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**Datasheet for the decision  
of 6 October 2015**

**Case Number:** T 0403/13 - 3.3.10

**Application Number:** 07700163.4

**Publication Number:** 1981554

**IPC:** A61L24/08

**Language of the proceedings:** EN

**Title of invention:**

LAYERED ADHESIVE CONSTRUCTION WITH ADHESIVE LAYERS HAVING  
DIFFERENT HYDROCOLLOID COMPOSITION

**Patent Proprietor:**

Coloplast A/S

**Opponent:**

Hollister Incorporated

**Headword:**

**Relevant legal provisions:**

EPC Art. 100(a), 111(1)  
RPBA Art. 12(4)

**Keyword:**

Grounds for opposition - inventive step (yes)

**Decisions cited:**

**Catchword:**



**Beschwerdekammern  
Boards of Appeal  
Chambres de recours**

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Case Number: T 0403/13 - 3.3.10

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.10**  
**of 6 October 2015**

**Appellant:** Hollister Incorporated  
(Opponent) 2000 Hollister Drive  
Libertyville, Illinois 60048-3781 (US)

**Representative:** Høiberg A/S  
St. Kongensgade 59 A  
1264 Copenhagen K (DK)

**Respondent:** Coloplast A/S  
(Patent Proprietor) Holtedam 1  
3050 Humlebæk (DK)

**Decision under appeal:** **Decision of the Opposition Division of the European Patent Office posted on 13 December 2012 rejecting the opposition filed against European patent No. 1981554 pursuant to Article 101(2) EPC.**

**Composition of the Board:**

**Chairman** P. Gryczka  
**Members:** R. Pérez Carlón  
F. Blumer

## Summary of Facts and Submissions

I. The appellant (opponent) lodged an appeal against the decision of the opposition division to reject the opposition against European patent No. 1 981 554.

II. Notice of opposition had been filed on the ground of lack of inventive step (Article 100(a) EPC).

III. The documents forming part of the opposition proceedings included the following:

D1: WO 94/15562  
D2: US 2003/0073965 A1  
D3: WO 99/11302

With the statement setting out the grounds of appeal, the appellant filed the following document:

D4: DK 157 899 and its English translation

IV. The opposition division concluded that document D1 was the closest prior art, that the problem underlying the claimed invention was providing an alternative two-layer adhesive with a rapid fluid transfer from one layer to the other, and that the solution, which was a construction in which both layers had identical or essentially identical continuous phases and different discontinuous phases, was not suggested by the available prior art, with the consequence that the subject-matter claimed was inventive.

V. Claim 1 of the patent as granted, which is the main request in these appeal proceedings, reads as follows:

*"A layered adhesive construction comprising a backing layer and a first and second layer of hydrocolloid adhesive, where the first and second layer of hydrocolloid adhesive have different composition and the hydrocolloids or mixture of hydrocolloids of the first and the second adhesive layer are different, and the second layer of hydrocolloid adhesive is at least partly interposed between the first layer of hydrocolloid adhesive and the backing layer, the first and second adhesive layers consisting of a continuous phase and a discontinuous phase wherein*

- a) the discontinuous phase of the first adhesive layer comprises a hydrocolloid composition providing a higher moisture absorption capacity and higher initial rate of absorption to the adhesive layer than the hydrocolloids in the discontinuous phase of the second adhesive layer, and*
  
- b) the discontinuous phase of the second layer of adhesive comprises a hydrocolloid composition providing a higher cohesion following moisture absorption to the adhesive compared to the hydrocolloids in the discontinuous phase of the first adhesive layer,*
  
- c) the composition of the continuous phase of the first and of the second adhesive layer are identical or essentially identical."*

VI. The arguments of the appellant relevant for the decision were the following:

Document D4 had been filed as a reaction to the decision of the opposition division and at the earliest

possible opportunity, namely with the statement setting out the grounds of appeal. D4 did not change the facts of the case but was only intended to support the appellant's arguments. As D4 was thoroughly discussed in document D1 and the opposition relied on that disclosure, the respondent should already be familiar with its content. For these reasons, D4 should be admitted into the proceedings.

Either document D1 or D2 could be considered the closest prior art for the claimed invention.

Document D2 disclosed a layered construction containing two adhesive layers. The skilled reader would understand that the composition of these layers was bound to be different, as they had different properties. For this reason D2, which referred to the problem underlying the claimed invention and shared with it the same number of technical features as D1, represented at least as promising a starting point as D1 for the assessment of inventive step.

