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**D E C I S I O N**  
**of 8 June 2000**

**Case Number:** T 0739/97 - 3.2.6

**Application Number:** 91906947.6

**Publication Number:** 0523107

**IPC:** A61F 13/48

**Language of the proceedings:** EN

**Title of invention:**

A sanitary napkin or incontinence guard

**Patentee:**

SCA Hygiene Products AB

**Opponent:**

- 01: Paul Hartmann Aktiengesellschaft  
02: The Procter & Gamble Company  
03: Kimberly-Clark Corporation

**Headword:**

-

**Relevant legal provisions:**

EPC Art. 54, 56, 69, 84, 123(2)

**Keyword:**

"Interpretation of ambiguous features added to the claims in the light of the description (no)"

"Novelty (yes)"

"Inventive step (no, second and third auxiliary request)"

"Support in description (no, main and first auxiliary request)"

**Decisions cited:**

T 0170/87

**Catchword:**

-



Case Number: T 0739/97 - 3.2.6

**D E C I S I O N**  
**of the Technical Board of Appeal 3.2.6**  
**of 8 June 2000**

**Appellant I:** SCA Hygiene Products AB  
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**Decision under appeal:**      **Decision of the Opposition Division of the  
European Patent Office posted 30 May 1997  
revoking European patent No. 0 523 107 pursuant  
to Article 102(1) EPC.**

**Composition of the Board:**

**Chairman:**    P. Alting van Geusau  
**Members:**    H. Meinders  
                  M. Vogel

## Summary of Facts and Submissions

- I. The appeals are from the interlocutory decision of the Opposition Division sent to the parties on 30 May 1997 maintaining European Patent No. 0 523 107 in amended form.
- II. In its decision the Opposition Division considered that the subject-matter of claim 1 of the main request and the first auxiliary request did not present novelty over the disclosure:
- D1: US-A-4 676 784.
- However, the subject-matter of claim 1 according to the second auxiliary request filed at the oral proceedings held on 12 March 1997 fulfilled the requirements of the EPC.
- III. Of the documents considered in the opposition proceedings the following are relevant for the present decision:
- D3: DE-A-3 600 420
- D15: GB-A-2 144 995
- D18: EP-A-0 210 968.
- IV. Against this decision an appeal was filed by the Patentee (Appellant I) on 4 July 1997, with payment of the appeal fee on that day. The statement of grounds of that appeal was filed on 8 October 1997.

Opponent 01 (Appellant II) also filed an appeal, on 8 August 1997, with payment of the appeal fee on the same day. The statement of grounds of that appeal reached the EPO on 9 October 1997. In its appeal Appellant II referred to two new documents:

D26: DE-A-3 719 069

D27: FR-A-2 589 047.

- V. With letters of 20 February 1998 and 28 April 1998, respectively, Appellants I and II reacted to each other's appeal. Appellant I requested the Board not to admit the newly cited documents as they were late filed.

In preparation of oral proceedings the Board, pursuant to Article 11(2) of the Rules of Procedure of the Boards of Appeal, sent a communication setting out its preliminary opinion on the case. It considered *inter alia* that the newly cited documents appeared relevant so that it was intended to admit them into the proceedings.

Appellant I thereupon filed six new auxiliary requests with letter of 28 April 2000, replacing the previous auxiliary requests.

- VI. Oral proceedings were held on 8 June 2000. The Respondents (Opponents 02 and 03) had notified the Board that they would not attend. During the oral proceedings Appellant I filed a main and three auxiliary requests based on its previous requests, of which the respective claims 1 read as follows (*the changes vis-a-vis the claim as granted are in Italics*):

Main request:

"1. An absorbent article, such as a sanitary napkin, a panty protector or an incontinence guard, comprising an absorbent pad enclosed in a casing (1,2) which comprises a first, liquid-permeable sheet (1) and a second liquid impermeable sheet (2), the pad comprising a first and a second absorbent layer (5,6) directly connected to each other, the first absorbent layer *consisting of* a mixture of hydrophilic fibres and *10-50 per cent by weight of* superabsorbent material, whereas the second absorbent layer exhibits good liquid-spreading ability, characterized in that the first absorbent layer (5) is disposed immediately inside the liquid-permeable sheet (1) on that side of the article which is intended to face towards the wearer in use and that the second absorbent layer (6) is placed *completely* beyond the first absorbent layer (5) relative to the liquid-permeable sheet (1) and comprises a liquid-absorbing fibre material which has been highly compressed."

