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**Datasheet for the decision
of 8 December 2009**

Case Number: T 1831/07 - 3.3.10

Application Number: 95934759.2

Publication Number: 0788378

IPC: A61L 15/28

Language of the proceedings: EN

Title of invention:

Wound dressing

Patentee:

Advanced Medical Solutions Limited

Opponent:

Coloplast A/S
Johnson & Johnson Medical Ltd.

Headword:

Wound dressing/ADVANCED MEDICAL SOLUTIONS LTD.

Relevant legal provisions:

EPC Art. 54, 56, 100(b)

Keyword:

"Sufficiency of disclosure (yes): disclosure sufficient also
in absence of examples falling under the claims - selection
rule indicated"

"Novelty (yes)"

"Inventive step (yes): non-obvious alternative"

Decisions cited:

-

Catchword:

-



Case Number: T 1831/07 - 3.3.10

D E C I S I O N
of the Technical Board of Appeal 3.3.10
of 8 December 2009

Appellant: Coloplast A/S
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
20 August 2007 concerning maintenance of
European patent No. 0788378 in amended form.

Composition of the Board:

Chairman: R. Freimuth
Members: C. Komenda
D. S. Rogers

Summary of Facts and Submissions

- I. The Appellant (Opponent I) lodged an appeal on 29 October 2007 against the interlocutory decision of the Opposition Division posted on 20 August 2007 which found that the amended European patent Nr. 788 378 based on European application Nr. 95 934 759.2 met the requirements of the EPC.
- II. Before the Opposition Division the Appellant had requested revocation of the patent as granted in its entirety on the grounds of lack of novelty, lack of inventive step (Article 100(a) EPC) and insufficient disclosure of the invention (Article 100(b) EPC). *Inter alia* the following documents were submitted in the opposition proceedings:
- (1) US-A-5 010 883,
 - (4) FR-A-2 663 229,
 - (15) EP-A-0 107 915,
 - (15a) the granted version of document (15),
 - (22) WO-A-90/01954,
 - (23) Chronic wound care, D. Krasner , Health Management Publications Inc. 1990, Chapter 4, pages 31 to 46, and
 - (24) Muzzarelli R. et al., Biomaterials 9(3), pages 247 to 252 (1988), abstract.
- III. In its decision the Opposition Division held that the amendments made to the claims then on file fulfilled the requirements of Article 123(2) EPC. Further, it was accepted that the invention was disclosed in a manner sufficiently clear for a skilled man to carry out the invention. Novelty of the subject-matter of the claims

was acknowledged. Starting from either of documents (1) or (15) as closest prior art the Opposition Division found that the subject-matter of claim 1 involved an inventive step.

IV. With his letter dated 31 July 2008 the Respondent (Proprietor of the patent) filed further sets of amended claims corresponding to a first, a second and a third auxiliary request. At the oral proceedings before the Board held on 8 December 2009 the Respondent maintained the third auxiliary request as sole request and withdrew his main request and the first and second auxiliary request. The independent claim 1 of the third auxiliary request read as follows:

"1. A wound dressing comprises in combination
(i) a first wound contact layer of a woven, non-woven or knitted fibrous material
(ii) a second layer of greater hydrophilicity than the first layer, and
(iii) a breathable film having an increased MVTR capability in the presence of liquid water as compared to moisture vapour alone,
wherein layer (i) comprises calcium alginate, zinc alginate, silver alginate, chitosan, pectin, silver N,O-carboxymethyl chitosan, or silver O-carboxymethyl chitosan and wherein layer (ii) is a felt comprised of sodium alginate/calcium alginate, sodium calcium carboxymethyl cellulose, sodium zinc carboxymethyl cellulose, sodium calcium polyacrylate or sodium calcium carrageenin."

