

**Internal distribution code:**

- (A) [ ] Publication in OJ  
(B) [ ] To Chairmen and Members  
(C) [ ] To Chairmen  
(D) [X] No distribution

**D E C I S I O N**  
**of 2 April 2003**

**Case Number:** T 1158/00 - 3.2.6

**Application Number:** 92121187.6

**Publication Number:** 0548714

**IPC:** A61F 13/15

**Language of the proceedings:** EN

**Title of invention:**  
Hygienic absorbent article

**Patentee:**  
KIMBERLY-CLARK WORLDWIDE, INC.

**Opponents:**  
SCA Hygiene Products AB  
Paul Hartmann AG  
The Procter & Gamble Company  
McNeil-PPC, Inc.

**Headword:**  
-

**Relevant legal provisions:**  
EPC Art. 123(3), 83, 84, 54(2)

**Keyword:**  
"Amendments - extension of the protection conferred (no)"  
"Sufficiency of disclosure (yes)"  
"Clarity (yes)"  
"Novelty - after amendment (yes)"  
"Remittal to the first instance for further prosecution (yes)"

**Decisions cited:**  
T 0511/92

**Catchword:**  
-



Case Number: T 1158/00 - 3.2.6

**D E C I S I O N**  
**of the Technical Board of Appeal 3.2.6**  
**of 2 April 2003**

**Appellant:** KIMBERLY-CLARK WORLDWIDE, INC.  
(Proprietor of the patent) 401 North Lake Street  
Neenah, Wisconsin 54956 (US)

**Representative:** Dixon, Philip Matthew  
Frank B. Dehn & Co.  
Holzstrasse 26  
D-80469 München (DE)

**Respondent I:** SCA Hygiene Products AB  
(Opponent I) S-40503 Göteborg (SE)

**Representative:** Egeröd, Lisbeth  
Ström & Gulliksson IP AB  
Sjöporten 4  
S-41764 Göteborg (SE)

**Respondent II:** Paul Hartmann AG  
(Opponent II) Paul-Hartmann-Strasse 12  
D-89522 Heidenheim (DE)

**Representative:** Dreiss, Fuhlendorf, Steimle & Becker  
Patentanwälte  
Postfach 10 37 62  
D-70032 Stuttgart (DE)

**Respondent III:** The Procter & Gamble Company  
(Opponent III) One Procter & Gamble Plaza  
Cincinnati, Ohio 45202 (US)

**Representative:** McGregor, Judit Ester  
Procter & Gamble Service GmbH  
Sulzbacher Strasse 40-50  
D-65924 Schwalbach am Taunus (DE)

**Respondent IV:** McNeil-PPC, Inc.  
(Opponent IV) Grandview Road  
Skillman, NJ 08558 (US)

**Representative:** Groening, Hans Wilhelm, Dipl.-Ing.  
BOEHMERT & BOEHMERT  
Pettenkoferstrasse 20-22  
D-80336 München (DE)

**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 22 September 200  
revoking European patent No. 0 548 714 pursuant  
to Article 102(1) EPC.

**Composition of the Board:**

**Chairman:** P. Alting Van Geusau  
**Members:** G. Pricolo  
M. B. Tardo-Dino

## Summary of Facts and Submissions

I. The appeal is from the decision of the Opposition Division posted on 22 September 2000 to revoke European patent No. 0 548 714, granted in respect of European patent application No. 92 121 187.6.

In the decision under appeal the Opposition Division considered that claim 1 of the main request filed with letter dated 23 June 2000, lacked novelty in the light of the disclosure of document:

D1: US-A-4 687 478.

In its decision the Opposition Division also commented on the documents cited during the oral proceedings held on 27 July 2000, in particular:

D2: SE-B-379 635, with English translation;

D8: EP-A-397 110;

D11: US-A-4 798 603;

and stated that these documents were not more relevant than D1.

