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**D E C I S I O N**  
**of 9 November 1999**

**Case Number:** T 0177/98 - 3.2.4

**Application Number:** 88121163.5

**Publication Number:** 0320991

**IPC:** A41B 13/04

**Language of the proceedings:** EN

**Title of invention:**

A disposable incontinence garment or training pant

**Patentee:**

Kimberly-Clark Corporation

**Opponent:**

The Procter & Gamble Company  
Mölnlycke AB

**Headword:**

-

**Relevant legal provisions:**

EPC Art. 54, 56, 113(1)  
EPC R. 68(2), 89

**Keyword:**

"Novelty (yes)"  
"Inventive step (yes)"

**Decisions cited:**

T 0450/89, T 0677/91, T 0511/92, T 0013/84 T 0002/83,  
T 0056/87, T 0005/81

**Catchword:**

-



Case Number: T 0177/98 - 3.2.4

**D E C I S I O N**  
**of the Technical Board of Appeal 3.2.4**  
**of 9 November 1999**

**Appellant I:** The Procter & Gamble Company  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 12 December 1997  
rejecting the oppositions filed against European  
patent No. 0 320 991 pursuant to Article 102(2)

**EPC.**

**Composition of the Board:**

**Chairman:** C. A. J. Andries  
**Members:** R. E. Gryc  
C. Holtz

## Summary of Facts and Submissions

I. The appellants (opponents I and II) lodged appeals, received at the EPO on 13 January and 9 February 1998 respectively, against the decision of the Opposition Division, dispatched on 12 December 1997, rejecting the oppositions against the European patent EP-B-0 320 991.

The appeal fees were paid on 20 January and 9 February 1998 respectively and the statements setting out the grounds of appeal were received at the EPO on 6 April 1998 (opponent II) and 20 April 1998 (opponent I).

II. The appellants filed oppositions against the patent as a whole on the ground of lack of novelty and inventive step (Article 100(a) EPC) of the subject-matter of the claims mainly in view of the following prior art documents:

D11: GB-A-1 520 740 (acknowledged in the Patent Specification),

D12: US-A-4 690 681

D14: EP-A-0 213 642

D15: US-A-4 205 679 and

D20: EP-A-0 187 728

The Opposition Division held that the grounds for opposition did not prejudice the maintenance of the patent unamended and rejected the oppositions.

III. With his statement of the grounds of appeal,  
Appellant I filed the following documents:

D23: EP-A-0 213 642 (identical to D14);

D24: Preliminary technical information of August 1976  
from the Textile Fibers Department of Du Pont de  
Nemours International S.A., Geneva, entitled "Weft  
Knitted Fabrics with Lycra Elastane Fibre" - front  
page and page 12.

D25: Preliminary technical information of October 1976  
from the Textile Fibers Department of Du Pont de  
Nemours International S.A., Geneva, entitled  
"Manufacturing of Apparel from Woven Elastic  
Fabrics containing Lycra", front page and page 2.

Appellant I contended that the patentee would have  
acknowledged that all the technical problems allegedly  
solved in the invention relating to shape, comfort and  
fit have already been solved by the provision of the  
elastically stretchable outer cover in D14 (i.e. D23).  
He also contended that, at the priority date, the  
skilled person would have been aware of the common  
general knowledge disclosed in D24 and D25 about  
stretchable Lycra fabrics and that he would have read  
the references in D12 or D15 to "stretchable fabric" in  
the context of this common general knowledge.

Appellant I was also of the opinion that there was no  
difference between a "catamenial device" of the general  
type shown in D12 and the garment claimed in Claim 1  
since catamenial pants for small women were often  
smaller than training pants which may start being used

after the baby is 30 months old. He considered that the reference in Claim 1 to "elastic stretchable" merely related to the use of elastic fabrics such as, for example, those shown in D24 or D25 which were available at the priority date.