If document D1 was considered the closest prior art, the technical problem underlying the claimed invention would be to provide a further layered adhesive construction, and the solution, which was a construction characterised in that it contained adhesives having an identical or essentially identical continuous phase and different hydrocolloids, was obvious having regard to D1 alone or in combination with any of D2, D3 or D4, with the consequence that the subject-matter of claim 1 was not inventive.

In addition, the subject-matter of claim 1 was not inventive since claim 1 was too broad, as it included embodiments having substantially identical adhesives

which did not even need to be in contact. Claim 1 thus lacked essential technical features. Furthermore, it could not be determined whether the construction tested in the patent in suit contained adhesives as required by claim 1. For all these reasons, claim 1 failed to solve the problem underlying the claimed invention.

VII. The arguments of the respondent relevant for the decision were the following:

Document D4 was cited in D1. Already for that reason, the appellant could have filed it during the proceedings before the opposition division. D4 should thus not be admitted into the proceedings.

Were D4 admitted, the case should be sent back to the opposition division in order to have all the relevant issues decided by two instances.

Document D1 was the closest prior art, the technical problem underlying the claimed invention was to provide a further layered adhesive construction, and the solution, which was a construction characterised in that it contained adhesives having an identical or essentially identical continuous phase and different hydrocolloids, was not obvious having regard to the available prior art. For this reason, the subject-matter of claim 1 was inventive.

VIII. Oral proceedings before the board of appeal took place on 6 October 2015.

IX. The final requests of the parties were the following:

- The appellant requested that the decision under appeal be set aside and that the patent be revoked.
  
- The respondent requested that the appeal be dismissed (main request), or, subsidiarily, that the decision under appeal be set aside and that the patent be maintained under either of auxiliary requests 1 and 2, filed as "Request A" and "Request B" with letter dated 5 August 2013.

The respondent further requested that document D4 not be admitted into the proceedings, or, if D4 was admitted, that the case be remitted to the opposition division for further examination.

- X. At the end of the oral proceedings, the decision was announced.

### **Reasons for the Decision**

- 1. The appeal is admissible.

Document D4, admissibility

- 2. Document D4 was filed with the statement setting out the grounds of appeal. The respondent requested that this document not be admitted into the proceedings since it could have been filed earlier. By not filing it until the appeal proceedings, the appellant was depriving the respondent from having its disclosure examined by two instances.

Document D4 was filed as a reaction to the decision of the opposition division rejecting the opposition, at the earliest possible opportunity during these appeal



proceedings, namely with the statement setting out the grounds of appeal. The respondent, who was already familiar with its content, as D4 is discussed at length in document D1, was able to take a position on that document, as reflected in the response to the grounds of appeal and in the discussion during the oral proceedings before the board.

The board thus does not see sufficient reasons for making use of its discretion under Article 12(4) RPBA not to admit this document, which is therefore part of these opposition appeal proceedings.

3. The respondent further requested that, if D4 was admitted, the case be remitted to the opposition division.

However, according to Article 111(1) EPC, a board may either exercise any power within the competence of the department which was responsible for the appealed decision, i.e. decide on all issues, or remit the case to the first instance for further prosecution. Thus, the EPC does not guarantee the parties an absolute right to have all the issues of a case considered by two instances.

Document D4 does not change the facts of the case to the extent that it could not be dealt with during these appeal proceedings.

The board decides for this reason not to make use of its discretion to remit the case to the opposition division.

Inventive step, main request

4. Closest prior art

The opposition division and the respondent considered that document D1 represented the closest prior art. The appellant considered that not only D1 but also D2 could be the closest prior art for the claimed invention.

4.1 It has not been disputed that document D1 discloses a layered adhesive construction comprising a backing layer and two layers of hydrocolloid adhesive having different composition. One layer shows a faster liquid migration and the second layer a higher cohesion.

4.2 Document D2 also discloses a layered adhesive construction (Figure 3) having two layers containing hydrocolloids (17a, 20). Adhesive (17a) and adapter ring (20) may be of similar composition ([0018]). Adhesive (17a) is capable of absorbing moisture and has both wet and dry tack ([0015]). Adapter ring (20) is non-flowable, retains its integrity upon hydration and has shape-recovery properties ([0018]).

The appellant argued that, as these layers have different properties, their composition was bound to be different.

