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**Datasheet for the decision
of 28 November 2019**

Case Number: T 2288/15 - 3.2.06

Application Number: 04751815.4

Publication Number: 1635752

IPC: A61F13/58

Language of the proceedings: EN

Title of invention:

FASTENING FILM SYSTEM AND ASSEMBLY COMPRISING A FASTENING FILM
SYSTEM AND A SUBSTRATE

Patent Proprietor:

3M Innovative Properties Company

Opponents:

AVERY DENNISON CORPORATION
Paul Hartmann AG

Headword:

Relevant legal provisions:

EPC Art. 100(b), 100(c), 83, 123(2)
RPBA Art. 13(1)

Keyword:

Amendments - added subject-matter (yes)
Sufficiency of disclosure - (no)
Claims - clarity (no)
Procedural economy - Reasons 5.1.1 to 5.1.7

Decisions cited:

T 0025/03

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 2288/15 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 28 November 2019

Appellant: 3M Innovative Properties Company
(Patent Proprietor) 3M Center
P.O.Box 33427
St. Paul, MN 55133-3427 (US)

Representative: Vossius & Partner
Patentanwälte Rechtsanwälte mbB
P.O. Box 86 07 67
81634 München (DE)

Appellant: AVERY DENNISON CORPORATION
(Opponent 1) 150 North Orange Grove Boulevard
Pasadena, California 91103 (US)

Representative: Brouwer, Hendrik Rogier
Arnold & Siedsma
Bezuidenhoutseweg 57
2594 AC The Hague (NL)

Appellant: Paul Hartmann AG
(Opponent 2) Paul-Hartmann-Strasse 12
89522 Heidenheim (DE)

Representative: DREISS Patentanwälte PartG mbB
Friedrichstraße 6
70174 Stuttgart (DE)

Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
16 November 2015 concerning maintenance of the
European Patent No. 1635752 in amended form.**

Composition of the Board:

Chairman	M. Harrison
Members:	M. Hannam
	W. Ungler

Summary of Facts and Submissions

- I. An appeal was filed by the appellant (patent proprietor) against the interlocutory decision of the opposition division in which it found that European patent No. 1 635 752 in an amended form met the requirements of the EPC. Appeals were also filed against this interlocutory decision by each of the appellant/opponents (Opponent I and Opponent II).
- II. The appellant/Opponent I and the appellant/Opponent II - (hereafter simply 'Opponent I' and 'Opponent II') each requested that the decision under appeal be set aside and the patent be revoked.
- III. The appellant/patent proprietor (hereafter simply 'proprietor') requested (with its grounds of appeal and also with its response to the grounds of appeal of the opponents) that the decision be set aside and the patent be maintained as granted or, in the alternative, that the patent be maintained according to one of the following requests:
Main request a, Main request b;
Auxiliary requests 1, 1a, 1b;
Auxiliary requests 2, 2a, 2b;
Auxiliary requests 3, 3a, 3b.
- IV. The Board issued a summons to oral proceedings and a subsequent communication containing its provisional opinion, in which it indicated *inter alia* that the ground for opposition under Article 100(c) EPC seemingly prejudiced maintenance of the patent as granted (main request). It further indicated that the requests with suffix 'b' each failed to overcome the objection of added subject-matter in the subject-matter of claim 1 of the main request. The objection under

Article 100(b) EPC to the main request was also indicated to be persuasive with respect to claim 8.

V. With letter of 14 November 2019, the patent proprietor filed further auxiliary requests as follows:
Main request c;
Auxiliary requests 1c, 2c and 3c.

VI. Oral proceedings were held before the Board on 29 November 2019, during which the patent proprietor withdrew auxiliary requests 1, 1a, 1b, 1c, 2, 2a, 2b, 2c, 3, 3a, 3b and 3c. It also filed further auxiliary requests as follows:
Main request d - 14:50h;
Auxiliary requests 1d, 2d, 3d;
Main request d - 16:55h;
Main request d - 19:30h.

The final requests of the parties were as follows:

The Opponent I and Opponent II each requested that the decision under appeal be set aside and that the European patent No. 1 758 710 be revoked.

The patent proprietor requested that the decision under appeal be set aside and that the patent be maintained according to one of the:

Main request, Main request a), Main request b), Main request c), Main request d) - 19:30h, Auxiliary requests 1d, 2d or 3d to be adapted to be consistent with the amended wording of the main request d) - 19:30h.

