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**Datasheet for the decision
of 22 September 2022**

Case Number: T 0151/19 - 3.2.06

Application Number: 06785116.2

Publication Number: 1898856

IPC: A61F13/49, A61F13/56

Language of the proceedings: EN

Title of invention:

ABSORBENT ARTICLE WITH IMPROVED TEAR RESISTANCE AND SOFTNESS

Patent Proprietor:

The Procter & Gamble Company

Opponent:

Ontex BVBA

Headword:

Relevant legal provisions:

EPC Art. 100(a), 100(b)

RPBA Art. 12(4)

RPBA 2020 Art. 13(1)

Keyword:

Grounds for opposition - insufficiency of disclosure (no) -
lack of patentability (no)
Late-filed objection - admitted (no)

Decisions cited:

G 0010/91, G 0001/95, G 0007/95, T 0131/01, T 0597/07,
T 0184/17, T 1816/17, T 1042/18, T 2161/18

Catchword:



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Case Number: T 0151/19 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 22 September 2022

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 7 December 2018
rejecting the opposition filed against European
patent No. 1898856 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman M. Harrison
Members: M. Hannam
A. Bacchin

Summary of Facts and Submissions

- I. An appeal was filed by the appellant (opponent) against the decision of the opposition division rejecting the opposition to European patent No. 1 898 856. It requested that the decision under appeal be set aside and the patent be revoked.
- II. In its letter of reply, the respondent (patent proprietor) requested that the appeal be dismissed or, in the alternative, that the patent be maintained according to an auxiliary request dated 23 July 2019.
- III. The following documents, referred to by the appellant in its grounds of appeal, are relevant to the present decision:
- D1 WO-A-2004/054492
 - D2 WO-A-2004/060666
 - D3 US-A-2004/0122406
 - D6 WO-A-02/05739
 - D7 EP-A-1 719 484
 - D8 US-A-2006/089616
 - D9 WO-A-93/24085
 - D10 WO-A-98/51252
 - A1 Test Report 1, prepared by Mr Schneider of Ontex
 - A2 Technical data sheet for aplix® NAS 300-V4
- IV. With letter of 4 May 2020 the appellant filed new inventive step attacks starting from D1, D2, D3 and D6.
- V. 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(b) EPC appeared

not to be prejudicial to maintenance of the patent as granted. It further stated that the subject-matter of claim 1 appeared to be novel and that recognition of the presence of an inventive step would depend upon the objective technical problem to be solved. It additionally indicated that the inventive step attacks starting from D7 and being combined with D8 or D9 appeared to be unsubstantiated and that those starting from D1, D2, D3 and D6 would likely not be admitted.

VI. Oral proceedings were held before the Board on 22 September 2022. The parties' requests at the close of the proceedings were the same as those indicated in points I. and II. above.

VII. Claim 1 of the main request (claim 1 as granted) reads as follows, with paragraph annotation included as used by the opposition division in its decision:

A disposable absorbent article (20) comprising

- F1* a) a chassis (22) having a front waist region (36), a rear waist region (38), a crotch region (37) between the front waist region (36) and the rear waist region (38), and a pair of longitudinal edges (12), said chassis (22) comprising
 - F1.1* i) an absorbent core (28) having a garment-facing surface and a body-facing surface,
 - F1.2* ii) a liquid permeable topsheet (24) positioned adjacent said body-facing surface of said absorbent core (28),
 - F1.3* iii) a backsheet (26) positioned adjacent said garment-facing surface of said absorbent core (28);
- and

- F2 b) a pair of back ears (42) each having a perimeter (44), a distal edge (48), and a proximal edge (46); said back ears (42) comprising
 - F2.1 i) an elastomeric film (74) and
 - F2.2 ii) a first substrate (80) joined to the elastomeric film (74)wherein said disposable absorbent article (20) is characterized in that
 - F3.1 said elastomeric film (74) has a shortened perimeter
 - F3.1.1 such that a first void region (76) is formed adjacent the proximal edge of the back ear wherein a void region is an area of the back ear 42 where the elastomeric material is absent (46)
 - F3.2 that said back ear (42) extends laterally outwardly from the longitudinal edge of the chassis (12) in the rear waist region (38) and
 - F3.3 that the back ear (42) is joined to the chassis (22) by at least one mechanical bond (84) that engages the elastomeric film (74).

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

An undue burden existed for the skilled person to carry out the claimed invention. How the step of shortening the perimeter of the elastomeric film should be achieved was not explained. Additionally, the size of the void region was not defined and this could be anything from 0.1% to 99.9% of the back ear area. Article 100(b) EPC was thus prejudicial to maintenance of the patent as granted.

