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**D E C I S I O N**  
**of 13 January 2000**

**Case Number:** T 1070/96 - 3.2.2

**Application Number:** 87850171.7

**Publication Number:** 0252041

**IPC:** A61F 13/15

**Language of the proceedings:** EN

**Title of invention:**

Disposable liquid-absorbing article

**Patentee:**

Mölnlycke AB

**Opponent:**

Paul Hartmann Aktiengesellschaft  
The Procter & Gamble Company

**Headword:**

-

**Relevant legal provisions:**

EPC Art. 54, 56, 100(b), 114(1)

**Keyword:**

-

**Decisions cited:**

G 0009/91, G 0010/91, T 0309/92, T 0931/91, T 0222/85,  
T 0557/94

**Catchword:**

-





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Boards of Appeal

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Case Number: T 1070/96 - 3.2.2

**D E C I S I O N**  
**of the Technical Board of Appeal 3.2.2**  
**of 13 January 2000**

**Appellant:** Paul Hartmann Aktiengesellschaft  
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**Respondent:** Mölnlycke AB  
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**Representative:** Harrison, Michael Charles  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 29 October 1996  
rejecting the opposition filed against European  
patent No. 0 252 041 pursuant to Article 102(2)

**EPC.**

**Composition of the Board:**

**Chairman:** W. D. Weiß

**Members:** D. Valle

R. T. Menapace

## Summary of Facts and Submissions

- I. On 10 December 1996 the appellant (opponent I) filed an appeal against the decision of the Opposition Division of 29 October 1996 to reject the opposition against the patent No. 252 041 and paid the appeal fee on the same day. The statement of grounds was filed on 28 February 1997.
- II. The Opposition Division found that the grounds based on Article 100(a) (lack of inventive step) and Article 100(b) (insufficient disclosure) did not prejudice the maintenance of the patent unamended. The initially raised objection of lack of novelty was no longer maintained during the oral proceedings.
- III. The following documents cited during the opposition proceedings were still discussed at the appeal stage:

D4: GB-A -2 114 895

D9: US-A-4 041 203

D10: US-A-3 949 130;

Together with the statement of grounds, the appellant cited the following further document:

D11: GB-A-2 144 995.

With subsequent letter of 13 December 1999 the appellant cited the following document for the first time:

D12: US-A-4 397 644.

With letter of 10 January 2000 the respondent filed the additional document:

D13: US-A-4 340 563, cited in document D12

- IV. With letter of 31 July 1997 the opponent II declared that he was no longer interested in the outcome of the appeal.
- V. Together with the summons for oral proceedings, the Board, on 12 July 1999, issued a communication stating as its provisional opinion that the ground based on Article 100(b) EPC would be considered by the Board because, following the decisions T 309/92 and T 931/91, if an Opposition Division has examined on its own motion a ground for opposition, the Board of Appeal was empowered to rule on it.
- VI. Oral proceedings were held on 13 January 2000 at which only the appellant and the respondent (patentee) were represented. At the end of the oral proceedings the requests of the parties were as follows:

The appellant requested that the decision under appeal be set aside and the patent be revoked.

The respondent (patentee) requested that the appeal be dismissed (main request) or that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of one of the four auxiliary requests submitted on 13 December 1999.

Furthermore, he maintained his request to remit the case back to the first instance for further examination, if the document D12 was allowed into the proceedings.

VII. Claims 1 of the main request as granted and of the four auxiliary requests filed with letter of 13 December 1999 read as follows (amendments over the main request in italics):

Main request:

A disposable liquid-absorbing article such as a diaper, a sanitary napkin or the like comprising an absorption body (1) surrounded by a casing which is liquid permeable at least in its portion (5) facing the user of the article, the liquid-permeable body-contacting portion (5) of the casing consists of a thin, spun-bonded fibrous fabric layer composed of a hydrophobic material, characterized in that a similarly constructed hydrophobic fibrous layer consisting of melt-bonded fibre fabric is applied between said casing portion and the absorption body, said latter layer (2) having a surface weight which is greater than that of the aforementioned casing portion.