Appellant I accepted that the claimed invention was novel over D11 and D12 but he maintained his objection of lack of novelty over the garment shown in Figure 17 of D15 which, in his opinion, disclosed an absorbent pad having side edges certainly joined to the impervious cover of the absorbent assembly to form a pant-like garment having a seam joining the side members. Since, moreover, Claim 1 did not exclude the possibility of the outer cover of the absorbent assembly being made of elastic stretchable material or being a continuation of the elastic stretchable material of the side panels and since D15 taught gathering means to provide elasticity around the leg openings, Appellant I was of the opinion that the question of whether or not D15 anticipated Claim 1 depended on whether or not the outer cover of the pant known from D15 was made of elastic stretchable material. He concluded that, in view of the common general knowledge of D24 and D25, anyone reading D15 would understand it to teach the use of elastic stretchable material and would contemplate using this material.

Appellant I also argued that providing a form-fitting, self-adjusting, disposable garment was the only problem to be solved by the invention, said problem having already been solved by D14 (i.e. D23), D12 and D15, especially when construed in the light of common

general knowledge and the stretchable fabrics which would inherently be used by anyone at the priority date.

Appellant I contended that either D12 or D15 or D20 could be considered as disclosing the prior art closest to the invention.

In his opinion, D12 could be held as the closest prior art since there was no structural difference between a training pant and a catamenial device having an absorbent pad extending from the front waist to the back waist and since the side panels would clearly be made of elastically or resiliently stretchable material. According to Appellant I, to start from a blank as in D15 or D20 and side seam it in order to simplify manufacturing the products of D12 would be obvious since it was common general knowledge from D15 and D20 to provide a seam down each side of training pants. Appellant I considered also that, when starting from D15 as the closest prior art, it would be obvious to solve the problem of maintaining the training pant snugly in place after a discharge by replacing the micro-pleated fabric mentioned in D15 by the stretchable fabrics of D24 and D25 belonging to the common general knowledge at the priority date. If D20 were considered as the closest prior art, the problem should be the poor fit due to a non-elastic cover and the solution would be taught by D14 (i.e. D23) and by the common general knowledge of D24 and D25.

Moreover, according to Appellant I, anyone concerned with the problem of improving the form-fitting and self-adjusting properties of the product of D20 would



replace the overall non-stretched cover of the garment of D20 with a central non-stretched region and elasticated side panels, as shown in D11. The fact that the products of D11 were non-disposable was irrelevant since the same general performance in use was required in non-disposable products as in disposable garments.

In his statement setting out the grounds of appeal, Appellant II (opponent II) argued that all the features of Claim 1 were present in a training panty according to D15. He contended, in particular, that Figure 17 of D15 disclosed a panty comprising an absorbent assembly with a backing layer made of micropleated material having parts extending laterally beyond the side edges of the assembly, these parts constituting stretchable side members which were to be fixed together by side seams in order to form a training panty. Appellant II was of the opinion that since nothing was said in Claim 1 about the amount of extension or elasticity needed, every material having some elasticity, even if it was very limited as the elasticity of a micropleated material, would fall under the definition of Claim 1. Therefore, the panty of D15 should be considered as comprising side panels elastically stretchable to the extent needed for ensuring a good fit.

Appellant II also contended that the aim of the claimed invention was to improve a disposable training pant according to D15 or D20 and that, when trying to solve such a general problem, the skilled person reading D20 would have got therein direct advice to study menstrual and incontinence garments for adults. He explained that, since D20 emphasised the importance for a disposable training pant to simulate cloth underpants,

the skilled person should have studied at first hand the art of reusable garments and consulted D11 where he would have learnt in particular that the provision of elastic side panels to a pants-type garment provided a snug fit and held the absorbent pad against the body of the wearer. According to Appellant II, the skilled person would then have realised that the use of elastic side panels could improve the garment of D20 and he would have been inclined to substitute the four ear portions of the blanks lying outside the absorbent batt by pieces of elastic material; after having formed the side seams in accordance with the teachings of D20, the skilled person would get a disposable training pant having all the features stated in Claims 1 and 18. Appellant II considered that the same reasoning was applicable to improving a training pant according to D15.