II. The appellant (patentee) lodged an appeal against this decision, received at the EPO on 1 December 2000, and simultaneously paid the appeal fee. The statement setting out the grounds of appeal, with which the appellant filed new main and auxiliary requests, was received at the EPO on 1 February 2001.

III. In an annex to the summons for oral proceedings

pursuant to Article 11(2) Rules of Procedure of the Boards of Appeal the Board expressed its preliminary opinion according to which it would appear that claim 1 of all requests did not meet the requirements of Article 123(2) EPC and that the objections raised by the respondents under Article 83 and 84 needed further discussion. In respect of novelty the Board stated that if it should come to the conclusion that novelty over D1 was given, then it would appear that the case should be remitted to the department of first instance for further consideration, in particular because the decision under appeal neither took into consideration the alleged prior uses, nor the question of inventive step.

- IV. New claims 1 to 28 and amended description pages 2 and 3 according to a revised main request were filed by the appellant with letter dated 28 February 2003. New first and second auxiliary requests were also filed.
  
- V. Oral proceedings took place on 2 April 2003.

The appellant filed new claims 1 to 3 replacing the previous claims 1 to 3 of the main request filed with letter dated 28 February 2003. He requested that the decision under appeal be set aside, that novelty be recognised for the claims of either the main request as amended during oral proceedings or of the auxiliary requests previously filed, and that the case be remitted to the first instance for consideration of inventive step.

Respondents I and III (opponents I and III) requested that the appeal be dismissed.

Respondents II and IV (opponents II and IV) did not attend the oral proceedings as announced with letters dated 24 March 2003 and 9 January 2003, respectively. The proceedings were continued without them (Rule 71(2) EPC). During the written proceedings the respondent II did not file any submissions in respect of the appeal. Respondent IV requested that the appeal be dismissed.

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

"A sanitary napkin (10, 10', 110, 210, 410) configured to absorb menstrual fluid discharged by the body during a menstrual period comprising a liquid-permeable cover (11, 111, 211, 416), a liquid-impermeable baffle (14, 412), a first absorbent layer (12, 212, 418) and a second absorbent layer (13, 420) positioned between said baffle and said first absorbent layer, wherein said second absorbent layer (13, 420) has a higher rate of wicking a liquid from the center to its lateral edges (18, 19) than said first absorbent layer (12, 212, 418), and said second absorbent layer (13, 420) is wider along its central transverse axis than said first absorbent layer (12, 212, 418), said central transverse axis of said second absorbent layer generally lining up with the central transverse axis of the sanitary napkin (10, 10', 110, 210, 410), characterised in that, in position in a user's undergarment, the lateral edges (18, 19) of the second absorbent layer (13, 420) are visible to the user when she looks down onto the top of the sanitary napkin (10, 10', 110, 210, 410), such that menstrual fluid detected near the lateral edges (18, 19) of the second absorbent layer (13, 420) indicates to the user that the sanitary napkin needs replacing."

VII. In support of its main request the appellant relied

essentially on the following submissions:

The definition of claim 1 was supported by the application as filed. Concerning the liquid-permeable cover, it was clear that a certain selection of materials should be made, as the cover should not be completely masking but should allow the user to see the lateral edges of the second absorbent layer. The skilled person would immediately know what materials to use for that purpose. Although it was essential for the performance of the claimed invention to provide a second absorbent layer wider than the first absorbent layer, the patent in suit did not disclose that this feature alone was responsible for the intended purpose of allowing visual inspection of the lateral edges of the second absorbent layer. As regards the rate of wicking referred to in claim 1, this was a feature already defined in claim 1 as granted and thus not open to objections under Article 84 EPC according to the established case law. Anyway, it was clear for a skilled person what was meant by materials having different rates of wicking.

Moreover, the patent in suit did not specify that only large amounts of menstrual fluids should be visible. If claim 1 as amended could be construed to include the possibility that even tiny amounts of menstrual fluids were visible, this also applied to claim 1 as granted. Therefore the amendments did not extend the protection conferred.