VII. Claim 1 of the main request and of "main request a)" read as follows:

"Assembly (40) comprising a substrate (5) bearing an adhesive layer (6) having an extension in the cross-direction and in the machine direction, and rectangular discrete strips (2) of a backing (7) having a major surface (3a) bearing a plurality of male fastening elements (4) capable of engaging with fibrous materials (32) having a plurality of complementary female fastening elements, and a major surface (3b) opposite to the major surface (3a), said strips (2) being attached to the adhesive layer (6) through the major surface (3b) of the backing (7) in a parallel fashion along the machine direction and in a distance in the cross-direction from each other such that an alternating sequence of parallel strips of exposed adhesive layer (6) and of the strips (2) of the backing (7) is obtained, wherein the sum of the maximum densities of the strips (2) of the backing (7) along the extension of the adhesive layer (6) in the cross direction and in the machine direction, respectively, as defined on page 8, paragraphs [0059] and [0060], lines 3-14 and on page 11, paragraph [0092], lines 2-12 of the patent specification, is at least 0.8 cm^{-1} , whereby the assembly (40) can releasably adhere to said fibrous material (32) through a combination of a mechanical and an adhesive bonding mechanism."

Claim 1 of "main request b)" reads as for claim 1 of the main request except for the value 'at least 0.8 cm^{-1} ' reading "at least 1 cm^{-1} ".

Claim 1 of "main request c)" reads as for claim 1 of "main request b)" except that after the wording '... is obtained' the following is inserted:

"each of said strips (2) extending continuously across the entire extension of the substrate (5) and adhesive

layer (6) in the machine direction".

Claim 1 of "main request d) - 19:30h" reads as follows:

"Assembly (40) comprising a substrate (5) bearing a continuous adhesive layer (6) having an extension in the cross-direction and in the machine direction, and rectangular discrete strips (2) of a backing (7) having a major surface (3a) bearing a plurality of male fastening elements (4) capable of engaging with fibrous materials (32) having a plurality of complementary female fastening elements, and a major surface (3b) opposite to the major surface (3a), said strips (2) being attached to and entirely arranged on the adhesive layer (6) through the major surface (3b) of the backing (7) in a parallel fashion along the machine direction and in a distance in the cross-direction from each other such that an alternating sequence of parallel strips of exposed adhesive layer (6) and of the strips (2) of the backing (7) is obtained, the adhesive layer (6) being rectangular, the adhesive layer (6) extending continuously across the entire extension of the substrate (5) in the machine direction and extending continuously in the cross-direction, wherein the extension of the substrate (5) in the cross-direction exceeds the extension of the adhesive layer (6) in the cross-direction, each of said strips (2) extending continuously across the entire extension of the substrate (5) and adhesive layer (6) in the machine direction, wherein the extensions of the substrate (5) and of said strips (2) in the machine direction match with the extension of the adhesive layer (6) in the machine direction, wherein the sum of the maximum densities of the strips (2) of the backing (7) along the extension of the adhesive layer (6) in the cross direction and in the machine direction, respectively,

as defined on page 8, paragraphs [0059] and [0060], lines 3-14 and on page 11, paragraph [0092], lines 2-12 of the patent specification, is at least 1 cm^{-1} , whereby the assembly (40) can releasably adhere to said fibrous material (32) through a combination of a mechanical and an adhesive bonding mechanism."

Claim 1 of the respective auxiliary requests 1d, 2d and 3d, were not filed. Nonetheless, the proprietor indicated that the amendments made to "main request d) - 19:30h" were also to be included in auxiliary requests 1d, 2d and 3d. However, the final decision taken with respect to these requests does not require a recitation of their wording (see Reasons, point 5.1.8 *infra*).

VIII. The proprietor's arguments relevant to the present decision may be summarised as follows:

Main request

The subject-matter of claim 1 did not extend beyond the content of the application as filed. The wording added to claim 1 during examination was not taken from Fig. 2, rather solely from the wording on page 14, lines 26 to 30 which the drafter of the application had evidently noted as being the sole important features relevant to the invention as depicted in Fig. 2. The referenced paragraph on page 14 also related to the general part of the description, so the argument that this related to a specific embodiment including a combination of technical features was incorrect. The rotary knife cutter indicated to produce the strips in lines 24 to 26 of page 14 also supported the understanding that the strips could stop anywhere in the machine direction.

