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Datasheet for the decision of 26 June 2007

Case Number: T 1058/06 - 3.2.06

Application Number: 99941175.4

Publication Number: 1113771

IPC: A61F 13/15

Language of the proceedings: EN

Title of invention:
A method for cutting and sealing an absorbent member

Patentee:
THE PROCTER & GAMBLE COMPANY

Opponent:
Paul Hartmann AG

Headword:
-

Relevant legal provisions:
EPC Art. 54, 56

Keyword:
"Late-filed document (not admitted)"
"Claim 1 (main request): novelty (yes) - inventive step (no)"
"Claim 1 (1st auxiliary request): inventive step (yes)"

Decisions cited:
-

Catchword:
-

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 1058/06 - 3.2.06

D E C I S I O N
of the Technical Board of Appeal 3.2.06
of 26 June 2007

Appellant: (Opponent)
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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted 28 April 2006 rejecting the opposition filed against European patent No. 1113771 pursuant to Article 102(2) EPC.**

Composition of the Board:

Chairman: P. Alting Van Geusau
Members: G. L. de Crignis
K. Garnett

Summary of Facts and Submissions

I. The mention of the grant of the European Patent No. 1 113 771 with respect to European patent application No. 99 941 175.4 filed on 13 August 1999 was published on 2 May 2003. The granted patent was based on eleven claims. Claim 1 was the only independent claim and reads as follows:

Claim 1 as granted:
"A method for cutting and sealing an absorbent member (26), said absorbent member (26) comprising a core web (110) comprising a fibrous material and a superabsorbent material and having a first side edge (111) and a second side edge (112), a wrap web (105) having an outer surface (107) and an inner surface (106), said method being characterized by the steps of:
- applying a superabsorbent material movement obstruction agent (120) to said wrap web (105),
- combining said wrap web (105) with said core web (110) such that said inner surface (106) is facing towards said core web (116) to form an absorbent member web), and said method further comprising a step of
- cutting said absorbent member web (140) into discrete absorbent members (26)."

II. A notice of opposition was filed by the opponent with letter of 28 January 2004. The opponent requested revocation of the patent in its entirety on the grounds of lack of novelty and lack of inventive step under Article 100(a) EPC and on the ground of the patent not being disclosed in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art (Article 100(b) EPC) in particular with

regard to the subject-matter of claim 4. The opposition was supported by the following documents:

E1 WO-A-95/03021

E2 EP-A-0 176 305 and

E3 EP-B-0 346 928.

III. In a decision posted on 28 April 2006, the opposition division rejected the opposition. The opposition division held that the subject-matter of claim 1 was novel and involved an inventive step (Article 100(a) EPC). In particular it was of the opinion that the primary core integrity layer of E1 did not clearly and unambiguously correspond in its function to the wrap web of the patent in suit and that E1 did not disclose a method involving a cutting step as claimed. The objection raised under Article 100(b) EPC had been withdrawn and was not pursued any further by the opposition division.

IV. On 28 June 2006 a notice of appeal against this decision was filed by the appellant (opponent) and the appeal fee was paid that same day, followed by the statement of grounds of appeal filed on 16 August 2006. The appellant requested that the decision of the opposition division be set aside and the patent be revoked on the grounds of Article 100(a) EPC (lack of novelty and lack of inventive step), particularly because the subject-matter of claim 1 as granted was not novel over E1.

V. In a communication dated 8 March 2007 accompanying the summons to oral proceedings, the Board indicated that it considered the primary core integrity layer of E1 to correspond with the wrap web specified in claim 1 and to that extent did not agree with the reasoning of the opposition division.

VI. Oral proceedings were held on 26 June 2007. The appellant requested that US-A-3,111,948 be admitted into the proceedings, that the decision under appeal be set aside and that the patent be revoked. The respondent (patent proprietor) requested that the appeal be dismissed or, in the alternative, that the patent be maintained on the basis of the set of claims filed during the oral proceedings (first auxiliary request).

