BESCHWERDEKAMMERN DES EUROPÄISCHEN PATENTAMTS

BOARDS OF APPEAL OF THE EUROPEAN PATENT OFFICE

CHAMBRES DE RECOURS DE L'OFFICE EUROPEEN DES BREVETS

Internal distribution code:
(A) [ ] Publication in OJ
(B) [ ] To Chairmen and Members
(C) [X] To Chairmen
(D) [ ] No distribution

D E C I S I O N
of 29 January 2002

Case Number: T 0103/99 - 3.2.6

Application Number: 92112127.3

Publication Number: 0523683

IPC: A61F 13/46

Language of the proceedings: EN

Title of invention:
Absorbent article

Patentee:
KIMBERLY-CLARK WORLDWIDE, INC.

Opponent:
The Procter & Gamble Company
SCA Hygiene Products AB

Headword:
-

Relevant legal provisions:
EPC Art. 54, 56, 114(2), 116
EPC R. 55(c)

Keyword:
"Novelty (yes); Inventive step (yes)"
"Sufficient indication of facts and evidence in respect of prior use (no)"

Decisions cited:
T 0328/87; T 0522/94 T 0056/87

Catchword:
-

Europäisches Patentamt | European Patent Office | Office européen des brevets

Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0103/99 - 3.2.6

D E C I S I O N
of the Technical Board of Appeal 3.2.6
of 29 January 2002

Appellant: (Proprietor of the patent)
KIMBERLY-CLARK WORLDWIDE, INC.
401 North Lake Street
Neenah
Wisconsin 54956 (US)

Representative:
Dixon, Philip Matthew
Frank B. Dehn & Co.
Holzstrasse 26
D-80469 München (DE)

Respondent I: (Opponent I)
The Procter & Gamble Company
One Procter & Gamble Plaza
Cincinnati
Ohio 45202 (US)

Representative:
Boon, Graham Anthony
Elkington and Fife
Prospect House
8 Pembroke Road
Sevenoaks
Kent TN13 1XR (GB)

Respondent II: (Opponent II)
SCA Hygiene Products AB
S-405 03 Göteborg (SE)

Representative:
Romare, Laila Anette
Albihns Göteborg AB
Box 142
S-401 22 Göteborg (SE)

Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted 18 November 1998 revoking European patent No. 0 523 683 pursuant to Article 102(1) EPC.**

Composition of the Board:

Chairman: P. Alting van Geusau
Members: H. Meinders
R. T. Menapace

Summary of Facts and Submissions

I. European Patent No. 0 523 683, granted on application No. 92112127.3, was revoked by the Opposition Division by decision announced on 15 September 1998 and posted on 18 November 1998. It based the revocation on the finding that the subject-matter of claim 1 according to the main request did not involve an inventive step. The first to the fifth auxiliary requests were rejected for the reason that the respective claims did not fulfil the requirements of Article 84 EPC (lack of clarity) and/or of Article 56 EPC (lack of inventive step).

II. The following evidence available in the file is relevant for this decision:

D2: Letter of Mr Okabe (Uni-Charm Corporation) to Mr Nilsson, President of Mölnlycke AB, Feminine Hygiene Products and Laboratory report Mölnlycke AB 91010301, 4 pages, regarding the alleged prior use of a Sofy Sara Wing towel

D5: WO-A-92 07 535

D7: JP-U-1 122 727 (with translation in English)

D8: US-A-4 701 177

D11: EP-A-0 329 160

D12: EP-A-0 163 287

D13: US-A-4 662 876

D14: US-A-4 900 318

D18: US-A-4 397 644

III. On 20 January 1999 the Appellant (Patentee) filed an appeal and paid the appeal fee. Together with the statement of grounds of appeal it filed new requests with amended sets of claims by letter dated 26 March 1999.

IV. In an annex to the summons to oral proceedings pursuant to Article 11(2) of the Rules of Procedure of the Boards of Appeal sent to the parties on 5 October 2001 questions as to support and clarity of the claims were raised and the Board expressed its provisional opinion in respect of novelty and inventive step of the subject-matter of these claims.

The Appellant filed amended sets of claims by fax on 20 December 2001, these were forwarded to the parties on 4 January 2002.

V. Oral proceedings were held on 29 January 2002 in the absence of Respondent I (Rule 71(2) EPC) who had notified the Board with letter of 7 November 2001 that it would not attend the oral proceedings.