V. In his statement of the grounds for appeal, as well as in his letter dated 29 September 2008 the Appellant

argued on the subject-matter of claim 1 as maintained by the Opposition Division. He merely stated that these arguments also applied to the subject-matter of claim 1 that was before the Board at the oral proceedings, without further specifically addressing the additional technical features of present claim 1. The Appellant reiterated his objection under Article 100(b) EPC that the invention according to the claims underlying the decision under appeal was not disclosed in a manner sufficiently clear and complete for a skilled man to carry out the invention. Since neither the claims nor the description of the patent specification contained any indication of a method for determining the hydrophilicity, the Appellant was of the opinion that the skilled person was not able to select the layers (i) and (ii) of a wound dressing according to the claims, which fulfilled the technical feature that layer (ii) should be of greater hydrophilicity than layer (i). Since there existed no one single commonly accepted method for determining the rate of absorption of a material, but several methods probably leading to different values of hydrophilicity, the skilled man could not decide, whether he worked within or outside the scope of claim 1 and, consequently, could not carry out the invention. The Appellant further submitted that starting from document (15) or (15a) as closest prior art the subject-matter of claim 1 did not involve an inventive step, since all the technical features were already disclosed in this document. An alternative line of attack started from document (4) as closest state of the art, which disclosed a wound dressing of two layers corresponding to layers (i) and (ii) of the patent in suit. If the skilled person starting from this document wanted to ensure that excessive exudate was readily

removed, he would have found an incentive in documents (15) or (1) to apply a third layer of a material having a higher MVTR rate in the presence of liquid water than in the presence of water vapour alone and, thus, would also have arrived at the subject-matter of claim 1. With letter dated 29 September 2008 the Appellant submitted a further document

(26) US-A-3 709 221,

which it considered as the closest prior art document in a further line of arguments with regard to the issue of inventive step.

VI. The Respondent submitted that the invention was disclosed in a manner sufficiently clear and complete for it to be carried out by a skilled person, since the hydrophilicity of layer (ii) was not required to be within certain absolute values, but was only required to be higher than in layer (i), which is a relative property. Since hydrophilicity is a commonly known property and is further defined in the patent in suit as being the "rate of absorption" of liquid the skilled man would have had various methods at his disposal as to how to measure the rate of absorption in his starting materials, layers (i) and (ii), before assembling these into a wound dressing, and would have been able to determine whether the required hydrophilicity was present. Further, the specification in paragraph [0013] gave him further guidance on how to modify the hydrophilicity of all embodiments falling within the claimed layer (ii). He further was of the opinion that the subject-matter according to the claims involved an inventive step over document (15) taken

alone, or in combination with either of documents (1), (4), (22), (23) or (24), since none of these documents suggests to adjust the hydrophilicity of layer (ii) so as to make it greater than that of layer (i) in order to achieve the transport of excess exudate away from the surface of the wound.

VII. The Party as of right (Opponent II) neither filed comments nor requests.

VIII. The Appellant requested in writing that the decision under appeal be set aside and that the patent be revoked.

The Respondent requested that the decision under appeal be set aside and that the patent be maintained on the basis of the "Third auxiliary request" submitted with a letter dated 31 July 2008.

IX. The oral proceedings were held in the absence of the Appellant and the Party as of right, who had informed the Board with letters dated 20 August 2009 and 28 July 2009, respectively, that they would not attend. At the end of oral proceedings the decision of the Board was announced.

Reasons for the Decision

1. The appeal is admissible.
2. *Non-appearance at oral proceedings*

According to Article 11(3) of the Rules of Procedure of the Boards of Appeal (RPBA) the Board is not obliged to delay any step in the proceedings, including its decision, by reasons of the absence at oral proceedings of any party duly summoned who may then be treated as relying only on its written case. In deciding not to attend the oral proceedings, the Appellant choose not to avail itself of the opportunity to present its observations and arguments orally but instead to rely solely on its written case. The Appellant is deemed to have expected that during oral proceedings the Board would consider any arguments brought forward by the Respondent.

In the present case the Board had therefore the power and the duty to take a final decision at the oral proceedings on the case before it, notwithstanding the announced absence of the duly summoned Appellant.

