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**Datasheet for the decision
of 9 July 2009**

Case Number: T 0358/08 - 3.2.06

Application Number: 99946652.7

Publication Number: 1214034

IPC: A61F 13/15

Language of the proceedings: EN

Title of invention:

Fastener device and disposable product using the same

Patentee:

THE PROCTER & GAMBLE COMPANY

Opponent:

SCA Hygiene Products AB
3M Innovative Properties Company

Headword:

-

Relevant legal provisions:

EPC Art. 108, 123(2), 56
EPC R. 99(1), (2)
RPBA Art. 12(1),(2), 13(1)

Relevant legal provisions (EPC 1973):

EPC R. 64

Keyword:

"Admissibility - yes"
"Inventive step - no"

Decisions cited:

G 0009/92, G 0004/93, G 0001/99, J 0022/86, J 0027/86,
J 0003/06, T 0007/81, T 0089/85, T 0001/88, T 0085/88,
T 0194/90, T 0631/91, T 0632/91, T 0727/91, T 0925/91,

T 0273/92, T 0932/93, T 0372/94, T 0281/95, T 0049/99,
T 0179/01, T 0407/02, T 0420/03, T 0474/03

Catchword:

(1) Rule 99 EPC 2000 has not altered the previous law as to the requirements of either the notice of appeal or the statement of grounds of appeal as regards the appellant's requests. Rule 99(1)(c) EPC is satisfied if the notice of appeal contains a request, which may be implicit, to set aside the decision in whole or (where appropriate) only as to part. Such a request has the effect of "defining the subject of the appeal" within the meaning of Rule 99(1)(c) EPC.

(2) In the case of an appeal by an applicant or proprietor, it is not necessary that the notice of appeal should also contain a request for maintenance of the patent in any particular form. This is something which relates to "the extent to which [the decision] is to be amended", and which is therefore a matter for the statement of grounds of appeal under Rule 99(2) EPC.



Case Number: T 0358/08 - 3.2.06

D E C I S I O N
of the Technical Board of Appeal 3.2.06
of 9 July 2009

Appellant: The Procter & Gamble Company
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 14 December 2007
revoking European patent No. 1214034 pursuant
to Article 102(1) EPC.

Composition of the Board:

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

Summary of Facts and Submissions

- I. European patent No. 1 214 034, granted on application No. 99946652.7, was revoked by the opposition division by decision announced during the oral proceedings on 16 November 2007 and posted on 14 December 2007.
- II. The decision of the opposition division was based on the finding that although the subject-matter of claim 1 of the main request (patent as granted) did not extend beyond the content as originally filed (Article 100(c) EPC) and was novel, it did not involve an inventive step when starting from:

D2 EP-A-0482383

and combining it with the teaching of either:

D1 EP-A- 0826352 or

D8 EP-A-0861642.

In auxiliary request 1, the subject-matter of claims 1 and 2 as granted were combined into an amended claim 1. This amendment, however, was found not to overcome the above deficiency of lack of inventive step.

- III. On 13 February 2008 the appellant (patent proprietor) both filed a notice of appeal against this decision and paid the appeal fee. In the notice of appeal, the appellant stated: "... we hereby appeal against the decision of the Opposition Division ... We ask that the decision of the Opposition Division be set aside and the patent maintained." The statement of grounds of appeal was filed on 23 April 2008. It contained a request to set aside the decision and to maintain the

patent as granted, alternatively according to the claims of the first to third auxiliary requests which were filed with the grounds of appeal.

- IV. In a communication dated 7 April 2009 sent in preparation for oral proceedings according to Article 11(1) of the Rules of Procedure of the Boards of Appeal, the Board gave its preliminary opinion on points raised by the parties. Furthermore, the Board questioned the admissibility of the appeal in view of the requirements of Rule 99 EPC 2000.
- V. Oral proceedings were held on 9 July 2009. The appellant requested that the decision under appeal be set aside and that the European patent be maintained as granted.

The respondents requested that the appeal be dismissed.

Claim 1 as granted reads:

"A fastener device(10) which may be secured to a disposable product(200), comprising:

a first tape section(1) having a free end portion(4) and a first connection portion(11) opposing the free end portion(4); a second tape section(2) having a second connection portion(12), a first anchor portion(5) and a branch connection portion(BC) between the second connection portion(12) and the first anchor portion(5), the second connection portion(12) being joined to the first connection portion(11) of the first tape section(1) and a third tape section(3) having a third connection portion(13) and a second anchor portion(19) next to the third connection portion(13), the third connection portion(13) being joined to the branch connection portion(BS) between the second

connection portion(12) and the first anchor portion(5) of the second tape section(2);
the first and second anchor portions(5,19) being to be used for securing the fastener device(10) to a disposable product(200);
the first tape section(1) having an inner surface(1a) coated with adhesive(14) and an outer surface(1b) coated with low adhesion material, and the second and third tape section each having a first surface(2a,2b) coated with adhesive material(15,16) and a second surface(2b,3b) coated with low adhesion material;
the first, second and third tape sections(1,2,3) being piled through the adhesive surfaces(1a,2a,3a) and the low adhesion surfaces(1b,2b,3b);
the adhesive surface of the second connection portion(12) of the second tape section(2) being turned over towards the adhesive surface(1a) of the first connection portion(11) of the first tape section(1) so that the first and second tape sections(1,2) are connected through the adhesives on the adhesive surfaces(1a,2a) of the first and second tape sections; and the adhesive surface(3a) of the third connection portion(13) of the third tape section(3) being turned over towards the adhesive surface(2a) of the second tape section(2) so that the second and third tape sections(2,3) are connected through the adhesives on the adhesive surfaces(2a,3a) of the second and third tape sections;
such that the adhesive surface(1a) of the first tape section(1) can be attached and reattached to other component in the disposable product."

VI. The appellant relied essentially upon the following submissions:

It was the long established practice of the Boards of Appeal that a notice of appeal by a patentee did not need to set out expressly the form in which the patent should be maintained. The notice of appeal only had to state whether the whole or only part of the decision was being appealed against, T 420/03 being an example of the latter type of case. There was no intention to change such a practice via the regulations of EPC 2000, in particular Rule 99 EPC 2000. The appellant referred to the explanation of the rule-change as published in OJ EPO 2003, Special Edition No. 1, pp. 183, 184 and the *travaux préparatoires* published as CA/PL 5/02 and CA/PL 5/02 Rev. 1 Add. 1, both to be found on the EPO website. The appellant also referred to the adverse practical consequences which would result if there had in fact been a substantive rule change. Therefore, the long established practice should not be changed.