First auxiliary request:

A disposable liquid-absorbing article such as a diaper, a sanitary napkin or the like comprising an absorption body (1) surrounded by a casing which is liquid permeable at least in its portion (5) facing the user of the article, the liquid-permeable body-contacting portion (5) of the casing consists of a thin, spun-

bonded fibrous fabric layer composed of a hydrophobic material, characterized in that a similarly constructed hydrophobic fibrous layer consisting of melt-bonded fibre fabric *which consists of heat-bondable fibers being only locally heat-bonded for creating a voluminous insulating layer having fibrous, cushion-like protuberances formed between the local connecting points* is applied between said casing portion and the absorption body, said latter layer (2) having a surface weight which is greater than that of the aforementioned casing portion.

Second auxiliary request:

A disposable liquid-absorbing article such as a diaper, a sanitary napkin or the like comprising an absorption body (1) surrounded by a casing which is liquid permeable at least in its portion (5) facing the user of the article, the liquid-permeable body-contacting portion (5) of the casing consists of a thin, spun-bonded fibrous fabric layer composed of a hydrophobic material, characterized in that a similarly constructed hydrophobic fibrous layer consisting of melt-bonded fibre fabric is applied between said casing portion and the absorption body, said latter layer (2) having a surface weight which is greater than that of the aforementioned casing portion, *and in that the casing portion (5) made of spun-bonded fibre fabric has a surface weight less than approx. 15g/m<sup>2</sup>.*

Third auxiliary request:

A disposable liquid-absorbing article such as a diaper,



a sanitary napkin or the like comprising an absorption body (1) surrounded by a casing which is liquid permeable at least in its portion (5) facing the user of the article, the liquid-permeable body-contacting portion (5) of the casing consists of a thin, spun-bonded fibrous fabric layer composed of a hydrophobic material, characterized in that a similarly constructed hydrophobic fibrous layer consisting of melt-bonded fibre fabric *which consists of heat-bondable fibers being only locally heat-bonded for creating a voluminous insulating layer having fibrous, cushion-like protuberances formed between the local connecting points* is applied between said casing portion and the absorption body, said latter layer (2) having a surface weight which is greater than that of the aforementioned casing portion, *and in that the casing portion (5) has a surface weight less than approx. 15g/m<sup>2</sup> and in that the layer (2) made of melt-bonded fibre fabric has a surface weight in the order of 20-30g/m<sup>2</sup>.*

Fourth auxiliary request:

A disposable liquid-absorbing article such as a diaper, a sanitary napkin or the like comprising an absorption body (1) surrounded by a casing which is liquid permeable at least in its portion (5) facing the user of the article, the liquid-permeable body-contacting portion (5) of the casing consists of a thin, spun-bonded fibrous fabric layer composed of a hydrophobic material, characterized in that a similarly constructed hydrophobic fibrous layer consisting of melt-bonded fibre fabric *which consists of heat-bondable fibers being only locally heat-bonded for creating a*

*voluminous insulating layer having fibrous, cushion-like protuberances formed between the local connecting points is applied between said casing portion and the absorption body, said latter layer (2) having a surface weight which is greater than that of the aforementioned casing portion and in that the two fibre fabric layers (2, 5) of the spun-bonded and the melt-bonded type, respectively are non-secured in relation to one another within the body-contacting area during use of the article.*

VIII. The appellant argued essentially as follows:

- Regarding Article 100(b) EPC (insufficient disclosure):

Article 100(b) had been examined by the Opposition Division on its own motion on the basis of Article 114(1) EPC. It should be open to revision during the appeal proceedings.