Third Auxiliary Request

3. *Amendments*

Claim 1 of the third Auxiliary request has been amended with respect to layer (i), which has been restricted *vis-à-vis* the granted version to comprise "calcium alginate, zinc alginate, silver alginate, chitosan, pectin, silver N,O-carboxymethyl chitosan, or silver O-carboxymethyl chitosan", which finds a basis in original claim 8. Layer (i) has further been restricted to a particular macroscopic structure as being "of a woven, a non-woven or knitted fibrous material", which finds a basis on page 3, line 3 of the original application documents. The deletion of the passage

"which preferably has a positive effect on the healing of the wound" from granted claim 1 does not offend against Article 123 EPC, since this passage was not restricting the subject-matter of granted claim 1. Present claim 1 has also been amended with respect to layer (ii), by the addition of the phrase "is a felt comprised of sodium alginate/calcium alginate, sodium calcium carboxymethyl cellulose, sodium zinc carboxymethyl cellulose, sodium calcium polyacrylate or sodium calcium carrageenin", which finds its basis in original claim 11.

Since all the amendments made are based on the original application and result in a restriction of the scope of granted claim 1, they fulfil the requirements of Article 123(2) and (3) EPC. The Appellant raised no objection in this regard.

4. *Sufficiency of disclosure of the invention*
(Article 100(b) EPC)

4.1 The Appellant challenged the finding of the Opposition Division that the subject-matter of claim 1 could be carried out by a person skilled in the art in particular because the wound dressing was defined by means of an inadequate functional feature, namely the feature of layer (ii) being of greater hydrophilicity than layer (i).

4.2 It is the established jurisprudence of the Boards of Appeal that the requirements of sufficiency of disclosure are only met if the invention as defined in the claims can be performed by a person skilled in the art across the whole area claimed without undue burden,

using common general knowledge and having regard to further information given in the patent in suit (see decisions T 409/91, OJ 1994, 653, point 3.5 of the reasons; T 435/91, OJ EPO 1995, 188, point 2.2.1 of the reasons). That principle applies to any invention irrespective of the way in which it is defined, be it by way of the result to be achieved or not. The peculiarity of the functional definition of a technical feature resides in the fact that it is defined by means of the result to be achieved. That mode of definition comprises an indefinite and abstract host of possible alternatives, which is acceptable as long as the skilled person can determine without undue burden the technical characteristics of the alternatives which achieve the desired result. Therefore, it has to be established whether or not the patent in suit discloses sufficient information to enable the skilled person to determine which are the claimed alternatives achieving the results defined in the claim.

- 4.3 The Appellant submitted (letter dated 28 December 2007) that, since no method for the determination of the hydrophilicity was indicated in the claims, or in the description, the skilled person could not select layers (i) and (ii), which fulfilled the required hydrophilicity. A method for determining the absorption capacity was indicated by the Respondent in his letter dated 31 July 2008 on page 2, bottom, as one possible method for determination. Since, according to the Appellant this method did not represent the only possible commonly accepted method for determining the absorption rate, the skilled man could not measure the absorption rate in a reproducible manner and, therefore, could not prepare the claimed wound dressings, which

amounted to the invention being insufficiently disclosed.

However, for a skilled person "hydrophilicity" is a conventional property, which the description of the patent in suit further defines in paragraph [0013]. According to the invention, this property is to be understood as referring to the "rate of absorption" of aqueous liquids, such as exudates. It has not been disputed amongst the parties that a skilled person is able to determine the rate of absorption of a material. Further, in the present case it is not critical whether there exists one or more commonly accepted methods for determining the absorption of a material, since the required hydrophilicity is defined as a relative quality with respect to both layers (i) and (ii) only, and not in terms of particular absolute hydrophilicity values to be adjusted for each layer. Thus, the skilled person merely has to determine that the hydrophilicity is higher for layer (ii) compared to layer (i), which is a relative quality. In the absence of an indicated method for determining hydrophilicities, i.e. the absorption rate, the skilled man would select whatever conventional method seemed convenient for this purpose and would necessarily employ the same method for measuring that property for both layers, since only this approach makes technical sense. The absolute values as such obtained according to any conventional determination method are of no relevance for the proper selection of layers (i) and (ii) of the claimed wound dressing, since only their relative proportion is required according to claim 1.

