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**Datasheet for the decision  
of 13 March 2018**

**Case Number:** T 0198/15 - 3.2.08

**Application Number:** 08758284.7

**Publication Number:** 2160161

**IPC:** A61F5/443, A61F5/445

**Language of the proceedings:** EN

**Title of invention:**

A BODY WASTE COLLECTING DEVICE

**Patent Proprietor:**

Coloplast A/S

**Opponent:**

HOLLISTER INCORPORATED

**Headword:**

**Relevant legal provisions:**

EPC Art. 108

EPC R. 99(2), 101(1)

RPBA Art. 12(2)

**Keyword:**

Admissibility of appeal - appeal sufficiently substantiated  
(no)

**Decisions cited:**

T 0015/01, T 0501/09, T 2223/10, J 0010/11

**Catchword:**



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Case Number: T 0198/15 - 3.2.08

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.08**  
**of 13 March 2018**

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

**Representative:** Høiberg P/S  
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1304 Copenhagen K (DK)

**Respondent:** Coloplast A/S  
(Patent Proprietor) Corporate Patents  
Holtedam 1  
3050 Humlebaek (DK)

**Representative:** Coloplast A/S  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 5 November 2014  
rejecting the opposition filed against European  
patent No. 2160161 pursuant to Article 101(2)  
EPC.**

**Composition of the Board:**

**Chairwoman** P. Acton  
**Members:** M. Foulger  
Y. Podbielski

## **Summary of Facts and Submissions**

- I. With the decision posted on 5 November 2014, the opposition division rejected the opposition against European patent no. 2160161.
- II. The appellant (opponent) filed an appeal against this decision.
- III. Oral proceedings took place before the Board on 13 March 2018. For further details thereof reference is made to the minutes.
- IV. The appellant requested that the decision under appeal be set aside and the patent be revoked. Moreover, they requested that documents D6-D12 be admitted into the proceedings.

In the written proceedings the respondent (patent proprietor) requested that the appeal be dismissed or, in the alternative, that the patent be maintained on the basis of a set of claims filed as auxiliary request A or auxiliary request B with the reply to the statement setting out the grounds of appeal. They also requested that documents D6-D12 not be admitted into the proceedings.

At the beginning of the oral proceedings the respondent further requested that:

- the appeal be held inadmissible
- the appellant's submissions concerning the following grounds of opposition not be admitted into the proceedings for failure to substantiate these grounds of opposition:
  - Article 100(b) EPC,
  - Article 100(a) EPC insofar as it concerned Article 54

EPC and documents D1 and D2,  
- Article 100(a) EPC insofar as it concerned Article 56  
EPC.

- V. The respondent's arguments on the admissibility of the appeal can be summarised as follows:

The appeal was inadmissible because no reasons had been given as to why the decision under appeal was not correct. The vast majority of the arguments in the statement setting out the grounds of appeal were simple word for word repetitions of the arguments in the notice of opposition. The attempt to introduce two new allegedly novelty-destroying documents (D6 and D9) with the statement setting out the grounds of appeal could also not lead to the admissibility of the appeal, as there was nothing which showed how they related to the decision under appeal.

The respondent acknowledged that their objection was made at a late stage in the proceedings, but emphasised that the admissibility of the appeal was something that had to be examined at every stage of the proceedings.

- VI. The appellant's arguments on the admissibility of the appeal can be summarised as follows:

The objection of inadmissibility of the appeal had been made at a very late stage. Up to the oral proceedings, neither the appellant nor the Board had suggested that there could be a problem with the admissibility of the appeal and thus the objection in itself should be regarded as having been made too late in the proceedings.

Moreover, the appeal was admissible because they had

made it clear with the notice of appeal that they disagreed with the decision under appeal. In the statement setting out the grounds of appeal the attacks under Articles 100(a) and (b) EPC were further explained.

It was a generally accepted right in European law that the losing party had the right to file an appeal and to have a decision of a department of first instance reviewed. Although some of the attacks were the same as in the notice of opposition, this was simply because the appellant did not agree with the decision under appeal.

Furthermore, in section 4.1.1 of the statement setting out the grounds of appeal, the paragraph starting "[o]n a more general level..." made it clear that the discussion had been taken to a higher level of generalisation. Whilst the statement in this paragraph was made in the context of the novelty discussion in view of document D6, it was not limited to this, but addressed generally the absorption and moisture vapour transmission properties of skin barriers. Thus, this statement could be regarded as a reply to the decision under appeal, where this issue clearly played a role. Thus the appeal was admissible.

