Internal distribution code:

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

Datasheet for the decision of 1 July 2014

Case Number: T 2476/11 - 3.3.09

Application Number: 02776294.7

Publication Number: 1456315

IPC: C09J7/00, C09J7/02, A61F13/15

Language of the proceedings: EN

Title of invention:
THREE DIMENSIONAL PROFILING OF AN ELASTIC HOT MELT PRESSURE SENSITIVE ADHESIVE TO PROVIDE AREAS OF DIFFERENTIAL TENSION

Patent Proprietor:
KIMBERLY-CLARK WORLDWIDE, INC.

Opponent:
Procter & Gamble, Inc.

Headword:

Relevant legal provisions:
EPC Art. 54, 56, 83, 84

Keyword:
Clarity - (yes)
Sufficiency of disclosure - (yes)
Novelty - (yes)
Inventive step - (yes)

Decisions cited:

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern
Boards of Appeal
Chambres de recours

European Patent Office
D-80298 MUNICH
GERMANY
Tel. +49 (0) 89 2399-0
Fax +49 (0) 89 2399-4465

Case Number: T 2476/11 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 1 July 2014

Appellant: (Patent Proprietor)	KIMBERLY-CLARK WORLDWIDE, INC. 401 North Lake Street Neenah, WI 54956 (US)
Representative:	Davies, Christopher Robert Dehns St Bride's House 10 Salisbury Square London EC4Y 8JD (GB)
Respondent: (Opponent)	Procter & Gamble, Inc. One Procter & Gamble Plaza Cincinnati, OH 45202 (US)
Representative:	den Hartog, Jeroen H.J. Hoyng Monegier LLP Rembrandt Tower, 31st Floor Amstelplein 1 1096 HA Amsterdam (NL)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 28 September 2011 revoking European patent No. 1456315 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman	W. Sieber
Members:	N. Perakis
	E. Kossonakou

Summary of Facts and Submissions

I. Mention of the grant of European patent No. 1 456 315 in the name of Kimberly-Clark Worldwide Inc. was published on 14 March 2007 (Bulletin 2007/11). The patent was granted with 26 claims. Claims 1, 7, 8 and 9 read as follows:

"1. An elastomeric, hot melt, pressure-sensitive adhesive film (52,62,66,72,80) having major surfaces in the X-Y plane and having at least two different material thicknesses (56,58) in the Z axis (54), the different material thicknesses (56,58) resulting in differential tensions when the elastomeric film is stretched."

"7. The elastomeric, hot melt, pressure-sensitive adhesive film (52) according to any of Claims 1 to 4 wherein the elastomeric film has a cross section through the Z axis (54) with a regular profile formed of unbroken lines."

"8. The elastomeric, hot melt, pressure-sensitive adhesive film (52,62,66,72,80) according to any preceding claim further comprising:

a first facing layer component (12) adhered to a first surface of the elastomeric adhesive film to form a laminate, the laminate being capable of elongation in a first direction, the laminate having a non-elongated original length in the first direction, the laminate being retractable after elongation to a length substantially equivalent to the original length."

"9. The elastomeric, hot melt, pressure-sensitive adhesive (52,62,66,72,80) according to Claim 8 further comprising:

a second facing layer component (14) adhered to a second surface of the elastomeric adhesive film to form a laminate."

II. A notice of opposition was filed by Procter & Gamble Company requesting revocation of the patent in its entirety on the grounds that the granted subject-matter was neither novel nor inventive (Article 100(a) EPC) and that the patent did not disclose the invention in a manner sufficient clear and complete for it to be carried out by a person skilled in the art (Article 100(b) EPC).

III. The documents filed by the opponent included the following:

D4: US 5 431 644 A;
D6: WO 00/58541 A1;
D7: US 6 245 050 B1;
D9: WO 01/87213 A1;
D10: WO 01/87588 A2;
D11: ASTM Designation: D 882-09, "Standard Test Method for Tensile Properties of Thin Plastic Sheeting", A00866999 11 November 2009; and
D13: WO 96/11236 A1.

The following document was cited by the opposition division:

D14: Kratont™ Polymers, Fact Sheet K0151, Americas, 1/2001.

IV. By a decision announced orally on 6 September 2011 and issued in writing on 28 September 2011 the opposition division revoked the patent because it considered that the subject-matter of the main request filed with letter dated 22 June 2011 lacked an inventive step. Auxiliary requests 1-7 were likewise considered to lack an inventive step.