Although there was no literal wording in the application as originally filed corresponding to the feature of claim 1 that "the first, second and third tape sections being piled through the adhesive surfaces and the low adhesive surfaces", the general information in the application, including the Figures and the further wording of the claims, enabled the skilled person to realise that the construction as a whole had to be folded and piled, the term "pile" not necessarily excluding an irregular pile. Accordingly, the skilled person would understand the meaning of this wording of the claim in this manner and consequently the requirements of Article 123(2) EPC were met.

The subject-matter of claim 1 was novel. The term "joined" was defined in paragraph [0020] such that it "encompasses configurations whereby an element is directly secured to another by affixing the element directly to the other element, and configurations whereby the element is indirectly secured to the other element by affixing the element to intermediate member(s) which in turn are affixed to the other element". Accordingly, the joining action necessitated an "affixing" of an element. Therefore, the three tape sections could not be made up of one element since such an element would not need an "affixing". Moreover, with regard to the first tape section, claim 1 also referred to a free end portion and an opposing connection portion. Accordingly, two end portions had to be present.

D1, which was cited with regard to lack of novelty, did not have three separate tape sections which were coated with adhesive on one surface and low adhesion material on the other surface.

With regard to inventive step, D2 was the most suitable document for representing the closest prior art. It disclosed a three-sectional fastener. This fastener differed from the claimed one in that the second tape section had no anchor portion, and in that the adhesive connections were different. No document suggested both adding an anchor portion and changing the adhesive connections in the claimed way. Therefore, the subject-matter of claim 1 involved an inventive step.

VII. The respondents argued essentially as follows:

With regard to the admissibility of the appeal, the notice of appeal did not clearly specify the subject of the appeal as was required according to Rule 99(1) EPC. A requirement had clearly been added in the new rule and it was now necessary that a proprietor-appellant makes it clear what it wants in the appeal, ie in which direction it wished to go. Given that there had been more than one request before the opposition division, a request simply that the patent "be maintained" did not satisfy this requirement.

The amendment to the patent contravened Article 123(2) EPC. The wording "piled through the adhesive surfaces" was not disclosed in the application as originally filed. The Figures did not show "piled" configurations and the protrusions on the sides did not fit to the concept of "piling". The originally disclosed wording referred to each of the three sections being folded and piled (or layered) together before the fastener device was actually used for fastening.

The subject-matter of claim 1 was not novel over the fastener shown in Figure 5 of D1, which had a piled construction. The three sections were formed by one element, and each section showed a partial coating of adhesive on one surface and a coating of low adhesion material on the opposite surface. Claim 1 of the patent in suit included such subject-matter. Moreover, the part of claim 1 of the patent in suit, relating to the adhesive connections of the sections, was worded in a product-by-process language such that one could not

tell in the final product upon which surface the adhesives had been originally applied.

With regard to inventive step, the closest prior art was represented by the three-sectional fastener shown in Figure 1 of D2. Starting from such an embodiment, the application of a second anchor portion by prolonging the second tape section or connecting a bridging portion to it provided a more firm attachment, in particular in view of the tensional stress when unfolding the fastener.

It was a general problem in the art to provide a secure attachment of a fastener tape to a disposable article. To overcome such a problem by providing two anchor portions was known from various cited documents. For example both D1 and D8 showed such a configuration. Accordingly, no inventive step was necessary when incorporating such well-known features into the arrangement of D2.

The strength of the inner-adhesive connections was not defined in the claim. It was part of the ordinary judgment of the skilled person to use the correct adhesives in the required amount when wishing to ensure the proper functioning of the fastener. Hence, no inventive step was necessary in applying the correct adhesive in the required amount on the required locations for the connection of the distinct tape sections.

Reasons for the Decision

1. *Admissibility*

1.1 Before the opposition division the appellant requested maintenance of the patent as granted (main request) alternatively maintenance of the patent on the basis of a first auxiliary request. The opposition division rejected both requests and revoked the patent. In its notice of appeal filed on 13 February 2008, the appellant stated: "... we hereby appeal against the decision of the Opposition Division ... We ask that the decision of the Opposition Division be set aside and the patent maintained."

1.2 Even when construed in the context of what had taken place in the proceedings, it cannot be determined from the notice of appeal in precisely what form the appellant wished the patent to be maintained. Only when the appellant filed its statement of grounds of appeal did this become clear.

1.3 Rule 99 EPC 2000 is applicable to the present appeal: see J 3/06 (OJ EPO 2009, 170). The rule, which came into force on 13 December 2007, states as follows:

"Content of the notice of appeal and the statement of grounds

(1) The notice of appeal shall contain:

(a) the name and the address of the appellant as provided in Rule 41, paragraph 2(c);

(b) an indication of the decision impugned; and

(c) a request defining the subject of the appeal.

(2) In the statement of grounds of appeal the appellant shall indicate the reasons for setting aside the decision impugned, or the extent to which it is to be amended, and the facts and evidence on which the appeal is based.

.... "

- 1.4 The issue which arises is whether the notice of appeal in this case complied with the requirement that it should contain "a request defining the subject of the appeal." Taken by itself, it is not easy to say what this requirement entails. The words must therefore be construed in the context of the other provisions of the EPC 2000 to discover the true meaning of the expression, but help may also be obtained by examining (a) what the position was before the new rule was introduced and (b) any relevant *travaux préparatoires*. The expressions used in German and French texts do not take the matter any further, being respectively: "*einen Antrag, in dem der Beschwerdegegenstand festgelegt wird*", and "*une requête définissant l'objet du recours*."

2. *Position before coming into force of the EPC 2000*

Rule 99 EPC 2000 is to be compared to the previous relevant rule, Rule 64 EPC 1973, which read as follows

"Content of the notice of appeal

The notice of appeal shall contain:

(a) the name and the address of the appellant in accordance with the provisions of Rule 26, paragraph 2(c);

(b) a statement identifying the decision which is impugned and the extent to which amendment or cancellation of the decision is requested."

The previous rules did not say anything about the grounds of appeal. The only relevant provision was Article 108 EPC 1973, which stated that "... a written statement setting out the grounds of appeal must be filed." (the equivalent passage in Article 108 EPC 2000 now states "... a written statement setting out the grounds of appeal shall be filed in accordance with the Implementing Regulations"). As will be seen, the requirements as to what should be contained in the statement setting out the grounds of appeal were developed by the case law of the Boards of Appeal.