Main requests a), b), c)

The same arguments with respect to added subject-matter presented for the main request applied under Article 123(2) EPC also to the subject-matter of claim 1 of each of these requests.

Main request d) - 14:50h

The requirements of Article 83 EPC were met. The argument of opponent I relating to a discontinuous adhesive layer in the cross-direction was an artificial reading of the claim which would not reasonably be considered by the skilled person. The subject-matter of claim 1 also had clear basis in the application as filed.

Main request d) - 16:55h

This request should be admitted since it was *prima facie* allowable. Particularly the limitation to a 'single' adhesive layer was clear (Article 84 EPC) since the skilled person would, in the context of the present invention, only consider such a single layer as meaning 'of one piece in the plane'. There was consequently no lack of clarity. The subject-matter of claim 1 also had clear basis in the application as filed.

Main request d) - 19:30h

This request should be admitted since it overcame all previous objections. The objection to the previous request was unforeseeable and the simple replacement of 'single' with 'continuous' resolved the lack of clarity and the amendment also met Article 123(2) EPC. Fig. 2 disclosed the adhesive layer to be continuous. It was also an invalid reason not to admit a claim due to it being late in the day.

Auxiliary requests 1d, 2d, 3d

These requests should also be admitted for the same reasons as those given for the foregoing request.

- IX. The combined arguments of opponent OI and opponent OII relevant to the present decision may be summarised as follows:

Main request

The ground for opposition under Article 100(c) EPC prejudiced maintenance of the patent as granted. The features adopted into claim 1 related to the Fig. 2 embodiment such that the features structurally and functionally related to those adopted into claim 1 had also to be included in the claim for the subject-matter to be originally disclosed. At least the coextensive nature of the adhesive layer and the strips of backing in the machine direction had been omitted from claim 1; the opponents had already objected to the lack of all the features from Fig. 2 being included.

The ground for opposition under Article 100(b) EPC also prejudiced maintenance of the patent as granted. The skilled person was unable to reliably ascertain the maximum densities since paras. [0059] and [0060] of the patent failed to accurately define how the extension of the adhesive layer was to be measured. This was particularly evident with an assembly of 'H' shape, which in the cross-direction would then have multiple extensions of the adhesive layer to potentially be included in the calculation of maximum density in the cross-direction. This led to an inability to reliably carry out the invention.

The same arguments applied to main requests a, b and c, it being additionally noted that main request c) had been filed by the proprietor in response to the preliminary opinion of the Board, i.e. after the filing

of its complete case.

Main request d) - 14:50h

The request should not be admitted into the proceedings; it should have been filed previously. Also, the amendments to claim 1 failed to overcome the foregoing objection under Article 100(b) EPC, now considered under Article 83 EPC. The adhesive layer was still not even defined to extend continuously in the cross-direction such that the skilled person would still be unsure of which 'extension of the adhesive layer' to measure in its calculation of the maximum density in the cross-direction. The claimed subject-matter also still did not meet Article 123(2) EPC, the adhesive layer as defined in claim 1 possibly being larger than the substrate, this not being derivable from the Fig. 2 embodiment.

Main request d) - 16:55h

Claim 1 lacked clarity (Article 84 EPC). The 'single' adhesive layer was ambiguous in that it could imply at least two different characteristics of the adhesive layer. A first meaning could be a single coating of the substrate or even a single adhesive, rather than multiple coatings, typically also referred to as "layers" in this technical field. A second meaning could equally be that the 'single adhesive layer' can be of a single piece or in some other way coherent in the relevant plane, rather than multiple or non-coherent pieces. Merely taking these two different interpretations resulted in the claim being unclear such that the request should not be admitted since it was evidently not *prima facie* allowable, which would be a minimum requirement for admitting an amended request at such a late stage of the procedure. The claimed subject-matter also still did not meet Article 123(2)

EPC.

Main request d) - 19:30h

This request was procedurally so late that it should not be admitted. All objections to the previous requests filed at oral proceedings were either already raised in the grounds of appeal or had been occasioned by amendments made by the proprietor in trying to overcome the existing objections. If admitted, further time would again be necessary to study the request, which could not reasonably be dealt with by the opponents without adjournment.