Claim 1 according to the first auxiliary request differs from claim 1 as granted (main request) in that in the characterizing portion the first step has been amended as follows (amendments in italics):

"- applying a superabsorbent material movement obstruction agent (120) to said wrap web (105), *wherein said superabsorbent material movement obstruction agent (120) is a material selected from the group of polymeric solutions or emulsions*,"

Furthermore, the auxiliary request differs from the main request in that dependent claims 10 and 11 are deleted, and the reference numbers in claims 4 and 5 are partly deleted for consistency with the reference numbers in the Figures. Furthermore, it is clarified in

claim 4 that it is the wrap web whose sides are joined to each other.

VII. In support of its requests the appellant argued essentially as follows:

Figure 3 of E1 disclosed a cross-sectional view of the different layers of the absorbent article. According to this disclosure, it was clear that the placement of the individual primary core integrity layer (120) would take place after combination of this layer with the core web (storage layer) because otherwise it would be technically difficult to achieve the correct positioning of the layers, in particular for layers having a lengthways registration. In such a case the primary core integrity layer and the storage layer had always to be cut in combination. Because the skilled person would recognise this from an analysis of Figure 3, this embodiment deprived the subject-matter of claim 1 of novelty.

The subject-matter of claim 1 did not involve an inventive step when starting from either E1, E2 or E3. The whole article disclosed in E1 could be formed on-line, as explicitly set out for the primary core integrity layer. Continuous and intermittent processes were referred to. E1 further disclosed that the end edges of the primary core integrity layer might be registered with the end edges of other layers of the absorbent core. The skilled person would immediately recognize that such an embodiment was advantageous in so far as the function of the primary core integrity layer was only related to the core (= storage) layer and thus there was no need for this layer to extend

beyond the edges of the storage layer. Having decided that this layer should have an extension identical to the storage layer, it was obvious for the skilled person to combine these two layers before placing them on another part of a more complex absorbent article, in order to guarantee correct positioning. The combination of these two layers and their identical length only required one cut and thus represented the most economical technical solution as well. Therefore, no inventive skills were necessary to arrive at the subject-matter of claim 1. The same reasoning applied *mutatis mutandis* when starting from E2 or E3.

The subject-matter of claim 1 of the auxiliary request was not clear (Article 84 EPC) and the skilled person did not know how to carry out the invention (Article 83 EPC).

The added wording when compared to claim 1 of the main request related to a superabsorbent material movement obstruction agent being a material selected from the group of polymeric solutions or emulsions. It was not clear whether "polymeric solutions or polymeric emulsions" was meant or whether "emulsions" generally were being referred to (Article 84 EPC).

Furthermore, the added wording resulted in an undue burden for the skilled person (Article 83 EPC) when trying to carry out the invention claimed. The polymeric solutions or emulsions were not further specified, no example was disclosed and it was not credible that the method could be performed over the whole range claimed including all polymeric solutions or emulsions.

When assessing inventive step, again any one of documents E1, E2 or E3 was an appropriate starting point. Each of these documents referred to an absorbent article having a storage layer and a wrap web and disclosed a construction adhesive in the form of hot melt adhesive. The use of polymeric solutions or emulsions instead of hot melt adhesives had the advantage of better penetration into the core, a fact which was well-known to the skilled person. Such a selection was therefore obvious.

The auxiliary request was late filed and therefore its content could not have been considered in detail nor could it have been expected that it would have been necessary to prove that polymeric solutions or emulsions were appropriate for use in diaper construction. Therefore, document US-A-3,111,948 should be admitted into the proceedings in order to demonstrate the background knowledge in this respect.

VIII. The respondent argued essentially as follows:

Concerning novelty of the main request, E1 disclosed an absorbent article but did not disclose manufacturing steps and in particular did not refer to a cutting step. Although it was obvious that all components of such an article had to be cut, there existed many different possibilities in this respect. The schematic drawing in Figure 3 of E1 highlighted the fact that various widths of the different layers were to be taken into account. With respect to the length of the layers, Figure 2 indicated that the length of the primary core integrity layer should differ from the length of the storage

layer. Therefore, a simultaneous cut of these two layers was not disclosed.

Concerning inventive step of the subject-matter of claim 1 of the main request, E1 represented an appropriate starting point. However, E1 did not suggest a manufacturing method involving a distinct assembly of the primary core integrity layer with the storage layer before assembling them with the other layers. The different lengths of the primary core integrity layer and the storage layer of the article shown in Figure 2 of E1 contradicted the possibility of a common cut of these two layers. Therefore, E1 lacked any specific teaching in the direction of the claimed features.

