BESCHWERDEKAMMERN DES EUROPÄISCHEN PATENTAMTS

BOARDS OF APPEAL OF THE EUROPEAN PATENT OFFICE

CHAMBRES DE RECOURS DE L'OFFICE EUROPEEN DES BREVETS

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

Datasheet for the decision of 8 March 2013

Case Number: T 1843/11 - 3.3.09

Application Number: 01970910.4

Publication Number: 1320458

IPC: B32B 5/08

Language of the proceedings: EN

Title of invention:
Disposable nonwoven wiping fabric and method of production

Patent Proprietor:
Ahlstrom Nonwovens LLC

Opponent:
KIMBERLY-CLARK WORLDWIDE, INC.

Headword:
-

Relevant legal provisions:
EPC Art. 113(1), 100(b)
EPC R. 103(1)(a), 111(2)
RPBA Art. 11

Keyword:
"Substantial procedural violation (yes)"
"Reimbursement of the appeal fee (yes)"
"Sufficiency of disclosure (yes)"

Decisions cited:
R 0019/10, R 0017/11, J 0004/10, T 0003/90, T 0070/02, T 0763/04, T 0246/08

Catchword:
"Substantial procedural violation - one of the opponent's crucial arguments not dealt with in the opposition division's decision (see point 5.6 of the Reasons)."

Europäisches Patentamt | European Patent Office | Office européen des brevets

Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 1843/11 - 3.3.09

D E C I S I O N
of the Technical Board of Appeal 3.3.09
of 8 March 2013

Appellant: (Patent Proprietor)	Ahlstrom Nonwovens LLC Two Elm Street Windsor Locks, CT 06096 (US)
Representative:	Mercer, Christopher Paul Carpmaels & Ransford One Southampton Row London WC1B 5HA (GB)
Respondent: (Opponent)	KIMBERLY-CLARK WORLDWIDE, INC. 401 North Lake Street Neenah WI 54956 (US)
Representative:	Beacham, Annabel Rose Dehns St Bride's House 10 Salisbury Square London EC4Y 8JD (GB)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted 27 June 2011 revoking European patent No. 1320458 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman: W. Sieber
Members: M. O. Müller
K. Garnett

Summary of Facts and Submissions

I. This decision concerns the appeal by the proprietor of European patent No. 1 320 458 against the decision of the opposition division to revoke it.

II. An opposition was filed requesting revocation of the patent in its entirety on the grounds that the claimed subject-matter was not inventive (Article 100(a) EPC), that the patent did not disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art (Article 100(b) EPC) and that the patent contained subject-matter which extended beyond the content of the application as filed (Article 100(c) EPC).

III. The opposition division's decision, announced orally on 24 May 2011 and issued in writing on 27 June 2011, was based on a main request and auxiliary requests I and II, all requests filed during the oral proceedings before the opposition division.

The opposition division's position can be summarized as follows:

All requests lacked sufficiency of disclosure. Claim 1 of each request was directed to a fibrous non-woven web material and contained the requirement that the web material had "a wet tensile strength (for a 55 gsm basis weight) in the machine direction of at least about 160 gsm/25 mm" while at the same time the claim covered web materials with a basis weight different from 55 gsm, namely of about 30 to about 90 gsm. There was however no indication in the patent as to how the

wet tensile strength for a 55 gsm basis weight was to be determined when the product had a different basis weight, but still within the claimed range of 30 to 90 gsm. In particular, the test procedure referred to in paragraph [0050] onwards in the patent made no mention of the basis weight of the test sample, nor did it discuss how any tensile strength measured was to be converted into a tensile strength "for a 55 gsm basis weight" product. In this respect, the proprietor's argument that a linear relationship between the basis weight and the wet tensile strength existed was held not to be convincing. In particular, the proprietor was not able to substantiate its view on the basis of the patent itself or the cited prior art. In fact, if anything, it appeared plausible that there was no linear relationship (the opposition division in this respect referred to the "well-known inherent difference in pore sizes of wet light-weight vs. thicker nonwovens"). Irrespective of this, the requirements referred to in claim 1 could also be read as meaning that the wet tensile strength range applied only to sheets of a basis weight of 55 gsm but not to any other basis weights covered by claim 1. Consequently, the skilled person did not know what was to be understood by the wording "wet tensile strength (for a 55 gsm basis weight) in the machine direction of at least about 160 gsm/25 mm" in claim 1. The skilled person therefore did not know when he was working within the forbidden area of the claims.

