a process for installing a

product in an undergarment. Also the result directly obtained by the production process of claim 7 as granted would still be a sanitary napkin **with** a release strip (46'), whereas the sanitary napkin installed in the garment according to present claim 1 would no longer have this release strip.

IX. Regarding the question requested to be referred to the Enlarged Board of Appeal, Appellants II-IV were of the opinion that such a referral served no purpose; there was no contradiction in the existing case law, it would not assist in any other pending case and the EPC could not be interpreted otherwise than that the protection conferred by the patent was extended when the product as originally claimed (or resulting from a claim relating to a process of manufacture of the product) underwent a change in its technical features.

X. Regarding the auxiliary request:

Appellant IV argued that the process step of pre-folding the flaps over the topsheet before applying the adhesive patch was not originally disclosed in the original application documents.

Novelty of the subject-matter of claim 1 was acknowledged by Appellants II-IV. Inventive step, however, could not be recognised. The only distinguishing feature in respect of D1 was the fact that instead of applying a hot-melt adhesive to the flaps and only subsequently the protective strip thereto, now the adhesive and the release strip were applied in one step, in predetermined lengths cut from a trisectioned roll.

This, however, was known at the time of filing the application for the patent in suit, as acknowledged in the patent in suit, column 11, lines 22 to 28.

Furthermore, also in the opposition proceedings the patentee had acknowledged the prior availability of machines for applying adhesive and release strip in such a way, see his submission of 9 November 1998, page 6, second paragraph.

A skilled person having to apply adhesive and a release strip to the flaps 245, 247 of the sanitary napkin according to D1 would recognize the advantages of doing this in one single step and therefore choose the known process of applying the adhesive to the release strip in two trisections and applying cut sections of this strip to the sanitary napkin. D 11 constituted documentary evidence for using a longitudinally trisectioned roll of release strip material with two separate adhesive regions; D5 showed the application of pre-cut sections of release strip from a trisectioned roll with adhesive thereon.

Reasons for the Decision

1. The appeals are admissible.
2. *Main request - Amendments (Article 123(3) EPC)*
 - 2.1 Claim 1 of the patent as granted is a product claim for a sanitary napkin with, among other technical features, two flaps extending outwardly from each longitudinal side margin, the flaps being folded over the topsheet of the napkin and means being provided to maintain the

flaps in the topsheet facing relationship.

- 2.2 Claim 1 of the main request now is a process claim relating to a method of installing a sanitary napkin in a garment involving, among other steps, providing the napkin with its two flaps folded over the topsheet and being releasably maintained folded by a unitary release strip bridging and covering adhesive patches on each of the flaps, peeling off the release strip, folding the flaps off the topsheet and around the edges of the crotch of the undergarment and attaching them to the outside of the latter.

According to Article 64(2) EPC this claim confers protection on the product directly resulting from the process. The direct result of the method now claimed is a sanitary napkin installed in a garment whereby the napkin no longer has its flaps folded over its topsheet but in a backsheet facing relationship, nor does it any longer have a release strip maintaining the flaps in the topsheet facing relationship.

- 2.3 According to Decision G 2/88 (OJ 1990, 93, Reasons 4.1), irrespective of whether there is a change in claim category, as with any amendment it has to be ascertained whether there is a change in technical features, so as to determine whether the protection conferred by the patent is extended or not. If technical features are changed by amendment such that the technical subject-matter of the claims after amendment is outside of the scope of the technical subject-matter before amendment, there is consequently an extension of protection.

Even though by the amendment a technical feature is

added (the undergarment), which on the one hand limits the extent of protection, the sanitary napkin itself is modified by peeling off the release strip, folding out the flaps and attaching the flaps to the undergarment's outside. This means that the flaps are now in a backsheet facing position and there is no longer a release strip present. The sanitary napkin now covered by the claim is outside of the scope of the one covered by claim 1 as granted in that the presence of a release strip, or the topsheet facing relationship of the flaps, is no longer a limiting feature.

When compared with granted claim 1 this amendment extends the scope of protection and therefore constitutes an infringement of Article 123(3) EPC.

2.4 Claim 7 of the patent as granted is a claim for a process which comprises, among other steps, the following:

- applying adhesive and a release strip to the flaps of a sanitary napkin by:
- providing a longitudinally trisectioned roll comprising a release strip with two longitudinally oriented adhesive segments, each overlying a respective outboard trisection of the roll,
- cutting the trisectioned roll in a predetermined length,
- applying the adhesive generally contemporaneously with the release strip to the faces of the flaps exposed by the fact that they have been folded over the topsheet of the napkin.