The subject-matter of claim 1 lacked novelty over D2. The opposition division erroneously found features 3.1 and 3.1.1 of claim 1 not to be known from D2. As

regards feature 3.1 of claim 1, since the shortened perimeter implied that the elastomeric material occupied an area smaller than that of the back ear, the perforations in the elastomeric material of the side panels 42 of D2 satisfied this condition. Feature 3.1.1 was anticipated by the perforations on the waistband adjacent the longitudinal centre-line of the article. These were at the proximal edge of the back ears and were also 'void regions' where the elastomeric material was not present.

The subject-matter of claim 1 lacked an inventive step starting from D7 in combination with common general knowledge, D2 or D10.

D7 failed solely to disclose feature 3.3 of claim 1, i.e. 'that the back ear is joined to the chassis by at least one mechanical bond that engages the elastomeric film'. As regards the mechanical bond, this offered no advantage in terms of strength, at least in the generality claimed, over an adhesive bond. Without further specification of the mechanical bond type, area of the bond and number of bonds, no strength conclusion could be drawn. This was further proven by A1 and A2 which should be admitted by the Board. The respondent's argument that a mechanical bond alternatively offered the advantage of avoiding contamination of the production line through more accurate placement of the bond should not be admitted since this had not been argued in the respondent's complete appeal case. The argument was also not credible since any contamination depended upon the type and amount of glue applied and the method of application. As regards bonding the elastomeric film, Figs. 1b and 1c of D7 depicted the elastic threads G overlapping with the article chassis such that the elastic threads, or the elastomeric film

if used instead of the threads, would automatically be engaged by any bond between the main body portion and the side panels in D7. Bonding the elastic film also offered no technical advantage over bonding a nonwoven substrate and so could not contribute to the objective technical problem to be solved. The technical problems posed by the respondent were thus not objective. The objective technical problem was therefore to provide an alternative bond.

It was well known to the skilled person in the field of absorbent articles that adhesive and mechanical bonds were alternatives such that it would be obvious for them to use a mechanical bond and thus reach the claimed subject-matter. D2 or D10 also provided teaching that a mechanical bond was a commonplace bond used in absorbent articles.

Considering the objective technical problem posed by the Board, taking the option of an elastomeric film replacing the threads G, it would be obvious to extend this into the non-contractile region C1, the elasticity then being deadened in C1 as disclosed in para. [0030]. C1 would then be a void region as claimed, yet the bond would engage the elastomeric film still present in the region C1. The skilled person would thus reach the claimed subject-matter without exercising an inventive step. D2 would also lead the skilled person to the claimed subject-matter since this disclosed bonding in the unperforated zones 56 of the full panel elastic laminate 52 i.e. in those regions where the elastic film of the laminate was unbroken. Alternatively D10 suggested the required modification of D7 in order to reach claim 1 since this disclosed increasing the seam strength by including more material layers. The skilled person would thus include the elastomeric film of D7 in the mechanical bond to similarly increase the bond

strength using more material layers.

The inventive step objections starting from D7 and combining with D8 or D9 were substantiated in the grounds of appeal. For example, page 10 recited relevant portions of the opposition division's decision with specific paragraph numbers of D8 which were relevant for the inventive step attack, this finally being concluded on page 13 of the grounds. Similarly, with respect to D9, the inventive step objection was clearly derivable.

As regards the inventive step objections starting from D1, D2, D3 and D6, these were not particularly complex and were filed over two years before the oral proceedings. They were also filed in response to item 6.10 of the respondent's reply to the grounds of appeal. T184/17 concerned a similar situation to that of the present case, having the same factual and evidentiary framework for the novelty and inventive step attacks, and supported the admittance of these latter attacks.

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

The objections made under Article 100(b) EPC were not prejudicial to maintenance of the patent as granted. It would have been apparent to the skilled person how the perimeter of the elastomeric film should be shortened in order to provide the claimed void region not only from claim 1 itself, but also from col. 12, lines 48 to 55 of the patent in combination with Figs. 2A and 2B. A smaller area of elastomeric film did not necessarily define a shortened perimeter thereof.

The subject-matter of claim 1 was novel over D2, it failing to disclose at least features 3.1 and 3.1.1 of claim 1.

The subject-matter of claim 1 also involved an inventive step over all attacks starting from D7. D7 failed to disclose:

- features 3.1 and 3.1.1 - D7 lacked disclosure of how the non-contractile portion would be realised with an elastic film. It would either be omitted in the non-contractile portion or be rendered ineffective in that portion. The elastomeric film having a shortened perimeter was thus neither explicitly nor implicitly disclosed in D7; and
- feature 3.3 - D7 placed the bond between the side panels and the chassis solely in the non-contractile portion and thus did not engage the elastomeric film.