The disclosure in the prior art, in particular in D1 and D2, of the materials used for the absorbent layers did not constitute a direct and unambiguous disclosure of their relative wicking rates. In this respect, the

patent in suit emphasized that the values relating to absorbency and wicking rates were relative for any particular style of absorbent article and that one particular style of absorbent article might utilize the same material in its second absorbent layer as that utilized as the first absorbent layer in another absorbent article. Furthermore, there was no direct and unambiguous disclosure in D1 that the edges of the second absorbent layer were visible. This effect could only be obtained by selecting a liquid-permeable cover which did not mask the underlying absorbent layer. In fact, covers that would mask the absorbent layer did exist, as acknowledged in the patent in suit.

In D2, moreover, the second absorbent layer was covered by two layers, the topsheet and a soft paper layer, and was consequently masked from the user. The embodiments of D8 and D11 relied upon by the respondents referred to diapers, not to sanitary napkins. Transferring features of those embodiments to sanitary napkins would necessitate significant changes in the structure which were not disclosed in D8 and D11. Furthermore, these documents disclosed absorbent structures composed of two layers providing a capillary gradient for drawing fluid from the top to the lower absorbent zones of the diaper. There was no disclosure of the relative rate of wicking in a transverse direction.

VIII. The arguments of respondent I can be summarized as follows:

The feature of claim 1 that the lateral edges of the second absorbent layer were visible to the user contravened Articles 83 and 84 EPC because it was not clear whether this was due to the inherent transparency

of all conventional cover materials for absorbent articles or whether a specific selection among those cover materials was necessary. In any case, the patent in suit disclosed that the only reason why the lateral edges of the second absorbent layer were visible was that the latter was wider than the first absorbent layer. Furthermore, it was not clear how the rate of wicking should be measured, contrary to the requirements of Article 84 EPC. The patent in suit disclosed to measure the stain of liquid for a liquid up-take at different times, but was silent about what specific time should be taken into consideration for determining the rate of wicking.

D1 disclosed a sanitary napkin having a liquid-permeable cover made of any materials conventional in the art. All such materials were sufficiently transparent in order to allow visual inspection of the underlying absorbent layers. The second absorbent layer was preferably a tissue paper sheet which had inherently a higher wicking rate than the first absorbent layer, which preferably was of fluff pulp. The higher wicking rate of tissue over fluff was best illustrated by Table 2 of the patent in suit. The edges of the second absorbent layer were at a position corresponding to the crimping lines, which constituted a barrier to the further lateral wicking of fluid. Fluid detected near these edges constituted an indication that the sanitary napkin needed replacing. Therefore, the subject-matter of claim 1 was not novel. It also lacked novelty over the disclosure of documents D2, D8 and D11. Indeed, D2 disclosed a sanitary napkin which, as the sanitary napkin of D1, comprised an absorbent core made of fluff pulp and a second absorbent layer consisting of wet-strong soft paper, ie



tissue. The edges of the second absorbent layer were visible through the liquid-permeable cover and the soft paper layer enclosing the absorbent layers. D8 related to absorbent articles and in particular to sanitary napkins, comprising a conventional liquid-permeable cover and an absorbent structure with an upper layer having a lower capillary attraction, and therefore a lower rate of wicking, than the lower layer which edges were visible to the user. Similarly, D11 disclosed a sanitary napkin comprising an absorbent structure with an upper layer having a lower capillary attraction than the lower layer.

IX. Respondent III concurred with the argumentation of respondent I and additionally submitted that according to the definition of claim 1 even tiny amounts of menstrual fluid could be detected by the user near the lateral edges of the second absorbent layer. However, granted claim 1, when read in the light of the description, only encompassed the possibility that large amounts of menstrual fluids were visible. Therefore, the amendments resulted in an extension of the scope of protection, contrary to Article 123(3) EPC.