IV. By its letter of 15 August 2011, the proprietor objected to the omission, from both the decision and the minutes, of one of its arguments made in respect of sufficiency of disclosure as regards the "wet tensile

strength (for a 55 gsm basis weight) in the machine direction of at least about 160 gsm/25 mm". The proprietor also requested the correction of the minutes to record its argument.

V. By its communication of 24 August 2011, the opposition division rejected the proprietor's request for correction of the minutes (for details, see point 5.4.2 below).

VI. On 19 August 2011, the proprietor (hereinafter: "the appellant") filed a notice of appeal against the above decision and paid the prescribed fee on the same day. A statement setting out the grounds of appeal was filed on 4 November 2011 together with a main request and auxiliary requests 1 to 3 as well as:

D11: Graphical representation of the wet tensile strength data of examples 5a-5f and 6a-6f of the opposed patent; and

D12: WO/0187367 A2.

VII. A response to the statement of grounds of appeal was filed by the opponent (hereinafter: "the respondent") with its letter of 16 March 2012.

VIII. With its letter of 4 April 2012, the appellant filed further comments.

IX. By its communication dated 8 October 2012, the board summoned the parties to oral proceedings scheduled for 25 April 2013. In the subsequent communication of 9 October 2012, the board informed the parties that in

its preliminary opinion, a substantial procedural violation had been committed by the opposition division in that one of the appellant's arguments relating to sufficiency of disclosure had not been dealt with in the written reasons for the decision. The board further noted, however, that in view of the arguments presented by the parties, it should be possible to decide on the issue of sufficiency of disclosure in the appeal proceedings and that it was therefore not intended to remit the case by reason of any such procedural violation. The board finally stated that in the event that it decided to acknowledge sufficiency of disclosure, it intended to remit the case to the opposition division for examination of the further grounds of opposition.

X. With its letter of 1 February 2013, the respondent announced that unless the appellant sought to broaden the claims of the main request prior to the oral proceedings, it did not intend to be represented at the oral proceedings.

XI. By its letter of 11 February 2013, the appellant confirmed that the claims of the main request and auxiliary requests 1 to 3 remained unchanged from those filed with the grounds of appeal dated 4 November 2011. Furthermore the previous request for oral proceedings made in its letter of 4 November 2011 was replaced by a conditional request for oral proceedings, namely that oral proceedings were only requested in the event that the board considered that one or more of the main and auxiliary requests did not meet the requirements of Article 83 EPC, and therefore did not intend to remit

the case back to the opposition division for consideration of Articles 100(a) and 100(c) EPC.

XII. Claim 1 of the appellant's main request reads as follows:

"1. A fibrous nonwoven web material comprising at least about 50 percent by weight wood pulp fibers; at least about 5 percent by weight lyocell fibers; and at least about 0.5 percent by weight of synthetic binder fibers; wherein the web material has a basis weight in the range of about 30 to about 90 grams per square meter, has a wet tensile strength (for a 55 gsm basis weight) in the machine direction of at least about 160 gms/25 mm and is capable of disintegrating under mild agitation in water as determined by having a flush break up time to fibers of less than 300 seconds, wherein the flush break up test is as specified in the description."