Contending that, in the decision under appeal, the Opposition Division had obviously not considered the above mentioned reasoning (i.e. whether, in view of D11, a skilled person would provide a training pant according to D20 with elastic side panels), Appellant II complained of a substantial procedural violation and requested the reimbursement of the appeal fee.

As regards inventive step, Appellant II also argued that the term "elastic" used in the claims must be interpreted to fall within the definition given in the patent description, that the differences between products such as diapers, pants diapers, training pants and incontinence guards were more related to the use than to the construction of these products, and that,

although the micropleated material of D15 had a small resistance to elongation, this resistance was enough to make this material fall within the definition of "elasticity" given in the patent.

The main reason stated by Appellant II for lack of inventive step was that a skilled man facing the general problem of improving a pants-type diaper or a training pant would, at first hand, consult the art of reusable garments and thus D11 where he would learn that elastic side panels provided a better fit and would get the idea of using them to improve a training pant according to D20 or D15. According to Appellant II, it was so simple to add side panels to the article blanks of D15 and D20 that this would not prevent a skilled man from incorporating such a step in the manufacturing process of said articles.

The respondent (patent proprietor) replied that the claims were all limited to training pants specially designed for very young children who were being toilet trained (i.e children of about 15-30 months old), these pants being thus much smaller than any garment for adults and comprising an absorbent pad extending from the front to the rear end portion of the garment.

The respondent pointed out that the fabric forming the sides of the garment of D15 was described as being stretchable but not as being elastic so that D15 thus failed to disclose all the features of Claim 1. According to the respondent, the problem was due in part to the anatomy of very small children and was solved by the use of elastic discrete side panels, such use not being derivable from the pants of D15 or D20.

The respondent also contended that D12 and D23 did not even suggest that the disclosed garments could have elastic panels divided into members joined by seams. The respondent was of the opinion that the invention was not suggested either by D15 or by D20 even when read in combination with D11, D24 and D25.

IV. Oral proceedings took place on 9 November 1999.

The appellants contended that to direct the claims to a child's training pant would not be a structural limitation for the claimed garment since there were no difference in size between pants for small adults and thirty months old babies. They contended also that the term elastic used in Claim 1 was vague and they insisted that the side members be regarded as directly joined to the side edges of the absorbent assembly. The respondent agreed with this interpretation.

The appellants pointed out that the stretchability of the micropleated backing layer of the panty of D15 was far greater than that of the side members of the claimed garment and that said micropleated layer was described as providing a good conformability and fit. The appellants were also of the opinion that as long as the side panels were connected to the absorbent assembly, they should be considered as "joined" within the meaning of Claim 1 and that they did not need to be made separate from the assembly and connected to it afterwards.

The appellants argued that, since the patent gave no clear information about the elasticity of the side panels, the micropleated material used for the panty of

D15 fulfilled the requirements of Claim 1 as regards elasticity and stretchability; it was solely a question of degree of the traction exerted. Therefore, according to the appellants, the subject-matter of Claim 1 was totally anticipated by the panties shown on Figures 17 to 20 of D15

As regards inventive step, Appellant I contended that, no specific problem being stated in the patent, the closest state of the art could be seen either in D12 or in D15 or in D20. Arguing that the panty-like garment of D12 was suitable for incontinence use (see D12: column 5, lines 34, 35 and 64 to 66) and that, as regards the size, there was an overlap between a child and a young woman, he contended that the panty-like garment of D12 could be taken as a starting point. He was of the opinion that the side panels of said known garment were at least as stretchable as the panels of the claimed garment and that, if the feature of Claim 1 concerning the connection of the side panels to the absorbent assembly were interpreted as signifying that the edges of the assembly should support the lateral pulling forces, the difference between the panties of Claim 1 and of D12 would exist solely in the elasticity of their side panels. According to the appellants, it would be obvious for the skilled person to use the lycra material of D24 in order to get from the side panels of the panty of D12 the same elasticity as from the panels of the garment of Claim 1.