In this context the Appellant alleged that different methods for measuring the hydrophilicity might lead to different hydrophilicity values for layer (i) and (ii) and might even lead to a situation, where according to one method the hydrophilicity of layer (ii) was greater than that of layer (i), whereas according to another method the hydrophilicity of the same layer (ii) might be less than that of the same layer (i).

However, the Appellant-Opponent, who bears the onus of proof in this respect (T 182/92, OJ EPO 1991, 391), has neither substantiated this assumption, nor has he provided any corroborating evidence that a specific conventional method, when measuring hydrophilicity, i.e. the rate of absorption, of layers (i) and (ii) would result in a reverse and not the same relative proportion of both layers and, thus, that the measuring method would be critical. Therefore, the Appellant-Opponent's allegations are mere speculations, which the Board cannot adopt as a basis for its decision.

- 4.4 In his letter dated 28 December 2007 the Appellant outlined different methods for determining the absorption capacity of materials used for layers (i) and (ii). According to methods (1), (2) and (3) the absorption could be measured either as the absorbed amount of liquid by weight, or by volume, or by surface of the tested material. He gave as an example, a first layer composed of 1 gram of a material having an absorption capacity of 0.2 ml/g could absorb only 0.2 ml of liquid, whereas a second layer composed of five grams of a material having an absorption capacity of only 0.1 ml/g could absorb 0.5 ml of liquid. Consequently, the second layer had a greater

hydrophilicity than the first layer, as it absorbed more liquid due to the greater amount of material used in the second layer. Looking at the materials as such the situation was however different, since the absorption capacity of the material used in the first layer was greater when measured for equivalent amounts than for the material used in the second layer. Thus, the hydrophilicity was greater for the material used for the first layer than that of the material used for the second layer. Therefore, the hydrophilicity also depended on the absolute amount of material used in layers (i) and (ii).

However, this argumentation cannot succeed, since the methods indicated under (1), (2) and (3) in the Appellant's letter relate to different reference units. The skilled man necessarily uses the same method for determining the absorption rate or hydrophilicity of the material used for layers (i) and (ii), this being the only technically sensible approach. Further, the claim is clear in its wording, as it claims that the hydrophilicity of layer (ii) is greater than that of layer (i), and does not refer to the hydrophilicities of the materials used for the preparation of the layers. Therefore, the Appellant's objection is devoid of merit.

- 4.5 The Appellant further submitted that in the absence of a method for determining hydrophilicity the skilled man did not know whether he worked inside or outside the scope of claim 1. In support thereof he referred to decisions T 252/02, T 256/87 and T 387/01, which purportedly considered this situation as being a breach of the requirement that the invention has to be

disclosed in a manner sufficiently clear for it to be carried out by a skilled person.

However, this objection refers to the definition of the subject-matter for which protection is sought and is, thus, rather a matter of clarity of the claim and, thus, of Article 84 EPC, which is not a ground for opposition pursuant to Article 100 EPC. Furthermore, the decisions cited by the Appellant refer to a different situation, namely where specific target values in absolute terms are to be achieved. As the situation in the present case, however, relates to a relative property, the cited decisions do not apply.

- 4.6 According to the Appellant in his letter dated 28 December 2007 (see equation (4)) the skilled man could also consider preparing the assembled wound dressing first and subsequently to measure the absorption rate thereof. When determining the hydrophilicities or absorption rates of layers (i) and (ii) in the assembled wound dressing the patent in suit did not contain any indication as to whether the absorption rates of the layers (i) and (ii) were to be measured on the dry materials, thus resulting in higher absorption rates, or whether in use, in which case the layers (i) and (ii) of the wound dressing would have already taken up some liquid or would already be saturated with liquid, and thus the absorption rates could be expected to be significantly lower. In the latter case the effect of efficient transport of exudate could no longer be observed.