Based on these differentiating features, the objective technical problem could be seen as being the improvement of the bond while minimising material usage. The bond was 'improved' since the mechanical bond avoided adhesive contaminating the production line. This had been directly argued already in the reply to the grounds of appeal through reference to para. [0007] of the patent and the need to overcome the deficiencies therein. The bond was also 'improved' through the bond engaging an extra layer allowing stress relief in a greater number of material layers. As a result of bonding occurring outside the void region, a 'free' advantage was achieved since the elastomeric film was already present and could be bonded to improve the bond strength at no cost. This effect was realised irrespective of the area or number of bonds present. A1 and A2 were thus irrelevant to the formulation of the problem and moreover should have

been filed already before the opposition division at the time of filing D7, itself filed after the 9-month opposition period.

As regards D7 itself guiding the skilled person to the claimed subject-matter, even if a mechanical bond were selected by the skilled person, this would not be placed in the area with the elastomeric film since D7 disclosed forming bonds in the non-tractile portion. As regards D2, this disclosed bonding away from the perforated region since this region would form a weaker bond. As for D10, this was directed to improving seam strength and disclosed no elastomeric film to which a bond might be formed.

The inventive step attacks starting from D7 and combining D8 or D9 with this were unsubstantiated in the grounds of appeal and should not be admitted. Similarly, those starting from D1, D2, D3 and D6 were an amendment to the appellant's appeal case and should not be admitted.

Reasons for the Decision

1. *Article 100(b) EPC*

The ground for opposition under Article 100(b) EPC does not prejudice maintenance of the patent as granted.

- 1.1 The appellant's allegation that the skilled person would be unable to carry out the invention since they would not know how the elastomeric film should have a shortened perimeter (feature 3.1 of claim 1) is not accepted. Whilst the Board accepts that 'shorten' is indeed a verb and claim 1 is directed to an article, in

the present context the expression 'a shortened perimeter' would logically be understood by the skilled person as an adjective in context since it implies a measurable parameter which has been made shorter than a previously measured one. Therefore in the present case, the 'shortened perimeter' is logically a perimeter which is shorter than that of each of the back ears identified in feature F2 of the claim. This is also clearly depicted as such, for example in Figs. 2A and 2B, such that the skilled person would know how to provide the elastomeric film with the claimed shortened perimeter.

1.2 In its letter of 4 May 2020, the appellant further argued with respect to Article 100(b) EPC, that the size of the void region was undefined and could be anything from 0.1% to 99.9% of the back ear area. It also argued that this would mean that the mechanical engagement which was itself of an undefined nature/size would not be possible across the whole scope of the claim. This objection was, however, not included in the appellant's complete appeal case filed with its grounds of appeal as required by Article 12(3) RPBA 2020 and its admittance is thus at the discretion of the Board under Article 13(1) RPBA 2020.

1.2.1 In its preliminary opinion, the Board pointed to the likely non-admittance of the new objection due to it being introduced after the filing of the grounds of appeal. To the Board's opinion the appellant offered no counter-arguments, neither in writing nor orally at oral proceedings, explicitly relying solely on its written submissions. These written submissions contained no reasons as to why the objection was only introduced at that stage.

1.2.2 In the absence of any arguments questioning its preliminary opinion, the Board confirms the same herewith and exercised its discretion not to admit this late filed objection (Article 13(1) RPBA 2020).

1.3 In the absence of any further objections, the Board finds the skilled person able to carry out the invention as claimed. The ground for opposition under Article 100(b) EPC thus does not prejudice maintenance of the patent as granted.

2. *Article 100(a), Article 54 EPC*

The ground for opposition under Article 100(a) EPC in combination with Article 54 EPC does not prejudice maintenance of the patent as granted.

2.1 The sole novelty objection is based on D2, which discloses the following features of claim 1:

A disposable absorbent article (see Fig. 1; 20) comprising

a) a chassis having a front waist region (22), a rear waist region (24), a crotch region (26) between the front waist region and the rear waist region, and a pair of longitudinal edges (see Fig. 1), said chassis comprising

i) an absorbent core (34) having a garment-facing surface and a body-facing surface,

ii) a liquid permeable topsheet (32) positioned adjacent said body-facing surface of said absorbent core,

iii) a backsheet (30) positioned adjacent said garment-facing surface of said absorbent core; and

b) a pair of back ears (42) each having a perimeter (implicit from page 12, lines 15 to 19 and Fig. 1; if a

separately attached side panel is present, a perimeter must be determinable), a distal edge, and a proximal edge; said back ears (42) comprising

- i) an elastomeric film (page 12, lines 25 to 27) and
- ii) a first substrate (page 12, lines 23 to 25) joined to the elastomeric film (accepted by the proprietor as known) wherein

said back ear (42) extends laterally outwardly from the longitudinal edge of the chassis (see Fig. 1) in the rear waist region (24) and

the back ear (42) is joined to the chassis (20) by at least one mechanical bond (39, an ultrasonic bond; see page 14, line 27) that engages the elastomeric film.