The appellants also contended that, when starting from a training pant for children as described in D15 or D20, the skilled person would be directed (see the abstract D15 and page 24 of D20, lines 15 to 17) to

consult documents concerned with adult menstrual or incontinence garments such as D11 or D12 and, if he followed their instructions, the skilled person would use a lycra-type material for making the side panels. Therefore, it would be obvious for the skilled person to arrive at the invention simply by combining the teachings of D11 or D12 with the disclosures of D15 or D20.

The respondent (patentee) was also of the opinion that the closest state of the art was disclosed either in D15 or in D20 which addressed about the same problem. However, he contradicted the argumentation of the appellants and concluded that to arrive at the invention when starting from the training pants of D15 or D20 it would need too many manufacturing steps to be considered as obvious.

- V. At the end of the oral proceedings, the appellants (opponents) requested that the decision under appeal be set aside and that the European patent be revoked. Appellant II (opponent II) further requested that the appeal fee be reimbursed and that the decision under appeal be corrected under Rule 89 EPC.

The respondent (patentee) requested that the appeals be dismissed, alternatively that the patent be maintained on the basis of either of the auxiliary requests 1 to 4 filed with letter dated 8 October 1999.

- VI. Independent Claims 1 and 18 as granted (respondent's main request) read as follows:

Claim 1:

"1. A garment (2) for absorbing human discharge, comprising: an absorbent assembly comprising a liquid impervious outer cover (90), a liquid-pervious liner (88) and an absorbent medium (92); said absorbent assembly further comprising generally opposite side edges and generally opposite end edges, elastic stretchable side panels (6,8) joined to said side edges to form with said absorbent assembly a pant-like garment having a waist opening (10) and a pair of leg openings (12,14), and whereby each of said elastic stretchable side panels (6,8) comprises two elastic side members (18,20, 24,26) said garment being characterized in that at least one seam (30,32) joins said elastic side members (18, 20, 24, 26) to provide a disposable child's training pant, said elastic stretchable side panels (6,8) providing generally inwardly directed force vectors against a wearer to maintain said garment (2) snugly against the wearer's body (16) and said absorbent assembly snugly in place against the crotch area both before and after a discharge, and that gathering means (46) provides elasticity along at least portions (76, 78) of said leg openings (12, 14) to prevent leakage thereat."

Claim 18:

"A garment (2) for absorbing human discharge, comprising: an absorbent assembly comprising a liquid-impervious outer cover (90), a liquid-pervious liner (88) and an absorbent medium (92), elastic stretchable side panels (6,8) being joined to said absorbent assembly to form a waist opening (10) and a pair of leg openings (12, 14) whereby said elastic stretchable side panels (6,8) comprise stretchable side members

(18,20,24,26) characterised in that: at least one seam (30,32) joins said stretchable side members (18,20, 24,26) to provide a disposable child's training pant, and that an intermediate portion (Z) of each said elastic stretchable side panel (6,8) being generally peripherally disposed along a crotch portion of a respective one of said leg openings, whereby said stretchable side panels provide generally inwardly directed force vectors against a wearer, to maintain said garment snugly against the wearer's body (16) and said absorbent assembly snugly in place against the crotch area both before and after a discharge."

### **Reasons for the Decision**

1. Admissibility of the appeal.

The appeals are admissible.

2. *Respondent's main request (Claim 1 as granted)*

- 2.1 Interpretation of the wording of Claim 1.

Although it is not so directly clear from the wording of claim 1, claim 1 is unequivocally restricted to disposable child's training pants.

The following terms and expressions of Claim 1 (see columns 16 and 17 of the patent specification) have been interpreted as follows:

- "elastic stretchable" (column 16, line 57): This expression has been interpreted as describing the



ability of the side panels to elongate when submitted to the normal forces exerted by the wearer of the training pant and to retract completely so as to recover its original dimensions when the forces are no longer applied. See in this respect the definition given in the description (column 4, lines 23 to 29) of the terms "elasticity", "stretchability" and "elongation".