## **Reasons for the Decision**

1. *Timing of the request to reject the appeal as inadmissible*
  - 1.1 The admissibility of the appeal was only cast in doubt by the respondent at the start of the oral proceedings. This is indeed a very late stage of the proceedings for

raising such an objection.

1.2 However, it is established jurisprudence of the Boards of Appeal that the admissibility of the appeal is to be examined *ex officio* at every stage of the appeal proceedings (see T 15/01, OJ 2006, 153, Reasons 1), and thus also at the oral proceedings (T 501/09, Reasons 2, T 2223/10, Reasons 1). The appellant's objection that the respondent's request was filed too late in the proceedings cannot therefore succeed.

1.3 The appellant's argument that the appeal should be considered admissible, because neither the Board nor the respondent mentioned in the written proceedings that there might be a problem with the admissibility of the appeal, cannot succeed either, because if the admissibility of the appeal may be examined at any time of the proceedings, it cannot be ruled out that this occurs even at a stage of the proceedings, when the main submissions of the parties have already been exchanged and the Board has issued a communication.

## 2. *Admissibility of the appeal*

2.1 In the present case, the admissibility of the appeal depends on whether the statement of grounds of appeal complies with Article 108, third sentence, EPC in conjunction with Rule 99(2) EPC. According to these provisions, in the statement setting out the 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 The statement setting out the grounds of appeal must enable the Board to understand immediately why the

decision under appeal is alleged to be incorrect and on which facts the appellant bases their arguments, without having to make investigations of its own (see J 10/11, Reasons 2.1 with reference to several decisions).

2.3 In the decision under appeal the opposition division addressed the arguments presented by the opponent in support of their grounds for opposition under Articles 100(a) and 100(b) EPC and concluded that the patent as granted met the requirements of Articles 83, 54 (novelty in view of D1 and D2) and 56 (starting from D3 or D1) EPC. It has not been argued by the appellant, nor can the Board see any reason to support the argument, that the decision under appeal was lacking in reasoning to the effect that the appellant was unable to identify why and to what extent it disagreed with it.

2.4 The statement setting out the grounds of appeal consists essentially of the following:

- Word for word repetitions of the notice of opposition, supplemented by
- Word for word repetitions of the appellant's written submissions dated 1 September 2014 (prior to the oral proceedings before the opposition division); and
- New novelty attacks based on documents D6 and D9, which did not form part of the proceedings before the opposition division.

2.5 The arguments which are mere repetitions of the ones presented before the opposition division, do not, and cannot, give reasons why the decision under appeal is to be set aside because they were drafted before the decision of the opposition division was issued.



- 2.6 The passage in the statement setting out the grounds of appeal in section 4.1.1 (page 7, 3<sup>rd</sup> paragraph), which starts "[o]n a more general level", may well attempt to introduce a higher level of generalisation into the discussion. It does, however, refer to the discussion of novelty with respect to document D6, which had not been filed during the opposition proceedings. Moreover, it does not set out at all how it relates to the decision under appeal and the Board cannot immediately understand how it does so either. This passage does not therefore contribute to the admissibility of the appeal.
- 2.7 The objections based on D6 and D9, are an entirely fresh case made on appeal. Leaving aside the issue of whether or not such new documents should be admitted, there is again no link to the decision under appeal. These passages do not therefore contribute to the admissibility of the appeal either.
- 2.8 Hence, there is no analysis in the statement of grounds of appeal of why the impugned decision is incorrect.
- 2.9 It may well be that the appellant does not agree with the decision. However, a mere re-run of the opposition before the Board which does not include the reasons for setting aside the impugned decision (Rule 99(2) EPC) - albeit with the additional issue of the admission of new documents - is not compatible with the main purpose of the opposition appeal proceedings, which is to give the losing party a possibility to challenge the decision of the opposition division on its merits (G 9/91, OJ 1993, 408, Reasons 18). Therefore, the

appeal is inadmissible.

**Order**

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

1. The appeal is rejected as inadmissible.

The Registrar:

The Chairwoman:



K. Boelicke

P. Acton

Decision electronically authenticated