2.1 As helpfully suggested by the appellant, the changes can be more easily appreciated by comparing the rules in tabular form:

Rule 64 EPC 1973

The notice of appeal shall contain:

(a) the name and the address of the appellant in accordance with the provisions of Rule 26, paragraph 2(c);

(b) a statement identifying the decision which is impugned ...

... and the extent to which amendment or cancellation of the decision is requested."

Rule 99 EPC 2000

(1) The notice of appeal shall contain:

(a) the name and the address of the appellant as provided in Rule 41, paragraph 2(c);

(b) an indication of the decision impugned; and

(c) a request defining the subject of the appeal.

(2) In the statement of grounds of appeal the appellant shall indicate the reasons for setting aside the decision impugned, or the extent to which it is to be amended, and the facts and evidence on which the appeal is based.

2.2 As to what were the requirements of Rule 64 EPC 1973 when it stated that the notice of appeal should contain "a statement identifying ... the extent to which amendment or cancellation of the decision is requested", the answer becomes apparent from considering decisions of the Boards of Appeal which dealt with the construction of notices of appeal.

2.3 As to this, it was recognised that the requirements of Rule 64 EPC 1973 were formal in nature only (J 22/86, OJ EPO 1987, 280) and that a notice of appeal should be construed objectively to determine its content (T 1/88). The "extent" to which the impugned decision was requested to be amended or cancelled could therefore often be inferred, even when the notice of appeal contained no express statement in this respect. Thus where, for example, the notice of appeal stated merely "An appeal is hereby lodged," or words to similar effect, this was often construed in the context of the case as a request to set aside or cancel the decision in its entirety; this was "the extent to which amendment or cancellation of the decision" was requested. The decisions can be categorised as follows:

Appeal by applicant following refusal of application:

See T 7/81 (OJ EPO 1983, 98), point 1 of the reasons for the Decision, where the Board said: "The appeal ... complies with Rule 64(b) which stipulates that the notice of appeal shall identify the extent to which amendment or cancellation of the impugned decision is requested. The content of the impugned decision is purely and simply the refusal of the last version of the European patent application then ruling. The formulation "to lodge an appeal" against the decision

is therefore to be interpreted as meaning that the setting-aside of a decision in its entirety ... is being sought." See also T 632/91, T 49/99 and T 474/03.

Appeal by patentee following revocation: See T 89/85, where the notice of appeal stated, *inter alia*, that the "decision is hereby appealed." The Board said that this "should be interpreted as being a request for cancellation of the decision (in its entirety)." See also T 372/94 and T 932/93.

Appeal by opponent following maintenance of patent as amended: See T 1/88 and T 179/01.

Appeal by opponent following rejection of opposition: See T 925/91, where the Board stated: "As to the extent to which amendment or cancellation of the decision is requested, the notice of appeal does not contain any detailed statement. However, it can be derived from its wording that the appeal was lodged against the decision in its entirety. Thereby, the extent of the appeal within the meaning of Rule 64(b) EPC is sufficiently identified." See also T 273/92 and T 281/95.

- 2.4 In the great majority of cases, therefore, the requirement to state the extent to which amendment or cancellation of the decision was requested was somewhat toothless. Almost always the appellant wanted the decision set aside in its entirety and replaced by a different order. It was for this reason that the Boards of Appeal were able to construe very basic notices of appeal as satisfying the provisions of Rule 64(b) EPC 1973. Where, however the decision contained two elements, eg, an order relating to the patent and an

order as to costs, the rule now had real bite. The notice of appeal had to say whether both elements were being appealed or only one, and the course of the appeal proceedings was thereby determined: see J 27/86, T 407/02 and T 420/03.

- 2.5 At first sight, some cases, including some of the above, might appear to go further, since they also say that such a notice of appeal (eg, in the form "an appeal is hereby lodged") also implicitly included a request to grant the last request before the Division below. Thus:

As regards appeals by an applicant following refusal of application, see T 7/81, above. The fuller citation from this decision is as follows: "The appeal ... complies with Rule 64(b) which stipulates that the notice of appeal shall identify the extent to which amendment or cancellation of the impugned decision is requested. The content of the impugned decision is purely and simply the refusal of the last version of the European patent application then ruling. The formulation "to lodge an appeal" against the decision is therefore to be interpreted as meaning that the setting-aside of a decision in its entirety *and the grant of the European patent with the final documents of the European patent application is being sought*. The appeal is therefore admissible..." (Emphasis added by the Board). Again, in T 632/91 the Board said: "The content of the decision under appeal is simply the refusal of the then pending sole version of the patent application. Thus, the wording "... we hereby file Notice of Appeal to the decision ..." has to and can only be construed as a request to entirely set aside the decision under appeal *and to grant a patent on the*

basis of the documents of the European patent application to which the decision under appeal referred." (Emphasis added by the Board). See also T 474/03.

To the same effect are various decisions in appeals by a patentee following revocation (see T 194/90, T 727/91, T 372/94 and T 932/93), appeals by an opponent following maintenance of patent as amended (see T 1/88, T 85/88 and T 273/92) and appeals by an opponent following rejection of the opposition (see T 1/88, T 631/91 and T 273/92).

2.6 However, the Board does not read into these decisions any statement that the notice of appeal should in fact have contained a request, even if only implicit, as to the order which the Board of Appeal was being asked to make, whether it be a request to grant the last request before the Division below or some other request. The decisions merely say how, in these particular cases, the Board construed the notice of appeal.

2.7 Such a requirement would have given rise to difficulties, as exemplified by the facts of the present case, where an applicant/proprietor merely requested that the patent "be maintained" and it could not be objectively determined from these words, even in the context of what had taken place at first instance, in what form the proprietor wished the patent to be maintained, in particular, whether the proprietor wished the patent to be maintained as granted or in accordance with its auxiliary request before the Division or on some other basis.

2.8 That this was not in fact a requirement of Rule 64(b) EPC 1973 is made clear by other decisions of the Boards of Appeal, which are to the effect that although the notice of appeal must specify whether it is being requested that the decision be set aside in whole or in part, in the case of an appeal by an applicant or patentee the precise form in which the patent is requested to be granted or maintained is a matter for the grounds of appeal.