- "joined" (see column 16, line 57): According to the description (see in particular column 8, lines 17 to 22 and column 9, lines 9 to 13 and 30 to 34) and to the drawings (in particular Figures 1, 2, 5 and 11 to 13), this term should be interpreted as meaning not only explicitly, that a binding exists between the side panels and the absorbent assembly (also referred to in the description as the "waste containment section"), but also implicitly, that the side panels are made separate from and not integral with any one of the components of the absorbent assembly (i.e. bodyside liner 88, absorbent medium 92 or outer cover 90) and that, afterwards, a permanent link is created between the side edges of the side panels and the side edges of at least one of these components.
- "seam" (column 17, line 7): This term has been interpreted as designating the line along which the elastic side members are permanently bound to each other.
- "disposable" pant (column 17, line 9): This expression designates a pant specially designed to

be used once and then thrown away.

## 2.2 Novelty (Article 54 EPC)

According to established EPO Boards of Appeal case law, a very restrictive interpretation of disclosure has consistently been applied when examining novelty. A claimed subject-matter would lack novelty only if it were derivable as a whole directly and unambiguously from a prior art disclosure and if a "clear and unmistakable teaching" of the combination of all the claimed features (and not only the essential one) could be found in said prior art disclosure (see for instance unpublished decisions T 450/89 (section 3.11), T 677/91 (section 1.2), and T 511/92 (section 2.2)).

As regards D15, the Board considers that the above-mentioned conditions are not satisfied for the following reasons:

D15 is concerned with disposable training panties having an outer or backing layer cut into a blank from a non-woven web made stretchable by compressive shrinking and micropleating (see for instance D15: column 2, lines 27 to 32 and column 4, lines 40 to 51). The backing layer of the known panties is contoured to form legs apertures which define lateral side panels (see in particular Figures 16, 17, 20 and 21) on both sides of an absorbent assembly composed of an absorbent panel sandwiched between the facing and the backing layers (see in particular column 9, lines 17 to 30). Said side panels, which result from the cutting of the non-woven web according to the manufacturing method of

D15, are thus made integral with the backing layer of the absorbent assembly and not joined afterwards to said assembly in the meaning of Claim 1 (see above section 2.1).

Moreover, the non-woven web used to make the backing layer and the contoured side panels of the pants of D15 cannot be considered as "elastic stretchable" within the meaning of the invention since, even if a compressively shrunk or micropleated fabric may retract a little (i.e. have some elasticity) when the tensive forces are no longer applied, it is doubtful that it would retract completely so as to recover its original dimensions after having been submitted to the forces resulting from the contortions of the body of a young child wearing the training pant.

Also, it appears clearly from the drawings of D15 that none of the disclosed embodiments has side panels comprising each, as claimed in Claim 1, two side members joined by at least one seam within the meaning of the invention.

For each of the aforementioned reasons, the subject-matter of Claim 1 is new within the meaning of Article 54 EPC over the prior art disclosed in D15.

Regarding the other relevant documents cited in the proceedings, the following should be pointed out:

D11 does not describe a child's training pant having, within the meaning of the invention, at least one seam (i.e. a permanent bound - see section 2.1) joining the elastic side panels of the disclosed garment, each of

said panels being, moreover, not composed of two members as claimed in Claim 1.

D12 is not concerned with a child's training pant but with a catamenial or incontinence device having side portions which are described solely as being stretchable but not "elastic stretchable" within the meaning of the invention.

D14 does not relate to a disposable child's training pant but to a disposable diaper having a stretchable outer cover contoured so as to form side panels made integral with the said back cover. Moreover, these side panels do not each comprise two elastic side members connected together by a seam within the meaning of the invention i.e. permanently bound.

D20 is concerned with a disposable child's training pant according to the invention. However, the ear portions of the pant are neither elastic stretchable nor made separate and joined to the side edges of the absorbent assembly according to the invention but are formed integrally with the bodyside liner and the outer cover, an absorbent batt being sandwiched between them.

D24 and D25 are not concerned with and do not disclose any disposable incontinence garment or training pant.

Therefore, the board is satisfied that none of the cited documents discloses a child's training pant comprising in combination all the features described in Claim 1, the subject-matter of said claim being thus new within the meaning of Article 54 EPC.