The words: "similarly constructed" in claim 1 were not clear and therefore the invention could not be carried out by a person skilled in the art. During the opposition proceedings several interpretations were given for these words. In the minutes of the oral proceedings, page 2, second paragraph, it was reported that such words had to be interpreted, according to the opponents, in the sense that the second layer was spun-melt-bonded, whereas the patentee contended that "similarly" meant that the second layer was liquid permeable, the second layer being melt-bonded, that is consisting of

carded web of staple fibres consolidated by melt-bonding. The decision under appeal, page 5, stated further that short fibers were excluded for the second layer since a spun-bonded layer consisted of endless filaments and a layer made of short fibers would not be "similarly constructed" to a spun-bonded layer. The description finally did not give any further clues to interpret such terms.

The statement of the patentee that "similarly constructed" was to be interpreted as meaning just "liquid permeable" was not acceptable because this was a self-evident property and therefore an explicit statement in this respect would be superfluous.

"Melt-bonded fibers" meant that the fibers were bonded by melting, whereas "spun-bonded fibers" expressed that they were spun and then bonded. Document D10, page 167, clearly distinguished between the methods of producing non-woven fabrics (including steps like carding and spun-bonding) and the methods of consolidating them (e.g. by chemical or mechanical bonding). Thus, the term "spun-bonded" did not provide any information about how the fibers were consolidated and the term "melt-bonded" did not define how the non-woven material was deposited, but merely how it was consolidated.

- Regarding Article 100(a) EPC

The objection of lack of novelty was now reiterated on the basis of the newly cited

document D12.

Document D12 had been cited so late because it was only found accidentally. It was also prima facie highly relevant and therefore it should be considered by the Board, see "Case law of the Boards of Appeal", 3rd edition 1998 page 303, with particular reference to decision T 255/93.

The case should not be remitted to the first instance because the introduction of this new document merely filled a gap which had become evident by the argumentation of the Opposition Division in the decision under appeal. In view of the statements in the decision under appeal, that the only difference between document D4 and the invention was that the body-covering layer of the invention was a spun-bonded layer (page 6 of the decision) and that it was not obvious to replace the first layer of the article of document D4 by a spun-bonded melt-bonded layer as disclosed in document D9 (see page 9 of the decision), it was obvious that the Opposition Division would have decided differently if it had known document D12.

Document D12 disclosed a spun-bonded cover, see column 6, from line 52, which was hydrophobic (polypropylene), see column 7, from line 14.

Furthermore it disclosed a comfort enhancing layer 14a (intermediate transfer layer) which was also hydrophobic. Layer 14a was namely subject to fusing, whereby fusing was defined as the partial softening and/or melting of a thermoplastic

material to produce bonds (column 5, from line 36), that is melt-bonding, see also column 4, lines 11 to 14. In column 5, line 48, it was said that the transfer layer may contain nonthermoplastic fibers. Since the material Chisso ES cited in column 5, line 62 stood for a bicomponent polypropylene/-polyethylene fiber, the basic teaching of document D12 was to use a thermoplastic, hence hydrophobic, material for the intermediate layer. It was clear that the absorbent quality of the layer mentioned in column 8, from line 63, referred only to the core layer and not to the thermoplastic layer 14a. On the other hand the term "absorbent", when referred to the layer 14a, should be interpreted in the sense that such intermediate layer transferred the fluid downwards, without intermediately storing it.

It goes without saying that the basis weight of the cover of a sanitary napkin or diaper should be kept as low as possible and had never a basis weight above  $30\text{g/m}^2$ , see also document D4, table 3, which cited values less than  $10\text{ g/m}^2$  and document D9 which cited a value range of  $2\text{-}20\text{ g/yd}^2$ . The feature that the basis weight of the cover was lower than that of the intermediate layer was also derivable from the drawings of document D12 and belonged to the common general knowledge. Document D13, column 9, lines 21 onwards, cited a value of 5 denier for the filaments of the cover, whereas document D12, column 7, line 15, cited a value of 3 denier, thus implying a low basis weight. Since document D13 concerned a general method of forming non-woven webs and it was not specifically

directed to diapers or sanitary napkin covers but *inter alia* also to carpets, see column 1, lines 24, 25, the range for the basis weight mentioned therein (3,4-340 g/m<sup>2</sup>) was obviously not applicable in its entirety to layers for diapers or sanitary napkins.