With respect to the auxiliary request, it was additionally specified in claim 1 of this request that the material for the superabsorbent material movement obstruction agent was to be selected from the group of polymeric solutions or emulsions. The added wording already formed the subject-matter of dependent claim 8 as originally filed and as granted and therefore no problem could arise regarding the requirements of Articles 123(2) EPC or 84 EPC. In case there was any doubt whether polymeric emulsions were referred to, the description in paragraph [0024] clarified this aspect. It referred to the preferred emulsions as being waterborne emulsions of acrylic or vinylic adhesive polymers. Hence, only adhesive polymeric emulsions should be considered.

As regards the objection to claim 1 of the first auxiliary request on the grounds of insufficiency of disclosure (Article 100(b) EPC), Article 100(a) EPC was

the only objection raised by the appellant in the appeal and the only objection pursued during the opposition proceedings. The appellant should not be permitted to introduce a new objection at such a late stage. There could be no doubt that the skilled person could clearly identify appropriate polymeric solutions or polymeric emulsions, as the "more preferred" examples in paragraph [0024] suggested waterborne emulsions of acrylic or vinylic adhesive polymers. The choice of appropriate polymeric solutions or emulsions had to take into account the nature of the materials making up the affected neighbouring layers. Therefore, it was not necessary to specify the adhesive polymeric solutions or emulsions further.

Contrary to the claimed subject-matter and irrespective of the cutting step, E1, E2 and E3 specified hot melt adhesive as the appropriate construction adhesive. Hence, the added subject-matter distinguished claim 1 further from this prior art. None of the documents which were cited disclosed adhesive polymeric solutions or emulsions for the purpose of a superabsorbent material movement obstruction agent. Therefore, there was nothing to suggest such use to the skilled person.

The document US-A-3,111,948 submitted by the appellant and cited as relevant for the background knowledge concerning polymeric solutions or emulsions was late filed during the oral proceedings. It should not be admitted into the proceedings as such a document was not suitable for the purpose intended, namely for establishing common general knowledge. Furthermore, granted claim 8 upon which the added wording was based had never been objected to during the opposition

proceedings and therefore such a late-filed objection should be considered an abuse of proceedings.

Reasons for the Decision

1. The appeal is admissible.

2. Admissibility of the document US-A-3,111,948

2.1 Appeal proceedings are normally examined and decided upon on the basis of facts and evidence filed during the proceedings before the opposition division. Further, the Rules of Procedure of the Boards of Appeal require the parties to set out their case in full, together with all facts, arguments and evidence relied on, in the grounds of appeal or reply (Rules of Procedure of the Boards of Appeal, (OJ EPO 2004, 541, consolidated version with OJ EPO 2003, 89), Article 10a(2)). While the filing of facts and evidence by parties to opposition appeal proceedings is not precluded at any stage of such proceedings, the admissibility of facts and evidence filed at a late stage in such proceedings is always a matter of discretion for the EPO (see Article 114(2) EPC, G 4/95 (OJ 1996, 412, point 4a), Rules of Procedure of the Boards of Appeal, Article 10b).

2.2 US-A-3,111,948 was filed during oral proceedings before the Board of Appeal and after the discussion of inventive step of the subject-matter of claim 1 of the auxiliary request had been entered into. According to the appellant, the necessity to provide evidence of the common general knowledge emerged only at that stage, in

response to the filing of claim 1 of the auxiliary request.

2.3 However, the added subject-matter in claim 1 of this request is based on the wording of claim 8 as granted, which had never been objected to or addressed by the appellant in the opposition-appeal proceedings. Furthermore, the subject-matter of claim 1 of this request was in substance already filed with the letter of 25 May 2007. Thus, there was no reason why the US-A-3,111,948 document could not have been introduced earlier. Since the document is late filed, it needs to be assessed whether it should nevertheless be introduced into the proceedings.

2.4 In accordance with the jurisprudence of the Boards of Appeal, relevance is an important criterion for deciding on the admissibility of a late-filed document, quite apart from considerations such as the procedural stage at which it is submitted and the complexity of a new submissions which it involves (see Case Law of the Boards of Appeal of the European Patent Office, fifth English edition, 2006, VI.F.2/3).