However, a wound dressing constitutes a laminate composed of various layers. The wound dressing is

defined by the technical features of each of the layers used as starting materials for its manufacture. This is clear from claim 1 which indicates the relative hydrophilicities of both layers, thus, representing a separate selection rule for each of the layers (i) and (ii), but not for the assembled wound dressing. Therefore, a skilled person, when confronted with the task of preparing a wound dressing, wherein two layers are characterised by the fact that layer (ii) should have a greater hydrophilicity than layer (i), takes the individual layers (i) and (ii), which represent his starting materials, and measure their respective hydrophilicities, i.e. their absorption rates before assembling the wound dressing. In this case the only technically sensible approach is to measure this property on the dry starting material. The argument of the Appellant that when in use layers (i) and (ii) may have become saturated and that thus an efficient transport of exudate could no longer be observed is not a feature defining the subject-matter of claim 1, but a matter of inventive step only and, thus, not relevant in the discussion of the different issue of sufficiency of disclosure pursuant to Article 100 (b) EPC.

4.7 Therefore, the arguments of the Appellant do not convince the Board that the invention is insufficiently disclosed. This is supported by the fact that the Appellant has argued in particular with regard to the claims underlying the decision under appeal, i.e. the former main request which, however, is no longer at stake. The present claims, which were those submitted by the Respondent in the form of a third auxiliary request, have not been challenged by the Appellant in detail, but merely with reference to the arguments

brought forward with regard to the claims of the decision under appeal. However, the subject-matter of present claim 1 has been further defined by specifying the materials used for layers (i) and (ii) and by indicating the macroscopic structures of these layers. Therefore, a skilled man who aims at manufacturing the wound dressings according to claim 1 finds information on the kind of materials to be used in claim 1 and finds guidance on how to modify and adjust the hydrophilicity of layer (ii) in paragraph [0013] of the patent specification. Thus, the patent specification together with common general knowledge as set out above provides sufficient information for a skilled person to arrive, with a reasonable amount of routine experimentation, at the wound dressings falling within claim 1. Therefore, the Board is satisfied that the invention is disclosed in a manner sufficiently clear and complete for it to be carried out by a skilled man. Consequently, the objection of the Appellant under Article 100 (b) EPC cannot succeed.

5. *Novelty*

Novelty of the subject-matter of present claim was not objected to in the decision under appeal and was not objected to during appeal proceedings. The Board on its own sees no reason to take a different view, since document (15) does not disclose a wound dressing, in which layers (i) or (ii) are manufactured of any of the materials defined in present claim 1.

6. *Inventive step*

- 6.1 For the assessment of inventive step in accordance with the "problem-solution approach", it is necessary to establish which document represents the closest prior art in order to determine in the light thereof the technical problem which the invention addresses and solves. The "closest prior art" is normally represented by a prior art document disclosing subject-matter aiming at the same objective as the claimed invention and having the most relevant technical features in common.
- 6.2 In the present case the patent in suit is directed to a wound dressing, which comprises in combination three layers and which is suitable to remove excess exudate from the surface of the wound.
- 6.3 A similar wound dressing belongs to the state of the art according to document (15). This document was regarded as representing the closest state of the art according to the decision under appeal and by the Respondent. The Appellant preferred the granted version of document (15), which was referred to as document (15a). Both parties concurred on the fact that document (15a) did not contain any information going beyond that of document (15).

Document (15a) relates to a wound dressing composed of three layers. The interrupted layer, which is the layer closest to the wound surface, and the intermediate layer, which is situated between the interrupted layer and the outer layer, are both of a non-woven fabric (cf. document (15a), claims 1, 12 and 13; page 4, line 40). The outer layer is a moisture vapour permeable continuous film, which has a moisture vapour

permeability which is greater when in contact with water than when not in contact with water (cf. document (15a) claim 1), thus, being identical to layer (iii) of the patent in suit. The wound dressings of document (15a) are suitable as surgical wound dressings on moist wounds, whereby an excess of exudate should be removed from the wound surface, but without leading to dry wound surfaces (cf. document (15a) page 2, lines 19 to 20 and lines 43 to 45).