XIII. The appellant's arguments as submitted in the present written appeal proceedings can be summarized as follows:

(a) Substantial procedural violations

The following argument (in the following: "wet tensile strength argument") had been submitted by the proprietor during the oral proceedings before the opposition division:

The skilled person knew whether he or she was working within the forbidden area of the claims because the skilled person simply had to prepare a sheet of basis weight 55 gsm for a given

composition and measure the wet tensile strength. If the wet tensile strength of this particular sheet composition satisfied the criteria in claim 1, then a sheet having any basis weight within the claimed range for this specific sheet composition fell within the scope of claim 1.

It had been highlighted in the proprietor's letter of 15 August 2011 that the opposition division's decision neither acknowledged this argument nor provided any reasons as to why the argument was not convincing. The failure to provide adequate reasoning in a decision in accordance with Rule 111(2) EPC represented a substantial procedural violation.

A further substantial procedural violation had occurred because the above argument had also been omitted from the minutes of the oral proceedings before the opposition division.

An additional substantial procedural violation had occurred since the parties had not been given the opportunity to present arguments in respect of added subject-matter during the oral proceedings, contrary to Article 113 EPC. It was inefficient and illogical to make a decision on whether the invention was sufficiently disclosed without first making a decision on whether the requests were allowable under Article 123(2) EPC.

(b) Sufficiency of disclosure of the main request

Apart from the above wet tensile strength argument, sufficiency of disclosure had to be acknowledged for the following further reasons:

- The question of whether the skilled person knew what was covered by the claims was also a question of definition of the claimed subject-matter, hence an objection arising under Article 84 EPC, rather than sufficiency of disclosure.

- As shown in the charts of D11, the wet tensile strength was proportional to the basis weight. By using such charts it was well within the skilled person's means to establish the wet tensile strength of web materials having a basis weight as covered by claim 1.

XIV. The respondent's arguments as submitted in the written appeal proceedings can be summarized as follows:

(a) Substantial procedural violations

No substantial procedural violation had occurred. The proprietor was given ample opportunity to make submissions as regards sufficiency of disclosure in writing before the oral proceedings and made additional submissions on this point during the oral proceedings itself. The decision was therefore not based on grounds or evidence on which the proprietor had not had an opportunity to

present its comments, and there was therefore no violation of Article 113(1) EPC.

As regards the proprietor's objection concerning the right to be heard on added subject-matter, it was true that this issue was not discussed in great detail during the oral proceedings. However, the opposition division did not make any decision on this point and so this lack of discussion could not have any adverse impact on either party.

(b) Sufficiency of disclosure of the main request

The opposition division was right in not acknowledging sufficiency of disclosure. Even though claim 1 covered web materials with a basis weight in the range of about 30 to about 90 gsm, it specified that the wet tensile strength was "for a 55 gsm basis weight". As the opposed patent did not contain any indication as to how a wet tensile strength for a 55 gsm basis weight was to be determined when the web material had a different basis weight, the skilled person could not tell whether the particular web material had a wet tensile strength as claimed.

As to the procedure referred to by the appellant by way of its wet tensile strength argument, this procedure was nowhere disclosed in the application as filed and the skilled person would not interpret the reference in claim 1 to a 55 gsm basis weight in the way submitted by the appellant.

XV. The appellant requested that

(1) the decision under appeal be set aside and the case be remitted to the opposition division for further prosecution since a substantial procedural violation had occurred (this request implied direct remittal without examination of sufficiency of disclosure by the board, see point 5.1. of the appellant's letter of 4 November 2011);

(2) the appeal fee be refunded under Rule 103(1)(a) EPC;

(3) the decision under appeal be set aside on the basis of the main request filed with letter of 4 November 2011, should the board consider that request (1) could not be allowed;

(4) the decision under appeal be set aside on the basis of any of auxiliary requests 1 to 3 filed with letter of 4 November 2011, should the board consider that request (3) could not be allowed;

(5) the case be remitted to the opposition division for consideration of Articles 100(a) and (c) EPC in the event that the board considered that one or more of the main request and auxiliary requests 1 to 3 met the requirements of Article 83 EPC.