2.2 As regards D2 disclosing feature 3.1 'said elastomeric film has a shortened perimeter', the Board does not concur with the appellant that the shortened perimeter implies that the elastomeric material occupies an area smaller than that of the back ear (this is evident from simple geometry considerations), nor that the perforations in the elastomeric material satisfy this condition. D2 fails to indicate the length of the perimeter of the elastomeric film included in the side panels 42 (see page 12, line 22 onwards; Figs. 1 and 3) and so cannot unambiguously disclose that the elastomeric film perimeter is shortened relative to the perimeter of the side panels. The presence of perforations also fails to reduce the perimeter of the elastomeric material. Additionally, as also pointed out by the respondent, the perforations of D2 are anyway not unambiguously formed in the elastomeric film, rather only in the outer facing layers of the back ear (see page 14, lines 10 to 17). This has notably not been refuted by the appellant.

2.3 The appellant's argument that a void region was formed adjacent the proximal edge of the back ear in D2 is not accepted. The perforations adjacent the waistband of D2 do not satisfy this condition. Paragraph [0019] of the patent differentiates between a proximal edge being nearer to the centre-line than a distal edge of the same element. This does not allow the appellant's interpretation that the perforations 54 in the immediate vicinity of the longitudinal centre-line of the article of D2 (see e.g. Fig. 3) are the position of the proximal edge of the back ear. The skilled person reading D2 would understand the proximal edge of the side panel 42 to be much closer to the longitudinally extending lateral edges of the diaper 20.

2.4 Consequently, the following features of claim 1 are not known from D2:

F3.1 said elastomeric film has a shortened perimeter
F3.1.1 such that a first void region is formed adjacent the proximal edge of the back ear wherein a void region is an area of the back ear where the elastomeric material is absent.

To the Board's preliminary opinion reflecting the above, the appellant offered no counter-arguments. The Board thus herewith confirms the same.

2.5 Consequently, the ground for opposition under Article 100(a) EPC in combination with Article 54 EPC does not prejudice maintenance of the patent as granted.

3. *Article 100(a), Article 56 EPC*

3.1 *Starting from D7 in the analysis of inventive step*

3.1.1 D7 discloses the following features of claim 1:

A disposable absorbent article (see Fig. 1(a)) comprising

a) a chassis having a front waist region (20f), a rear waist region (20b), a crotch region (20d) between the front waist region and the rear waist region, and a pair of longitudinal edges (see Fig. 1), said chassis comprising

i) an absorbent core (25) having a garment-facing surface and a body-facing surface,

ii) a liquid permeable topsheet (24) positioned adjacent said body-facing surface of said absorbent core,

iii) a backsheet (26) positioned adjacent said garment-facing surface of said absorbent core; and

b) a pair of back ears (PL, PR) each having a perimeter (clearly depicted in Fig. 1(a)), a distal edge, and a proximal edge; said back ears (PL, PR) comprising

i) an elastomeric film (see col. 8, lines 29 to 31 and also col. 9, lines 52 to 58) and

ii) a first substrate (S1, S2; col. 8, lines 16 to 20) joined to the elastomeric film

wherein

said elastomeric film has a shortened perimeter (clearly depicted in Fig. 1(a) and described with respect to the non-contractile portions C1 and C2; see para. [0031])

such that a first void region (C1) is formed adjacent the proximal edge of the back ear (PL, PR) wherein a void region is an area of the back ear where the elastomeric material is absent;

said back ear (PL, PR) extends laterally outwardly from the longitudinal edge of the chassis (see Fig. 1(a)) in the rear waist region (20b).

3.1.2 The respondent's contention that D7 lacked disclosure of how the non-contractile portion would be realised with an elastic film and that the elastomeric film having a shortened perimeter was thus not known from D7 is not accepted. The incorporation of the film-shaped elastic member between the sheet-like materials S1 and S2 is described in paragraph [0029] in the context of Fig. 1(b). While this depicts the variant with elastic threads G rather than the film-shaped elastic member, Fig. 1(b) shows the extent of the elastic threads G, and thus implicitly also that of the alternative film-shaped elastic member, as clearly terminating at the lateral edge of the main body portion 20. Consequently the respective portion C1 of each of the side panels PL and PR does not have the film-shaped elastic member sandwiched between the sheet-like materials S1, S2, which results in the film-shaped elastic member having a shortened perimeter than the side panels PL, PR. This is further reflected in Fig. 1(a), albeit with respect to the elastic threads G, it being evident to the skilled person, and thus implicitly disclosed, that when the film-shaped elastic member is used this would also not extend into the respective portion C1 of the side panels PL, PR. Features 3.1 and 3.1.1 are thus known from D7.