The Appellant addressed in his letter dated 29 September 2008, page 3, paragraph 5 a further document (26) as being suitable to represent the closest state of the art, but only if the Board would not accept that document (15a) related to wound dressings suitable for use on highly exuding wounds. As however, the Board as well as the Respondent accept that document (15a) relates to surgical wound dressings to be used on wounds showing an excess of exudate, there is no need to further consider document (26). Further, this document rather relates to wound dressings that seal the wound area, as the wound dressings disclosed in document (26) do not contain a moisture vapour transmitting outer layer. Therefore, this document appears to be further away from the invention of the patent in suit than document (15a).

Therefore, the wound dressing disclosed in document (15a) is within the same technical field as the patent in suit and the Board, in agreement with the Appellant, the Respondent and the Opposition Division, takes this document as the starting point for the assessment of inventive step.

6.4 Document (15a) is directed to wound dressings, which are capable of removing an excess of exudate from the wound surface while still keeping the wound surface in a moist state. Having regard to this prior art the technical problem underlying the patent in suit at least was to provide a further wound dressing removing excess of exudates from the wound, which problem is in line with the submissions of the Appellant (letter dated 28 December 2007, page 8, last paragraph).

Only in case the solution to this least ambitious problem were found to be obvious *vis-à-vis* the closest prior art, the matter whether or not an improved technical effect was achieved over that prior art, as alleged by the Respondent, representing a more ambitious problem, would arise.

6.5 As the solution to the technical problem defined above the patent in suit proposes, according to claim 1, to select particular materials for layers (i) and (ii), corresponding to the interrupted layer and the intermediate layer of document (15a), and to adjust the hydrophilicities such that layer (ii) has a greater hydrophilicity than layer (i).

6.6 The success of the proposed solution to the above mentioned technical problem (see paragraph 6.4 *supra*) has not been contested by the Appellant. Although the examples of the patent in suit relate only to wound dressings composed of the layers (i) and (ii) it seems credible that the removal of excessive exudate from the wound surface, as shown for the two layer system, occurs also within the claimed wound dressing, which comprises in addition to layers (i) and (ii) an outer

layer (iii), since the latter shows a higher moisture vapour transmission rate in the presence of liquid water as compared to moisture vapour alone.

The Appellant brought forward under Article 100(b) EPC, that once the layers (i) and (ii) were saturated no further absorption of exudate was possible. Therefore, the purpose of removing an excess of exudate from the wound surface would no longer be achieved and consequently the proposed solution was unsuccessful.

However, to become saturated the layers (i) and (ii) necessarily absorb excessive exudate and, consequently, provide a successful solution to the above mentioned technical problem of transporting excessive exudate away from the wound surface. The fact that once having become saturated means only that the end of the wound dressings lifetime has been reached, but does not mean that no transport of exudate has been achieved. Thus, the argument of the Appellant is not convincing and the Board accepts that the solution proposed by the patent in suit successfully solves the technical problem.

6.7 It remains to be decided whether or not the proposed solution to the technical problem mentioned above (see paragraph 6.4 *supra*) is obvious in view of the state of the art. The Appellant addressed the closest prior art document (15a) alone, as well as documents (4) and (22) to (24) in order to object to inventive step. Therefore, the Board limits itself to a consideration of obviousness in view of these documents.