- 2.5 The amended process claim 1 of the main request does not relate to the application of adhesive and a release strip to a sanitary napkin by means of a trisectioned roll cut in predetermined lengths, but to the installation of a sanitary napkin in an undergarment by peeling off a release strip and folding the flaps around the edges of the crotch of the undergarment.

It is quite evident that the technical subject-matter of this claim after amendment is outside of the scope of the technical subject-matter as contained in claim 7 as granted, by the deletion of the process steps mentioned in point 2.4 above. Now any kind of method of applying the adhesive and the release strip would fall within the extent of protection conferred by the claim.

When compared with granted claim 7 this amendment therefore equally constitutes an infringement of Article 123(3) EPC.

- 2.6 According to Article 64(2) EPC, if the subject-matter of the European patent is a process, the protection conferred by the patent shall extend to the products directly obtained by such process.

The direct result of the process claim 7 as granted is, at least as far as the arrangement of the flaps and the release strip is concerned, a sanitary napkin with two flaps extending outwardly from each longitudinal side margin, the flaps being folded over the topsheet of the napkin, an adhesive patch being on each flap and a release strip covering both adhesive patches on the flaps and maintaining the flaps in the topsheet facing relationship.

2.7 As already discussed in point 2.2 above, the direct result of the installation of the sanitary napkin of claim 1 of the main request into an undergarment is a sanitary napkin with the flaps in a backsheet facing position, a release strip no longer being present. The subject-matter covered by this claim is outside the scope of the subject-matter covered by claim 7 as granted in that the presence of a release strip, or the topsheet facing relationship of the flaps, is no longer a limiting feature.

When the claim with this amendment is compared with granted claim 7, the amendment also involves an infringement of Article 123(3) EPC.

2.8 Appellant I has argued that present claim 1 should be read as a claim to the **use** of a product "for installing into a garment", probably in the sense as was considered allowable in decision G 2/88 (*supra*).

The Board cannot follow this opinion. Decision G 2/88 is quite clear (see Reasons 4.1) in stating that not only the question of a change in category, but also the question whether technical features of the invention are changed, should be examined. As already explained above the presently claimed method of installing the sanitary napkin involves a change in the technical features of the sanitary napkin itself, bringing the presently claimed sanitary napkin outside of the scope of the sanitary napkin as covered by claims 1 and 7 as granted.

That being the case, it is no longer necessary to discuss the allowability of the change in the claim category as such.

2.9 For the above mentioned reasons the Board is of the opinion that claim 1 of the main request does not meet the requirements of Article 123(3) EPC because technical features of the product, subject of the claim as granted, are changed such that the subject-matter of the claim after amendment lies outside of the scope of the granted claim.

3. *Request for referral of a question to the Enlarged Board of Appeal*

3.1 A Board of Appeal can, if it considers that in the case before it a decision of the Enlarged Board of Appeal is necessary to ensure uniform application of the law or because an important point of law has arisen, refer the relevant question of law to the Enlarged Board of Appeal (Article 112 EPC).

3.2 Considering the question as put forward by Appellant I (see point VI) the Board is of the opinion that none of these conditions is fulfilled in respect of this question.

As follows from the preceding points of this decision, the considerations as to the scope of protection conferred primarily concern a comparison of technical features between the claim as granted and the claim as amended, so as to assess the scope of each subject-matter claimed. They do not concern points of law.

3.4 As regards the question whether the protection conferred by the patent is extended by suppression of technical features from the subject-matter of the claims as granted there is no contradictory case law of the Boards of Appeal.

Such an amendment results in the claim covering subject-matter which was previously not covered by the claim as granted, thus making acts constitute infringement which prior to amendment could not have been considered as an infringement of the patent (see e.g. T 378/86, OJ 1988, 386 and T 744/94). The claim would truly protect an "aliud", namely a product which has been changed such that it is different from, not merely more specific than, the product protected by the claim as granted.

3.5 The request for referral of a question to the Enlarged Board of Appeal therefore has to be refused.

4. Since claim 1 of the main request does not meet the requirements of Article 123(3) EPC the main request cannot be allowed.

5. *Auxiliary request (Amendments (Article 123(2) and (3) EPC)*

5.1 Appellant IV argued in the written proceedings that the process step of pre-folding the flaps over the topsheet before applying the adhesive patch was not disclosed in the original application documents.

This feature is, however, clearly disclosed on page 16, lines 27 to 33 of the application documents as filed and to be found in original claim 7.

Thus, no objection under Article 123(2) EPC arises against claim 1 of the auxiliary request.

6. *Novelty of the subject-matter of claim 1 according to the auxiliary request (Article 54 EPC).*

Novelty of the subject-matter of claim 1 of this request vis-a-vis the available prior art is established in that none of the documents constituting this prior art discloses applying adhesive patches together with the release strip to **flaps** where the release strip is cut into predetermined lengths from a trisectioned roll before application to the flaps. None of the Appellants II-IV questioned the novelty of the subject-matter of claim 1 of this request.