2.9 Thus in T 49/99 the applicant appealed following refusal of application. The notice of appeal stated, "On behalf of the applicants, ... the undersigned attorney herewith files a Notice of Appeal ... against the decision of the Examining Division" and "The Statement of Grounds for the appeal will be submitted together with our requests in due term and form". The Board held that:
" ... in such cases, it is to be inferred from the express statement that the notice of appeal is filed "against" the decision under appeal that the appellants' request was actually complete reversal of the decision. Consistent herewith, the explicit deferral of filing requests is merely considered as the announcement that amended claims were going to be filed together with the filing of the statement of grounds. Rule 64(b) EPC can thus be treated as complied with and the appeal considered admissible."

2.10 In T 89/85 the patentee appealed against a decision revoking the patent. The notice of appeal stated - statement (i) - "This decision is hereby appealed", and - statement (ii) - "It is requested that the revoked

patent is reinstated on the basis of claims limited in a way earlier suggested by the Opposition Division".

The Board held that:

"(a) The statement (i) ... should be interpreted as being a request for cancellation of the decision (in its entirety).

(b) The statement (ii) should be interpreted, not as being a statement in accordance with Rule 64(b) EPC, but as being a statement additional to the notice of appeal, and in effect being a ground for the appeal. In other words, the notice of appeal as a whole should be interpreted as saying that the decision of the Opposition Division should be cancelled; furthermore, that as a ground of appeal, the Appellant requests grant of the patent with claims as previously suggested by the Opposition Division. The inclusion of statement (ii) does not limit the notice of appeal, and does not preclude the submission of further grounds of appeal."

2.11 To the same effect is the decision in T 407/02 :
"In welcher Fassung der Patentinhaber sein Patent verteidigen will, ist ... eine Frage der Begründung der Beschwerde ... und damit eine Angabe, die der Beschwerdeführer bereits in der Beschwerdeschrift machen kann, aber nicht muss."

2.12 The Board therefore concludes that Rule 64(b) EPC 1973 did not require, in the case of appeal by an applicant or proprietor, that the notice of appeal should contain, whether expressly or implicitly, a statement as to the form in which the appellant was requesting the Board of Appeal to grant or maintain the patent. This was a matter for the grounds of appeal.

2.13 The above decisions do not discuss what the difference may have been, if any, between amendment of a decision and cancellation of a decision, and whether the requirement that the notice of appeal identify the extent to which "amendment" was requested imposed a different or additional requirement to the requirement that the notice of appeal identify the extent to which "cancellation" of the decision was requested. In T 89/85, the Board made the point that "amendment" of a decision to revoke a patent was meaningless and that it was essential in such a case, from a proprietor-appellant's point of view, to have the decision cancelled. See point 2 of the reasons. It may therefore be that reference to "amendment" of a decision was more appropriate in the case of an appeal by a proprietor against a decision to maintain the patent in amended form, seeking to have it maintained in another form, even though in such a case the appropriate order on appeal would not strictly have been amendment of the first instance decision but its setting aside and replacement by a different order. In general, however, no significance appears to have been attached to the difference in these expressions. As will be seen, this will become relevant to what was later said about the rule change.

3. *Travaux Préparatoires*

The EPC was revised following the Diplomatic Conference of November 2000 in the form a new text adopted by the Administrative Council in June 2001. As regards the time limits and the form of appeals to the Boards of Appeal, minor changes were made to Article 108 EPC, as

follows (deletions from the previous version in italics, additions in bold):

"Notice of appeal [*must*] **shall** be filed [*in writing*] **in accordance with the Implementing Regulations** at the European Patent Office within two months [*after date of*] of notification of the decision [*appealed from*]. [*The*] **Notice of appeal** shall not be deemed to have been filed until [*after*] the fee for appeal has been paid. Within four months of notification of the decision, a [*written*] statement setting out the grounds of appeal [*must*] **shall be filed in accordance with the Implementing Regulations.**"

- 3.1 As to the Implementing Regulations, these were extensively revised. The overall objective of these revisions can be taken from the Explanatory Remarks published in OJ EPO 2003, Special edition No. 1, 159 as being as follows:

"The revision of the Implementing Regulations is based on the text in force as at 1 July 2002 and pursues the following three objectives:

1. Making the adjustments required by the substantive amendments to the EPC 1973 and those dictated by the implementation of the Patent Law Treaty of 1 June 2000.
2. Integrating the provisions transferred from the EPC to the Implementing Regulations.
3. Ensuring the consistency of the Implementing Regulations with the new text of the EPC 2000, restructuring and streamlining the Regulations, and standardising and harmonising their wording in the three languages."

- 3.2 It does not appear from the above that it was one of the purposes of these changes to alter the way in which appeal proceedings were conducted, whether in regard to the contents of the notice of appeal or the grounds of appeal.

3.3 Turning to the directly relevant *travaux préparatoires*, the earliest relevant material of which the Board is aware is CA/PL 5/02, dated 18 June 2002, drawn up by the President of the Office. The original language of this document is English. The proposed new version of Rule 64 was, for present purposes, the same as that which became Rule 99 EPC 2000.

3.4 In the explanatory remarks accompanying this document it was first stated:

"Under the current Rule 64(b) EPC, the notice of appeal already has to include a statement identifying the extent to which amendment of the impugned decision is requested. This rarely presents a problem in appeals filed by an opponent, but where the appellant is the patent proprietor, the amended patent claims are nearly always filed with the statement of grounds for appeal, and it is only then that the precise nature of the requested amendment becomes apparent. It is also to be noted that the requirements to be met by the statement of grounds of appeal under Article 108, third sentence, EPC have only been concretised by case law."

In general, the statement appears to be consistent with the conclusions reached by the Board, above, as to the requirements of Rule 64(b) EPC 1973. It infers, however that there was "a problem" in the case of appeals by a proprietor, it being said that it was usually only when the grounds of appeal were filed that the precise form in which the proprietor was seeking to have the patent maintained became known. The statement does not state more specifically what the problem was thought to be. From the fact that the statement omits any reference to the requirement in Rule 64(b) that the notice of appeal should identify the extent to which *cancellation* was requested but concentrates on the requirement to state

the extent to which *amendment* of the decision was requested, it may be that the author of the statement considered that the requirement of a statement of the extent to which amendment of the decision was requested was, in the case of a proprietor-appellant, more apt to describe a requirement that the form in which the patent was requested to be maintained should be identified, ie *via* the filing of amended claims. One possibility is therefore that the problem was seen to be that the existing position as developed by the case law of the Boards of Appeal was not consistent with the actual wording of Rule 64(b).

3.5 The explanatory remarks then continued:

"The proposed new version of Rule 64 EPC is based on practical requirements:

...