It was not clear, contrary to the requirements of Article 84 EPC, whether the following definition of claim 1: "such that menstrual fluid detected near the lateral edges of the second absorbent layer indicates to the user that the sanitary napkin needs replacing" referred to a property of the whole napkin or rather sought to define a feature of the liquid-permeable cover only. In any case, this definition could not be relied on for establishing novelty, because the patent in suit did not disclose how to provide a liquid-

permeable cover fulfilling the above-mentioned purpose, contrary to Article 83 EPC.

As regards novelty, respondent III stressed the fact that D1 explicitly disclosed to use the same materials of the patent in suit, in particular fluff pulp and tissue, for making the sanitary napkin. If the materials were the same, also the same function was unequivocally obtained. If the prior art did not disclose to visually inspect the sanitary napkin for an indication that it needed replacing, this could not imply that the claimed sanitary napkin was novel, but only that the particular use was novel. In respect of D8 and D11, although the embodiments shown therein were of diapers rather than sanitary napkins, it was clear for the skilled person that the teaching of these documents was to be seen in the construction of the absorbent structure. This teaching could be applied directly to sanitary napkins, which were explicitly cited in D8 and D11.

- X. Respondent IV only filed written submissions in respect of the appellant's main and auxiliary requests filed with the grounds of appeal. In respect of the main request, respondent IV argued that it lacked novelty over the disclosure of document D1. D1 disclosed the use, in a sanitary napkin, of the same absorbent materials as those specified in the patent in suit, and therefore the wicking properties of the known sanitary napkin inevitably corresponded to those of the claimed sanitary napkin. Furthermore, D1 disclosed the use of a formed film as the liquid-permeable cover. The term "film" implied that it had minor thickness which directly resulted in the desired characteristic of transparency.

## Reasons for the Decision

1. The appeal is admissible.
2. *Amendments - main request*
  - 2.1 Claim 1 includes all the features of claims 1 and 2 of the application as filed. It is further restricted by the addition of features taken from the description of the application as filed, see in particular page 1, first paragraph; the paragraph bridging pages 4 and 5; page 8 penultimate paragraph.

Dependent claims 2 to 28 are based upon claims 3 to 21, 24 to 27, 29, 30, 31 of the applications filed.

The description is amended to adapt it to the amendments made to the claims.

Therefore, the amendments made in accordance with the main request do not give rise to objections under Article 123(2) EPC.

- 2.2 Since claim 1 has been amended in respect of claim 1 as granted by way of introduction of additional features, the amendments do not result in an extension of the protection conferred so that no objections under Article 123(3) EPC arise.
- 2.3 Respondent III submitted that granted claim 1, when read in the light of the description, only encompassed the possibility that large amounts of menstrual fluids were visible, whilst claim 1 was so general to

encompass also the possibility that tiny amounts of menstrual fluid were visible.

Neither claim 1 as granted nor claim 1 as amended includes any specifications as to the amount of menstrual liquid that should be visible. Since moreover no substantial amendments of the description have been made, there cannot be an interpretation of amended claim 1 in the light of the description in respect of the quantity of menstrual fluid that should be visible to the user, which is different from the corresponding interpretation of claim 1 as granted. Therefore, there can be no question of a broader extent of protection conferred by amended claim 1.

3. *Sufficiency of disclosure (Article 83 EPC) - main request*

The question of sufficiency of disclosure was raised by respondents I and III in connection with the amendment of claim 1 introducing the feature that the lateral edges of the second absorbent layer were visible to the user when she looks down onto the top of the sanitary napkin.