Claim 1 of the main request (the only claim relevant for this decision) was a combination of granted claims 1, 8 and 9 (see above point I).

V. On 28 November 2011 the patent proprietor (in the following: the appellant) filed an appeal against the decision of the opposition division and paid the appeal fee on the same day. On 3 February 2012 the appellant filed the statement setting out the grounds of appeal together with its main request (the claims which formed the main request considered by the opposition division) and a new auxiliary request (claims 1 to 6). Claim 1 of the auxiliary request was a combination of granted claims 1, 7, 8 and 9 (see point I above) and reads as follows:

"1. An elastomeric, hot melt, pressure-sensitive adhesive film (52,62,66,72,80) having major surfaces in the X-Y plane and having at least two different material thicknesses (56,58) in the Z axis (54), the different material thicknesses (56,58) resulting in differential tensions when the elastomeric film is stretched, wherein the elastomeric film has a cross-section through the Z axis (54) with a regular profile formed of unbroken lines, the elastomeric, hot melt, pressure-sensitive adhesive film (52,62,66,72,80) further comprising: a first facing layer component (12) adhered to a first surface of the elastomeric adhesive

film to form a laminate, the laminate being capable of elongation in a first direction, the laminate having a non-elongated original length in the first direction, the laminate being retractable after elongation to a length substantially equivalent to the original length, and further comprising: a second facing layer component (14) adhered to a second surface of the elastomeric adhesive film."

VI. By letter of 27 June 2012, the opponent (in the following: the respondent) filed observations on the appeal. It requested that the appeal be dismissed and that the patent remain revoked for insufficient disclosure, lack of novelty and lack of inventive step.

VII. By letter of 9 October 2012, the appellant filed observations on the respondent's letter.

VIII. In an official communication dated 9 May 2014 the board expressed its preliminary non-binding opinion.

IX. By letter of 2 June 2014, the appellant filed additional comments regarding the issue of inventive step.

X. On 1 July 2014 oral proceedings before the board were held. During the oral proceedings the appellant withdrew its main request, with the result that the auxiliary request became its sole request.

XI. The relevant arguments put forward by the appellant in its written submissions and during the oral proceedings may be summarised as follows:

- The claimed invention was sufficiently disclosed. The terms used in the claim, such as "hot melt",

"pressure sensitive adhesive film", "different material thicknesses" and "differential tensions" did not raise any sufficiency problem as the skilled person would give them the meaning they normally had in this technical field. Regarding specifically the "different material thicknesses", they concerned those macroscopic differences which led to differential tensions. With regard to the absence of a test for measuring the differential tensions, the respondent had not shown that it led to insufficiency of disclosure.

- The feature of claim 1 "wherein the elastomeric film has a cross-section through the Z axis (54) with a regular profile formed of unbroken lines" had a clear meaning for the skilled person. A "cross-section through the Z axis" which technically made sense was a cross-section whose profile had different material thicknesses. The expression "regular profile formed of unbroken lines" had to be understood to mean, in the context of the patent in suit, flat and uninterrupted lines like the profile illustrated in figure 4. This feature excluded the profiles of granted claims 5 and 6 (deleted from the auxiliary request), which related to a crenellated or a curved profile such as the profile illustrated in figures 5 to 8.

- The subject-matter of claim 1 was novel over the prior art cited by the respondent, namely D6, D7, D9, D10 and D13. These documents failed to disclose a laminate whose pressure sensitive adhesive (PSA) film had different material thicknesses in the Z axis resulting in differential tensions or even a laminate whose

film had a cross-section through the Z axis with a regular profile formed of unbroken lines.

- In particular, D4 did not disclose that the film was part of a laminated structure, that it was a PSA film and that it had a cross-section through the Z axis with a regular profile formed of unbroken lines. Regarding D7, it disclosed PSA films in laminates but they had a uniform thickness.

- The subject-matter of claim 1 involved an inventive step no matter whether D4 or D7 was considered to represent the closest prior art.

- Starting from D7 as the closest prior art, the technical problem to be solved was seen in the provision of improved elasticity to the laminate.