Reasons for the Decision

1. *Main request (patent as granted)*

1.1 *Article 100(c) EPC*

The ground for opposition under Article 100(c) EPC prejudices maintenance of the patent as granted since the subject-matter of claim 1 extends beyond the content of the application as filed.

1.1.1 Claim 1 as granted includes the following feature:

"said strips (2) being attached to the adhesive layer (6) through the major surface (3b) of the backing (7) in a parallel fashion along the machine direction and in a distance in the cross-direction from each other such that an alternating sequence of parallel strips of exposed adhesive layer (6) and of the strips (2) of the backing (7) is obtained",

which was added to claim 1 as filed during the examination procedure.

- 1.1.2 The proprietor argued that this feature finds basis on page 14, lines 26 to 30, or indeed also on page 22, lines 24 to 30. The Board notes, however, that the features in both of these passages are disclosed directly in relation to Fig. 2 (see page 14, lines 22 to 24; page 22, lines 24 to 26). Multiple objections were raised by Opponents I and II regarding features which additionally needed to be included in claim 1 in order for its subject-matter to not extend beyond the content of the application as filed. Of these, the Board finds the objection relating to the omission of at least 'the adhesive layer (6) and the strips (2) being coextensive in the machine direction' to be correct.
- 1.1.3 From Fig. 2 it is clear that the features added to claim 1 relating to strips (2) being arranged in a parallel fashion along the machine direction and at a distance from each other in the cross-direction are disclosed only in the structural context of the adhesive layer and the strips being coextensive in the machine direction (see the uppermost and lowermost edges of the substrate depicted in Fig. 2). This coextensive nature of the adhesive layer and strips is furthermore consistently depicted as such in Figs. 3a, 3c and 3d. Absent the feature directed to the adhesive layer and the strips being coextensive in the machine direction, the subject-matter of claim 1 is an unallowable intermediate generalisation of the original disclosure.
- 1.1.4 The proprietor's argument that the wording added to claim 1 was not taken from the embodiment related to

Fig. 2 is not accepted. Page 14, line 22 states 'Fig. 2 shows a preferred embodiment of an assembly ... comprising rectangular strips of a backing', and continues in line 26 by further defining the rectangular strips of the backing with the wording added to claim 1. It is thus unambiguous that the wording added to claim 1 relates directly to the preferred embodiment of Fig. 2. Page 22, lines 24 to 30 is equally unambiguous in this regard, also directly linking the wording added to claim 1 with Fig. 2.

- 1.1.5 The proprietor's contention that the wording added to claim 1 taken from lines 26 to 30 of page 14 was all that the drafter of the application saw in Fig. 2 as being important for the invention is also not accepted. What the drafter of the application may or may not have seen as important for the invention is mere conjecture and is not the test to be applied when determining what features are disclosed in combination in any particular embodiment. Rather, G2/10 states, in what the Enlarged Board referred to as the 'gold standard', that for an amendment to meet the requirement of Article 123(2) EPC, this may only be made within the limits of what a skilled person would derive directly and unambiguously, using common general knowledge, and seen objectively and relative to the date of filing, from the whole of the application documents as filed. It is also established case law (see e.g. T25/03) that such a selection of features for addition to a claim, which were originally disclosed in combination with further features, meets the requirement of Article 123(2) EPC only in the absence of a clearly recognisable functional or structural relationship among the features of the specific combination. When this test is applied to the present case, there is a direct structural link between the arrangement of the strips

parallel in the machine direction and at a distance from each other in the cross-direction (features added to claim 1) and the coextensive nature of the adhesive layer and the strips (not included in claim 1), not least since both of these features address physical attributes depicted in Fig. 2 of the strips themselves. At least the omission of the latter features from claim 1 thus results in its subject-matter being an unallowable intermediate generalisation of the original disclosure.

1.1.6 The proprietor's suggestion that the referenced paragraph on page 14 related to the general part of the description is not convincing. Even though this is not in itself decisive, page 5 of the application as filed bears the title 'Detailed description of the invention', page 14 falling into this section. However, more importantly, page 14, line 22 refers to Fig. 2 as a "preferred embodiment" and continues to describe this embodiment with reference signs relating directly to Fig. 2. The Board is at a loss to understand this as anything but a detailed description part of the specification. Merely because later, on page 22, line 13, there is a heading "Detailed Description of the Figures", this can in no sense promote the previous description of preferred embodiments illustrated in certain Figures to being the "general part" of the description.