The patent in suit discloses specific examples of materials suitable for the liquid-permeable cover (see page 4, lines 4 to 11). In the Board's view, there is no difficulty for the skilled person to provide any of these materials in a form suitable for being used as a cover which allows visual inspection of the underlying lateral edges of the second absorbent layer. Once a specific material has been selected by the skilled person, it is only necessary to ensure that it is formed in a shape which is thin enough and/or that it

is of a colour which allows the lateral edges of the second absorbent layer and any menstrual fluid absorbed by the latter near the lateral edges to be seen through the liquid-permeable cover. In fact, the respondents I and III themselves admitted that the topsheets usually provided in sanitary napkins are inherently sufficiently transparent to allow visual examination of the underlying absorbent layers.

Therefore, the amendments do not give rise to objections under Article 83 EPC.

4. *Clarity (Article 84 EPC) - main request*

4.1 Respondent I submitted that it was not clear how the rate of wicking should be measured and therefore claim 1 was not clear.

However, the claim requires that a differential between the rates of wicking of the first and second absorbent layer be established. For determining whether such a differential exists it is not necessary to refer to a particular method of measuring the rate of wicking; it is only necessary that the measurements of the rates of wicking are carried out under similar conditions, in particular that the measurements of the stain for a liquid up-take are taken at the same time after each up-take. It follows that the objection of the respondent I is unfounded.

4.2 Respondent III submitted that it was not clear whether the definition of claim 1 that menstrual fluid detected near the lateral edges of the second absorbent layer indicated to the user that the sanitary napkin needed replacing referred to a property of the whole napkin or

rather sought to define a feature of the liquid-permeable cover only.

This definition refers to a result which can be achieved, in use, with a sanitary napkin having the technical features defined in claim 1. If the napkin comprises a second absorbent layer which is wider and has a higher rate of wicking from the center to its lateral edges than the first absorbent layer, and a liquid permeable cover which is such that the lateral edges of the second absorbent layer are visible to the user, then it is possible, in use, to detect menstrual fluid near the lateral edges of the second absorbent layer. Since moreover the second absorbent layer has a higher rate of wicking from the center to its lateral edges than the first absorbent layer, menstrual fluid can reach the lateral edges of the second absorbent layer faster than fluid that remains in the first absorbent layer (see page 3, lines 9 to 13, of the patent in suit). As a consequence, the presence of menstrual fluid near the lateral edges can constitute the indication for the user that the sanitary napkin needs replacing (see page 3, lines 13 to 15 of the patent in suit). The above-mentioned definition further implies that the dimensions of the absorbent layers should be such that the presence of menstrual fluid near the lateral edges **effectively constitutes** the indication for the user that the sanitary napkin needs replacing. However, it is clear that no further features of the napkin or of the liquid-permeable cover are implied by the above mentioned-definition, and therefore no ambiguity such as that pointed out by respondent III arises in connection therewith.

Thus, the Board finds that the amendments made are not

objectionable under Article 84 EPC.

5. *Novelty*

5.1 Using the wording of claim 1, document D1 discloses (see Figures 1, 2) a sanitary napkin configured to absorb menstrual fluid discharged by the body during a menstrual period comprising a liquid-permeable cover (topsheet 214), a liquid-impermeable baffle (backsheet 218), a first absorbent layer (absorbent core 216) and a second absorbent layer (flap absorbent core 230) positioned between said baffle and said first absorbent layer (and garment attachment panels 224, 224' constructed from the same material as the baffle and the liquid permeable cover) wherein said second absorbent layer (230) is wider along its central transverse axis than said first absorbent layer, said central transverse axis of said second absorbent layer generally lining up with the central transverse axis of the absorbent article.

D1 discloses (see column 4, lines 55 to 58) that the absorbent core 216 (first absorbent layer) can comprise any materials used in the art, preferably fibrated comminution pulp (airfelt) and that (see column 6, lines 35 to 38) the flap absorbent core 230 (second absorbent layer) can be made of any of the materials used for making the absorbent core 216, preferably a tissue paper sheet.