The subject-matter of Claim 1 of the main request lacked, therefore, novelty.

The subject-matter of claim 1 of the first auxiliary request lacked also novelty, see figures of document D12, reference number 11, and column 3, lines 60 onwards.

The subject-matter of claim 1 of the second and third auxiliary requests lacked at least an inventive step. The basis weight of the cover should obviously be as low as possible in order to enhance softness and improve permeability. On the other hand the prior art knew the values of the basis weight of the cover of the invention, see documents D4 and D9 (10 g/m<sup>2</sup> and 2-20 g/yd<sup>2</sup> respectively). The values for the intermediate layer were known also by document D4, table 3 and page 2, line 34 (8-25 g/m<sup>2</sup>). Finally document D13, cited by document D12, disclosed a range of basis weights which comprised those claimed in the claim. Choosing the particular claimed values for the basis weight was the result of a normal workshop activity directed to the optimization of the product.

The subject-matter of claim 1 of the fourth

auxiliary request did not involve an inventive step being less advantageous than the solution suggested by document D12 and only consisting in the elimination of the integration points.

IX. The respondent argued essentially as follows:

- Regarding Article 100(b) EPC (insufficient disclosure)

This ground for opposition was introduced by the opponent II during the opposition proceedings, whereas opponent I and present appellant did not raise it. The two oppositions being independent, he should not be allowed to refer to it during the appeal proceedings either.

Since the arguments put forward by the appellant concerned merely the clarity of the claims and not Article 100(b) EPC, this objection was also not admissible.

Since there was no comma after the words "similarly constructed" in claim 1, these words only qualified the subsequent word "hydrophobic" and did not refer to the layer as a whole.

From the description of the patent in suit, column 1, lines 43 to 50, column 2, penultimate line, and column 3, line 28, as well as from claim 6 it could be clearly deduced that spun-bonded and melt-bonded referred to different types of fabric. From column 3, line 3 onwards, it was clear that spun-bonded fibers did not generate

voluminous layers. It was generally known that melt-bonded fibers were not necessarily carded, never comprised endless fibers, but otherwise did not have any limitation in length. Usually the fibers were more than 1 cm long and in any case had to be longer than the distance between the bonding points.

- Regarding Article 100(a) EPC

Since the objection of lack of novelty had been withdrawn during the opposition proceedings, this ground should no longer be considered.

The late filed document D12 should also not be considered because it was not prejudicial for the novelty, and because its late citation without any plausible explanation constituted an abuse of the procedure. Should the Board be nevertheless inclined to consider document D12, the case should be remitted to the Opposition Division, see decisions of the Board of Appeal T 223/95 and T 125/93. The introduction of this new document was such that an entirely new case had to be considered. The respondent had no sufficient time to consider all the implications of the introduction of this new document.

Document D12 was not novelty destroying for claim 1 of the main request, since it did not disclose a thermoplastic hydrophobic transfer layer. The transfer layer 14a of document D12 was an absorbent layer and therefore not hydrophobic.



Particular reference was made in this respect so the abstract of document D12, to column 8, lines 63 to 65, to column 3, line 44, to column 7, lines 4 to 6, to column 5, line 55, and to claims 1 and 10.