7. *Inventive step of the subject-matter of claim 1 of the auxiliary request (Article 56 EPC)*

7.1 The closest prior art for assessing inventive step is considered to be represented by D1, because it involves a sanitary napkin with two integral and continuous extensions of a laminate of the topsheet and the backsheet, the extensions being flaps ("volets" 245 and 247).

Further, D1 mentions these flaps as being present in the middle zone of the napkin ("dans la zone mediane de la garniture"), Figure 5 does not show the topsheet extending into the laminate, forming the pull-away tabs 242 and 243, and only the backsheet 203 is mentioned as extending over the upper face of the napkin so as to overlap with its longitudinal edges 231 and 232.

Furthermore, the tear lines 240 and 241 extend to the region defining the flaps 245 and 247, of which they follow an edge ("..jusqu'à la zone définissant les volets (245) et (247) dont elle suit un bord"). Thus these flaps are already present in their final form, covering only a portion of the topsheet, when the napkin is in its wrapped state with the backsheet 203

enveloping the napkin and the pull-away tabs still in place.

Finally, these flaps can be released after tearing out the pull-away tabs 242 and 243 and by pulling off the release tab 249; they are therefore releasably maintained folded over the topsheet, among others by the release tab 249 cooperating with the adhesive patches 248. It is to be noted here that the claim does not mention the adhesive patches and the release strip being the **only** means releasably holding the flaps.

- 7.2 There are no indications in D1 supporting the view of Appellant I that the laminate of the topsheet and the backsheet forming the flaps in the sanitary napkin of D1 covers the entire topsheet surface.

On the contrary, the flaps are expressly mentioned in the description as being present in the middle section. It would further be a waste of topsheet material if it were thrown away with the pull-away tabs 242 and 243, and finally, it is the backsheet material 203 which is stated as being connected together with the backsheet material coming from the other side on top of the topsheet along its edges 231 and 232 (column 5, lines 1 to 3 and 12 to 15). It is not backsheet material being connected to the topsheet material of the opposite overlapping laminate of backsheet and topsheet, which would necessarily be the case considering the arrangement as shown in Figure 5.

- 7.3 The Opposition Division, in the decision under appeal (see point 9.2 regarding the third auxiliary request involving a process claim for the making of a sanitary napkin), found that there was a further feature

distinguishing that claim from the disclosure in D1, namely the fact that the flaps were **releasably** maintained before applying the release strip (emphasis added by the Opposition Division). As present claim 1 is identical to claim 1 then under examination by the Opposition Division in respect of this feature, this aspect of the decision under appeal needs further consideration.

It is to be observed that the actual wording of neither claim 1 of the request under examination by the Opposition Division nor of claim 1 according to the present auxiliary request leads to the interpretation indicated by the Opposition Division. The feature actually reads: "releasably maintaining the flaps (28) folded over the topsheet (22), , by applying adhesive patches (40) and a unitary release strip (46') to the flaps".

Even if the interpretation of the Opposition Division were accepted, the pull-away tabs (242 and 243) do releasably (they can later be torn out) maintain the flaps folded over the topsheet before the release strip is applied.

7.4 Finally, the Opposition Division also argued (point 10.4 of the decision under appeal) that the pull-away tabs 242 and 243 were the means primarily holding the flaps in the folded position, not the adhesive patches cooperating with the release strip. Therefore the disclosure of D1 did not involve the release strip releasably maintaining the flaps in the folded position.

The Board wishes to remark here that claim 1 of the

present auxiliary request does not mention the adhesive patches and the release strip being the **primary** means holding the flaps in the folded position, let alone the **only** means (emphasis added by the Board).

Thus the above mentioned feature as recognised by the Opposition Division cannot help in distinguishing claim 1 over D1 either.

7.5 Since the sanitary napkin known from D1 already provides a flap disposition which promotes cleanliness of the topsheet during handling as well as a convenient means for manipulating the flaps into a position in which they will be when the sanitary napkin is worn in an undergarment, the remaining object underlying the subject-matter claimed is to make the production method of the sanitary napkins more efficient (see the patent in suit, column 2, lines 10 to 21).

Starting from the sanitary napkin known from D1 this is achieved by the fact that the application of the adhesive patches as well as the release strip is done generally contemporaneously. The release strip comes from a trisectioned roll having adhesive segments covering the two outboard trisections of the roll. From this roll predetermined lengths are cut before application to the flaps of the sanitary napkin.