The respondents I, III and IV submitted essentially that the material (tissue) preferably used in D1 for the second absorbent layer inherently had a higher rate of wicking a liquid than the material (pulp) preferably used for the first absorbent layer. However, as

submitted by the appellant, a same material can be used for the manufacture of absorbent layers having different wicking rates, since it is not the material alone that determines the wicking properties of the absorbent layer, but also other parameters such as the degree of compression of the material (density) in the layer, the specific composition of the material, the orientation of fibres. Thus, the disclosure of the materials used for the absorbent layers cannot be regarded to constitute a clear and direct disclosure of the relative wicking rate of the absorbent layers from the center to the lateral edges. Neither have the respondents submitted any evidence in support of the allegation that if the materials disclosed in D1 are used for manufacturing the first and second absorbent layers, then the second absorbent layer **always** has a higher rate of wicking than the first **independently** from any other factors. The examples given in the patent in suit (Tables 1 and 2 on pages 8 and 9) merely show that the specific tissues used therein have a higher rate of wicking than one kind of fluff (Kotex maxi fluff insert). These examples, because of their specific nature, cannot however be generalised and cannot therefore constitute the above-mentioned evidence. It follows that it cannot be concluded that D1 clearly and directly discloses the feature of claim 1 that the second absorbent layer has a higher rate of wicking a liquid from the center to its lateral edges than said first absorbent layer. For this reason, considering that according to the established case law of the Boards of Appeal (see eg T 511/92) the subject-matter of a claim is deprived of novelty only if its features are clearly and directly disclosed by the prior art, the Board is satisfied that the subject-matter of claim 1 is novel over D1.



Moreover, the respondents submitted that all the materials used in D1 for the liquid-permeable cover were sufficiently transparent in order to allow visual inspection of the underlying absorbent layers. D1 discloses that the topsheet (liquid-permeable cover) can be made from any of the materials conventional for this type of use, in particular woven and nonwoven polyester, polypropylene, nylon, rayon and formed (ie apertured) thermoplastic films (see column 4, lines 4 to 9). However, also in this case D1 refers only to the material used, and does not give all the specifications of the topsheet necessary to conclude clearly and directly that the latter allows to see the lateral edges of the underlying second absorbent layer. Indeed, it is not only the material or the presence of apertures *per se* in the topsheet that are determining in this respect, but also the thickness and density of the material, as well as the pigmentation of the fibers, and the dimensions and location of any apertures provided in the topsheet. Since any information about the actual transparency of the topsheet is missing in D1, the generic disclosure of D1 does not take away the novelty of the claimed feature relating to the visibility of the lateral edges of the second absorbent layer. Finally, in its decision the Opposition Division considered that "the thickness of the cover material is not so relevant since all these topsheets will be made within a certain range. The transparency is more dependent on the material and the presence of apertures than on the thickness". However, it is not excluded that the thickness plays a certain role, even in the range of thicknesses usually adopted for topsheets of sanitary napkins, and therefore the statement of the Opposition Division has to be regarded as a mere allegation. It follows that it cannot be

concluded that D1 clearly and directly discloses the feature of claim 1 that, in position in a user's undergarment, the lateral edges of the second absorbent layer are visible to the user when she looks down onto the top of the sanitary napkin.

As a consequence of the fact that D1 does not disclose the above-mentioned features of claim 1, it must be concluded that there is no clear and unambiguous disclosure that the sanitary napkin of D1 is such that menstrual fluid can be detected near the lateral edges of the second absorbent layer, thereby indicating to the user that the sanitary napkin needs replacing.

- 5.2 As regards document D2, reference is made to the English translation, which is assumed to be correct since this has not been contested.