2.5 US-A-3,111,948 is cited as evidence of common general knowledge in the technical field of glue application in the manufacture of absorbent products. However, the question arises whether the document is appropriate for this intended purpose.

2.6 Generally, common general knowledge can be defined as the technical background knowledge of the hypothetical skilled worker in the relevant art. It is not limited to knowledge learned during basic studies or

apprenticeship but also includes literature relevant to the field such as encyclopaedias, handbooks and technical dictionaries which the skilled worker is used to rely upon. Only exceptionally do patent specifications form part of such knowledge, for example in cases where this is the only such literature available or where it is obvious that appropriate knowledge can only be found in such literature. The Case Law of the Boards of Appeal supports the view that patent specifications are otherwise not part of the common general knowledge of the natural skilled addressee (T 206/83, point 6). Only by way of exception can patent specifications (see T 51/87 OJ 1991, 177, point 9) be considered as forming part of the common general knowledge, as for example when a field of research is so new that technical knowledge is not yet available from textbooks. In such a case the skilled person would consider looking into literature such as relevant journals and patent specifications in order to establish in which direction this field had developed and how far the research had already been gone.

2.7 Concerning adhesive technology and hot melt application, common general knowledge in the form of classical hand books is already available. The technical field of manufacturing absorbent articles including such technology represents an established field of research. Hot melt adhesives as construction adhesives have been in use since the 1950s.

US-A-3,111,948 is generally related to an absorbent pad and wrapper therefore, and although adhesives are an important issue, this 1963 patent clearly does not qualify by way of an exceptional circumstance of the

kind mentioned above under which a patent may be considered to disclose "common" knowledge rather than specific knowledge. In any case, the Board fails to see why the skilled person would have considered such ancient patent literature as an appropriate source for reviewing the common general knowledge of adhesives, a technical field with substantial developments since publication of US-A-3,111,948.

2.8 Thus, and for this reason alone, the admission of US-A-3,111,948 into the proceedings for the intended purpose is not justified.

3. *Novelty - Claim 1 of the main request*

3.1 E1 discloses an absorbent article comprising an absorbent core with a storage layer comprising a fibrous web and superabsorbent particles (page 14, lines 20-22). In Figure 3 a schematic transverse cut of such an article is shown in which the primary core integrity layer (120) is located next to the storage layer (190). According to Figure 3 and the description on page 43, lines 12/13, a construction adhesive (96) is applied to the primary core integrity layer. The primary core integrity layer provides structural support to the absorbent core (page 28, lines 3/4).

3.2 When comparing the article disclosed in E1 with that of claim 1, the primary core integrity layer of E1 corresponds to the wrap web of claim 1 and the storage layer or core layer of E1 corresponds to the core web of claim 1. The primary core integrity layer is combined with the storage layer such that the inner surface of the primary core integrity layer is facing

towards said storage layer in E1 and thus forms an absorbent member web as claimed.

3.3 E1 primarily addresses the article but some manufacturing steps are disclosed as well. However, nowhere is it disclosed that the manufacturing method includes the cutting of a member web consisting of a primary core integrity layer and a storage layer into discrete absorbent member webs. Hence, the subject-matter of claim 1 is novel with respect to E1 (Article 54 EPC).

No novelty objections with regard to any other document have been put forward and novelty has only been discussed having regard to E1.

4. *Inventive step - Claim 1 of the main request*

4.1 E1 refers to an absorbent article and various manufacturing steps are disclosed which give information about the details of the manufacturing process. As set out with respect to the novelty issue, above, the distinguishing feature with respect to the subject-matter claimed in claim 1 is represented by the last method step of claim 1 which states:
"cutting said absorbent member web (140) into discrete absorbent members (26)".

4.2 The patent in suit discloses as the problem to be solved the elimination of the gel-on-skin-phenomena. Avoiding the escape of superabsorbent material at the open ends of an absorbent member (paragraph [0007]) can only be obtained by the use of the superabsorbent movement obstruction agent applied such that it

immobilizes the superabsorbent material. Such an immobilization or obstruction could be achieved either by specifying agents which could penetrate the wrap web or by the application of such agents to the inner surface of the wrap web. Neither of these possibilities is required according to the subject-matter of claim 1. Therefore, the problem relied upon by the respondent is not solved by the subject-matter of claim 1 and it is also immediately apparent that the feature distinguishing the subject-matter of claim 1 from the disclosure of D1 is not functionally related to this problem. Thus, when assessing inventive step, the objective technical problem to be solved by the subject-matter of claim 1 has to be redefined.