First auxiliary request:

"1. An absorbent article, such as a sanitary napkin, a panty protector or an incontinence guard, comprising an absorbent pad enclosed in a casing (1,2) which comprises a first, liquid-permeable sheet (1) and a second liquid impermeable sheet (2), the pad comprising a first and a second absorbent layer (5,6) directly connected to each other, the first absorbent layer *consisting of* a mixture of hydrophilic fibres and *10-50 per cent by weight of* superabsorbent material, whereas the second absorbent layer exhibits good liquid-spreading ability, characterized in that the

first absorbent layer (5) is disposed immediately inside the liquid-permeable sheet (1) on that side of the article which is intended to face towards the wearer in use *and provides a barrier against rewetting and prevents liquid spreading* and that the second absorbent layer (6) is placed beyond the first absorbent layer (5) relative to the liquid-permeable sheet (1) and comprises a liquid-absorbing fibre material which has been highly compressed."

Second auxiliary request:

"1. An absorbent article, such as a sanitary napkin, a panty protector or an incontinence guard, comprising an absorbent pad enclosed in a casing (1,2) which comprises a first, liquid-permeable sheet (1) and a second liquid impermeable sheet (2), the pad comprising a first and a second absorbent layer (5,6) directly connected to each other, the first absorbent layer *consisting of* a mixture of hydrophilic fibres and 10-50 per cent by weight of superabsorbent material, whereas the second absorbent layer exhibits good liquid-spreading ability, characterized in that the first absorbent layer (5) *is a non-apertured layer* and is disposed immediately inside the liquid-permeable sheet (1) on that side of the article which is intended to face towards the wearer in use and that the second absorbent layer (6) is placed beyond the first absorbent layer (5) relative to the liquid-permeable sheet (1) and comprises a liquid-absorbing fibre material which has been highly compressed."

Third auxiliary request:

"1. An absorbent article, such as a sanitary napkin, a



panty protector or an incontinence guard, comprising an absorbent pad enclosed in a casing (1,2) which comprises a first, liquid-permeable sheet (1) and a second liquid impermeable sheet (2), the pad comprising a first and a second absorbent layer (5,6) directly connected to each other, the first absorbent layer *consisting of* a mixture of hydrophilic fibres and *10-50 per cent by weight of* superabsorbent material, whereas the second absorbent layer exhibits good liquid-spreading ability, characterized in that the first absorbent layer (5) is disposed immediately inside the liquid-permeable sheet (1) on that side of the article which is intended to face towards the wearer in use and that the second absorbent layer (6) is placed beyond the first absorbent layer (5) relative to the liquid-permeable sheet (1) and comprises a liquid-absorbing fibre material which has been highly compressed, *and is narrower than the first absorbent layer (5).*"

VIII. Appellant I requested that the decision of the Opposition Division be set aside and the patent be maintained in amended form according to the main or one of the three auxiliary requests.

Appellant II requested that the decision under appeal be set aside and the patent be revoked in its entirety.

IX. The arguments of Appellant I can be summarised as follows:

Main request:

By the added feature "completely beyond" the subject-matter of claim 1 distinguished itself from the

disclosures of D1 as well as D26. A basis for this amendment could be found in the figures and in the description of the application as filed.

First auxiliary request:

The basis for this amendment could be found in the description of the application as filed.

Second auxiliary request:

The feature "non-apertured first layer" was primarily meant to be a disclaimer, to avoid the accidental novelty-destroying content of D1, which clearly involved an apertured first layer of the absorbent article. If the feature should be considered as a negative feature to make a distinction over the article known from D1 the basis therefor could be found in the figures and in the statement that the first layer acted as a barrier against rewetting, which was not possible if there were apertures in it.