3.1.3 D7 thus fails to disclose solely feature 3.3 of claim 1, i.e. that the back ear is joined to the chassis by at least one mechanical bond that engages the elastomeric film.

3.2 *Objective technical problem to be solved*

3.2.1 With respect to paragraph [0008] of the patent, the respondent alleged that feature 3.3 of claim 1 addressed the problem of producing an improved bond.

The 'improvement' disclosed in paragraph [0008] related to the mechanical bond providing a stronger bond between two non-woven sheets than would be achieved by an adhesive bond. This is not accepted in such generality. As also argued by the appellant, without further specification of the mechanical bond type, area of the bond and number of bonds, no strength conclusion between a mechanical and an adhesive bond could be drawn. It was certainly not generally the case that a mechanical bond was stronger than an adhesive bond under all conditions of application.

3.2.2 Admissibility A1, A2

- (a) In order to prove that a mechanical bond was no stronger than an equivalently sized and arranged adhesive bond, the appellant filed A1 and A2. This was filed with its grounds of appeal to show that a single mechanical bond, as claimed in the patent, had no technical effect or advantage over a similarly sized adhesive bond.
- (b) The Board considered whether these documents should already have been filed before the opposition division which, if confirmed, could lead to them being held inadmissible under Article 12(4) RPBA 2007.
- (c) Despite the appellant's contention that the filing of A1 and A2 was a reaction to the opposition division's decision finding that the problem to be solved, starting from D7, was to provide an improved bond, it is noted that the changed formulation of the objective technical problem by the opposition division relative to its preliminary opinion was actually caused by the appellant's

filing of D7 on the last day of the period under Rule 116(1) EPC (after the opposition division had issued its preliminary opinion). As such, the catalyst for filing A1 and A2 had resulted from the appellant's filing of D7. Consequently, the appellant not only could, but also should, have made its submissions in a complete manner by filing A1 and A2 at the time of filing D7 in order to support its contention that, starting from D7, the technical problem of providing an improved bond lacked objectivity.

- (d) The Board thus exercised its discretion to hold A1 and A2 inadmissible under Article 12(4) RPBA 2007.

3.2.3 Admittance of the problem relating to contamination

- (a) The respondent argued that the bond could alternatively be viewed as improved through a mechanical bond avoiding contamination of the process line through over-application of adhesive.
- (b) The appellant argued that this interpretation of the 'improvement' achieved by feature 3.3 of claim 1 was a change of the respondent's appeal case and should not be admitted under Article 13(2) RPBA 2020.
- (c) The Board disagrees with the appellant's view that this was an amendment to the respondent's appeal case. In point 6.11 of the respondent's reply to the grounds of appeal, reference is made to 'the deficiencies described in paragraph [0007] ... of the patent' in relation to an improved bond. Paragraph [0007] of the patent explicitly mentions problems associated with over-application of

adhesive and adhesive being applied beyond the edge of the chassis leading to wasted adhesive and contamination of the process line. The Board thus sees the respondent's reliance on avoiding contamination of the process line as an objective technical problem to merely be a development of its arguments originally filed in reply to the grounds of appeal, without involving any new facts to be assessed.

- (d) In the absence of an amendment to the respondent's appeal case within the meaning of Article 13(2) RPBA 2020, the Board does not hold the problem of avoiding contamination of the process line inadmissible.

3.2.4 Regarding the posed problem of 'how to improve the bond' in the context of avoiding contamination of the process line, this is however not seen as objective. As was also argued by the appellant at oral proceedings, contamination is not a problem when starting from D7. Even if adhesives were used, the bonding is not disclosed as being carried out particularly close to the longitudinal edge of the chassis, neither would this be necessary in order to bond the non-tractile portion C1 to the chassis. It is also held that accurate application of adhesives, for example through using slotted dispensing nozzles or even accurately directed spray patterns, is known to the skilled person, such that contamination of a process line is not seen to be a problem generally applicable to D7. Avoiding contamination of the process line thus does not make the posed problem of 'how to improve the bond' objective.