4.3 Considering the difference between the claimed subject-matter and E1, the problem concerns only the manufacture of discrete absorbent member webs. The solution according to claim 1 comprises the steps of combining the wrap layer with the core layer and subsequently cutting them simultaneously before further assembling an absorbent product.

4.4 Further, the disclosure of E1 leads to a pre-assembled absorbent unit. As noted generally with respect to novelty under point 3.2 above, the specific function of the primary core integrity layer in E1 is to provide structural support to the absorbent core (page 28, lines 3/4), to hold the absorbent core in a relatively stable position (page 28, lines 17/18) and to maintain the bonds which join the absorbent core and chassis component (page 28, lines 21-23). Hence, the primary core integrity layer performs the function which its name describes: it provides integrity to the core layer

and its function is closely related to the core layer. Such a function can only be performed in combination with the core. An extension of the primary core integrity layer beyond the core is not necessary for this function. The article shown in Figure 2 of E1 depicts the length of the primary core integrity layer as extending beyond the length of the storage layer. In such an embodiment a common cut of these two layers would not be possible. However in addition to this embodiment, E1 refers on page 26, lines 16 to 19 and on page 27, lines 7 to 9 to the possibility of the end edges of the primary core integrity layer being preferably registered with the end edges of the absorbent layers. Thus, E1 suggests the use of layers of identical length.

4.5 The skilled person noting the possibility referred to in E1 of the core layer and the primary core integrity layer having the same length would take it up both for economic reasons - no waste of material - and for structural reasons - no need for a core integrity layer beyond the core layer. In this event the logical consequence would be a combination of these two layers before positioning them on further components of the article because this leads to a unit avoiding the problem of dislocation of one of the parts. Such a unit can only be cut together.

4.6 Hence, the claimed method represents the selection of preferred steps in a logical chain which could be chosen within the teaching of E1 and the skilled person would do so in view of the apparent advantages. Therefore, the skilled person would have had an obvious teaching with regard to the claimed features and the

subject-matter of claim 1 does not involve an inventive step (Article 56 EPC).

5. *Auxiliary request*

5.1 Amendments

In addition to the subject-matter of claim 1 of the main request, claim 1 of the auxiliary request specifies that the superabsorbent material movement obstruction agent is a material selected from the group of polymeric solutions or emulsions.

5.2 Article 123(2) EPC

The amendments are based upon the subject-matter of claim 8 as disclosed in the originally filed PCT application and in its description on page 6, lines 14 - 19. Hence, the subject-matter of claim 1 does not give rise to objections under Article 123(2) EPC

The deletion of reference numerals 112, 111 and 110 in claims 4 and 5 and the amendment concerning the wrap web in claim 4 is supported by claims 4 and 5 of the originally filed PCT application and by the Figures.

5.3 Article 84 EPC

In the Board's view the term "polymeric solutions or emulsions" for the superabsorbent material movement obstruction agent is to be understood to mean "polymeric solutions or polymeric emulsions", an interpretation which follows both from the ordinary

reading of the claim and the description (see paragraph [0024]). No objections under Article 84 EPC arise.

5.4 Article 83 EPC

The appellant raised the point that no example for a polymeric solution or emulsion was disclosed in the patent in suit. This would lead to difficulties in carrying out the invention.

As set out under point 5.3 above with respect to clarity, the description discloses in paragraph [0024], as an example of natural polymeric solutions or emulsions, natural rubber latex and, as preferred waterborne emulsions, acrylic or vinylic adhesive polymers. Considering the intended use, the Board is of the opinion that the skilled person is capable of selecting appropriate adhesive polymeric solutions or polymeric emulsions in accordance with the material of the layers involved and the specified function of the solution or emulsion as a superabsorbent material movement obstruction agent. In this respect the Appellant failed to provide evidence or convincing arguments as to why the skilled person would have difficulties achieving at least some obstruction of movement of the superabsorbent particles when using commonly known adhesive polymeric solution or polymeric emulsion. Therefore, these objections with respect to insufficiency are not convincing. Moreover, an objection with regard to the subject-matter of granted claim 8 was never raised before and thus represents a late filed ground of opposition (Article 100(a) EPC, Article 10b RPBA) and can only be admitted with the consent of the respondent.