Novelty of the subject-matter of claim 1 vis-a-vis the absorbent article known from D26 resulted from the fact that the second layer was "highly compressed", meaning "more compressed than the first layer", **and** that the second layer exhibited good liquid-spreading ability.

Inventive step should be recognised since the invention overcame a prejudice against putting the superabsorbent material (hereafter referred to as "SAM") in the first layer where it normally caused gel blocking, a condition by which liquid was prevented from flowing to the second (wicking) layer. As a result of that prejudice the prior art presented a first layer to

provide the liquid spreading, and a second layer with the SAM. Also, in the absorbent article of D26 the liquid spreading was taken care of first, by providing grooves on the outer surface of the first layer, therefore there would be no need in that arrangement to provide for a more compressed wicking layer under the first layer.

Third auxiliary request:

The basis for the added feature was provided by the figures as well as the description of the original application.

Regarding novelty and inventive step the arguments presented above for the second auxiliary request applied here a fortiori, considering that the additional feature of the second layer being narrower than the first layer was neither known nor suggested by D26.

- X. The arguments submitted by Appellant II were basically the following:

Main request:

The added feature "completely beyond the first layer" introduced unclarity into the claim as it was not a feature with a clear meaning. It involved a number of different technical possibilities for which there was not sufficient support in the original application, e.g. the second layer could extend in a peripheral sense beyond the first layer. It further was not consistent with the embodiment of Figure 5, which showed a first layer extending to the same level as the

second layer.

First auxiliary request:

As regards the feature "provides a barrier": this was not a clear feature, and could not be put into practice by the skilled person as the description provided no information on how to provide this barrier. As regards the feature "prevents liquid spreading": this feature was only part of the actual feature disclosed, as it did not specify in which direction the liquid spreading should be considered.

Second auxiliary request:

As a disclaimer in relation to D1 the feature "non apertured" should not be allowed because disclaimers were only acceptable to avoid state of the art which was accidentally novelty destroying. In the present case, however, D1 was also important for assessing inventive step. Further, disclaimers were only allowable to disclaim specific values or parts of ranges from a range claimed. This presupposed a range having been disclosed in the claim, which was not the case here.

As a negative feature it should not be allowed according to the principles set out in decision T 170/87; but even if allowed it could not distinguish claim 1 from D26.

The feature "highly compressed" could not distinguish the second layer from the one disclosed in D26 as it was a feature without a specific meaning.

If one considered that the wording "highly compressed" meant that the second layer was "more compressed than the first layer", as the Opposition Division had done, it was evident that the second layer of the article disclosed in D26 had to be more dense than the first layer. It was further obvious to incorporate into the article of D26 the teachings of D3, which had the advantage of providing more stiffness to the article as well as better liquid spreading in the article. There was sufficient documentary evidence in the file showing similar arrangements in which the second layer was more dense than the first layer. Gel blocking was only a problem at high concentrations of SAM in the first layer. With lower SAM concentrations in the first layer there was no such problem; wicking could then be provided by the second layer.

Third auxiliary request:

Firstly this request should not be admitted as it was late filed, only at the oral proceedings, so Appellant II had not had the opportunity to prepare itself therefor. Secondly, the feature "narrower than the first layer" introduced unclarity into the claim. Finally, the added feature resulted in an inadmissible extension of subject-matter as it had been consistently disclosed together with the feature that the second layer was shorter than the first layer. The latter did not, however feature in the claim.

Novelty was not an issue because D26 did not disclose the second layer as being narrower than the first layer. For inventive step one should start from D3, from which the claim distinguished itself only by the feature of the presence of SAM in the first layer in a

quantity of 10-50 percent by weight. There was no prejudice against using SAM in the first layer and the advantages of doing this were evident to the skilled person from D26; inventive step should thus be denied.