- The skilled person starting from D7 and aiming at improving the elasticity of the laminate with a PSA film would not find any hint in the cited art towards modifying the uniformity of the film shape and providing a shape with different film thicknesses in the Z axis resulting in differential tensions and having a cross-section through the Z axis with a regular profile formed of unbroken lines. Nor did D4 provide any hint in this respect. D4 disclosed constructions of elastic strands set on a substrate, the constructions having a profiled surface defined by a plurality of thick zones (strands) separated by thin zones (substrate), the thick zones constituting individual regions of contraction force. The film of D4 had an irregular profile in the Z axis and was not disclosed to be part of a

laminate. Nor would the skilled person consider this film appropriate for a laminate construction. Thus, the skilled person would have no reason to combine the disclosure of D4 with that of D7, and even if he did he would not arrive at the claimed subject-matter since the film shape disclosed in D4 did not have a cross-section through the Z axis with a regular profile formed of unbroken lines.

XII. The relevant arguments put forward by the respondent in its written submissions and during the oral proceedings may be summarised as follows:

- The claimed invention did not fulfil the requirements of sufficiency. Claim 1 was so broad that it placed an undue burden on the skilled person, who had to set up a research programme in order to put the claimed invention into practice over the whole breadth of the claim. In particular, the terms "hot melt", "pressure sensitive adhesive film", "different material thicknesses", "differential tensions" had very broad meaning and the patent in suit did not disclose a more limited definition of these terms. Furthermore, as regards the "different material thicknesses" the patent in suit did not disclose how they were to be measured. Additionally, it did not disclose the parameters necessary for carrying out the differential tensions test (reference was made to D11). Lastly, there was no example according to the invention of the auxiliary request, which had eventually become the appellant's sole request.

- The feature of claim 1 "wherein the elastomeric film has a cross-section through the Z axis with a

regular profile formed of unbroken lines" was unclear in view of the lack of definition of the expressions "regular profile" and "unbroken lines". Moreover, the cross-sections through the Z axis included cross-sections which did not have at least two different material thicknesses.

- It was conceded that the subject-matter of claim 1 was novel over D2 and D4, but not over D6, D7, D9, D10 and D13.

- D7 and D13 explicitly disclosed a laminate with a PSA film, the latter having at least two different material thicknesses in the Z axis resulting in different tensions when stretched.
Thus, figure 2 of D7 disclosed a trapezoidal cross-section in the Z axis. It also disclosed the use of spray nozzles for the application of the PSA to one or more of the components of a disposable absorbent article (column 6, lines 13 to 20) which would lead to the formation of different PSA thicknesses. As regards D13, it disclosed thermal deactivation/relaxation of defined areas of the PSA which gave rise to different thicknesses of the material (page 52, lines 11-36; claims 97 and 101). The feature "wherein the elastomeric film has a cross-section through the Z axis with a regular profile formed of unbroken lines" was also disclosed in D7 and D13.

- Claim 1 lacked an inventive step in view of the obvious combination of D7 with D4. Either of these documents could be considered as the closest prior art. Starting from D7 and considering that it did not disclose the different thicknesses in the

Z axis and the specific shape of the film cross-section in that axis, the technical problem could be seen in the improvement of the elasticity of the PSA film. The skilled person departing from D7 and aiming at solving the technical problem would find in D4 the motivation to use different thicknesses of the film material in the Z axis resulting in differential tensions when stretched. Therefore this difference was obvious from D4. Regarding the shape of the cross-section of the film in the Z axis, this feature did not involve an inventive step since nowhere in the patent there was any mention that it had any technical effect or any particular advantage. The respondent concluded that this feature was nothing more than an obvious alternative.

XIII. The appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of claims 1 to 6 of the sole request filed as auxiliary request with the statement setting out the grounds of appeal dated 3 February 2012.

XIV. The respondent requested that the appeal be dismissed.

Reasons for the Decision

1. The appeal is admissible.

2. Clarity

The board considers that the feature of claim 1 "wherein the elastomeric film has a cross-section through the Z axis with a regular profile formed of unbroken lines" is clear for the skilled reader in the context of the claimed invention.

There is no doubt that the skilled person will choose a cross-section through the Z axis which reveals the different material thicknesses; otherwise the claim would not make technical sense.

Regarding the regular profile formed of unbroken lines of that cross-section, it is clear from the patent's content as a whole that it relates to a profile with flat sides and uninterrupted lines such as those of figure 4 of the patent in suit. Thus, the film is free of undulations and striations such as those of granted claims 5 and 6 which no longer form part of the claimed subject-matter.