1.1.7 The proprietor also referred to the rotary knife cutter, indicated as producing the strips in lines 24 to 26 of page 14, as supporting the view that the strip did not need to extend to the edge of the substrate. That such a rotary knife could be set-up to cut strips to any desired length is not denied. However, the Fig. 2 embodiment discloses a set of features in a single

combination, that being an arrangement of the strips parallel in the machine direction and at a distance from each other in the cross-direction (features added to claim 1) and the coextensive nature of the adhesive layer and the strips (not included in claim 1). It is also disclosed on page 15, lines 23 to 24 that a well balanced combination of adhesive and mechanical bonding mechanisms is necessary for the invention, this not being achieved by shorter lengths of strips (2). It is furthermore noted that all embodiments depict an adhesive layer coextensive with the strips. Extracting individual features for inclusion in claim 1 from this disclosure of a combination of features leads to subject-matter being claimed which was not directly and unambiguously disclosed to the skilled person.

1.1.8 It follows that the subject-matter of claim 1 extends beyond the content of the application as originally filed. Therefore the ground for opposition under Article 100(c) EPC prejudices maintenance of the patent as granted. The main request is thus not allowable.

1.2 *Article 100(b) EPC*

The ground for opposition under Article 100(b) EPC also prejudices maintenance of the patent as granted. Whilst the reasons for this are not important for the decision in view of the finding in point 1.1 above, the following points are nonetheless of importance to understand the procedural aspects of the present decision, in particular with regard to issues of admittance.

1.2.1 The invention was found not to be disclosed in a manner sufficiently clear and complete due to the skilled person being unable to reliably determine what might be

the maximum densities in the cross direction and the machine direction. The method for determining these densities, whilst described in paras. [0059] and [0060] of the patent, does not allow the densities to be reliably determined when the adhesive layer is not continuous along the line intersecting the maximum number of discrete portions. The proprietor's argument that the maximum extension of the adhesive layer was that which would be considered in the density calculation by the skilled person fails when the adhesive layer is not continuous. Such a shape of adhesive layer, depicted for example in the form of an 'H' in the arguments of opponent II, but which would apply to many other shapes, is not considered to exist just at the periphery of the claim in the field of absorbent articles, let alone for the broadly claimed assembly as defined in claim 1.

1.2.2 Opponent II had objected to claim 1 of the main request under Article 100(b) EPC already in writing in some detail, but further developed its arguments at oral proceedings in response to the Board's preliminary opinion. Being a development of an existing objection the Board saw no problem with this under Article 13(1) RPBA. Nonetheless it was during oral proceedings that the 'H' shaped adhesive layer was first raised as an example of the types of shape for which the maximum densities could not be reliably determined. The success of the objection under Article 100(b) EPC due to this new argument resulted in the Board exercising its discretion under Article 13(1) RPBA to grant the proprietor an opportunity to overcome this objection (and simultaneously that under Article 100(c) EPC) through the admittance of a further auxiliary request, even though the opponents argued that their underlying cases had not changed. This resulted in the filing of a

new main request, specifically "main request d - 14:50h". Opponent I objected to the admittance of this new auxiliary request, stating that the case had not changed.

2. *Main requests a), b) and c)*

2.1 The subject-matter of claim 1 of each of these requests fails to meet the requirement of Article 123(2) EPC for the same reasons as those found under Article 100(c) EPC to prejudice maintenance of the patent according to the main request (see points 1.1.1 to 1.1.8 above). The proprietor also presented no additional arguments in defence of these requests.

2.2 The main requests a), b) and c) are thus not allowable.

2.3 It should be noted that main request c) was filed by the proprietor in response to the Board's preliminary opinion, despite the amendments made to claim 1 of the request being directed at overcoming objections under Article 123(2) EPC that had been on file since at least the filing of the opponents' grounds of appeal. With the amendments made relative to the main request in main request c) not overcoming the objections of added subject-matter in the main request, the Board had still exercised its discretion a first time in admitting main request c) into the proceedings and thus allowing the proprietor an opportunity to overcome the objections that it had opined were prejudicial to all previous requests; the request which follows, "main request d) - 14:50h" is thus already the second opportunity granted to the proprietor to overcome the outstanding objections.