## Reasons for the Decision

1. The appeals are admissible.
2. *Amendments (Articles 84 and 123(2) and (3) EPC)*
  - 2.1 In the claims 1 of all requests the following indicates amendments that have been made to claim 1 as granted, together with the basis for the amendments in the originally filed application documents:
    - the first absorbent layer now **consists** of a mixture of hydrophilic fibres and SAM instead of "comprises" such a mixture. The basis therefor can be found on page 4, lines 15 to 27 and page 9, lines 13 to 21 of the original application, which do not refer to anything other than fibres and SAM being in the first layer.
    - the SAM is present in an amount of 10-50 % by weight of the first layer including the SAM. The basis therefor is to be found on page 9, lines 16 to 21 of the original application.

As these amendments also result in a further limitation of the subject-matter of the claim, they fulfil the requirements of Article 123(2) and (3) EPC.

- 2.2 Main request

- 2.2.1 In addition to the above amendments claim 1 of this request additionally claims that the second absorbent layer is placed **completely** beyond the first absorbent layer.
- 2.2.2 Appellant I argued that this additional information was derivable from Figures 2 and 5 of the application and also followed from the fact that had there been parts of the second layer which would come into contact with liquid earlier than the first layer because the first layer did not cover the second layer completely, the description would have mentioned this. Moreover, because the first layer was described as a barrier against rewetting it was immediately evident that the first layer completely covered the second layer.
- 2.2.3 However, the Board considers that there is no unambiguous disclosure of such a specific feature in the original application.

Firstly the Figures 2 and 5 show only sections of the absorbent article and of these only Figure 2 shows the second layer as being "beyond" the first layer in the sense that in respect of an imaginary plane dividing the first and the second layer the second layer lies entirely on one side of that plane and the first layer lies entirely on the other side of that plane. In contrast thereto the section of Figure 5 shows the first layer as extending on the lateral sides of the article up to the backsheet. The first layer thus also extends into the side of the imaginary dividing plane between the first and the second layer. In that embodiment the second layer obviously does not extend "completely beyond" the first layer.

Secondly, the expression "the second layer is placed completely beyond the first layer" is not limited to an arrangement wherein the first and second layers lie entirely on different sides, respectively, of the imaginary plane dividing the first and the second layer as referred to above or wherein the first layer completely covers the second layer. It also applies to an extension in the plane of the layers, i.e. the second layer extending peripherally outwards further than the first layer. For this, however, there is no support in the description.

- 2.2.4 Appellant I also submitted that this additional feature should be interpreted in the light of the description, pursuant to Article 69 EPC. The description made it clear that the first layer was a barrier against rewetting from the second layer; this could only mean that the second layer was completely beyond the first layer, no parts thereof receiving liquid earlier than the first layer.

The Board does not share this opinion. If a claim is amended during opposition or opposition appeal proceedings, such amendments should be clear in themselves and in the context of the claim, so as to comply with Article 84 EPC and not be dependent on interpretation in the light of the description.

- 2.2.5 This amendment is thus contrary to the requirements of Articles 84 and 123(2) EPC. The main request cannot be allowed for that reason.

### 2.3 First auxiliary request

- 2.3.1 In claim 1 of this request, in addition to the



amendments mentioned under point 2.1, it is specified in the form of functional features that the first absorbent layer **provides a barrier against rewetting and prevents liquid spreading.**

2.3.2 Appellant I argued that it was clear from the application documents (page 4, lines 32 to 35; page 5, lines 5 to 9) that this function was only provided by the SAM mixed with the fibres of the first layer, which absorbs the liquid which is pressed back under pressure during use from the second layer into the first layer and which keeps the liquid concentrated at the location of the SAM as soon as it has entered the first layer. The claim needed no further specification.

2.3.3 According to the case law of the Boards of Appeal a functional feature is allowable in a claim, provided *inter alia* that the feature provides the skilled person with a clear instruction to reduce it to practice without undue burden (see e.g. T 68/85, OJ EPO 1987, 228).

In the present case the functional features "providing a barrier" and "preventing liquid spreading", however, stand on their own, no connection in the claim being made with the presence of the SAM in the mixture with the fibres of the first layer as providing this result. Thus the functional features cover a broad range of technical possibilities of achieving the indicated results around the particular combination of features involved, for which further possibilities there is no support in the description.