- 3.2.5 The appellant argued that, in the absence of any form of improvement achieved through replacing an adhesive bond with a mechanical bond, the technical problem to be solved was simply to provide an alternative bond. This is not accepted. The feature differentiating claim 1 from D7 not only defines the back ear being joined to the chassis by at least one mechanical bond, but also that the bond engages the elastomeric film, the latter not being reflected in the appellant's posed technical problem.
- 3.2.6 The Board also finds the appellant's contention that engaging the elastomeric film offered no advantage over D7 to be incorrect. The concept of a bond engaging more material layers and thereby distributing strain between the layers engaged is seen to be relevant in this context. The resultant bond is stronger as a result of the force applied through the bond being distributed through each engaged material layer, any given layer thus experiencing less force and being less prone to tearing. In the oral proceedings this was referred to by the respondent as 'strain relief'. The effect of engaging an elastomeric film *per se* is not seen to offer an advantage, rather engaging the elastomeric film as an additional layer of material engaged by the bond, and thus achieving additional 'strain relief' in the bond, is where the advantage lies.
- 3.2.7 When starting from D7, it is also noted that the bonds between the chassis 20 and the side panels PR, PL occurred in the non-contractile regions C1, yet an elastomeric film was provided in the side panels outside of the non-contractile regions C1. In order to appropriately reflect the presence of the elastomeric film in the side panels of D7, the objective technical problem to be solved is seen to be 'to provide a

bonding arrangement making use of available alternative materials'.

3.3 *D7 in combination with D7 / common general knowledge*

3.3.1 Whilst D7 discloses alternative bonding methods (hot-melt adhesive and ultrasonic welding), this is only in relation to producing the laminate used for the side panels (see col. 11, lines 26 to 30). Even if this were seen as a teaching to use mechanical bonding for joining the side panels to the chassis, D7 lacks any suggestion of placing the bond so as to engage the elastomeric film. In fact, D7 discloses an advantage of specifically avoiding this location and forming the bond in the non-contractile portion: since this portion lies flat, attachment of the side panels to the main body portion is facilitated (see paragraph [0011]).

3.3.2 It is also noted that, if the elastomeric film in D7 were extended into the non-contractile portions C1 of the side panels in order to allow it to be engaged by the bond, the claimed void region would no longer exist in the resultant absorbent article. Additionally, teaching exists neither in D7, nor in common general knowledge, to extend the elastomeric portion just partly into the non-contractile portions, in order to enable the bond to engage with the elastomeric portion whilst maintaining a void region.

3.3.3 The appellant's argument that deadening the elastomeric film in the non-contractile portion C1, as disclosed for the elastic threads in paragraph [0030], would produce a void region yet simultaneously result in the bond engaging the elastomeric film, is not accepted. Feature 3.1.1 of claim 1 defines a void region as 'an area of the back ear where the elastomeric material is

absent'. The region in which the elastomeric film is deadened, however, whilst still comprising a film, no longer comprises an elastomeric film since elastomeric properties are no longer displayed by the film. Consequently, the bond formed in this region would not engage the elastomeric film since the film in this region is no longer elastic.

3.3.4 Consequently, nothing in D7 itself, or in combination with common general knowledge, would guide the skilled person, starting from D7 and wishing to solve the objective technical problem, to the claimed subject-matter without their becoming inventively active.

3.4 *D7 in combination with the technical teaching of D2*

3.4.1 Similarly to D7, D2 discloses both ultrasonic and adhesive bonds (see page 14, line 27), yet in D2 these bonds 39 are used to join the shaped full panel elastic laminate 52 to the diaper 20. However, since the entirety of the elastic laminate 52 is elastic, modifying D7 with this laminate would result in the claimed void regions no longer being present. Consequently, modifying D7 with the teaching of D2 would also fail to guide the skilled person to the claimed subject-matter.

3.4.2 The appellant's contention that D2 would lead the skilled person to form the bond in the region where the elastic film of the laminate is unbroken does not deprive the subject-matter of claim 1 of an inventive step. Even if D2 were to suggest engaging the elastomeric film of D7 in a mechanical bond, the skilled person would not be guided to the claimed arrangement in which the void region is maintained. As described in point 3.3.2 above, if, so that the bond

may engage the elastomeric film, the film were extended into the non-contractile portions C1 of the side panels, the claimed void region would no longer exist in the resultant absorbent article. The claimed subject-matter would thus still not be reached.

3.4.3 Consequently, starting from D7 and wishing to solve the objective technical problem, D2 would not guide the skilled person to the claimed subject-matter without their becoming inventively active.

3.5 *D7 in combination with D10*

3.5.1 D10 is directed to providing a flangeless seam for a disposable absorbent article. Even though it discloses mechanical bonding, it fails to suggest this as an alternative to adhesive bonding, thus failing to provide the skilled person with guidance as to alternative bonding options. In addition, although D10 discloses providing more material in a seam to increase its strength, it fails to suggest including an elastic film in the bond in order to increase its strength.