5.5 Inventive step of claim 1

5.5.1 In addition to the distinguishing feature identified under point 4.1 above, the added feature further distinguishes the subject-matter of claim 1 from the disclosure of E1. The additional subject-matter referring to the polymeric solutions or emulsions as material for the superabsorbent material movement obstruction agent implicitly renders it suitable for penetrating the wrap web and thus to perform its intended function, namely to obstruct the movement of the superabsorbent material. Therefore, the subject-matter of this claim solves the problem of avoiding loss of the superabsorbent material.

5.5.2 In E1, the primary core integrity layer is joined to the adjacent absorbent article components such as the absorbent core layers by a construction adhesive (page 42, lines 22 to 28 and page 43, lines 5 to 17). As an adhesive material, construction adhesive is disclosed in the form of hot melt adhesive (page 43, lines 9 to 11). The thermoplastic material on which the hot melt adhesives are typically based helps to increase the penetration of thermoplastic material into a fibre layer of the absorbent core (discussed in page 29, lines 12 to 24 and page 31, lines 25 to 26) and this is considered relevant for the resultant improved integrity of the combined web. The adhesive is used and specified having regard to its function for assembling the layers as a construction adhesive. The adhesive properties of the hot melt adhesive also mean that it functions as a superabsorbent material movement obstruction agent.

5.5.3 In comparison with this teaching, claim 1 requires the selection of a particular adhesive material. According to the respondent the use of polymeric solutions or emulsions instead of hot melt adhesives has the advantage of better penetration into the core even when applied onto the outer surface of the wrap web and thus a more specific means for achieving superabsorbent material movement obstruction is provided.

5.5.4 The appellant's argument that the use of polymeric solutions and emulsions represents usual manufacturing technology for construction adhesives (and thus would have been an obvious alternative to the disclosed use of hot melt adhesives) is not supported by any evidence. Moreover, E1 points extensively and consistently to the advantages of the use of hot melt adhesives (page 31, line 25 to page 33, line 11) and thus it would not have been obvious to a skilled person to use polymeric solutions or emulsions. Particular reference is made in these paragraphs to viscosity and crystallization rates, which play a significant role for hot melt application. Construction adhesive is only considered in the context of joining neighbouring layers and although the adhesive also has the effect of a superabsorbent movement obstruction agent, superabsorbent movement is mainly hindered via tissue or enveloping end edges of the primary core layer. Hence, in E1 no teaching is available which suggests that the use of polymeric solutions or emulsions represents an alternative to or an improvement over the use of hot melt adhesive and would solve a problem of superabsorbent loss in use of the article.

5.6 E2 and E3 lie further away from the claimed subject-matter. Their disclosure refers to disposable absorbent articles, including an absorbent member comprising fibrous material and superabsorbent material adjacent to a wrap tissue, without reference to a cutting step and to that extent is comparable with the disclosure of E1. However, there is no disclosure concerning the length and width of the different layers and a separately manufactured absorbent member web is neither directly nor implicitly disclosed. Therefore, they are not as relevant as E1. Considering the disclosure referring to the adhesive connection of the layers, both documents refer to hot melt adhesive. Therefore, none of these cited documents discloses or suggests the use of polymeric solutions or emulsions either.

6. The Board therefore comes to the conclusion that the subject-matter of claim 1 according to the appellant's auxiliary request cannot be derived in an obvious manner from the cited prior art and accordingly involves an inventive step (Article 56 EPC). This independent claim, together with claims 2 to 8 and the amended description and drawings, therefore form a suitable basis for the grant of a patent.

Order

For these reasons it is decided that:

1. The document US-A-3,111,948 is not admitted into the proceedings.

2. The decision under appeal is set aside.

3. The case is remitted to the opposition division with the order to grant a patent on the basis of

   (a) claims numbers 1 to 8 as filed during the oral proceedings

   (b) the amended description consisting of columns 1 to 6 as filed during the oral proceedings and

   (c) Figures 1 to 3 as originally filed.

The Registrar The Chairman

M. Patin P. Alting van Geusau