In the production of the sanitary napkin of D1 a hot-melt adhesive is applied to the backsheet folded over the topsheet at the location where the backsheet and the topsheet together form the laminate of the flaps 245 and 247. The release strip is laid over it subsequently.

7.6 It is known in this art that first applying adhesive to the backsheet of a sanitary napkin as the enveloping material of the absorbent core of a sanitary napkin and then covering it with a release strip is disadvantageous. This is discussed in D11, page 1, lines 22 to 40. The skilled person starting from the sanitary napkin disclosed in D1 and wishing to improve the production method thereof, will thus be on the lookout for other ways of applying the adhesive and the release strip.

As acknowledged in the patent in suit and confirmed by Appellant I in the oral proceedings, it was also known, prior to the priority date of the patent in suit, to apply adhesive first to the release strip, cut the strip with the adhesive to a predetermined length and apply this length of strip together with the adhesive to the backsheet of a sanitary napkin (see column 11, lines 22 to 28. In this respect Appellant I argued that the previously known process of applying adhesive which it had acknowledged did not involve a longitudinally trisectioned roll.

7.7 However, D5 (see Figures 1 and 2 and column 2, lines 1 and 2) clearly discloses the result of such a process, known before the priority date of the patent in suit, wherein a predetermined length of release strip with adhesive thereon has been applied to the backsheet of a sanitary napkin, where the release strip has to have originated from a longitudinally trisectioned roll with two adhesive segments each overlying an outboard trisection of the roll.

Thus the skilled person had, at the priority date of the patent in suit, already at his disposal machines

which applied a predetermined length of release strip from a trisectioned roll, with adhesive already applied on the outboard trisections, to the backsheet of sanitary napkins.

- 7.8 Since the flaps 245 and 247 of the sanitary napkin of D1 are not loose flaps, but are maintained in their topsheet facing relationship by the backsheet material 203 enveloping the entire absorbent core including the flaps, the problems put forward by Appellant I as existing with sanitary napkins having loose flaps to which adhesive and a release strip could difficultly be applied, do not arise. The face of the sanitary napkin having the flaps folded over the topsheet of the absorbent core is not different from the backsheet face of the sanitary napkin which is provided with cut lengths of release strip with adhesive patches thereon according to D5.

There is thus for the skilled person no technical obstacle against using the known process for applying predetermined lengths of release strip cut from a trisectioned roll with adhesive segments covering the two outboard trisections to the backsheet of a sanitary napkin.

- 7.9 The skilled person having to manufacture the sanitary napkin as disclosed in D1 in a more efficient way would recognize the advantages of this process implicitly known from D5 and apply it to the manufacture of the sanitary napkins as known from D1, thus arriving at the process claimed in claim 1 of the auxiliary request in an obvious manner.

- 7.10 Appellant I further questioned why it was so obvious to

apply adhesive to napkins by means of predetermined lengths of release strip cut from a trisectioned roll with adhesive already applied thereto as known from D5 (dating from 1970), instead of applying adhesive first to the napkin and only subsequently covering it with a release strip, if according to D2 the latter was still done in 1979.

- 7.11 According to D1, the application of adhesive to the backsheet of a napkin, with the subsequent application of a release strip, was still performed not only in 1979, but also as late as 1988. This, however, does not alter the fact that the disadvantages of this process still existed, having been acknowledged in 1972, the year of filing of D11. These disadvantages therefore still required a remedy.

Also in 1988 it had been acknowledged in the field of sanitary napkins that both methods were equivalent, which can be derived from D7, in which both methods are discussed for applying adhesive and a release strip to the backsheet as well as (at least) one of the flaps, on the backsheet face thereof, without expressing a preference in respect of one or the other (see column 5, lines 28 to 32 of D7).

- 7.12 Thus, the skilled person had a choice among equivalent processes of applying adhesive to a napkin's backsheet, one of which he was already performing in the manufacture of the sanitary napkin he was starting from (the one disclosed in D1).

The question therefore arises whether he would consider applying the other alternative. It is quite clear that the application of adhesive together with the release

strip has the additional advantage of not having to perform two steps, applying adhesive and subsequently the release strip, but performing one step, without having to synchronize the application of the release strip with the presence of the adhesive already applied to the sanitary napkin. This improves efficiency considerably.

This advantage is considered so evident to the skilled person that the question has to be answered in the affirmative.

8. Thus in view of the above assessment the Board comes to the conclusion that the subject-matter of claim 1 of the auxiliary request lacks inventive step.

None of the requests of Appellant I being allowable, the patent has to be revoked.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The request for referral of a question to the Enlarged Board of Appeal is refused.
3. The patent is revoked.

The Registrar:

The Chairman:

M. Patin

P. Alting van Geusau