3.5.2 The appellant's argument that increasing seam strength by including more material layers was taught in D10 thus guiding the skilled person to include the elastomeric film of D7 in the mechanical bond is not accepted. As indicated in point 3.5.1, D10 provides no guidance to incorporate an elastic film in the bond in order to increase its strength. Starting from D7, the skilled person would be expected to consider providing further non-woven layers in the bond to increase its strength, rather than adjusting the extent of the elastic laminate with the resultant undesirable 'wrinkling' of the non-contractile portion C1.

3.5.3 Therefore, when starting from D7 and in view of the objective technical problem, D10 would not guide the skilled person to the claimed subject-matter without their becoming inventively active.

3.6 *D7 in combination with D8 or D9 - admittance*

3.6.1 In its preliminary opinion, the Board indicated that the inventive step objections starting from D7 in combination with D8 or D9 seemed not to be substantiated. The appellant's broad reference to large portions of the decision of the opposition division without drawing substantive conclusions therefrom is not seen as a substantiated indication of why the finding of the opposition division on inventive step is incorrect.

3.6.2 The appellant's reference, with respect to the objection of D7 in combination with D8, to pages 10 and 13 of the grounds of appeal does not prove a substantiated objection. A significant portion of the inventive step attacks raised in the grounds of appeal simply cite passages of the decision of the opposition division which itself largely simply recites the arguments raised by the opponent during the opposition procedure. Whilst the fourth paragraph on page 10 of the grounds of appeal indeed concerns the disclosure of D8, the conclusion drawn in the second paragraph on page 11 is merely an unsupported statement that 'a film as required by the Patent is indeed taught by D7'. The grounds of appeal thus fail to substantiate an inventive step objection relating to D8 at all. This situation is also not changed by way of the end of page 13 of the grounds of appeal stating 'Alternatively, a person skilled in the art would have considered any of D2, D8, D9 or D10 to combine with the teaching of D7'

since no clear argument has been presented indicating how, when starting from D7, the teaching of D8 would guide the skilled person to the claimed subject-matter.

3.6.3 As regards the objection of D7 in combination with D9, the appellant's reference to pages 10 and 13 of the grounds of appeal similarly fail to provide a substantiated inventive step objection. An indication of the disclosure of D9 on page 10 is again not used to substantiate an objection, neither does a mere reference to D9 in combination with D7 on page 13 formulate a substantiated inventive step objection.

3.6.4 The Board thus decided to disregard the inventive step attacks starting from D7 in combination with D8 or D9 for lack of substantiation (Article 12(4) RPBA 2007).

3.7 *D1, D2, D3, D6 + common general knowledge - admittance*

3.7.1 In its preliminary opinion the Board indicated that the inventive step objections starting from D1, D2, D3 or D6 raised for the first time in the appellant's letter of 4 May 2020 had not been raised in its grounds of appeal and their admittance was thus at the discretion of the Board under Article 13(1) RPBA 2020.

Article 13(1) RPBA 2020 requires that 'Any amendment to a party's appeal case after it has filed its grounds of appeal or reply is subject to the party's justification for its amendment and may be admitted only at the discretion of the Board'. These new inventive step objections were filed almost one year after the respondent's reply to the statement of grounds of appeal and a justification for their late filing is notably lacking.

Relative to the statement of grounds of appeal, the new inventive step objections constitute an amendment to the appellant's appeal case (Article 12(3) RPBA 2020), in which novelty was only attacked in view of D2 and inventive step only starting from D7.

Furthermore the Board cannot see any justification for not having filed these objections with the statement of grounds of appeal. The appellant was aware of which features were considered absent in these documents already from the provisional opinion of the opposition division of 8 February 2018 (see items 9.1 to 9.5). This was also discussed during the oral proceedings (see minutes item 4.1) and clearly reasoned in the decision of the opposition division (see item 5). Thus the opponent would already have had reasons to raise its inventive step objections in a complete manner with the statement of grounds of appeal and the Board cannot see any justification for having filed them at a later stage.

- 3.7.2 The appellant's contention that these inventive step attacks were filed in reaction to point 6.10 of the respondent's reply to the grounds of appeal is not accepted as a justification. In point 6.10 the respondent simply argues that A1 and A2 should not be admitted due to their being irrelevant to the issue of adhesive versus mechanical bond strength. The context of A1 and A2 having been filed by the appellant related to whether, starting from D7, 'providing an improved bond' could be regarded to be the objective technical problem to be solved. The Board thus fails to see how this could reasonably justify the filing of new inventive step attacks starting from completely new starting points.

3.7.3 The appellant's argument that the inventive step objections starting from D1, D2, D3 and D6 were not particularly complex and were filed over two years before the oral proceedings, actually pertains to the criteria for the exercise of discretion by the Board under Article 13(1) RPBA 2020, once satisfied that there is a reason for the late filing. Thus they do not justify their admittance either.