### 2.3 The closest state of the art

During the proceedings, the appellants contended that there was no significant difference between a child's training pant for a 30 month old baby and incontinence garments or catamenial pants for small adults and that the differences between products such as diapers, pants diapers, training pants and incontinence guards were more related to the use than to the construction of these products. The Board cannot agree with such contentions because the essential differences do not reside solely in the size but more in the adaptations of the product to the specific conditions of its use. In particular, the garment must be adapted not only to the size but also to the anatomy and the behaviour of the wearer since very young children have a large stomach and narrow hips contrary to adults and they are much more boisterous. The garment must also be adapted to its specific function i.e. a child's training pant must be conceived so as to be easily pulled up and down in order to encourage a very young child to do it himself. Moreover, whereas sanitary garments for adults are conceived to retain solely fluids, child's training pants must be able to retain without leakage not only fluid exudates but also solid wastes which means improved containment and support capacities compared to those needed for sanitary garments.

Therefore, it is clear that the size cannot be the sole significant structural difference between training pants for very young children and sanitary garments for adults and the Board is convinced that, in the present case, for the assessment of inventive step within the meaning of Article 56 EPC, only documents specifically

concerned with a child's training pant (i.e. D15 and D20) can be taken as starting points and that the embodiment shown in Figure 17 of D15 is the closest state of the art.

The training pant claimed in Claim 1 differs essentially from the said prior art in that its side panels are made separately from the absorbent assembly, they are joined thereto and each of them comprises two elastic side members providing generally inwardly directed force vectors against the body of a wearer to maintain the absorbent assembly snugly in place against the crotch area after a discharge.

#### 2.4 Problem and solution

Starting from said closest state of the art (i.e. the garment shown on Figure 17 of D15) and taking into account the above-mentioned differences, the Board sees the problem as objectively determined (see in particular decision T 13/84, OJ EPO 1986, 253) as being generally to improve said known embodiment (see column 2, lines 25 to 27) as regards its capability to maintain the absorbent assembly snugly in place against the crotch area more particularly after a discharge.

Prima facie, the Board has no reason to doubt that the invention as claimed in Claim 1 effectively brings a solution to this problem.

#### 2.5 Inventive step (Article 56 EPC)

2.5.1 When examining inventive step, it should be assessed not only whether all the characteristics of the

invention but also incitements to combine these characteristics in the manner of the invention can be found in the state of the art (see decision T 2/83, OJ EPO 1984, 265), keeping in mind that the technical disclosure in a prior art document should be considered in its entirety (see decision T 56/87, OJ EPO 1990, 188) and that an excessively abstract approach removed from the practical thinking of the skilled person must be avoided since such an approach is merely the result of an a posteriori analysis (see decision T 05/81, OJ EPO 1982, 249).

2.5.2 The side panels of the disposable training panty shown on Figure 17 of D15 are integral with the micropleated backing layer of the absorbent assembly and there is no indication in this document suggesting to the skilled person to conceive the outer layer of the garment in three portions, i.e. a central backing layer for the absorbent assembly and two side portions attached to said layer, and without any hint the skilled person would not be inclined to adopt spontaneously such a construction which looks more complicated than the one adopted in D15. Regarding the improvement of the capability to contain the body's wastes of the garment known from D15, the skilled person would be reluctant to consider a solution consisting in replacing the micropleated material of the side panels by the elastic Lycra material of D24 since the garment is a disposable one and the Lycra material is known to be expensive.

It seems reasonable to think that, in its search for a solution to his problem, the skilled person would consult firstly the document specifically concerned with training pants which was the most recently

published at the priority date i.e. D20. In this document, the skilled person would not learn anything about manufacturing the outer cover of the training pant in several separate parts and about connecting discrete side panels to the side edges of the absorbent assembly. In D20, he would also find no information about the advantage of having elastic side panels in a disposable training pant, let alone side panels comprising each two elastic side members.

Therefore, a combination of the teachings of D15 and D20 could not lead the skilled person to a garment as claimed in Claim 1.