6.8 Document (15a) is concerned with the same technical problem as the patent in suit, that of providing a

transport of excess exudate away from the surface of the wound, but provides a different solution. According to document (15a) the transport is effected by virtue of an interrupted layer, which allows the excess of exudate to pass through the holes in this layer. The intermediate layer is of a material, which due to its netlike structure provides a passage of the exudate towards the outer layer, from which the exudate may evaporate. Thus, document (15a) aims at solving the technical problem by providing a particular three-dimensional geometric arrangement of the materials in form of an interrupted layer containing holes and a water-transmitting intermediate layer providing apertures for the passage of the exudate to the outer layer, whereas according to the patent in suit the problem is solved by providing a combination of layers (i) and (ii), corresponding to the interrupted layer and the intermediate layer of document (15a), wherein layer (ii) has a greater hydrophilicity than layer (i). This solution was neither suggested, nor pointed to by document (15a).

The same argumentation applies to document (1), the description of which is for the greater part identical to that of document (15a) and which does not add any information going beyond what is already taught in document (15a).

Document (4), which was also referred to by the Appellant discloses materials falling within the definitions of the materials to be used for layers (i) and (ii).

However, this document discloses a wound dressing comprising as first layer a calcium alginate felt, which is coated with a solution of sodium alginate. The calcium alginate serves in document (4) as gelling material for the sodium alginate solution, which upon contact with the calcium alginate felt starts to gel. As this document does not teach to combine the two layers in the order of their hydrophilicity and as it does not even address the purpose of achieving the transport of excess exudate away from the surface of the wound the skilled man would not have had any incentive from this document to select the materials used in document (4) in order to solve the technical problem to be solved starting from document (15a).

Documents (22), (23) and (24) were referred to by the Appellant in his letter dated 28 December 2007 on page 7, paragraph 5, as containing the information that the materials to be used as wound contact layer (i) were materials that assist in wound healing.

However, these documents do not contain any information that the combination of the particular materials of layers (i) and (ii), and the condition that layer (ii) has a higher hydrophilicity than layer (i) solve the technical problem as mentioned above (see paragraph 6.4 *supra*), which was to provide a wound dressing removing an excess of exudate from the surface of the wound while keeping the wound surface in a moist healing state. Therefore, the skilled person had no incentive from either of these documents to find the solution proposed by the patent in suit.

Finally, the Appellant argued that for the intermediate layer in document (15a) a hydrogel could be used, which by nature was a hydrophilic material and the interrupted layer could be a non-woven fabric, which was rather a hydrophobic material (cf. letter of the Appellant dated 28 December 2007, page 8, paragraph 5). Therefore, document (15a) already taught a combination of an interrupted layer and an intermediate layer, wherein the latter had a greater hydrophilicity than the interrupted layer. Consequently, the skilled man would have selected an intermediate layer having a greater hydrophilicity in order to remove an excess of exudate away from the surface of the wound and would have arrived at the invention according to the patent in suit.

However there is no teaching in document (15a) that the hydrophilicity of the intermediate layer has to be greater than that of the interrupted layer. The particular property of hydrophilicity is nowhere mentioned in that document. Since according to present claim 1 the embodiment of layer (ii) being a hydrogel no longer falls within the definition of layer (ii) in claim 1 as amended, this argument of the Appellant is irrelevant.

6.9 To summarise, the Board considers that document (15a) taken alone or taken in combination with either of documents (1), (4), (22), (23) or (24) does not render the claimed invention obvious.

6.10 Since the solution proposed according to present claim 1 to the least ambitious technical problem as indicated in paragraph 6.4, *supra*, was already regarded

as not being obvious over the cited prior art an investigation into whether this solution is also associated with an improved technical effect over the closest prior art is not necessary.

- 6.11 For these reasons the Board concludes that the subject-matter of present claim 1 and by the same token that of dependent claims 2 to 11, which include all features of claim 1, involves an inventive step within the meaning of Article 52(1) and 56 EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside; and
2. The case is remitted to the department of first instance with the order to maintain the patent with the following claims and a description to be adapted thereto:
 - claims 1 to 11 of the "Third Auxiliary Request" filed with letter dated 31 July 2008.

The Registrar

The Chairman

C. Rodríguez Rodríguez

R. Freimuth