3. *Main request d) - 14:50h*

3.1 As indicated in point 1.2.2 above, the opportunity to overcome the objection under Article 100(b) EPC to the main request by filing a further auxiliary request was deemed by the Board to be an appropriate response to the procedural development with respect to Article 100(b) EPC. Despite this request not being maintained by the proprietor, a brief indication of why it was found unallowable is again necessary to better understand the procedural aspects which follow.

3.2 *Article 83 EPC*

Opponent OI indicated how the adhesive layer of claim 1, despite being rectangular and extending continuously across the entire extension of the substrate in the machine direction, could still include a discontinuity in the cross-direction. Such a discontinuity would provide an inability to reliably determine the extension of the adhesive layer in the cross-direction since at least two extensions could be envisaged. This prohibited the skilled person from carrying out the claimed invention due to an inability to reliably determine the maximum densities in the cross-direction. This was a possibly unforeseen, yet valid, interpretation of wording anticipated to overcome the sufficiency objection when discussing the main request. However, it did relate to a specific written submission of the proprietor in which it had indicated that the maximum length at any location of density measurement had to be taken, which however was not derivable from the patent; indeed something quite different was disclosed. Despite the proprietor's arguing that this was an artificial reading of the claim lacking any reasonable interpretation, the Board found differently:

the claim covered embodiments including discontinuities of the adhesive layer in the cross-direction which resulted in the inability for the skilled person to reliably determine the extension of the adhesive layer in the cross-direction.

3.3 The Board thus found the subject-matter of claim 1 of "main request d - 14:50h" not to meet the requirement of Article 83 EPC. At least for this reason "main request d - 14:50h" was not allowable. Although the actual reasons for its further conclusion (see the minutes of oral proceedings), i.e. that the subject-matter of claim 1 of the "main request d) 14:50h" did not fulfil Article 123(2) EPC, do not need to be stated here for the purposes of the revocation decision taken in this case, it should be mentioned that the opponents' objections under this Article were indeed also found to be justified. Thus the Article 123(2) EPC objection had also not been overcome.

4. *Main request d) - 16:55h*

4.1 *Admittance - Article 13(1) RPBA*

4.1.1 Despite the admittance of the previous request already having been a second exercise of discretion of the Board, the proprietor was nevertheless afforded a still further opportunity to file an amended request. As was the case also for the previous request, the present request was not maintained, but the following comments to the request are useful to better understand subsequent procedural steps taken.

4.1.2 Amended claim 1 includes *inter alia* the limitation to the substrate 'bearing a single adhesive layer'. This was found to be *prima facie* unclear contrary to Article

84 EPC due to the above limitation having at least two different and irreconcilable meanings.

4.1.3 A first meaning is that the 'single adhesive layer' can be a single coating or application of the substrate, rather than multiple coatings. A second meaning is that the 'single adhesive layer' can be of a single piece in the plane, rather than multiple pieces. The proprietor's contention that solely the second meaning was relevant to the present invention is not accepted in the light of, not least, the last sentence in para. [0039] of the patent disclosing the adhesive layer optionally being formed by one of the two adhesive layers of a double-coated adhesive tape comprising a carrier film bearing two adhesive layers. Both linguistic meanings of the expression 'single adhesive layer' are thus technically reasonable in the patent yet describe completely disparate characteristics of any adhesive layer, resulting in the expression lacking clarity. Also, the Board would add that no other feature of the claim helps clarify what is meant (nor indeed was it even argued that a further particular feature might actually solve the lack of clarity issue).

4.1.4 It is noted that the inclusion of the word 'single' also extended the claimed subject-matter beyond the content of the application as filed contrary to the requirement of Article 123(2) EPC. No explicit basis for the adopted word 'single' was provided by the proprietor, it simply being argued with reference to Fig. 2 that the interpretation of the adhesive layer being a 'single piece in the plane' was the only interpretation the skilled person would derive from the application as filed. This is however not accepted, as already indicated in point 4.1.3 above, where para.