2.5.3 As regards D11, the Board has some doubt that, at the priority date and in order to improve the disposable training pant of D15, the skilled person would consult such a document which discloses a state of the art two and half years older than the state of the art of D15 and which relates to garments of a different nature (i.e. reusable instead of disposable), of a different conception (i.e. based on baby diapers instead of on a cloth underpants), of different sizes (i.e. for adults instead of for very young children) intended furthermore for a completely different type of wearers (i.e. "geriatric and other invalids who are more or less immobile" - see D11: page 1, lines 9 to 12 - instead of very young and boisterous children) and for a different function (i.e. a pure sanitary function instead of a training function).

Assuming nevertheless that the skilled person would have consulted D11 where he could learn the use of a garment having stretchable elastic side pieces (with



releasable fastenings) providing a snug fit on the body of the wearer and assuming secondly that he would have then envisaged transforming the training pant of D15 (Figure 17) according to the teaching of D11, the skilled person could have interchanged the complete outer covers of the two garments as a whole, but it would not have been reasonable to dismantle the side portions from the respective central pieces of the outer covers in order to interchange solely said side portions, because such a modification would, in the opinion of the Board, be based on hindsight and considered merely as the result of an a posteriori analysis.

Therefore, after the above-mentioned hypothetical transformation, the elastic side panels of the modified training pant would still not be connected to the lateral edges of the absorbent assembly and the skilled person would still not have arrived at a garment according to the invention.

- 2.5.4 If the skilled person starting from D15 had consulted D12, although this document is also concerned with garments of a different size (i.e. a size for adults instead of for infants), intended for a different type of wearer (i.e. women instead of babies) and for a different function (i.e. sanitary instead of training), he would have learned that the garment may be constructed by assembling together an impervious backing to form the center portion with two separate stretchable side pieces and by sandwiching an absorbent pad between the impervious backing and a permeable layer sealed to said backing (see D12: column 4, lines 23 to 33 and Figures 1 and 2). Therefore, even if it is

considered that the features concerning the joining of stretchable side panels to the side edges of the absorbent assembly would be taught by D12, neither the use of elastic side panels nor the construction of each side panel with two elastic side members joined together by at least one seam as claimed in Claim 1 is suggested. Therefore, even if the skilled person were to combine the teachings of D12 and D15, he would still not obtain a garment according to the invention.

2.5.5 From D14 (i.e. D23), the skilled person would not learn how to construct a training pant as claimed in Claim 1 but a form-fitting, self-adjusting disposable diaper that provides enhanced fit and D14 would teach him the use of a resiliently-stretchable outer cover and to attach a separate absorbent assembly within the outer cover. Therefore, by combining the teachings of D14 and D15, the skilled person could obtain a garment having an elastic stretchable outer cover, which side ends look like the side panels according to the invention but these side ends would neither be separate from the central portion of the outer cover nor be connected to the side edges of the absorbent assembly as claimed in Claim 1. Moreover, the feature of manufacturing each side panel with two side members is also not known from D14. Therefore, a combination of the teachings of D14 and D15 would also not lead the skilled person to the invention.

This finding cannot be modified by the argument that D14 suggests, in order to use Lycra for side panels, dividing the outer covers into a main part and two side panels, since such a suggestion cannot be found in D14 either explicitly or implicitly.

- 2.5.6 When starting from a disposable training pant described in D20, the same reasoning as above applies as regards the possible combinations of the teaching of D20 with the teaching of either D11, D12, D14 or D15.
  
- 2.5.7 As already indicated above, the starting point to assess inventive step should be a disposable child's training pant.

However, the appellants also wanted to start from D2 disclosing a disposable leakproof catamenial or incontinence device comprising a panty-like garment. If such an embodiment is improved, modified or further developed in an obvious manner, then it will result in an improved, modified or developed disposable leakproof catamenial or incontinence device instead of in a disposable child's training pant. Indeed, in view of the specific type of garment, which is a disposable child's training pant, it does not seem obvious in the view of the Board in this specific case, to switch from one freely chosen, different type of device (catamenial or incontinence device) to a child's training pant. Such a switch-over can only be the result of an ex-post-facto analysis.