- The "request defining the subject of the appeal" in paragraph 1(c) can be interpreted by the Boards in accordance with practical needs. The notice of appeal should clearly indicate the general aim of the appeal, even if its scope cannot yet be specified in detail.
- However, the full extent of the appellant's requests must become clear in, at the latest, the statement of grounds of appeal; in principle, the appellant should present his complete case in the statement of grounds for appeal."

Although not particularly clear, what is plain is that a distinction was being made between the need to indicate the "general aim" of an appeal in the notice of appeal, by means of the "request defining the subject of the appeal", and the making clear of the full extent of the appellant's requests later in the grounds of appeal. However, the Board does not need to say anything more about this part of the explanatory remarks because, as will be seen, it was later deleted.

3.6 A number of interested parties made comments on the proposal. The United Kingdom delegation (a) commented that the change in wording appeared to place greater requirements on the applicant than was previously the case under EPC 1973, (b) questioned what the expression "defining the subject of the appeal" meant and (c) suggested that the current wording be retained (see CA/PL 10/02 Add. 4). The Chartered Institute of Patent Agents (a) also questioned why the extra requirements of Rule 64(1)(c) had been added, (b) asked what was meant by the new Rule 64(1)(c), and (c) stated a preference for the existing Rule 64 (see CA/PL 10/02 Add. 8). Finally the Trade Marks Patents and Designs Federation observed that the information required in a notice of appeal was to be increased and that it was not clear what paragraph 64(1)(c) meant (see CA/PL 10/02 Add. 11).

3.7 On 30 September 2002 a revised draft text (CA/PL 50/02 Rev.1) was drawn up by the President of the Office which was stated to take into account the comments which the EPO had received, together with revised explanatory remarks (CA/PL 50/02 Rev.1 Add. 1). No relevant alterations had been made to the draft of the new Rule 64 but the explanatory remarks had been substantially amended and now read as follows (paragraph numbering added):

"[1] Paragraph 1 defines the contents of the notice of appeal to be filed within the period specified in Article 108, first sentence, EPC 2000. Paragraph 2 defines the contents of the statement of grounds of appeal to be filed within the period specified in Article 108, third sentence, EPC 2000.

[2] New Rule 64(1) takes up requirements mentioned in the current Rule 64(a) and (b), namely the indication

of the appellant and the decision impugned. However, under the current Rule 64(b), the notice of appeal already has to include a statement identifying the extent to which amendment of the impugned decision is requested. This rarely presents a problem in appeals filed by an opponent; as a rule, an opponent will request that the decision impugned be set aside and the patent be revoked (partially or in its entirety). However, where the appellant is the patent proprietor, the amended patent claims are nearly always filed with the statement of grounds for appeal, and it is only then that the precise nature of the requested amendment of the decision impugned becomes apparent. Consequently, this requirement is moved to paragraph 2, defining the contents of the statement of grounds of appeal, which up to now has only been concretised by board of appeal case law under Article 108, third sentence, EPC.

[3] The requirement of Rule 64(1)(c) EPC takes into account that the appellant's initial request, according to the case law of the Enlarged Board of Appeal (see G 9/92 and G 4/93, OJ EPO 1994, 875, and G 1/99, OJ EPO 2001, 381), defines the subject of the appeal and thereby the framework of the appeal proceedings. As a rule, the notice of appeal should already clarify whether the decision under appeal is contested as a whole or only partially, and define the extent of the issues raised in the appeal proceedings."

- 3.8 As to these explanatory remarks and their background:
 - 3.8.1 Again, it does not appear that it was intended to make any change in the substantive practice relating to the form of the notice or grounds of appeal.
 - 3.8.2 Apart from the fact that the effect of the proposed new rule was apparently not clear to everyone, nothing relevant can be deduced from the comments of the interested parties themselves, set out above: one cannot say whether the framers of the new rule considered that the views were mistaken or correct, or whether these parties changed their views. However, it is perfectly possible that the amendments to the explanatory statement were made partly in reaction to

these comments in an attempt to explain the changes more fully.

3.8.3 The new material added to the explanatory remarks at paragraph [2] is not particularly easy to understand. At first reading it would appear to say that a requirement has been moved from the notice of appeal to the grounds of appeal. However, on a closer reading it seems that the "requirement" referred to is the principle which had been established by the case law of the Boards of Appeal, namely that an appellant-proprietor need not specify the form in which it was being requested that the patent be maintained in the notice of appeal but that this should be contained, at the latest, in the statement of the grounds of appeal. This "requirement" was thus being "moved" from mere case law to a specific provision in the rules. This reading is also consistent with the possibility, referred to above, that the author of the statement considered that the actual wording of Rule 64(b) was not consistent with the case law of the Boards of Appeal, in which case the words were indeed being moved from the notice of appeal to the grounds of appeal.

3.8.4 Paragraph [3] of the statement is also not very clear but is potentially important as it may explain the origin of the expression "a request defining the subject of the appeal". The Enlarged Boards of Appeal in the cited cases (G 9/92, G 4/93 and G 1/99) were not in fact concerned with the form of the notice of appeal directly but with the issue of *reformatio in peius*. Thus in G 9/92 and G 4/93 the Enlarged Board was concerned with two related issues, first, in a case where a patent proprietor is the sole appellant against

an interlocutory decision maintaining a patent in amended form, can the maintenance of the patent in the form ordered by the Opposition Division be challenged by another party to the appeal? Second, where the opponent is the sole appellant against an interlocutory decision maintaining a patent in amended form, is the patent proprietor restricted during the appeal proceedings to defending the patent in the form in which it was maintained by the Opposition Division? In the course of dealing with these questions the Enlarged Board observed:

"1. ... Proceedings under the EPC in respect of European patent applications and patents are, with some exceptions, initiated by a party. The initial "request" determines the extent of the proceedings.... The present case concerns the question whether the extent of the initial appeal, i.e. the statement in the notice of appeal, affects the extent of the subsequent proceedings. ...

7. The question of law referred to the Enlarged Board of Appeal asks whether and to what extent a Board of Appeal can depart from the request formulated in the notice of appeal when deciding opposition appeal proceedings, to the disadvantage of the appellant... In essence, however, the referred question of law is concerned with the possible binding effect of the appellant's statement in the notice of appeal of the "extent to which amendment or cancellation of the decision is requested" on the subsequent appeal proceedings. It can have a restrictive effect on any subsequent requests by appellants or respondents, as well as on ex officio examination. ...

9. "... However, the subject-matter of the appeal proceedings is always the appeal itself. The appeal may not be simply regarded as a means of commencing the proceedings."