At these oral proceedings Respondent II indicated its intention to file a sample of a "Sofy Sara Wing" article as additional evidence for the prior use "Sofy Sara Wing", substantiated so far by D2, and requested that the Board consider it despite its late filing. It was of the opinion that from this sample - still in its possession - one could easily derive all features of the absorbent article of claim 1 filed by fax of 20 December 2001 and therefore it constituted very relevant evidence. Regarding these features as well as

the circumstances of the prior use it could search for further supporting evidence, if deemed necessary by the Board. In that case it requested adjournment of the oral proceedings for further acquisition of evidence regarding the product "Sofy Sara Wing", as well as regards its public availability before the priority date of the patent in suit.

The Appellant objected to the late filing of evidence and submitted that further testing would be needed on the sample to establish whether the materials used for the absorbent article actually had the claimed properties, as the properties in question could not be determined on simple visual inspection. The circumstances of the prior use were at least doubtful, as there was no evidence previously indicated or submitted at the oral proceedings that the sample to be filed came from a package which had actually been available to the public, nor was there proof that this was the case for the sample which had been the subject of the laboratory reports in D2.

After discussion and deliberation at the oral proceedings the Board came to the conclusion that even with submission of the sample Respondent II's indication of evidence in support of the alleged prior use "Sofy Sara Wing" would remain insufficient in respect of the technical features of the absorbent article in question and the circumstances of its alleged public availability. Thereupon Respondent II decided not to file the sample. Further, due to the incompleteness of the evidence, the Board was not in a position to establish the "*prima facie*" relevance of the prior use as now alleged.

VI. The Appellant requested setting aside the decision of the Opposition Division and maintaining the patent in amended form on the basis of:

- claims 1 to 19 filed during the oral proceedings,

- pages 2 to 9 filed during the oral proceedings,

- figures 1 to 8 of the patent as granted.

Respondent I had indicated in a letter dated 13 August 1999 that it would not file submissions in respect of the amended claims filed with the statement of grounds of appeal, but that it reserved the right to file submissions if the claims were amended. Also in respect of the claims filed on 20 December 2001 Respondent I did not file any submissions.

Respondent II requested the dismissal of the appeal.

VII. The wording of independent claim 1 according to the request of the Appellant is as follows:

"An absorbent article (10,54,78,100, 136) comprising
an absorbent (12,58,84,106,138)
a cover (24,60,86,110,140) at least partially enclosing said absorbent and including a first material (26) having openings formed therethrough, and
a separation means (18,72,98,120,144) for controlling dispersion of body fluid away from said cover (24),
wherein the separation means (18) is positioned between said first material(26) and said absorbent in direct contact with said first material (26) and is provided for controlling dispersion of body fluid

downward, in the z-direction, away from said cover (24),

the first material is selected from the group consisting of an apertured thermoplastic film, a net and an apertured extrusion-coated nonwoven material and constitutes the primary fluid-receiving region of the cover arranged to be positioned, in use, directly beneath the principal point of discharge from the human body,

characterized in that

said cover is a bicomponent cover (24) and includes a non-apertured second material (30) secured (32,34) to at least a portion of the outer periphery of said first material (26), and

said non-apertured second material (30) is a liquid-permeable soft nonwoven web, which forms a secondary fluid-receiving region of the bicomponent cover (24)."

VIII. The arguments of the Appellant can be summarised as follows:

Starting from the article disclosed in D3 having a single-component cover which could consist of a soft nonwoven liquid permeable web, the problem possibly existing with this known arrangement would be insufficient dryness in the central region. To solve that problem, the skilled person would follow the teaching of D3 in that he would choose another single component cover material, for instance a net and accept less comfort, or he would provide more perforations in the central region of the nonwoven web, which in itself already provided comfort. There was no indication available in this prior art to switch to a bicomponent cover.

The article disclosed in D7 comprised a bicomponent cover, but both components were perforated, thereby providing less comfort along the sides. Such an arrangement would not fulfil the requirement of the second material being non-apertured. Moreover, the provision of perforations in the second material was a clear indication that the latter, by itself, was not liquid-permeable.

D12 taught an article with a second material which was laminated with a liquid-impermeable material, thus could not form a secondary fluid-receiving region as claimed. The same applied to the laminates in the articles disclosed in D5 and D8.

Finally, the Appellant contended that Respondent II alone had access to the evidence regarding the prior use (samples of the "Sofy Sara Wing" article from 1990 were no longer available) and could have submitted any further evidence in due time, thus there should be no adjournment of the oral proceedings for collection of more evidence.