Thus claim 1 of the first auxiliary request does not fulfil the requirement of Article 84 EPC of adequate

support in the description. This request cannot, therefore, be allowed.

#### 2.4 Second auxiliary request

2.4.1 In addition to the features mentioned under point 2.1 above claim 1 of this request mentions that the first absorbent layer is **non-apertured**, so as to distinguish it from the arrangement known from D1, which discloses an apertured first layer.

2.4.2 In view of the fact that the first absorbent layer is consistently described (see page 4, lines 15 to 35 and page 11, lines 14 to 17 of the description) as providing a barrier against rewetting and that such a function is achieved by the first layer consisting of a fluffy mixture of fibres and SAM, it is considered to be implicit to a skilled person that the first layer should be without apertures. Otherwise the liquid could pass unhindered through the first layer, back to the topsheet.

2.4.3 In the present case the principle of decision T 170/87 (OJ EPO 1989, 441), invoked by Appellant II in support of the argument that this negative feature could not be derived unequivocally from the application as filed, does not apply. In the case subject to that decision the negative feature was to be derived solely from the (schematic) drawings which did not show such a feature. In the present case there are not only the figures clearly showing no apertures in the first layer, there is also sufficient basis in the above mentioned parts of the description to consider it implicit that there are no apertures in the first layer.

2.4.4 In view of the fact that there is a basis in the original application for the incorporation of the negative feature "non-apertured", there is no need to discuss the further point raised by Appellant II that this feature was not admissible as a disclaimer to avoid the novelty destroying document D1.

Claim 1 of this request thus fulfils the requirements of Article 123(2) EPC. As it concerns a feature further limiting the scope of the claims, also the requirements of Article 123(3) are fulfilled.

2.5 Third auxiliary request

2.5.1 Because the third auxiliary request was filed during the oral proceedings Appellant II considered this request late filed and requested not to admit it.

The Board cannot concur with Appellant II in this matter. It should be expected by opponents that the patentee might file an auxiliary request wherein subject-matter of dependent claims as granted is added to the main claim in an attempt to save the patent from revocation. If their subject-matter is technically simple and consists of only one feature an opponent should be able, if necessary after an appropriate interruption of the oral proceedings, to present his case. In the present case the subject-matter of dependent claim 7 had in any event already been addressed in the notice of opposition.

2.5.2 In addition to the features mentioned under points 2.1 and 2.4 above, claim 1 of this request involves the inclusion of the subject-matter of the granted dependent claim 7: **the second absorbent layer is**

**narrower than the first absorbent layer.**

2.5.3 A basis for this amendment can be found in the originally filed claim 7 and in that page 8, lines 1 to 4 specifically mentions this feature as helping to avoid the risk of chafing the skin of the wearer.

2.5.4 Appellant II argued that this feature was unclear, because it did not specify in which direction of the article and/or to what extent the second layer should be narrower.

However, the Board is of the opinion that with absorbent articles in the form of pads as constitute the subject-matter of the claims, the skilled person knows that these generally have a form extending further in a longitudinal direction than in a lateral direction. Thus it is clear that the "narrowness" of the second layer is meant to be in the lateral direction.

Further, the figures of the application as filed provide sufficient illustration of this, such that it is not necessary to specify in the claim the extent over which the second layer is narrower.

3. *Novelty of claim 1 according to the second auxiliary request (Article 54 EPC).*

3.1 Novelty of the subject-matter of claim 1 *vis-à-vis* the article disclosed in D1 is established in that the first absorbent layer is a non-apertured layer.

3.2 Novelty of the subject-matter of claim 1 over the article disclosed in D26 follows from the fact that

this document does not disclose the second layer of the absorbent article as being "highly compressed".