10. According to the EPC, the filing of a notice of appeal (including a statement of the extent to which amendment or cancellation of the decision is requested - the appeal request) is subject to a time limit. ...

14. The first case involves a sole appeal by the patent proprietor against an interlocutory decision by the Opposition Division to maintain the patent in amended form. The amended text is not covered by the appellant's appeal request, that is its statement setting out the scope of the appeal (Art. 108, first sentence, and Rule 64(b) EPC). The aim of such an appeal is to replace the text of the patent as maintained by the Opposition Division ..."

In G 1/99 the Enlarged Board was concerned with whether the principle of the prohibition of *reformatio in peius* must be applied to a case where the opponent is the sole appellant. In the course of dealing with this question the Enlarged Board observed:

"6.1 ... that the subject of an appeal is a decision issued by one of the instances listed in Article 106(1) EPC ... Indeed, issues outside the subject-matter of the decision under appeal are not part of the appeal.

6.2 Moreover, as regards the extent of the proceedings, as stated supra, the Enlarged Board of Appeal pointed out in point 1 of the reasons of G 4/93 that "the initial request" determines the extent of the proceedings. The appellant may file an appeal against the decision taken as a whole or in part (see: Rule 64(b) EPC)....

6.4 ... it is the appellant who in the notice of appeal determines the extent to which amendment or cancellation of the decision under appeal is requested."

3.8.5 All that can be gathered from these passages is that the statement in the notice of appeal which was required by Rule 64(b) EPC (ie, of "the extent to which amendment or cancellation of the decision is requested"), this being described by the Boards as the "initial request" or the "appeal request", determined the "extent" or "scope" of the proceedings. The Enlarged Boards did not in fact refer to this request

as one defining the "subject of the appeal", the wording now found in Rule 99(1)(c) EPC 2000.

3.9 The opening sentence of paragraph [3] of CA/PL 5/02 Rev. 1 Add. 1 is not made easier to understand by the fact that the author appears to have elided the position under the old rule with that under the new. Thus the explanation of the effect of the new rule is explained as if the new rule were the subject of existing case law of the Enlarged Boards of Appeal. Nevertheless, the language reinforces the impression that the framers of the new rule did not intend to make any change in the substantive law in this respect. It would also seem from the references to the Enlarged Board cases that what the author of the statement refers to as the "initial request" defining "the subject of the appeal" is what had been the statement in the notice of appeal identifying the extent to which the amendment or cancellation of the decision was being requested. It therefore appears that the author believed that the requirement of what became Rule 99(1)(c) EPC 2000 (to define "the subject matter of the appeal") was simply what had been the requirement of Rule 64(b) EPC 1973, namely that the notice of appeal should contain a statement of the extent to which the amendment or cancellation of the decision was being requested, as this requirement had been interpreted by the Boards of Appeal.

3.10 Paragraph [3] of CA/PL 5/02 Rev. 1 Add. 1 goes on to state: "As a rule, the notice of appeal should already clarify whether the decision under appeal is contested as a whole or only partially, and define the extent of the issues raised in the appeal proceedings." Again,

this sentence is not made easier to understand by the fact that the position under the old rule appears to have been elided with that under the new. It nevertheless seems clear that the passage is referring to what became the new Rule 99(1)(c). Presumably the words "As a rule" are not meant to imply that this requirement is optional but to state what should happen, ie what the rule is. It is not clear what the use of the word "already" is intended to convey, whether to indicate the position under the old rule or something else. The words "and define the extent of the issues raised in the appeal proceedings" are also problematic because they suggest that the notice of appeal should not only clarify whether the decision under appeal is contested as a whole or only partially but also define the extent of the issues raised in the appeal proceedings, ie do something more. However, in the light of the reference to G 9/92, which explains that the statement in the notice of appeal of the extent to which amendment or cancellation of the decision is requested determines the extent of the proceedings, it is difficult to see what this could be.

- 3.11 The Board cannot resolve all of these questions but suspects that the statement should be understood as meaning: "The notice of appeal should clarify whether the decision under appeal is contested as a whole or only partially, and thus define the extent of the issues raised in the appeal proceedings."
- 3.12 The Committee on Patent Law approved *inter alia* the text of the new Rule 64 without discussion at their meeting on 15 and 16 October 2002 (CA/PL PV 19) and, with immaterial alterations, this text became what is

now Rule 99 EPC 2000, as adopted by the Administrative Council on 12 December 2002 (OJ EPO 2003, Special edition No. 1, 74) and later amended by the Administrative Council on 7 December 2006 (OJ EPO 2007, Special edition No. 1, 159). The text of the explanatory memorandum from CA/PL 50/02 Rev. 1 Add. 1, set out above, was, with immaterial alterations, published by the EPO as part of the explanatory remarks to the revised version of the Implementing Regulations (OJ EPO 2000, Special Edition No. 1, pp 159 et seq).

- 3.13 In conclusion, although the *travaux préparatoires* are not entirely clear:
- 3.13.1 They do not suggest that the existing position in relation to the requirements of the notice and grounds of appeal, summarised above, was giving rise to problems or criticisms.
- 3.13.2 They do not indicate an intention to make a substantive change in the requirements of the notice or grounds of appeal in this area, a change which would have far-reaching effects for many appeals.
- 3.13.3 In general, they show an intention to bring the wording of the rules in relation to notices and grounds of appeal into line with the practice as developed by the Boards of Appeal.
- 3.13.4 It appears that the requirement which is now found in new Rule 99(1)(c) to state "the subject matter of the appeal" was being equated with the former requirement of Rule 64(b) that the notice of appeal should contain a statement of the extent to which the amendment or

cancellation of the decision is being requested as this requirement had been interpreted by the Boards of Appeal.

4. *Construction of Rule 99 EPC*

Generally, the requirements as to the notice of appeal under Rule 99(1) EPC and the statement of the grounds of appeal under Rule 99(2) EPC must be read together to try and arrive at a coherent and sensible structure. The requirements must also be construed as applying to appeals of all possible types and not just appeals by a proprietor, which is the focus of the present appeal.

4.1 As a further general remark, the Board takes into account that if it was required that the notice of appeal by an applicant or proprietor should contain a request for the grant or maintenance of the patent in a specified form, it is not clear what the position would be if the appellant later wished to amend this request, whether to broaden the claims or restrict them. On the assumption that the appellant was able to amend the request, then "defining the subject of the appeal" at the outset by reference to a set of claims which later might change would serve no useful purpose. On the alternative assumption that the appellant was not able to amend the request, this would make appeal proceedings extremely inflexible and would also be contrary to the existing practice in appeals.