IX. Respondent II submitted that the prior use "Sofy Sara Wing"took away novelty of the subject-matter of claim 1. The reason why this prior use was again relied upon only at the oral proceedings was that Respondent II did not feel affected by any of the sets of claims filed with the statement of grounds of appeal and therefore had had no reason to pursue it further at the time. Now that the claims had been amended with letter of 20 December 2001 and were less restricted than the set of claims filed with the appeal, the prior use had become relevant again.

Considering the other state of the art cited against the patent in suit Respondent II was of the opinion that the sole difference between the article in claim 1 and the prior art disclosed in D3 was the feature of the cover being a bicomponent cover instead of a single component cover. D3 taught to have a cover of soft nonwoven liquid permeable material with a central portion which was perforated; if the skilled person wished to improve the dryness he would choose a net or a perforated thermoplastic film as suggested by D3. However, if that material would be chosen for the whole cover, the advantage provided by the soft nonwoven web along the sides of the article would evidently be lost. To solve that problem, the skilled person would find in the prior art (e.g. D5, D8 or D12) the solution of connecting the soft nonwoven web to the periphery of a central region consisting of a net or perforated film, such that the nonwoven web would be at those locations where softness and wearing comfort would be necessary, i.e at the sides. In doing this he would arrive in an obvious manner at the subject-matter of claim 1.

Reasons for the Decision

1. The appeal is admissible.

2. *Request for adjournment of the oral proceedings*

2.1 Rule 55(c) EPC stipulates that an indication of the facts and evidence shall be submitted together with the notice of opposition. Article 114(2) EPC gives the departments of the EPO the discretion to disregard facts or evidence not submitted in due time, in order to ensure that proceedings can be concluded swiftly in

the interest of the parties, the general public and the EPO. Thus it is the duty of the Opponent to submit the facts and evidence relevant to the case as early and as completely as possible, if it wishes them to be taken into account.

2.2 The prior use "Sofy Sara Wing" was originally introduced into the opposition proceedings by Respondent I, in its notice of opposition. According to the information supplied by Respondent II this prior use had been put forward in the opposition filed by Respondent II against Respondent I's European patent 0 612 233. At no time in the opposition or written appeal proceedings did Respondent I or Respondent II submit further evidence in respect of that alleged prior use, nor did they indicate the intention to file such further evidence, although the Appellant had questioned whether the prior use was sufficiently substantiated.

In its communication dated 5 October 2001 accompanying the summons to oral proceedings the Board had indicated that any further submissions of the parties should be filed at least one month before the oral proceedings. However, neither of the Respondents filed any such submission, let alone further evidence.

It was only at the oral proceedings before the Board that Respondent II requested adjournment of the oral proceedings so that it could collect more evidence regarding the technical features of the "Sofy Sara Wing" article and the circumstances of its public availability, in case the Board found the available facts and evidence to be insufficient.

2.3 Exceptionally the Boards of Appeal take into account

late filed facts and evidence, e.g. if their late filing is occasioned by a change in the subject of the proceedings and if they are relevant to the case, or in case the prior use became known to the Opponent only at a later stage in the proceedings.

However, in the present case the "Sofy Sara Wing" article was nothing new to Respondent II. There was also no change in the subject of the proceedings as the Board had already given its preliminary opinion in its above mentioned communication (which according to the file was received by Respondent II by 9 October 2001) that the features of the first material having openings therethrough and the second material being a liquid permeable non-apertured soft nonwoven material were not derivable from the evidence supplied up to then in support of the alleged prior use "Sofy Sara Wing".

These features were also present in the claims filed with letter of 20 December 2001. Thus, at a much earlier date than the oral proceedings Respondent II should have realised that it had the burden of proof regarding these features, if it wished to pursue the prior use "Sofy Sara Wing" in the appeal proceedings.

2.4 Respondent II argued further that it realised that the prior use "Sofy Sara Wing" had to be brought up again only after the amendment of the claims by the Appellant with letter of 20 December 2001, by which the subject-matter of the claims became less restricted than that of the claims accompanying the statement of grounds of appeal.

However, the above mentioned duty (see point 2.1) of the Opponent to submit relevant facts and evidence

available to him as soon and as completely as possible does not depend on the Opponent's subjective appraisal of the extent to which a certain amended wording of the claims might affect its (economic) interests. This is so because, whilst the parties may formulate their requests according to their subjective needs, the establishment of the state of the art to be taken into account for the decision is an objective matter.