XVI. The respondent requested that the appeal be dismissed. The respondent further requested that in the event that the appeal was not dismissed, the case be remitted back to the opposition division for consideration of the remaining grounds of opposition.

Reasons for the Decision

1. The appeal is admissible.

2. With its letter of 1 February 2013, the respondent stated that unless the appellant sought to broaden the claims of the main request prior to the oral proceedings, it did not intend to be represented at the oral proceedings which had been appointed (see point X, above). The board interprets this as a conditional withdrawal of its previous request for oral proceedings. See, eg, T 3/90 (OJ 1992, 737, headnote) and J 4/10 of 15 March 2012 (not published in OJ EPO, point 3). Given that the appellant subsequently confirmed that it did not seek to broaden the claims of its main request (see point XI, above) the condition can be taken as satisfied and the respondent's request for oral proceedings as withdrawn.

3. Similarly, the appellant made a conditional request for oral proceedings, namely that oral proceedings were only requested in the event that the board considered that one or more of the main and auxiliary requests did not meet the requirements of Article 83 EPC, and therefore did not intend to remit the case back to the opposition division for consideration of Articles 100(a) and 100(c) EPC (see point XI, above). For the reasons given below, the board considers that the appellant's main request meets the requirements of Article 100(b) EPC and the board also intends to remit the case back to the opposition division for consideration of Articles 100(a) and 100(c) EPC. The event forming the basis for the appellant's conditional request for oral proceedings therefore does not arise.

4. In the circumstances the oral proceedings previously appointed for 25 April 2013 were cancelled.

5. *Substantial procedural violation - wet tensile strength*

5.1 The opposed patent is directed to fibrous nonwoven web materials to be used as premoistened wipes. These web materials are characterised by *inter alia* a basis weight in the range of about 30 to about 90 gsm and "a wet tensile strength (for 55 gsm basis weight) in the machine direction of at least about 160 gms/25 mm" (claim 1). Due to this wet tensile strength, the web material's serviceability and resistance to sheet material breakage during manufacturing operations, as well as its handling on automated equipment, is improved and the finished material is able to resist tearing or puncturing during dispensing and use (page 2, lines 17-18 and page 3, lines 30-33 of the opposed patent).

5.2 The opposition division revoked the patent for lack of sufficiency of disclosure as the skilled person was considered not to know how to determine the parameter "wet tensile strength (for 55 gsm basis weight)" in claim 1 and thus was not able to tell whether he was working within the forbidden area of the claims or not.

5.3 In the statement of grounds of appeal (point 4.11 of the letter dated 4 November 2011), the proprietor (appellant) complained that a substantial procedural violation had been committed by the opposition division as its decision neither acknowledged nor gave any

reasons as to the following argument (in the following: "wet tensile strength argument"):

"...the skilled person did know whether he or she was working within the forbidden area of the claims because the skilled person simply had to prepare a sheet of basis weight 55 gsm for a given composition and measure the wet tensile strength. If the wet tensile strength of this particular sheet composition satisfied the criteria in claim 1, then a sheet having any basis weight within the claimed range for this specific sheet composition must fall within the scope of claim 1."

5.4 In the following, it will be examined whether the appellant's complaint is justified. In this respect, it has first to be decided whether it is credible that the wet tensile strength argument was indeed made by the appellant during the first instance opposition proceedings.

5.4.1 The appellant had complained in its letter of 15 August 2011, ie after issuance of the opposition division's decision and prior to the present appeal, that despite the above wet tensile strength argument having been made during the oral proceedings, it had been omitted from the opposition division's decision and the minutes. The appellant requested accordingly that the minutes be corrected.

5.4.2 The opposition division refused this request as follows:

"The Proprietor's request for correction of the minutes of the oral proceedings which took place on the 24th May 2011 is rejected. The opposition division

considers that the requirements of Rule 124(1) EPC of those containing the essentials of the oral proceedings and the relevant statements made by the parties are fulfilled."