D2 discloses a sanitary napkin comprising a liquid-permeable cover (6), a liquid-impermeable baffle (10), a first absorbent layer (1) made of fluff (see page 2, line 22) and a second absorbent layer (stiffening layer 2) made of wet strong soft paper (see page 2, line 25) positioned between said baffle and said first absorbent layer, wherein said second absorbent layer (2) is wider along its central transverse axis than said first absorbent layer. However, the disclosure in D2 of the materials used for the absorbent layers cannot be regarded to constitute a clear and direct disclosure of their relative wicking rate (see point 5.1 above). Moreover in D2 the second absorbent layer (2) is covered by a soft paper layer (4) and by a cover (6) made of a nonwoven material (see page 3, lines 2, 3, 9 and 28 to 30). Also here, the general disclosure of the materials for the layers covering the

second absorbent layer (2) does not constitute a clear and direct disclosure that the latter is visible through said two layers.

- 5.3 Document D8 discloses (see Figures 1, 2) an absorbent structure (page 4, line 28) comprising a topsheet (28), a liquid-impermeable backsheet (30), a surge management portion (46) being a first absorbent layer and a retention portion being a second absorbent layer positioned between said baffle and said surge management portion.

Various materials for the topsheet are disclosed in D8 (see page 5, lines 23 to 32). However, as explained above (see point 5.1), the general disclosure of the materials for the topsheet does not constitute a clear and direct disclosure that the lateral edges of an underlying absorbent layer are visible through it. Furthermore, D8 (see page 7, line 55 to page 8, line 4) discloses that the surge management portion has and maintains a capillary attraction which is lower than that exhibited by the retention portion, whereby liquid surges occurring in the target zone tend to be desorbed more readily from the surge management portion and into the retention portion. However, this disclosure relates to the capillary attraction in the vertical direction from the surge management portion to the retention portion. There is no clear and direct basis to conclude that it also relates to a similar capillary attraction in transversal direction (from the center towards the lateral edges).

A disclosure analogous to that of D8 is found in D11 (see column 1, line 7; column 4, lines 60 to 66; column 11, lines 14 to 21), which shows (see Figure 1)

an absorbent body comprising topsheet (14), first absorbent layer (18), second absorbent layer (16) and a backsheet (12 in Figure 4).

D11 additionally discloses ranges for fiber denier, thickness and pore size of the topsheet (see column 4, lines 29 to 68), yet there is no evidence that by freely selecting values among these ranges a topsheet is obtained which allows visual examination of the lateral edges of an underlying absorbent layer.

Moreover, D11 specifies that in the absorbent article a gradient of decreasing pore size is provided as liquid moves from the first to the second absorbent layer (see column 7, lines 27 to 41). Also here, analogously to D8, the disclosure relates to a pore size gradient providing a preferential flow in a vertical direction away from the topsheet. There is no clear and direct basis to conclude that it relates to a pore size gradient also providing a higher rate of wicking of the second absorbent layer from the center to its lateral edges.

Furthermore, the specific examples given in D8 and D11 of topsheets and absorbent layers refer to diaper articles (see D8, page 4, lines 26 to 29; see D11, column 2, lines 57 to 60). Both D8 and D11 disclose that the invention also applies to sanitary napkins; however this only implies that the absorbent structures conceptually disclosed therein can be used for sanitary napkins, not that any specific component disclosed for use in diapers (eg an absorbent core having a given thickness) is as such practically suitable for sanitary napkins configured to absorb menstrual fluid.

- 5.4 It follows that the subject-matter of claim 1 and of dependent claims 2 to 28 in accordance with the main request is found to be novel over the disclosure of D1, D2, D8 and D11.
6. As regards novelty, the Opposition Division has not considered the allegations of prior uses. Neither has it considered the question of inventive step. Furthermore, the appellant requested that the case be remitted to the first instance for consideration of inventive step. For these reasons, the Board of Appeal finds it appropriate to remit the case to the Opposition Division for further prosecution on the basis of the requests filed by the appellant in the appeal proceedings.

## **Order**

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

1. The decision under appeal is set aside.
2. The case is remitted to the first instance for further prosecution.

The Registrar:

The Chairman:

R. Schumacher

P. Alting van Geusau