However, there is no reason why a composition could not be, at the same time, capable of absorbing moisture and have both wet and dry tack ([0015]), as required by the adhesive layer (17a), and be flow-resistant and not disintegrate as it absorbs moisture, as required for adapter ring (20). The appellant's argument that the skilled reader would immediately understand that the adhesives of D2 must have different composition thus cannot be followed.

4.3 Document D2 has, therefore, fewer features in common with the claimed invention than D1, since it fails to disclose a construction having two adhesives with different composition.

4.4 Document D1, which discloses a construction containing two adhesive layers of different composition, one of them showing a higher moisture absorption capacity and higher initial rate of absorption, and the other showing higher cohesion following moisture absorption, thus represents the closest prior art.

It has not been disputed that the adhesives of different composition of the layered construction of D1 contain the same hydrocolloids but different continuous phases.

5. Technical problem underlying the invention

It has not been disputed that the technical problem underlying the claimed invention is that of providing a further layered adhesive construction comprising two different hydrocolloid adhesives, in which one adhesive has higher moisture absorption capacity and higher initial rate of absorption and the second adhesive has higher cohesion following moisture absorption.

6. Solution

The claimed solution is a layered adhesive construction comprising two adhesive layers of different composition, which is characterised in that both adhesives have an identical or essentially identical continuous phase but different hydrocolloids or mixtures of hydrocolloids.

7. Success

It has not been disputed that this problem has been credibly solved by the features of claim 1 and, having regard to the clinical studies provided in examples 5-7 of the patent in suit, the board sees no reason to differ.

8. Lastly, it remains to be decided whether or not the proposed solution to the objective problem underlying the patent in suit is obvious in view of the state of the art.

The appellant argued that the claimed solution was obvious to the person skilled in the art having regard to D1 either alone or in combination with any of documents D2 to D4.

8.1 Document D1

8.1.1 The appellant argued that in D1 the skilled person already found the teaching leading to the claimed solution.

On page 8, lines 4-7, document D1 discloses that the speed of liquid migration is a function of the cohesion of the adhesive.

On page 8, lines 9-13, D1 discloses that the liquid migration speed is a function of the amount and type of hydrocolloid present in the skin plate product.

According to the appellant, the skilled person would conclude from these two paragraphs that the degree of cohesion was dependent on the amount and the type of

hydrocolloid in the adhesive.

- 8.1.2 However, D1 discloses that the liquid migration speed depends both on the cohesion and on the type and amount of hydrocolloid, but fails to disclose any relationship between the last two features.

The skilled person thus does not find in D1 an indication that, by using different hydrocolloids, adhesives with different cohesion can be obtained.

- 8.1.3 Further, the first of these two paragraphs on page 8 of D1 cited above discloses that the liquid migration speed in a hydrocolloid-containing adhesive is dependent on the cohesion *of the adhesive*.

In contrast, the second paragraph discloses that the liquid migration speed depends on the amount and type of hydrocolloid *in the skin plate product* (i.e. in the finished construction). This passage thus does not teach using different hydrocolloids within the same skin plate, but only one.

- 8.1.4 Document D1 continues by disclosing that the cohesion of an adhesive (page 8, lines 32-35) can be modified either by changing the molecular weight of the polyisobutylene employed or by adding a further binder. Both embodiments imply modifying the composition of the continuous phase, but not that of the hydrocolloid phase as required by claim 1.

D1 provides on page 9, lines 1-16 and on page 10, lines 1-10, two specific examples of adhesive combinations suitable for a skin plate product. In both cases the adhesives contain different continuous phases and the same hydrocolloid composition.

For these reasons, it is concluded that document D1 does not hint at the claimed solution, which requires adhesives having an identical or essentially identical continuous phase but different hydrocolloids or mixtures of hydrocolloids.

## 8.2 Document D2

### 8.2.1 The appellant argued that the skilled reader would find in document D2 a hint towards the claimed solution for the following reasons:

Document D2 discloses a layered adhesive construction (Figure 3) having two adhesive layers containing hydrocolloids (17a, 20) of similar composition ([0018]). Adhesive layer (17a) should be capable of absorbing moisture and have both wet and dry tack ([0015]), whereas layer (20) should be flow-resistant and should not disintegrate as it absorbs moisture ([0018]).

The appellant argued that the composition of these layers must necessarily be different, as these layers should have different properties.