3. Sufficiency

The respondent's objection to sufficiency of disclosure was two fold. Firstly, it objected to the use of certain terms in the definition of the claimed invention which were too broad to allow the skilled person to carry out the invention within the whole range claimed. Secondly, it objected to the absence of a method for measuring the difference in thicknesses and the differential tensions in the claim and the patent specification.

3.1 With regard to the first point, the board considers that the skilled person to whom the claim is addressed will have no difficulty understanding the meaning of the terms "hot melt", "pressure sensitive adhesive film", "different material thicknesses" and "differential tensions" within the technical context of absorbent articles.
Regarding specifically the "different material thicknesses", the board agrees with the appellant that

this feature would be understood to mean that the film has macroscopic (not microscopic) regions of different thicknesses. Moreover, the claim requires that these macroscopic regions of different thicknesses result in different elastic properties at different regions, namely a measurable difference in tension. Therefore, the imperfections in the film thickness, to which the respondent referred, cannot be considered to automatically fall within the claimed subject-matter. This would only be the case if they provided measurable differential tensions. However, the respondent has provided no evidence of that.

3.2 With regard to the second point, the measurement of the film thickness, from which derives the difference in thicknesses, is evidently trivial. The skilled person using common general knowledge, and without undue burden, can measure the thickness of a film at different regions in order to verify the difference in thicknesses.

As regards the measurement of the differential tensions, the fact that the claims and the patent do not mention a standard test procedure for determining a value for the difference in tension does not necessarily lead to a problem under Article 83 EPC. There is no evidence on file showing that the method of measurement makes a difference and even leads to insufficiency of disclosure. Thus, the respondent's argument appears to be based on a mere speculation.

In the context of the difficulties associated with the tension measurement the respondent referred to D11, ASTM's standard agreed by experts in the thin plastic sheeting/film field as to the factors that determine tensile properties. The respondent objected in

particular to the lack of information as to the jaw speed in such a method. However, as pointed out by the appellant, D11 relates to a method for measuring differential tensions for materials different from the claimed elastomeric, hot melt, PSA films (see tables 2 to 7). There again, the respondent, who carries the burden of proof, did not submit any technical evidence to substantiate its assertion that the difference in jaw speed had an influence on the tension measurement of the claimed film materials.

3.3 Under the present circumstances, the board considers that the skilled person using the teaching of the patent in suit and his common general knowledge would have no difficulty - i.e., undue burden - in putting the invention into effect, namely providing films of differing thicknesses showing different elastic forces in different regions.

4. Novelty

4.1 The respondent maintained its novelty objections in view of D6, D7, D9, D10 and D13 but withdrew those based on D2 (a document under Article 54(3) EPC) and D4 at the oral proceedings before the board. Since, however, D4 is relevant for the assessment of inventive step, its disclosure is analysed in the following paragraph.

4.2 D4 discloses elastic strand constructions, which are used among other things in the manufacture of disposable diapers and incontinence garments (column 11, lines 5-8; figure 12). A plurality of strands (ribs) is located on a sheet, prepared by thin zones formed by the sheet (see abstract; example 4; figures 3-6). The elastic strands of D4 are

manufactured by extruding a thermoplastic elastomer through a profiled die which may have a variety of shapes to accommodate unitary strands of different configurations (column 9, lines 51-56; figure 7).

However, contrary to the requirements of claim 1, D4 does not disclose that the construction to be used in disposable absorbent articles is a laminate. The specific construction of example 4, to which the respondent made reference, simply discloses that the elastic strand is set on a polyethylene film. This construction is clearly not a laminate in which first and second facing layers are each adhered to the respective surfaces of the film. Also column 11, lines 14-18, which discloses that the strand material is attached to a substrate between layers of an overall composite construction, does not directly and unambiguously disclose a laminate. Nor would the skilled person consider this construction appropriate for a laminate, in view of the ribs of strand material projecting out of the substrate surface, which do not give rise to a shape which would conventionally be used in a laminate structure.

Furthermore, contrary to claim 1, D4 does not disclose that the profile die provides an elastomeric film with a cross-section through the Z axis which has a regular profile formed of unbroken lines. The profile according to D4 (see figures 3 to 6) is irregular and comprises thick zones (protrusions) and thin zones (recessions). This is different from a profile such as that of figure 4 of the patent in suit.