2.5 That it no longer could rely on Respondent I to pursue the prior use "Sofy Sara Wing" should also have been evident to Respondent II as soon as it received the copy of Respondent I's letter of 7 November 2001, forwarded to it by the EPO on 15 November 2001, indicating withdrawal of its request for oral proceedings and its intention to not attend the latter. With letter of 13 August 1999 Respondent I already indicated that it did not intend to file submissions on the claims filed with the statement of grounds of appeal and since then no further facts, evidence or arguments were submitted by Respondent I.

2.6 Even if one would accept Respondent II's argument that the amendment of the claims as filed with letter of 20 December 2001 made it necessary for Respondent II to fall back upon the prior use "Sofy Sara Wing", the request for adjournment of the oral proceedings still would have been late: the sets of amended claims filed by the Appellant with letter of 20 December 2001 were communicated to Respondent II with letter of 4 January 2002. Thus according to Rule 78(2) EPC Respondent II can be considered to have known the extent of these amendments by 14 January 2002, which is two weeks before the oral proceedings set for 29 January 2002. The request for adjournment of the oral proceedings as

well as the evidence supporting it could therefore without difficulty have been filed at a point in time at which the Board could have reconsidered the matter and still could have notified the parties that the oral proceedings were adjourned, so that unnecessary loss of preparation time for the parties as well as the Board and unnecessary travel to attend the oral proceedings could have been avoided.

2.7 Hence, Respondent II did not present the facts and evidence in support of its case as early and as completely as possible. This late presentation of facts and evidence took both the Appellant and the Board by surprise and denied both the opportunity of a proper preparation and response. Moreover, at the oral proceedings Respondent II failed to specify which facts and evidence it was going to submit, but left it to the Board to decide which evidence in support of which facts Respondent II should supply.

This is clearly not in conformity with the requirements of Rule 55(c) EPC nor with the procedural principle that each party bears the burden of proof for the facts it is alleging.

2.8 For the above reasons the Board did not accede to the request of Respondent II to adjourn the oral proceedings for the collection of further facts and evidence. Consequently, the alleged prior use "Sofy Sara Wing" is to be examined only on the basis of the facts and arguments as presented in connection with the evidence D2.

3. *Alleged prior use "Sofy Sara Wing" on the basis of D2*

3.1 Respondent II argued that the prior use "Sofy Sara Wing" put into question the novelty of the subject-matter of claim 1.

According to the established case law of the Boards of Appeal in case of an alleged prior public use the following must be established:

the **subject** of the prior use, **when** it took place and under **which circumstances** (see e.g. T 328/87, OJ EPO 1992, 701 and T 522/94, OJ EPO 1998, 421). Relevant for the present decision is the question what was the **subject** of the alleged prior use and under **which circumstances** did it take place.

3.2 The subject of the alleged prior use

In its communication of 5 October 2001 accompanying the summons to oral proceedings, the Board already explained why it considered that the features of the first material having openings therethrough and the second material being a liquid permeable non-apertured soft nonwoven material were not derivable from D2, the only evidence supplied up to then in support of the alleged prior use "Sofy Sara Wing".

Respondent II alleged that the sample of the "Sofy Sara Wing" article it intended to file showed both features.

The Board concurs, however, with the Appellant that at least the absence of apertures in the second material and its liquid permeability are features which cannot be assessed by a mere visual inspection of a sample, but require proper testing, which cannot be carried out in oral proceedings. Therefore there is no reason to

consider the sample further, of which the properties and thus the relevance cannot be established in the present proceedings.

In the absence of further supporting evidence in respect of the above mentioned features the Board finds that it is not proven that the subject of the alleged prior use "Sofy Sara Wing" was identical in the relevant features to the subject-matter of claim 1.

3.3 The circumstances of the alleged prior use.

In the letter of Mr Okabe, contained in D2, it is stated that the "Sofy Sara Wing" article was launched in April 1990; a sketch of this product was referred to, but not annexed. The laboratory reports of Mölnlycke AB in D2 show a photograph of a package with the mention that it contains 40 single wrapped towels and that the price is unknown.

Respondent II submitted that the samples used for the laboratory reports forming part of D2 most probably had been purchased on the open market by the person who had drafted these reports, who was known to bring back competing products from her trips abroad. The fact that the price was not known was probably due to the fact that the relevant receipts had to be turned over to the finance department for reimbursement and were not easily retrievable.