Moreover, document D12 did not disclose a cover having a basis weight lower than that of the transfer layer. In column 7, line 12 onwards it was said that the transfer layer basis weight was  $0,0129 \text{ g/cm}^2 = 129 \text{ g/m}^2$ . Furthermore documents D12 and D13 disclosed a cover 10 which could have a basis weight between 3,4 to  $340 \text{ g/m}^2$  (column 7, lines 13, 14; column 6, lines 52 to 58; and document D13, column 1, lines 16 to 20). Furthermore, in document D13, column 1, line 16 onwards, it was said that the non-woven web could be used for diaper liners and sanitary napkin wraps. The person skilled in the art would therefore choose among the range disclosed by document D13 the middle value for the basis weight of the cover (that is about  $170 \text{ g/m}^2$ ), which was higher than that of the intermediate layer ( $129 \text{ g/m}^2$ ). There was therefore no evidence that the intermediate layer 14a (corresponding to the layer 2 of claim 1) had a surface weight, which was greater than that of the cover 10 (corresponding to the casing 5). The surface weight could vary greatly in non-woven materials. For example document D12 (figures 2 and 3) showed an intermediate layer 14a having a basis weight of  $129 \text{ g/m}^2$  and an absorption body having a basis weight of  $580 \text{ g/m}^2$  although the thickness was very similar, see also column 7, from line 12, and

lines 28 to 35 of document D13.

Document D4 referred to a cover made of melt-bonded material and not of a spun-bonded one.

The patent in suit was concerned with rewetting; document D12 was concerned with menstrual fluids.

Regarding the second and third auxiliary requests, it was pointed out that the value of 15 g/m<sup>2</sup> was an exceptionally low weight. The normal weight was 25-35 g/m<sup>2</sup>. The problem solved by the invention was to avoid rewetting and allow transfer of the fluid. That problem was not known by the prior art. Documents D12 and D13 gave no indication to choose the particular combination of values for the basis weight. Document D4 disclosed an entirely different mechanism.

Regarding the fourth auxiliary request it was pointed out that both documents D12 and D4 disclosed bonded layers for the transfer of fluid, whereby the mechanism of transfer of the fluid relied on that bonding. The invention on the contrary relied on the full area of the cover sheet for the transfer of the fluid. Furthermore the air gap between the two sheets by the invention improved the behaviour against rewetting of the article.

## **Reasons for the Decision**

1. *The appeal is admissible*

2. *Sufficiency of disclosure*

2.1 The appealed decision examined the ground of insufficient disclosure on its own motion on the basis of Article 114 (1) EPC. If an Opposition Division has examined on its own motion (Article 114(1) EPC) a ground for opposition - as it did in the present case in respect of insufficient disclosure (Article 100(b) EPC) - then the Board of Appeal is empowered to rule on this ground (see decisions T 309/92 and T 931/91). Since appeal proceedings aim at a judicial decision upon the correctness of a decision of the first instance, it is irrelevant which opponent had raised a particular objection or whether this particular opponent is still party to the proceedings, provided that such objection is dealt with in the decision under appeal.

For a ground to be subject to consideration by the Board, it is not necessary that the arguments on which it is based are convincing. It is sufficient that the submissions are such that the case can be properly understood on an objective basis (see also decision of the Board of Appeal T 222/85).

The ground of insufficient disclosure has therefore to be considered.

2.2 The objection of insufficient disclosure has been raised with respect to the feature "similarly constructed hydrophobic layer" used in claim 1. The appellant argued that the term was not clear and that

that made the invention not feasible.

Since the requirement of Article 100(b) EPC - in contrast to Article 84 EPC - concerns the content of the patent as a whole, an objection of insufficient disclosure cannot be solely based on an unclear feature in the claims, but must be assessed by taking account of the whole disclosure.

However, already the wording of the claim gives here an indication of the meaning of the word "similarly". In fact, there being no comma after "similarly constructed", the expression merely refers to the subsequent word "hydrophobic" and not to "fibrous layer" following thereafter and qualifies the function "hydrophobic" of the second layer as being more "liquid permeable" than the first layer. "Similarly" on the other hand does not refer to the structure and to the production method of the layer. This interpretation is confirmed by the description of the patent in suit, column 1, lines 43 to 50; column 2, penultimate line; column 3, line 28, and by claim 6. From these passages it becomes evident that the patent clearly distinguishes between the spun bonded layer and the melt bonded one, confirming thereby that the word "similarly" on the claim is not intended as referring to the structure and to the production method of the layer.