However, there is no reason why the same composition could not be capable of absorbing moisture and having both wet and dry tack ([0015]), as required by the adhesive layer (17a), and at the same time be flow-resistant and not disintegrate as it absorbs moisture, as required for adapter ring (20).

Since D2 does not disclose different compositions but similar compositions, it does not provide a hint towards the claimed solution, which requires that the

continuous phase of both adhesives is identical or essentially identical whereas their hydrocolloids are different.

### 8.3 Document D3

The appellant argued that document D3 reflected the general knowledge of the skilled person with respect to hydrocolloid-containing adhesives.

On page 2, lines 12-17, document D3 discloses that various hydrocolloids could be used as cohesive strengthening agents, and an analogous teaching can be found on page 3, lines 4-6. The appellant argued that it was common general knowledge that hydrocolloids improved cohesion and that, for that reason, the claimed invention was obvious.

However, the cited passages refer to patent documents and cannot be considered to reflect a generally accepted technical knowledge.

Even if these passages reflected generally accepted technical knowledge, they would hint, at the most, at adhesives having different hydrocolloid composition but not at a construction having two different adhesives in which, additionally, the continuous phase is identical or substantially identical, as required by claim 1.

### 8.4 Document D4

The appellant further considered that document D4 provided a hint towards the claimed solution. On page 5, penultimate paragraph, D4 disclosed a structure containing a layer hampering water migration which, although generally it did not contain hydrocolloid,

could also contain less hydrocolloid than its neighbouring layer. The passage bridging pages 11 and 12 referred to a combination of two adhesives having the same continuous phase, one of them containing hydrocolloids. D4 thus taught that water migration could be modified by changing the hydrocolloid content.

However, D4 links the amount and type of hydrocolloid with the liquid migration speed, but not with the cohesion. D4 thus does not provide any teaching which could lead the skilled person to modify the hydrocolloid of one of the adhesives in order to increase its cohesion.

Furthermore, claim 1 requires adhesives in which the hydrocolloids or mixture of hydrocolloids are different. A reduced amount of hydrocolloids, as disclosed in D4, does not amount to a different hydrocolloid or mixture of hydrocolloids.

- 8.5 The appellant has argued that claim 1 was too broad since it only required that the hydrocolloid composition was "different" but did not quantify how different, so that both layers could be almost identical. For this reason, it concluded that an essential technical feature was missing from claim 1 of the patent.

The appellant further argued that the patent in suit did not provide any evidence showing whether the adhesives of the tested structures had the properties required by claim 1 and that, also for this reason, the claimed subject-matter lacked inventive step.

Lastly, the appellant argued that claim 1 did not require that the adhesive layers were in contact and,



for this reason, any effect linked to a contact of said layers in terms of absorption or of lack of migration of their components could not be considered as part of the problem underlying the claimed invention.

- 8.6 Claim 1 is drafted in terms of functional features, namely that the first adhesive layer has a higher absorption capacity and higher initial rate of absorption than the second, whereas the second has a higher cohesion following moisture absorption. These features thus indicate how different the required layers should be. Already for this reason, the appellant's argument that the layers could be almost identical cannot be followed.

With respect to the argument that the problem underlying the claimed invention would not be credibly solved by the features of claim 1, the mere fact that the adhesive layers are "different" already suffices to credibly solve the problem of providing a further construction. This argument thus relates to a formulation of the technical problem underlying the claimed invention more ambitious than that defined by the respondent (see point 5. above). The same holds true for the argument that claim 1 did not require that the adhesive layers were in contact.

Lastly, the argument that the patent in suit did not contain sufficient information for carrying out the invention, as it was not even apparent whether the examples put forward fell within the scope of claim 1, relates to an objection of lack of sufficient disclosure (Article 100(b) EPC), which was not a ground of opposition. The board fails to see how this alleged deficiency could lead to a lack of inventive step.

8.7 There is thus no teaching in the available prior art which would have led the skilled person to the claimed construction having two adhesives with the same continuous phase but different hydrocolloid composition.

For this reasons it is concluded that, in the light of the evidence on file, the subject-matter of claim 1 and, for the same reasons, that of claims 2-14 is inventive (Article 56 EPC) with the consequence that the ground of opposition under Article 100(a) EPC does not preclude the maintenance of the patent as granted.

## Order

### **For these reasons it is decided that:**

The appeal is dismissed.

The Registrar:

The Chairman:



C. Rodríguez Rodríguez

P. Gryczka

Decision electronically authenticated