3.2.1 The term "highly compressed" used in the claim needs further consideration to establish its technical meaning in the context of the claimed article. From the description of the patent in suit it can be derived that this term means: "the second layer is more compressed than the first layer" so as to exhibit better liquid spreading ability than the first layer. This was also established by the Opposition Division in the decision under appeal (point 5.2). The basis therefor can be found on page 5, lines 9 to 31 and page 11, lines 5 to 17 of the application as filed.

3.2.2 Appellant II argued that in comparison to the first layer the second layer of the article disclosed in D26, because of the absence of SAM, was bound to have a higher density because:

- the fluffy first layer in that article had to be able to absorb the sudden gushes of liquid quickly, it had to be more porous, thus less dense, than the second layer
- the SAM held the pores between the fibres more open
- the second layer had to be stable enough to be folded around the loose material of the first layer so as to hold it together.

The Board cannot agree with this argumentation since there is no indication whatsoever in D26 of a difference in density between the two layers being

important.

There is no need to provide the first layer as a less dense layer so as to absorb the gushes of liquid quickly, as D26 already solves this problem by other means: increasing the surface of the first layer by means of grooves in the upper surface of the first layer.

Finally, a compression of the second layer so as to permit folding around the first layer and holding it together cannot unambiguously be derived from D26 either, as it is not necessary that the second layer should be more compressed to perform this function. Other technical means, e.g. the tissue layers 16 and 17, glued between the fibrous material and the respective inner and outer sheets, may provide this function as well.

- 3.2.3 Appellant I argued that a further distinguishing feature of claim 1 in respect of the article of D26 should be recognised in that the second layer had **better** liquid spreading abilities than the first layer.

Having regard to the wording of the claim: "the first absorbent layer consisting of a mixture of hydrophilic fibres and 10-50% by weight of SAM, whereas the second absorbent layer exhibits good liquid spreading ability", in the context of the originally filed description (see page 5, lines 7 to 9, which mentions that the SAM "effectively prevents liquid from spreading around the wetting point in the first layer"), the absence of SAM in the second layer is beneficial to liquid spreading.

The first layer of the article of D26 has SAM present among the fibres in a concentration within the range claimed in claim 1, and the second layer has none. The mere presence of the SAM in the first layer in this concentration thus will have the same limiting effect on the spreading of liquid in the first layer as is disclosed in the patent subject to appeal and consequently the second layer of the article of D26 will have a better liquid spreading ability than the first layer.

The feature "the second layer exhibits good liquid spreading ability" therefore cannot distinguish the subject-matter of this claim from the absorbent article of D26.

3.3 As the subject-matter of claim 1 also distinguishes itself over the article disclosed in D3 by the feature of SAM being present in the first absorbent layer, and none of the other documents in the opposition proceedings (upon which Appellant II no longer relied) discloses all features of this claim, the Board finds that the subject-matter of claim 1 of the second auxiliary request is novel.

4. *Inventive step of the subject-matter of claim 1 of the second auxiliary request (Article 56 EPC)*

4.1 Considering the subject-matter of this claim the parties and the Board are in agreement that D26 represents the closest prior art. The absorbent article of claim 1 differs from the article known from D26 in that the second layer is more compressed than the first layer. By incorporating this feature two non-related objects are achieved:

- avoidance of deformation of the article in use (see page 7, lines 17 to 32 of the application as filed).
- preventing concentration of liquid at the location where it has entered the article, i.e. how to improve the distribution of liquid (see page 5, lines 16 to 31),

4.2 Such objects are well known in this field, see e.g. D3, page 6, second paragraph; page 7, first and second paragraph; page 8, last sentence. These passages refer to the liquid remaining near the location where it entered the hitherto known articles, not being distributed along its length and thus resulting in skin irritation as well as the absence of rigidity in the known articles, resulting in the article folding in the crotch area so that liquid was pressed sideways out of the article.

4.3 D3 (see page 9, third paragraph and page 11, third paragraph) also provides the skilled person with the solution to such problems: providing the second layer as one which is more compressed than the first layer. This results in the second layer drawing away liquid from the first layer (away from the body side, thus preventing irritation of the skin), a transportation of liquid along the second layer (thus avoiding rewetting resulting from the liquid being pressed out of the article) as well as a rigid backing of the first layer (thus counteracting crumpling of the article). There are no technical obstacles to applying the teaching of D3 to the article known from D26 as they are both very similar. It can thus be expected that the skilled person will employ the solution of a more compressed



second layer as provided by D3, in view of the objects involved.