4.2 On the contrary, if a proprietor must in the grounds of appeal at the latest specify the form in which the patent is requested to be maintained, the respondent will still know at a relatively early stage in the

appeal proceedings what case it has to deal with and can frame accordingly any reply which it chooses to file under Article 12(1)(b) of the Rules of Procedure of the Boards of Appeal (OJ EPO 2007, 536: "RPBA"). The appeal will then be based on these documents (together with any communication sent by the Board and any answer thereto), subject only to any amendment to a party's case which is thereafter allowed at the Board's discretion (Articles 12(1), 13(1) RPBA). This system provides a logical and practical framework for determining such appeals.

- 4.3 Turning to the rules themselves, as already pointed out, it is not immediately clear from the wording of Rule 99(1) EPC 2000 what has to be contained in the notice of appeal. If, however, Rule 99(2) EPC 2000 were to make it clear that certain matters are required to be included in the grounds of appeal then this would obviously make it easier to reach a conclusion that it was not necessary to include such matters in the notice of appeal, and thus what Rule 99(1)(c) means.
- 4.4 Unfortunately, the wording of the Rule 99(2) also raises problems as to its meaning. Broken out, it reads as follows:

"In the statement of grounds of appeal the appellant shall indicate

the reasons for setting aside the decision impugned,

or the extent to which it is to be amended,

and the facts and evidence on which the appeal is based."

4.5 The first problem is that in some situations at least (see the next paragraph) the rule requires the grounds to state "the extent to which the decision impugned is to be amended". However, under Rule 64(b) EPC 1973, what appears to be the same requirement (a statement of "the extent to which amendment ... of the decision is requested"), had been part of the requirements of the notice of appeal, so that at first sight it would appear that this requirement has been moved from the notice of appeal to the grounds of appeal (assuming the requirement has not just been duplicated). As explained above, the requirement in Rule 64(b), being a part of the requirement to state "the extent to which amendment or cancellation of the decision is requested", had been construed by the Boards of Appeal in a limited way as requiring the appellant merely to state whether it was requested that the decision be set aside in whole or part. If this requirement is now a requirement of the grounds of appeal, what is left as regards the requirements of the notice of appeal?

4.6 Second, the wording of the rule is at first sight also curious because under Rule 64(b) EPC 1973 a distinction appeared to be made between "amendment" of a decision and "cancellation" of a decision ("The notice of appeal shall contain ... a statement identifying ... the extent to which amendment or cancellation of the decision is requested"), these apparently being alternative forms of order which the appellant could request (although see paragraph 2.13, above). This distinction appears at first to be perpetuated in the

new rule in the form of a distinction between "setting aside" a decision and amending it to some extent, these again being alternatives. But if this is a valid distinction, why should the appellant now be required to indicate the reasons for setting aside the decision impugned, but not any reasons for amending it to any extent?

4.7 The versions of Rule 99(2) EPC 2000 in the German and French texts do not appear to take the matter any further. They are respectively: "*In der Beschwerdebegründung hat der Beschwerdeführer darzulegen, aus welchen Gründen die angefochtene Entscheidung aufzuheben oder in welchem Umfang sie abzuändern ist und auf welche Tatsachen und Beweismittel er seine Beschwerde stützt.*" and "*Dans le mémoire exposant les motifs du recours, le requérant doit présenter les motifs pour lesquels il y a lieu d'annuler la décision attaquée ou la mesure dans laquelle elle doit être modifiée, ainsi que les faits et les preuves sur lesquels le recours est fondé.*"

4.8 These considerations are puzzling, not least having regard to the fact that it does not appear from the *travaux préparatoires* to have been the intention to create a substantive change in the practice in this area.

4.9 The Board considers that the answer to this puzzle is to be found by considering the forms of order normally made on appeal. When an appeal is successful the order made by the Boards of Appeal is often in the form: "The decision under appeal be set aside and the patent is ordered to be maintained as granted/in amended

form/revoked", etc, and this is also the common form of requests made by appellants. The Board considers that Rule 99(2) EPC 2000 should be understood in this light, and as requiring the appellant to say, first, why the decision under appeal was wrong and should thus be set aside and then, second, what the appellant wants the Board of Appeal to order in its place (if anything). As pointed out in paragraph 2.13, strictly such an order would not be an amendment of the order made by the department of first instance but a new order, replacing the one which is ordered to be set aside, but this is how the reference in Rule 64(b) EPC 1973 to "amendment" of the order of the first instance department was also clearly understood.

- 4.10 Although it is not decisive for present purposes, the Rules of Procedure of the Boards of Appeal are consistent with this approach, although the wording is not precisely the same. Article 12(2) RPBA provides *inter alia* that the statement of grounds of appeal shall contain an appellant's complete case and set out clearly and concisely the reasons why it is requested that the decision under appeal be reversed, amended or upheld. Although the rules do not expressly state that a proprietor/applicant-appellant should state in what form it is requested that the patent be maintained, the rules are of course framed in general terms to deal with all forms of appellants, not just applicants and proprietors. The requirement that an appellant state its "complete case" in the grounds of appeal can be understood as requiring *inter alia* a proprietor/applicant-appellant to indicate the extent to which the decision under appeal is to be amended, if this is not already clear.

4.11 The reason why Rule 99(2) EPC 2000 is framed as it is, as compared to the Rule 64 EPC 1973, can perhaps be understood on the basis that it was apparently considered, as appears from the *travaux préparatoires* considered above, that the wording of Rule 64(b) EPC 1973 ("The notice of appeal shall contain ... a statement ... identifying ...the extent to which amendment or cancellation of the decision is requested.") was not satisfactory, even though it had been interpreted by the Boards of Appeal in a relatively restrictive way that was not in fact giving rise to problems or objections. At the same, it was apparently felt that it was unsatisfactory that the rules did not expressly say anything about the grounds of appeal, even though the Boards of Appeal had developed an interpretation of what was required which again was not giving rise to problems or objections. Rule 99 EPC 2000 was no doubt an attempt to restate the position using clearer language. The requirement that the notice of appeal should contain a request "defining the subject of the appeal" was no doubt thought to be a better description of the requirement that the notice should indicate whether the decision should be set aside in whole or part, since the effect of such a request was in fact to define the subject (the "extent" or "scope") of the appeal. Again, it was no doubt thought that the requirement that the grounds of appeal should indicate the extent to which the decision was to be amended was an appropriate formulation of the requirement that the appellant should, where appropriate, state what order the appellant wanted the Board of Appeal to make in place of the order of the first instance department.