[0039] of the patent (corresponding to page 10, lines 1 to 12 of the application as filed) discloses two adhesive layers in the context of a double coated adhesive tape. Indeed, the proprietor should reasonably have expected its choice of non-explicitly disclosed wording to result in possible objections from the opponents, particularly at such a late stage of proceedings when the Board had also pointed out to the proprietor that it should take great care in any amendments made at such a late stage of proceedings, that the requirements of Article 123 and Article 84 EPC be clearly met. Nevertheless the proprietor selected this particular wording.

4.1.5 Due to the *prima facie* lack of clarity of claim 1, and that its subject-matter contravened Article 123(2) EPC, the Board exercised its discretion not to admit "main request d) - 16:55h" into the proceedings (Article 13(1) RPBA).

5. *Main request d) - 19:30h*

5.1 *Admittance - Article 13(1) RPBA*

5.1.1 This request was filed by the proprietor after it had requested a short break to consider its final requests, having been asked by the Chairman (when establishing the final requests of the parties under Article 15(5) RPBA) simply whether it wished to maintain all requests currently still on file. Nonetheless, after being granted this opportunity for consideration of which requests it wished to maintain, the proprietor elected to submit yet a further request "main request d) - 19:30h".

- 5.1.2 Both opponent I and opponent II held that this request should not be admitted due to it being filed procedurally far too late, not least given the multiple opportunities afforded to the proprietor to amend its claims. The Board concurs that, seen procedurally, this request was filed at a very late stage. The request was furthermore the fourth attempt during the oral proceedings to overcome objections that were essentially on file at least since the outset of the appeal proceedings (see points 1.2.2, 2.3 and 4.1.1). That this request was filed at a late hour of the day of oral proceedings was however, as such, not a decisive issue for the Board's decision on admittance. This had indeed also previously been indicated by the Chairman when stating that any later discussion of novelty and inventive step would seemingly have required an adjournment of the oral proceedings to a later date due to the amended technical features of the newly filed requests.
- 5.1.3 As is established case law before the Boards of Appeal, a request filed after a party has submitted its complete case (see Article 12(2) RPBA) may be admitted and considered at the Board's discretion (Article 13(1) RPBA), such discretion being exercised *inter alia* in view of the need for procedural economy.
- 5.1.4 Claim 1 of this request differs from the previous request in that the word 'single' has been replaced with the word 'continuous'. The basis for the amended subject-matter was given by the proprietor as Fig. 2 which allegedly disclosed a continuous adhesive layer, albeit not stated as such in the application text.
- 5.1.5 This request was filed in a still further attempt to overcome objections to the subject-matter of claim 1

inter alia under Article 123(2) EPC. Objections regarding added subject-matter had been raised by the opponents against the main request and indeed against every further attempt to overcome this objection in each subsequent request. Throughout, the objection had at least been that the Fig. 2 embodiment of the application as filed disclosed features in addition to those that were adopted into claim 1 of the various requests. This ever present objection had, in all previous requests, simply not been overcome by the proprietor. The granting of a still further opportunity in the oral proceedings to overcome this objection was, at such a procedurally late instance, not procedurally economical.

- 5.1.6 In the time since the Board had issued its preliminary opinion, the proprietor had been granted three attempts to overcome the Article 123(2) EPC objections raised against the main request, in main request c), "main request d) - 14:50h" and "main request d) - 16:55h". Each of these requests entailed a change of the proprietor's complete case and necessitated the Board and the opponents familiarising themselves with amended subject-matter, at a very late stage of the procedure. To have to do so yet again, and indeed due to objections which arose out of further amendments introduced by the proprietor, was thus deemed not to be procedurally economical.
- 5.1.7 As a consequence, the Board exercised its discretion not to admit "main request d) - 19:30h" into the proceedings (Article 13(1) RPBA).
- 5.1.8 Despite the ultimate texts not having been filed in writing, the proprietor stated that the amendment made to "main request d - 19:30h" should be considered as

having also been carried out to auxiliary requests 1d, 2d and 3d. Further arguments in defence of such auxiliary requests were however not presented. The Board thus finds, for the same reasons as those given for the main request d - 19:30, that the admittance of these requests would not be procedurally economical. The Board therefore exercised its discretion under Article 13(1) RPBA also not to admit these auxiliary requests into the proceedings.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



M. H. A. Patin

M. Harrison

Decision electronically authenticated