4.4 Appellant I argued that the general belief at the time of filing the application was that the SAM in the first layer would absorb all liquid and therefore would block all transport of further liquid to the second layer. In support of this allegation Appellant I pointed out that the first layer of the article disclosed in D26 had grooves on its body side, which indicated that the liquid should be spread first before it entered the first layer. In such a configuration it would not make sense to provide the second layer as a wicking layer.

Further evidence could be found in D1, where the layer containing the SAM was provided with apertures for letting the liquid reach the second, wicking layer. Other prior art documents also disclosed the deliberate choice of putting the SAM not in the first, but in the second layer and having the first layer function as the wicking layer, without SAM.

For the following reasons Appellant I's submissions are not considered convincing:

Firstly, the known idea of providing a rigid backing of the first layer to avoid crumpling of the article and the resulting squeezing out of liquid is considered a sufficient reason for the skilled person to apply the teaching of D3 to the article known from D26 if stability problems arose. This is a matter independent of the question whether absorption of liquid by the SAM in the first layer results in gel-blocking and whether wicking should take place in the first or in the second layer.

Secondly, attention is drawn to other prior art disclosures on file in which the presence of SAM mixed with fibers in a first layer was apparently not considered detrimental to the passage of liquid towards a second more compressed wicking layer. For example, D15, page 2, lines 6 to 16 and D18, page 1, line 27 to page 2, line 30, page 4, line 6 to page 6, line 7 and page 7, lines 9 to 11 show SAM in the first layer. In particular the latter document suggests having separate layers and a low concentration of SAM in the first layer allowing the liquid to pass through towards the second layer having a higher concentration of SAM. The density of the second layer is higher than that of the first layer.

Based on the available prior art there is thus no reason to assume a **general** prejudice against putting SAM in a fibre matrix close to the body side of the article and a wicking function being performed by the layer at the garment side.

4.5 The Board therefore comes to the conclusion that the subject-matter of claim 1 of the second auxiliary request lacks inventive step.

5. *Inventive step of claim 1 of the third auxiliary request (Article 56 EPC)*

5.1 This claim consists of claim 1 of the second auxiliary request with the added feature of the second layer being narrower than the first layer. As that claim was considered to present novelty, only inventive step need be discussed.

5.2 The starting point for the discussion of inventive step

remains D26. The feature concerning the second layer being narrower than the first layer is not disclosed in D26. It solves the further distinct problem of adapting the article to the crotch region of the wearer, while still maintaining rigidity of the article.

- 5.3 This problem, as well as its solution of making the second layer narrower than the first layer, is equally known from D3, see page 14, second paragraph, mentioning this object *expressis verbis*.

Also here the skilled person will see the technical possibilities presented by this arrangement and will have no difficulty in incorporating this known arrangement in the article known from D26 to achieve the results wanted.

- 5.4 The absorbent material of the first layer of the article disclosed in D26 present in the form of cellulose flakes which are held together by the second layer being folded thereover along the sides is no technical hindrance for the skilled person to reduce the width of the second layer as suggested by D3 so that it is less than that of the first layer. The reason for this is that D3 also relates to articles comprising two layers of flaked pulp ("flockiger Pulpe") and shows that with the disclosed arrangement of the cover sheets and the form presented in Figure 5 it is possible to produce a properly working article in which the cellulose flake structure of the first layer is wider than the second layer. Holding the first layer together by folded flaps of the second layer is apparently not of primary importance when a stiff compressed second layer is used and the combination is maintained between a topsheet and a backsheet sealed

together along the periphery.

- 5.5 Thus the subject-matter of claim 1 of the third auxiliary request also lacks inventive step.
6. None of the requests of Appellant I being allowable, the patent has to be revoked.

### **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. Patin

P. Alting van Geusau