3.4 The Board considers that in this field of technology relating to absorbent articles like sanitary towels, diapers and incontinence guards, the specification of these products, while maintaining their brand name, is frequently modified during their product life. However,

the Board notes that no evidence has been provided that the "Sofy Sara Wing" product referred to in the letter of Mr Okabe as having been launched in April 1990 is identical in its technical features with the product referred to in the laboratory reports. As the product sketch referred to in the letter of Mr Okabe has not been filed there is no way of verifying this issue.

There is further no evidence available on the actual date, location and price of purchase. From the available sparse information it cannot be unambiguously derived that the product subject of the laboratory reports has been purchased on the open market, it may just as well have been put at the disposal of Mölnlycke AB, without having been purchased at all, as has been contended by the Appellant. Without further supporting evidence the submissions of Respondent II regarding the circumstances of the prior use thus remain mere allegations.

3.5 Therefore the Board concludes that the alleged prior use has not been proven as regards the features of its subject-matter or in respect of the circumstances necessary for assessing its availability to the public. It is therefore not further considered for the assessment of novelty and inventive step.

4. *Amendments (Article 123 EPC).*

Claim 1 differs from claim 1 as granted in that:

- the first material is selected from the group consisting of an apertured thermoplastic film, a net and an apertured extrusion-coated nonwoven material and constitutes the primary fluid-

receiving region of the cover arranged to be positioned, in use, directly beneath the principal point of discharge from the human body and that

- said second material is a liquid-permeable soft nonwoven web, which forms a secondary fluid-receiving region of the bicomponent cover.

Basis for these amendments can be found in the original application documents, page 4, lines 11 to 16; page 8, lines 11 to 31; page 10, lines 34 to 37; page 11, lines 12 to 26.

The added features further limit the subject-matter of claim 1 as granted.

Therefore the requirements of Article 123(2) and (3) EPC are met.

The amendments to the description are made to render the description consistent with the more limited wording of the claims (Article 84 EPC) and to acknowledge the closest prior art (D3) (Rule 27(1)(b) EPC) and thus do not give rise to objections either.

5. *Novelty (Article 54 EPC).*

The subject-matter of claim 1 differs from the article disclosed in D3 in that the cover is a bicomponent cover consisting of two different materials. It includes a non-apertured second material secured to at least a portion of the outer periphery of said first material, said non-apertured second material being a liquid-permeable soft nonwoven web, which forms a secondary fluid-receiving region of the bicomponent

cover.

None of the other evidence available in the file discloses all features of claim 1. Therefore the Board concludes that the subject-matter of claim 1 is novel (Article 54 EPC).

6. *Inventive step (Article 56 EPC).*

6.1 The parties agree that, in the absence of sufficient proof of the alleged prior use, D3 is the closest prior art for the purposes of discussing inventive step. The Board concurs with this view.

The subject-matter of claim 1 distinguishes itself from the absorbent article disclosed in D3 by the features discussed in point 5 *supra*.

These features aim at improving wearer comfort due to the soft nonwoven web in the region of contact with the thighs as well as to improve dryness by providing a secondary fluid receiving region, due to the liquid permeability of that second material (see page 2, lines 45 and 58 and page 5, line 13 and lines 33 to 41 of the patent in suit), while maintaining sufficient fluid reception in the apertured central region.

6.2 The Opposition Division was of the opinion that although D3 did not disclose the cover being a bicomponent cover, it involved an arrangement having a permeable liner with a perforated longitudinal zone. When comparing such a structure with the embodiment of figure 8 of the patent in suit, in which the two materials of the bicomponent cover were aligned in an abutting relationship and were connected to each other

by the underlying separation means, the use of two materials instead of one single material which was perforated in the fluid receiving region as disclosed in D3 was a step which the person skilled in the art was capable of performing without any inventive skill.

In the Board's opinion this reasoning remains a mere assertion as the Opposition Division did not explain **why** the skilled person would replace a single material cover as disclosed in D3 by a bicomponent cover consisting by definition of two materials. It is a generally accepted principle in the case law of the Boards of Appeal concerning the appreciation of inventive step that in arguing lack of inventive step not only the question whether the skilled person **could** arrive at the solution claimed should be discussed, but also the question why the skilled man **would** come up with that solution (see Case Law of the Boards of Appeal, third edition 1998, Chapter I-D, 6.1).

Based on this underlying principle of dealing with inventive step the Board agrees with the Appellant that in starting from D3 the skilled person would recognize that the improved comfort was already achieved by the use of a soft nonwoven liquid permeable material for the cover. The remaining problem of improving dryness would in that case be tackled by the skilled person along the lines suggested in D3, namely using either a net (and accepting less comfort) or increasing the number of perforations in the central region, in both cases maintaining the single material cover. There is no indication whatsoever in D3 for the skilled person to use a cover which is bicomponent.