Consequently the term "similarly constructed" in the claim is sufficiently clear to allow the person skilled in the art to carry out the invention.

Accordingly the objection based on Article 100 (b) EPC

is not well founded.

3. *Amendments*

- claim 1 of the first auxiliary request contains the additional feature:

"(latter layer 2) which consists of heat-bondable fibers being only locally heat-bonded for creating a voluminous insulating layer having fibrous, cushion-like protuberances formed between the local connecting points"

The feature is disclosed at column 2 line 59 to column 3, line 6 of the patent in suit.

- Claim 1 of the second, third and fourth auxiliary requests contain the additional features of the granted claims 2, 3 and 6 respectively.

The requirements of Article 123 EPC are therefore met.

4. Late filed documents and connected procedural issues

4.1 Document (D11) has been filed by the appellant together with the statement of grounds as a direct reaction to the appealed decision. Therefore it is to be considered.

4.2 Document D12 and D13

Document D12 has been submitted by the appellant with letter of 13 December 1999. Document D13, cited in the

description of document D12, has been submitted by the respondent with letter of 10 January 2000.

According to the decisions of the Enlarged Board of Appeal G 9/91 and G 10/91, the principle of ex officio examination (Article 114(1) EPC) should be applied restrictively in appeal proceedings. That means that new facts, evidence or arguments which go beyond those presented in the notice of opposition pursuant Rule 55(c) EPC should be only very exceptionally admitted into the proceedings if they are prima facie highly relevant in the sense to be highly likely to prejudice the maintenance of the patent. Also the fact that the patentee objects to the admissibility and the degree of procedural complication should be taken into consideration (Case Law of the Boards of Appeal, 3rd edition, 1998, page 303).

In the present case, D12 is highly relevant, being novelty destroying for claim 1 of the main request. On the other hand, the admission of this document didn't cause serious procedural complications, in that there was enough time left for the respondent to make a thorough evaluation, which was actually put forward in his letter of 10 January 2000 so that it could be taken into account in the discussions at the oral proceedings. For that reason, the late introduction of that document did not cause an undue burden on the respondent, which could have been in conflict with his procedural rights.

Accordingly document D12 and the related document D13 have been considered by the Board.

4.3 As a rule, a case should be remitted to the first instance, if a new document is so relevant that it has considerable influence on the decision to be taken. A remittal is, however, not appropriate if the Board is able to deduct from the reasoning of the decision under appeal how the Opposition Division would have decided had it known the late filed document (see decision T 557/84).

In the present case the decision under appeal, page 6, states that the subject-matter of claim 1 of the main submission differed from the article of document D4 only in that the body-covering layer of the invention was made from a spun-bonded layer. Further on page 8, last paragraph, it is stated that the problem of the invention starting from the teaching of document D4 was only solved by a spun-bonded cover layer. The late filed document D12 discloses a spun-bonded cover layer, see column 6, line 52 onwards. Consequently, the Opposition Division would have revoked the patent had it known document D12. Obviously, a remittal to the first instance, when it is clear which position will be taken on the relevant issue, would be a purely formalistic exercise not serving any purpose nor being in the interest of the parties in the proceedings.

4.4 Novelty is not a fresh ground for opposition having been introduced in the proceedings according to Rule 55(c) EPC. The fact that this ground has not been maintained during the opposition procedure because at that time it was established that no adequate documents were available to support that ground, is irrelevant, see Case Law of the Boards of Appeal, 3rd edition, 1988 page 474.

5. *Novelty and inventive step*

5.1 Document D12 discloses a disposable liquid-absorbing article such as a sanitary napkin (column, lines 6 to 8) comprising an absorption body 15 surrounded by a casing which is liquid permeable at least in its portion facing the user of the article, the liquid-permeable body-contacting portion 10 of the casing consists of a thin, spun-bonded fibrous fabric layer composed of a thermoplastic and therefore hydrophobic material (column 6, lines 12 to 16, and lines 52 to 54) whereby a similarly constructed hydrophobic fibrous layer consisting of melt-bonded (column 5, lines 36 to 54) fibre fabric 14a is applied between said casing portion 10 and the absorption body 15. Its intended function implies further that said layer 14a has a surface weight which is greater than that of the aforementioned casing portion 10.