This statement is not responsive to the appellant's complaint and in particular does not dispute in any way that the wet tensile strength argument was made during the oral proceedings.

5.4.3 For its part, the respondent has not, at any time during the opposition or appeal proceedings, disputed that the wet tensile strength argument was made during the oral proceedings before the opposition division.

5.4.4 Finally, apart from having been made during the oral proceedings, the wet tensile strength argument in fact was also made during the written opposition proceedings, namely in the appellant's letter of 21 April 2011 (point 5.11). More particularly, in this letter, the appellant argued as follows:

"In any case, to establish whether or not a nonwoven web material falls within the scope of claim 1 the skilled person only has to take the fibrous composition of its web and prepare a similar web material with a basis weight of 55 gsm and then measure its wet tensile strength. This process involves no inventive skill and does not represent an undue burden on the skilled person."

5.4.5 In view of the above, it is credible to the board that the appellant's wet tensile strength argument was advanced twice during the opposition proceedings,

namely in the written proceedings (letter of 21 April 2011) and then again during the oral proceedings.

5.5 In view of the above, it has to be examined whether the opposition division's decision is indeed silent about the appellant's wet tensile strength argument.

The only argument of the appellant addressed in the opposition division's decision is the argument that a linear relationship between the basis weight and the wet tensile strength exists such that with the value for eg a 30 gsm basis weight, the value for a 55 gsm basis weight can be obtained by linear extrapolation (for a more detailed summary of the opposition division's decision, see point III above).

This argument is not related to the appellant's wet tensile strength argument. More particularly, while the argument dealt with by the opposition division implies that the wet tensile strength at a basis weight of 55 gsm can be obtained mathematically by a linear extrapolation, the appellant's wet tensile strength argument in fact meant that a sample with a basis weight of 55 gsm must actually be prepared in order to obtain this wet tensile strength.

Hence, despite the wet tensile strength argument having been raised in the written and oral opposition proceedings, the opposition division did not address it at all in its decision.

5.6 It remains to be decided whether this constituted a substantial procedural violation.

5.6.1 According to Rule 111(2) EPC, decisions of the European Patent Office which are open to appeal shall be reasoned.

Although the opposition division is not required to address each and every argument of a party (R 19/10 of 16 March 2011; point 6.2 and R 17/11 of 19 March 2012; point 4, neither of which published in OJ EPO), the important question is whether the party concerned can objectively understand whether the decision was justified or not.

In this respect, the decision should contain at least some motivation on crucial points of dispute, in order to give the party concerned a fair idea of why its submissions were not considered convincing and to enable it to base its grounds of appeal on relevant issues (T 70/02 of 15 March 2002; point 7; not published in OJ EPO). The points to be addressed are in particular arguments which may militate against or cast doubt on the decision in question (T 246/08 of 14 August 2008; point 2.2; not published in OJ EPO).

5.6.2 As will be seen, the present decision of the board acknowledges sufficiency of disclosure on the basis of the appellant's wet tensile strength argument (see point 5 below). This argument is thus clearly crucial to the point decided upon by the opposition division.

5.6.3 The fact that no reasons were given in the decision of the opposition division why the appellant's wet tensile strength argument was not an answer to the objection under Article 83 EPC therefore amounts to a substantial procedural violation.

5.6.4 The respondent argued in this respect that the appellant was given ample opportunity to make submissions as regards sufficiency of disclosure in writing before the oral proceedings and that the appellant made additional submissions on this point during the oral proceedings itself. The decision was therefore not based on a ground or evidence on which the appellant had not had an opportunity to present its comments, and there was therefore no violation of Article 113(1) EPC.