D4 does not disclose that the elastomeric material is a hot melt PSA as required by claim 1. D4 discloses materials including a wide variety of thermoplastic

elastomers, which when stretched and released will retract to resume their original dimensions or nearly so (column 11, lines 36-41). The opposition division was correct to conclude that there is no unambiguous disclosure in D4 that the specific KRATON® 4141 elastomer used in the examples is capable of functioning as a pressure sensitive adhesive. As apparent from D14 (see page 1, second paragraph; page 9, table) KRATON® polymers comprise KRATON® D polymers with generally better PSA properties and KRATON® G polymers. However, this statement does not directly and unambiguously disclose that the specific KRATON® (D) 4141 should be considered as PSA.

4.3 D6 discloses a creep resistant composite elastic material wherein an elastic fibrous web is bonded to at least one gatherable layer to form the composite material (abstract; claim 9). The filaments and fibres of the elastomeric fibrous web are formed from at least one elastomeric polymer resin (claim 10). KRATON® G-2760 is used in examples 1 and 2 (page 36, line 7). However, D6 does not disclose that the elastomer is a PSA. Furthermore, there is no disclosure in D6 that the film has two different material thicknesses in the Z axis resulting in differential tensions when the film is stretched, let alone that the elastomeric film has a cross-section through the Z-axis with a regular profile formed of unbroken lines. Any microscopic differences in thickness resulting from stretching when passing the composite through the patterned pinch rollers (page 28, line 23) would not necessarily give rise to measurable differential tensions and are not within claim 1 when properly interpreted. Therefore claim 1 is novel also over D6.

4.4 D7 discloses a disposable absorbent article including an elasticised area formed from an elastomeric, hot melt, PSA, a first component and a second component, said first and second components being adhered to one another by said elastomeric, hot melt, PSA (claim 1). D7 discloses the laminated construction of claim 1 including an elastomeric, hot melt, PSA film, but not that the PSA film has at least two different thicknesses in the Z axis resulting in differential tensions when it is stretched or the claimed profile of the cross-section through the Z axis. Therefore claim 1 is novel also over D7.

The respondent argued that applying the PSA to the non-uniform surface of the substrate of D7 by spray nozzles would inevitably lead to a variation of the thickness of the applied PSA. This is in the board's view mere speculation which lacks any support in the document itself. But even if this was the case, D7 does not directly and unambiguously disclose that the variation of the thickness results in differential tensions when the film is stretched or that the cross-section of the PSA film in the Z axis has the profile required by claim 1 of the auxiliary request. Thus this argument of the respondent is not founded.

Nor does figure 2, which is a schematic representation of the laminate, directly and unambiguously disclose that the PSA film has different material thicknesses resulting in differential tensions when the film is stretched. The respondent's assertion that figure 2 discloses a PSA film of a trapezoidal form because the film allegedly becomes thinner at both ends is based on an inappropriate interpretation of the schematic representation which is considered by the respondent to illustrate features which on a realistic basis are not

present. Thus also this argument of the respondent is not convincing.

4.5 D9 discloses absorbent articles comprising an elastic material including zones of high and low elastic tension and/or high and low stretch in the same material, integrated during formation of the material (abstract; claim 2). D9 does not disclose the use of a PSA film. Furthermore, it does not disclose that the film has at least two different material thicknesses in the Z axis resulting in differential tensions when stretched, let alone that the elastomeric film has a cross-section through the Z axis with a regular profile formed of unbroken lines. The disclosure in D9 of pressing the targeted elastic laminate (TEL) between the nip rollers with patterned calender rolls (figures 10 and 11) simply means that the rollers compress the TEL in its Z axis. There is no direct and unambiguous disclosure of at least two different material thicknesses in the Z axis resulting in differential tensions when stressed. Consequently claim 1 is novel also over D9.

4.6 D10 is similar to D9 and also discloses a targeted elastic laminate (TEL) having different zones of tension across a width of the material (abstract; claim 1). The examples disclose strands of elastomeric polymer made up of PSA (page 40, example 4; page 42, example 5). D10 does not disclose that embossing the film leads to a change of the thickness and the formation of differential tensions when the film is stretched. Nor does it disclose that the elastomeric film has a cross-section through the Z axis with a regular profile formed of unbroken lines. Consequently claim 1 is novel also over D10.