6.3 Respondent II submitted that the skilled person would

have knowledge of other disclosures which gave him an indication to use a bicomponent cover with two different materials, namely D5, D8 or D12, which teach to fix soft nonwoven materials onto the periphery of a liquid receiving central region to achieve more wearer comfort.

A technical disclosure in a prior art document is to be considered in its entirety, as it would be done by a person skilled in the art, and it is not justified to arbitrarily isolate parts of such a document from their context in order to derive from them technical information which would be distinct from or even in contradiction with the integral teaching of that document (see e.g. T 56/87, OJ 1990, 188, Reasons point 3.1).

In that respect D8 and D12 teach away from the invention, as they disclose the soft nonwoven material as being laminated to an impervious layer, thus rendering the second material as a whole liquid impermeable. This is disclosed in D12, page 6, lines 1 to 14 and in D8, column 5, lines 45 to 64.

The situation is the same with respect to D5, which is a PCT application with an earlier priority date, but with a publication date in the interval between the priority date and the filing date of the patent in suit. It shows a soft nonwoven material 32 laminated to a second layer 34 of liquid impervious film, see page 15, last paragraph. Thus, this document cannot affect novelty, which is one of the conditions for it to be considered to form part of the state of the art pursuant to Article 54(3) and Article 158(1) EPC .

In conclusion, these three documents indicate to the skilled person to use a second material which is liquid impermeable, instead of the material as claimed in claim 1.

6.4 The Board cannot follow Respondent II's argument that D3 expresses a favourable opinion on the use of two materials, by its reference to D18 for the material of the cover.

The disclosure in D18 of a cover made up of two materials in combination relates to the bonding of the cover 10 to the transfer layer 14, thus producing a laminate of which only the cover 10 comes into contact with the wearer. Therefore it does not provide an indication either to use two materials of which one is connected to at least a portion of the outer periphery of the other, as claimed in claim 1.

6.5 Respondent II, in the written proceedings, had also argued that the skilled person would combine the teachings of either D7, D11, D13 or D14 with D3. In its communication accompanying the summons to the oral proceedings the Board already pointed out that:

- D7 (claim 1 of the translation) discloses the second material as being apertured, thus teaches away from a non apertured material as required by claim 1.

- D11 (column 5, lines 36 to 57) teaches the use of a first material 1 of nonwoven fabric or porous plastic material and a second material 8 in the form of porous waterproof sheet such as meltbond nonwoven fabric or hydrophobic plastic film with a

fine porosity, which teaches away from the apertured first material and the liquid pervious second material as required by claim 1.

- D13 (column 4, lines 11 to 58) teaches the use of a second material in composite form which is liquid impervious and a first material which is liquid permeable, but not necessarily apertured (woven fabric, fleece or tissue), thus not corresponding to the materials required by claim 1.

- D14 (column 2, lines 15 to 48) teaches the use of a second material in composite form (references 24 with 44 and 46) or in a single layer form (layer 24 treated by impervious spray or hot melt), which both are liquid impervious, and a first material (24) which is liquid pervious but not necessarily apertured. The resulting cover sheet therefore would not correspond to the one claimed in claim 1.

In the oral proceedings respondent II did not provide further arguments based on these documents.

6.6 Since none of the other documents available in the file provide more relevant information than the above, the Board comes to the conclusion that the skilled person receives no indication from the state of the art to provide the absorbent article of D3 with a bicomponent cover in which a second material is in the form of a non-apertured liquid permeable soft nonwoven web and is secured to at least a portion of the outer periphery of a first material forming the primary fluid-receiving region, the second material forming a secondary fluid-

receiving region of the cover.

6.7 In the Board's judgement the solution to the technical problem underlying the patent in suit as defined by present claim 1 is therefore not only novel but also inventive (Article 56 EPC). This claim as well as dependent claims 2 to 19 for the preferred embodiments of the absorbent article according to claim 1 can thus form the basis for maintenance of the patent in amended form.

The amended description and the drawings of the patent in suit are in agreement with the present wording and scope of the claims.

Thus, taking account of the amendments made by the Appellant, the patent and the invention to which it relates meet the requirements of the EPC.

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 with the following texts:

Claims 1 to 19 and

Description, pages 2 to 9, both filed at the oral proceedings, and

Figures 1 to 8 of the patent as granted.

The Registrar: The Chairman:

M. Patin P. Alting van Geusau