However, as stated in T 763/04 of 22 June 2007,

"Article 113(1) EPC is not a formal provision, but rather one of substance. Hence it is not sufficient to observe Article 113(1) merely formally by granting the Applicant the ***procedural*** *possibility for presenting comments, as this was the case here. This procedural step falls short of its legislative purpose and remains a pure formality, if there is no trace in the file that such comments were indeed read and discussed on the merits, beyond a mere acknowledgement of their existence. In summary, Article 113(1) requires not merely that a party be given an opportunity to voice comments, but more importantly it requires that the deciding instance demonstrably hears and considers these comments."* (point 4.4; not published in OJ EPO).

Consequently, the fact that the appellant in the present case was given the opportunity to (and in fact did) put forward the wet tensile strength argument is not sufficient for the requirements of Article 113(1) EPC to be met. What is additionally important is that

the opposition division demonstrably heard and considered this argument and, as has been set out above (point 5.5), this condition has not been met in the present case.

5.7 Thus a substantial procedural violation has occurred as regards the omission of the wet tensile strength argument from the opposition division's decision. Therefore, there is no need to elaborate on the appellant's further objection that this argument had also been omitted from the minutes of the oral proceedings before the opposition division.

6. *Substantial procedural violation - Added matter*

6.1 The appellant argued that a further substantial procedural violation had occurred since the parties had not been given the opportunity to present arguments in respect of added subject-matter (Articles 100(c) and 123(2) EPC) during the oral proceedings.

However, Article 113(1) EPC in this respect merely requires that a decision has to be based on grounds or evidence on which the parties concerned have had an opportunity to present their comments. Since in the present case, the opposition division did not base its decision on added subject-matter, there was no need to offer the parties an opportunity to address this issue. The requirements of Article 113(1) EPC were thus not violated in this respect.

6.2 The appellant additionally argued that it was highly inefficient and illogical to make a decision on sufficiency of disclosure without first making a

decision on whether the requests were allowable under Article 123(2) EPC (point 4.19 of the appellant's letter of 4 November 2011).

The board is however not aware of any provision in the EPC (and none has been cited by the appellant) that stipulates that the various patentability requirements or grounds of opposition have to be dealt with in a particular order in opposition proceedings. Therefore the order chosen by the opposition division, even if it were to be considered as inefficient or illogical, cannot amount to a substantial procedural violation.

7. *Direct remittal*

7.1 As set out in point 2 above, a substantial procedural violation was committed by the opposition division. Therefore, the appellant's request to set aside the decision of the opposition division and to immediately remit the case to the opposition division (request (1), point XV above) has to be considered. This request implies that the case should be remitted to the opposition division without considering the ground under Article 100(b) EPC (see point 5.1 of the appellant's letter of 4 November 2011).

7.2 Article 11 RPBA requires remittal to the department of first instance if fundamental deficiencies are apparent in the first instance proceedings, unless special reasons present themselves for doing otherwise.

7.3 In the present case, the board is in a position to decide on sufficiency of disclosure (Article 100(b) EPC) as this issue has been discussed in detail by both

parties and all arguments relevant to the present decision have been put forward by the parties in the present appeal proceedings. The board has also been able to reach a clear conclusion on the issue. To remit the case for the issue to be decided on again by the opposition division would not be a procedurally efficient way of dealing with the case, given the possibility of the opposition division again deciding the issue against the appellant and thus of a further appeal.

Therefore, the appellant's request (1) is refused.

8. *Sufficiency of disclosure of the main request*

8.1 Claim 1 specifies the wet tensile strength to be "for a 55 gsm basis weight" while at the same time the claim covers web materials with a basis weight different from 55 gsm, namely in the range of about 30 to about 90 gsm. In the opposition division's and the respondent's view, the opposed patent is insufficiently disclosed as it does not contain any indication as to how a wet tensile strength for a 55 gsm basis weight is to be determined when a particular web material has a different basis weight. The skilled person is therefore not able to tell whether this particular web material has a wet tensile strength as claimed.