(a) With respect to objections starting from D1 and D3 in its letter of 4 May 2020, the appellant aimed to 'preemptively respond to a generic argument' which cannot be considered a justification for the appellant to change its appeal case after having submitted its grounds of appeal.

(b) As for starting from D6, the appellant refers to the patentee having alleged the presence of a technical effect (when starting from D7). This is not a justification for presenting a new inventive step attack at this juncture. The very same conclusion was reached by the opposition division by way of formulating the objective technical problem to be 'how to improve the bond between the side panel and the diaper chassis' (see page 16 of the decision) such that, if a justification is at all to be recognised, the appellant had reasons to make this inventive step attack already in its grounds of appeal, in reaction to the opposition division's decision.

(c) As for the objection starting from D2 (see point 2.3.5 of the letter of 4 May 2020), this provides nothing which can be viewed as a justification for presenting this objection for the first time at

this juncture.

In conclusion, in the appellant's letter of 4 May 2020, no justification was provided for the amendment to its appeal case relating to the late filing of the inventive step objections starting from D1, D2, D3 or D6.

- 3.7.4 The appellant further argued that novelty objections had been raised in opposition on the basis of D1, D2, D3 and D6 and that, having the same factual and evidentiary framework, the inventive step attacks based on these documents were admissible. The appellant cited decisions T 597/07 and T 131/01 in support of its argument, according to which when a patent has been opposed on the grounds of lack of novelty having regard to a prior art document, a specific substantiation of the ground of lack of inventive step is neither necessary nor generally possible without contradicting the reasoning presented in support of lack of novelty.
- 3.7.5 The Board considers that the decisions relied on by the appellant cannot be applied to the present case. These decisions actually concerned the power of a Board to decide in appeal on a fresh ground for opposition for lack of substantiation in the notice of opposition, on account of the opinion G 10/91 and of decisions G 1/95 and G 7/95 of the Enlarged Board of Appeal. However, the present case does not concern a fresh ground for opposition, since lack of inventive step starting from D7 was raised and substantiated at the outset of the appeal proceedings. The question at stake is rather whether late-filed submissions in appeal proceedings, constituting an amendment of the party's appeal case, should be admitted, which is a question specifically governed by Article 114(2) EPC and the Rules of

Procedure of the Boards of Appeal (see also T 1042/18, Reasons 4.3 to 4.5, T 2161/18, Reasons 5.4 and T 1816/17, Reasons 12). The above cited decisions cannot therefore take precedence over application of the Rules of Procedure of the Boards of Appeal, in particular Article 13(1) RPBA 2020 thereof.

The appellant further cited decision T 184/17 in support of admittance and argued that both lack of novelty and lack of inventive step were discussed within the same factual and evidentiary framework. The Board cannot accept this argument either.

Like the cited cases T 131/01 and T 597/07, decision T 184/17 concerns the power of a Board to decide in appeal on a fresh ground for opposition and not the admittance of late submissions under Article 114(2) EPC and the Rules of Procedure of the Boards of Appeal. Thus for the same reasons given above (points 3.7.4 and 3.7.5) this decision is not applicable to the present case.

In addition, even if *the same factual and evidentiary framework* should be given a meaning in the context of Article 13(1) RPBA 2020, i.e. in terms of the existence of an amendment of the party's case, which however was not submitted by the appellant, still the Board finds T 184/17 not to be applicable to the facts of the present case.

Firstly, with regard to D1, D3 or D6 there is no factual and evidentiary framework in the context of novelty to which an objection of inventive step raised in appeal may be referred. The sole novelty attack raised on appeal was based on D2. No novelty attack was filed with the grounds of appeal, nor indeed in any

subsequent letter in the appeal procedure, on the basis of D1, D3 or D6. Therefore the opposition division's decision on novelty over D1, D3 and D6 not having been appealed, became final.

3.7.6 Secondly, with regard to D2 although a novelty attack was based on it in appeal, no substantiation of an inventive step attack starting from D2 was included in the letter of 4 May 2020. Indeed, all that was stated in point 2.3.5 of that letter was:

'Should for any reason the Main Request be considered novel over D2, then it is submitted that depending on the difference considered to be present, based on any of the above mentioned reasoning for that difference, it cannot be considered inventive.'

From this the Board cannot see a substantiated inventive step attack.

3.7.7 In conclusion, therefore, since the new inventive step objections constituted an amendment of the appellant's appeal case and there was no justification for their late filing, the Board exercised its discretion under Article 13(1) RPBA 2020 not to admit the inventive step attacks starting from D1, D2, D3 or D6 into the proceedings.

3.8 In conclusion, therefore, the Board finds the ground for opposition under Article 100(a) EPC in combination with Article 56 EPC not to prejudice maintenance of the patent as granted.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



C. Spira

M. Harrison

Decision electronically authenticated