2.6 Claim 18 as granted

Claim 18 differs mainly from Claim 1 in that an intermediate portion of each elastic stretchable side panel is generally peripherally disposed along a crotch portion of a respective one of the leg openings and replaces the gathering means of the garment of Claim 1 providing elasticity along said leg openings to prevent leakage thereat. Apart from this feature relating to

the gathering means, Claim 18 describes all the other essential characteristics of Claim 1.

Consequently, the interpretations given in above section 2.1 and the argumentation presented above in sections 2.2 to 2.5 concerning respectively novelty, the closest state of the art, the problem and its solution and inventive step of the subject-matter of Claim 1 remain valid as regards the subject-matter of Claim 18.

- 2.7 The Board therefore considers that to modify the disposable training pants of either D15 or D20 or the disposable undergarment of D12 in order to arrive at the subject-matter described either in Claim 1 or in Claim 18 as granted does not follow plainly and logically from the state of the art disclosed in the documents cited during the proceedings and thus implies an inventive step within the meaning of Article 56 EPC.
3. Therefore the invention as described and claimed in the European patent under appeal meets the requirements of the EPC and the patent can be maintained as granted.
4. *Respondent's auxiliary requests*

Since the board has acknowledged the main request as allowable, there is no need to consider the respondent's auxiliary requests.

5. *Alleged procedural violation and reimbursement of the appeal fee*

In his statement setting out the grounds of appeal,

Appellant II has complained (see the last page of the written statement) that the Opposition Division has "obviously not considered whether a skilled man in view of D11 would provide a training pant according to D20 with elastic side panels or not. Such a negligence of the Opposition Division constitutes a substantial procedural violation."

Regarding the decisions of the EPO, Article 113 and Rule 68(2) EPC respectively require solely that they "be based on grounds or evidence on which the parties concerned have had an opportunity to present their comments" and "shall be reasoned and shall be accompanied by a written communication of the possibility of appeal". Therefore, contrary to the assertion of Appellant II, in their decisions, the instances of the Office have no obligation to consider in detail the arguments of the parties and to give an opinion on every combination of prior art made during the proceedings but are solely obliged to take a position on the grounds for opposition of Article 100 EPC called upon by the parties. It may be that in a case like the present, where a large number of documents and arguments are presented, the Opposition Division does not consider all arguments as highly important and therefore does not discuss them all in their written decision.

A wrong evaluation of arguments however is not considered in the Boards' case law as a substantial procedural violation.

Of course, it is the task of each decision-taking body to grasp the relevant arguments and to reply to them. However, the more material is provided, with corresponding arguments, the more it may be likely that a choice of importance of the arguments is made. This is a question of discretion.

Furthermore, it should also be emphasised that the minutes of the oral proceedings before the Opposition Division (see section 9) clearly state that "OPPO II presented arguments against inventive step (with regard to claim 1) based upon a combination of the teachings of D20 or D15 and D11." Therefore, it seems to be clear that the Opposition Division considered the arguments brought forward.

Consequently, in the view of the Board, no negligence and no substantial procedural violation were made by the Opposition Division in this specific case and the appeal fee cannot be reimbursed.

6. *Correction of the decision under appeal*

The Boards of appeal are not the proper body for a request to modify the text of a decision made by another instance of the European Patent Office. Furthermore, in the decisions of the EPO, only linguistic errors, errors of transcription and obvious mistakes may be corrected (see Rule 89 EPC) and the alleged "negligence" of the Opposition Division is neither an error nor a mistake within the meaning of Rule 89 EPC.

Furthermore, in the present case, the Opposition Division having considered that the combination of the teachings of D20 and D11 did not lead obviously to the invention, the answer to the question whether the skilled person in view of D11 would provide a training pant according to D20 with elastic side panels or not is irrelevant since it would not influence the opinion of the opposition division which is based on another reason. Therefore, the decision under appeal need not be corrected.

## **Order**

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

The appeals are dismissed.

The Registrar:

The Chairman:

G. Magouliotis

C. Andries