8.2 The opposed patent describes in detail how the wet tensile strength is to be measured. It is in particular set out on page 6, lines 50-56 that a 50 mm wide and 127 mm long sample is first soaked in room-temperature water, then blotted on a cotton blotter to remove excess water, and subsequently placed in the jaws of a

tensile testing instrument that applies a constant rate of extension of 0.0021 m/s until the test sample breaks. A load cell is used to measure the force imposed on the sample at breakage and the force required to break the test sample is divided by 2 and reported in grams per 25 mm.

The board acknowledges that neither this detailed description nor the remaining parts of the opposed patent contain any information as to how the wet tensile strength at 55 gsm basis weight has to be measured if a web material actually has a different basis weight.

8.2.1 However, as explained by the appellant (see the above-discussed wet tensile strength argument), all that the skilled person has to do is to prepare a web material having a basis weight of 55 gsm using a given sheet composition and machine setting, and then measure its wet tensile strength. If the wet tensile strength of this particular web material satisfies the criteria in claim 1, then a similar web, ie one having any basis weight within the claimed range and being prepared by using the same sheet composition and machine settings, must fall within the scope of claim 1.

This approach for determining the wet tensile strength is in the board's view a plausible and straightforward approach the skilled person would adopt when trying to define the relevant feature. The experiment required in this approach does not represent an undue burden on the skilled person. It does therefore not matter for sufficiency of disclosure that this approach is not

disclosed in the opposed patent, as argued by the respondent.

8.3 Furthermore, there is no evidence on file that this approach would not work.

8.4 Finally, the opposition division's argument (point 6 of its decision) according to which the reference to a 55 gsm basis weight in claim 1 can also be read as meaning that the wet tensile strength requirement in this claim applies only to sheets of a basis weight of 55 gsm is not convincing. More specifically, claim 1 explicitly states that the web material has a basis weight in the range of 30 to 90 gsm. It would thus be nonsensical to assume that the further requirement that this web material has a certain wet tensile strength applies for one single basis weight only, namely 55 gsm.

8.5 The skilled person can thus determine whether a web material that he wants to prepare will have a wet tensile strength as required by claim 1 and hence is able to carry out the invention underlying the opposed patent. Sufficiency of disclosure therefore has to be acknowledged.

9. *Reimbursement of the appeal fee*

9.1 The appellant requested the reimbursement of the appeal fee (request (2), point XV above).

9.2 Rule 103(1)(a) EPC stipulates that the appeal fee shall be reimbursed where the board deems an appeal to be allowable, if such reimbursement is equitable by reason of a substantial procedural violation.

In the present case, both conditions of Rule 103(1)(a) EPC are met. Firstly, the board considers the invention underlying the main request to be sufficiently disclosed (point 8 above), which means that the appellant's appeal against the opposition division's decision to revoke the patent is allowable. Secondly, a substantial procedural violation occurred (see point 5 above). Thirdly, reimbursement is equitable in these circumstances.

9.3 Consequently, the appeal fee is to be reimbursed.

10. *Remittal for further prosecution*

The appellant further requested that, in the event that the main request is considered to meet the requirements of Article 83 EPC, the case be remitted to the opposition division for consideration of Articles 100(a) and (c) EPC (request (5), point XV above).

In a similar way, the respondent requested that, in the event the appeal is allowed, the case be remitted to the opposition division for consideration of the remaining grounds of opposition (see point XVI above).

Furthermore, the appellant explicitly complained that the parties had not yet had sufficient opportunity to discuss the issue of added subject-matter before the opposition division (point b) on page 6 of its letter of 4 November 2011).

In view of the parties' requests and in order to give the parties the opportunity to discuss the further requirements of the EPC at two levels, the case will be remitted to the opposition division for further prosecution.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the opposition division for further prosecution on the basis of the main request filed by the appellant with its letter of 4 November 2011.

3. The appeal fee is reimbursed.

The Registrar: The Chairman:

M. Cañueto Carbajo W. Sieber