4.7 D13 discloses an elastomeric, hot melt, adhesive composition (claim 1) and an elasticated absorbent article wherein the elasticity is provided by said elastomeric, hot melt, PSA (claim 86). The PSA can be applied in the form of strands, yarns, films, threads or fibres (claim 90). If it is applied to the article as a thread or strip, it may be subjected to complete or partial deactivation to improve adhesion to the article at a series of points along the length of the thread of the strip (claim 102). However, there is no disclosure in D13 that said deactivation would result in a change of the shape of the PSA thread or strip. Therefore, D13 does not directly and unambiguously disclose that an elastomeric, hot melt, PSA film has two different thicknesses in the Z axis resulting in differential tensions when stretched, let alone that the film has a cross-section through the Z axis with a regular profile formed of unbroken lines. Therefore claim 1 is novel also over D13.

4.8 In view of the above considerations, the subject-matter of claim 1 is novel over all the cited documents.

5. Inventive step

5.1 Closest prior art

The claimed invention relates to a laminate comprising an elastomeric, hot melt PSA film for use in a garment having one or more garment openings (paragraphs [0006] and [0007] of the patent in suit) such as disposable absorbent articles (paragraph [0010] of the patent in suit).

D7, cited in paragraph [0003] of the patent in suit, discloses a laminate comprising an elastomeric, hot

melt PSA film for use in a disposable absorbent article. Therefore D7 belongs to the technical field of the claimed invention.

Like the patent in suit, D7 aims at improving the economy of manufacture and processability of garments and the overall fit and comfort of such garments (see [paragraph 0004] of the patent in suit). The absence of adhesive layers between the film and the outer layers not only renders the manufacture process cheaper and simpler but also avoids adverse effects of the additional adhesive layers on the retractive forces in the areas of contact with the film (D7: column 1, lines 20-30; patent in suit: paragraph [0002]). Therefore D7 aims at the same objective as the claimed invention.

Moreover, as already set out above (see point 4.4), claim 1 differs from D7 in the shape of the PSA film, which is defined as having at least two different thicknesses in the Z axis resulting in differential tensions when the film is stretched and a cross-section through the Z axis with a regular profile formed of unbroken lines. Consequently, D7 and the claimed invention have the most relevant technical features in common.

On the basis of the above considerations, D7 represents the most promising starting point for the assessment of inventive step.

D4, which discloses a composite construction for disposable absorbent articles but fails to disclose a laminate construction and an elastomeric, hot melt, PSA film (see above, point 4.2), is more remote from the claimed subject-matter than D7.

5.2 Problem to be solved

Taking into account the disclosure of D7, the problem to be solved is seen as improving the elastic behaviour of the laminate. During the oral proceedings both parties agreed on this point.

5.3 Solution

This technical problem is solved by the distinguishing features of claim 1. The solution is illustrated in figure 4 and paragraph [0069] of the patent in suit, which show a film according to claim 1, while figure 3 and examples 1-3 show a film with a uniform thickness and thus according to the prior art D7. Moreover, paragraph [0067] of the patent in suit discloses that the film according to claim 1 produces the advantages of the present invention. Thus the board is satisfied that the patent in suit contains the required evidence that the technical problem set has indeed been solved.

5.4 Obviousness

The skilled person starting from the laminate of D7 and aiming to improve its elasticity would not find in any of the cited prior-art documents the motivation to modify the uniform thickness of the PSA film, e.g. during hot melt processing, by using a different die structure in order to produce at least two different thicknesses in the Z axis of the film resulting in differential tensions when the elastomeric film is stretched, wherein the elastomeric film has a cross-section through the Z axis with a regular profile formed of unbroken lines.

The respondent argued that the skilled person would find this motivation in D4. However, the board does not consider that the skilled person would consult D4, primarily because it does not relate to laminates. But even if he did consult it, he would not consider the films of figures 3 to 6 as suitable to be used in a laminated construction of a PSA, in view of their cross-section through the Z axis which does not have a regular profile formed of unbroken lines. And even if he did consider them suitable for a laminated construction, the combination of D4 with D7 would still not lead to the claimed subject-matter because the shape of the film needs to be amended so that its cross-section through the Z axis has a regular profile formed of unbroken lines. Thus, the assumption of the respondent is considered to be based on hindsight rather than a fair analysis of D4.

5.5 On the basis of the above considerations, the board concludes that the subject-matter of claim 1 involves an inventive step.

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 with the order to maintain the patent on the basis of claims 1 to 6 of the sole request filed as auxiliary request with the statement setting out the grounds of appeal dated 3 February 2012 after any necessary consequential amendment of the description and the figures of the patent specification.

The Registrar: The Chairman:

M. Cañueto Carbajo W. Sieber

Decision electronically authenticated