4.12 This conclusion means that in the case of an appeal by an applicant or proprietor who wishes to have the patent maintained in a different form than that ordered by the first instance department, the grounds of appeal are required to contain a statement as to ("shall indicate") the form in which the Board of Appeal is being requested to maintain the patent and thereby to alter the decision of the department of first instance. This then also means that such a requirement cannot also sensibly be part of the requirements of the notice of appeal under Rule 99(1)(c) EPC 2000, so that whatever the expression "a request defining the subject of the appeal" in Rule 99(1)(c) EPC 2000 means (and it is not necessary for the Board to say precisely what it does mean), it cannot be understood as requiring this.

4.13 The Board also does not have to consider how precise the indication in the grounds of appeal of "the extent to which [the decision] is to be amended" has to be, because in the present case it is not in doubt that the grounds of appeal contained a sufficiently precise indication, namely a request that the decision under appeal be set aside and the patent be maintained as granted or alternatively on the basis of sets of claims according to the first to third auxiliary requests which were filed with the grounds of appeal.

5. *Summary and conclusion*

In the end, and taking all of the above matters into consideration, the Board concludes that the change in the wording in the Implementing Regulations has not altered the previous law as to the requirements of

either the notice of appeal or the statement of grounds of appeal as regards the nature of the appellant's requests. Rule 99(1)(c) EPC is satisfied if the notice of appeal contains a request, which may be implicit, to set aside the decision in whole or (where appropriate) only as to part. Such a request has the effect of "defining the subject of the appeal" within the meaning of Rule 99(1)(c) EPC. In the case of an appeal by an applicant or proprietor, it is not necessary that the notice of appeal should also contain a request for maintenance of the patent in any particular form. This is something which relates to "the extent to which [the decision] is to be amended", and which is therefore a matter for the statement of grounds of appeal under Rule 99(2) EPC.

5.1 The notice of appeal in the present case contained the statement "... we hereby appeal against the decision of the Opposition Division ... We ask that the decision of the Opposition Division be set aside and the patent maintained." In accordance with the principles set out earlier in this decision this is to be interpreted as a request to set aside the decision of the Opposition Division in whole. This request defined the "subject of the appeal" within the meaning of Rule 99(1)(c) EPC. The request "to maintain the patent" was not inconsistent with this but otherwise added nothing. As already indicated in paragraph 4.13 above, the grounds of appeal contained an adequate indication under Rule 99(2) EPC of the extent to which the decision was being requested to be amended.

5.2 The appeal is therefore admissible.

6. *Formal requirements/novelty*

Since the appellant's request in any event fails for reasons of lack of inventive step it is not necessary to enter into the details as to why the formal objections (Article 123(2) EPC) or the objections with respect to lack of novelty (Article 54 EPC) would not have been accepted as valid by the Board.

7. *Inventive step*

7.1 The parties and the Board agreed that the embodiment disclosed in relation to Figures 1 and 2 of D2 represents the closest prior art. According to this embodiment, a fastener product is shown which has three distinct sections which are superimposed on one another to form a pile. Each of the three sections has a (top) surface covered with low adhesion material. The first and third section are coated on their opposite sides with a pressure-sensitive adhesive to effect attachment to a part of the diaper and also to connect (affix, or join) the tape sections in the folded end portions to the neighbouring section. A continuous or discontinuous strip of a hot-melt adhesive or wax is shown between the opposite surfaces of the second and third tape sections to hold the laminated adhesive tape in its folded condition until it is pulled apart by the user's fingers.

7.2 One feature distinguishing the claimed subject-matter from the disclosure of D2 is the provision of an additional anchor section for attachment of the tape to the diaper, which is the first anchor portion in claim 1 of the patent in suit. Other features

distinguishing the claimed subject-matter from the disclosure of D2 are the adhesive/adhesive connections of the first section to the second section and of the second section to the third section.

- 7.3 The general problem to be solved according to the patent in suit is to provide a fastener device for an absorbent article which can be more firmly secured to disposable products (paragraph [0007]). This problem is solved via the first distinguishing feature identified above, relating to the additional anchor section, which allows a better distribution of the tensioning forces when using the fastener for attachment to a second location on the diaper.
- 7.4 The further distinguishing features, relating to the adhesive connections between the first and the second as well as between the second and the third sections, are not functionally linked to this general problem. The distinct problem to be solved by these further distinguishing features is to ensure a reliably adhesive connection of the sections of the fastener. This problem is solved by the adhesive/adhesive connection.
- 7.5 With regard to the general problem identified above, D1 as well as D8 refer to the problem of insufficiently firm attachment of a quite similar fastener device to a disposable article (D1: col. 1, l. 16 - 44 and D8, col. 1, l. 25 - 45) and suggest the use of an additional anchor portion (see Figures 2/5 of D1 and D8) by extending the tape part that is adhesively attached to the bottom ("third") tape section at the turned-over end of it and adhesively attaching the extension to the

disposable product. In arriving at a solution to the stated problem the skilled person would adopt the construction shown in either D1 or D8 to a fastener as known from D2.

- 7.6 Focussing on the solutions given in D1 and D8, it is to be noted that whereas in D1 the extending part which is adhesively connected to the disposable product has an adhesive applied only to the end of it (21a), in D8 the whole of the second strip 18 is covered with adhesive. While both solutions to the stated problem provided by D1 and D8 would improve the attachment, the Board considers that the skilled person would immediately realise that when applying the D8 solution to the D2 fastener, the strip 27, which keeps the third and second sections together in D2, could be dispensed with and, because of the simplification which this brought, the D8 solution would be preferred. However when applying the D8 solution the adhesive connections between the first and the second as well as between the second and the third sections would necessarily be identical with those as claimed in claim 1 under consideration, that is to say adhesive of the second section being in contact with the adhesive of the third and first sections. Since in D8 the connection between the third and second sections is already via the adhesives applied to these sections, the skilled person would have no reason to consider attachment via a single adhesive layer at the connecting positions between the third and first sections.

7.7 Therefore, when applying the teachings of D8 to the fastener of D2, the skilled person would arrive in an obvious manner at the fastener claimed in claim 1 under consideration.

8. Consequently the subject-matter of claim 1 lacks an inventive step (Article 56 EPC) and the appellant's request is not allowable.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar

The Chairman

G. Magouliotis

P. Alting van Geusau