Accordingly the subject-matter of claim 1 of the main request is not novel.

The argument of the respondent that the layer 14a of document D12 was absorbent is irrelevant because claim 1 of the main request does not claim neither an absorbent nor a non-absorbent layer 14a.

The layer 14a according to document D12 consists of a thermoplastic material, which implies its hydrophobic properties, since no special measures are disclosed to change these intrinsic properties.

The argument of the respondent that document D12 together with document D13 discloses a very wide range



of basis weights for the cover, most of them not fulfilling the conditions of the claim, can not be followed because document D13 does not specifically refer to covers of sanitary napkins, but also, for example, to carpets, see column 1, lines 24, 25.

- 5.2 Claim 1 of the first auxiliary request contains the additional feature that the heat-bonding is only local and that it creates cushion-like protuberances. This feature is already known by document D12, see in particular figures 2 to 4 and column 5, from line 7 (integration sites 11 created by fusing).

Accordingly claim 1 of the first auxiliary request is also not novel.

- 5.3 The additional features concerning the value of the basis weight of the cover and of the intermediate layer contained in claim 1 of the second and third auxiliary request (15 g/m<sup>2</sup> and 20-30 g/m<sup>2</sup> respectively) may have been found by a normal workshop activity directed to optimize anti-rewetting and do not involve an inventive step. The values given therein are furthermore common in the field, see for example for the cover: 5-15 g/m<sup>2</sup>, page 2, line 31 and for the second layer: 8-25 g/m<sup>2</sup>, page 2, lines 34 to 35 of document D4. Contrary to the statement of the respondent, the problems to be solved by the invention and by the garment of document D12 are similar. The invention has the purpose of preventing rewetting. Rewetting means that the liquid which has been absorbed by the core layers for some reasons resurfaces on the cover. Document D12 is directed inter alia to attain a rapid transfer of liquids from the cover into the absorbent matrix, see column 3, from

line 5. It is clear that solving the problem of document D12 improves also the anti-rewetting qualities of the garment.

Accordingly, the subject-matter of claim 1 of the second and third auxiliary requests does not involve an inventive step.

5.4 The additional feature of claim 1 of the fourth auxiliary request that the cover and the intermediate layer are not secured in relation to one another within the body-contacting area during use of the article is neither disclosed nor hinted at by document D12 nor by other documents of the available prior art. The purpose of the invention over document D12 is to avoid stiffness and irritating frictional contact with the skin of the user but still prevent rewetting. The stiffness is caused in the garment according to document D12 by the integration of the second component with the cover by local bonding (column 3, lines 11 to 12; lines 57 to 63; column 4, lines 11 to 24).

The presence of cushion-like protuberances on the surface of the intermediate layer due to local binding are such that the prevention of rewetting is improved, whereas the absence of bonding between the cover and the intermediate layer still assures a high level of comfort. This combination of features goes against the teaching of document D12 for which the presence of bonding between the cover and the intermediate layer is essential.

Contrary to the statement of the appellant, it is not sufficient to state that the teaching of using two

independent layers is common knowledge in the field, in order to successfully challenge the inventiveness of the claim; it would have been necessary to prove that this knowledge would lead the skilled person in the field to modify the teaching of document D12 in the sense of the invention.

Accordingly the subject-matter of claim 1 of the fourth auxiliary request involves an inventive step.

## **Order**

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

1. The decision under appeal is set aside
  
2. The case is remitted to the first instance with the order to maintain the patent in amended form on the basis of claims 1 to 5 according to the fourth auxiliary request submitted with letter of 13 December 1999 and description and figures as granted.

The Registrar:

The Chairman:

V. Commare

W. D. Weiß