

Technical Board of Appeal, 19 October 2004, Procter & Gamble

PATENT LAW

Amendment application:

• **Needs to be directly and unambiguously derivable from application**

The Board notes that the application as originally filed mentions the fastening tape on a number of occasions in connection with a stretching property. Page 3, lines 15-19 states that "the material of the fastening tape is more or less non-stretchable and nonelastic under the conditions the fastening tape is used in the present context". Page 4, lines 27 and 28 mentions the fastening tape 10 as comprising an "elastically stretchable center portion 30 between the end portions 18, 20". Page 2, line 35 – page 3, line 2 and page 5, lines 1-13 refer to the central portion of the fastening tape and the tape section as separate entities which are moved together as a laminate through the gap of the ring rolls, by which process step both layers are stretched. Even when taking account of the Appellant's argument that the fastening tape and the elastic tape section are two separate entities forming a laminate, the Board cannot conclude from these passages that the material of this fastening tape is directly and unambiguously derivable as being "non-stretchable". Neither its conditions of use nor those of the article are mentioned in claim 1, resulting in this claim lacking a relationship with this passage on page 3 of the application as filed. Further, the mentioned "more or less non-stretchable"-property cannot be equated to the presently claimed explicit "non-stretchable"-property of the fastening tape material. Finally, the end portions of the initially stretchable fastening tape, which have not been passed through the zigzag gap between the ring rolls, will in any case still be of "stretchable material", even when attached to a sanitary article, the attachment merely impeding, but not taking away the actual stretchability.

As a consequence claim 1 of the main request does not comply with the requirements of Article 123(2) EPC and therefore the main request is not allowable.

• **According to the consistent case law of the Boards of Appeal it is not permissible to extract isolated features from a set of features which have originally been disclosed in combination**

(see e.g. T 1067/97 and T 1110/97, Special Edition No. 3 of the OJ EPO 2001, 39 and 40). The present wording of claim 1 not involving the limitation of the fastening tape being non-elastic thus amounts to an extension of subject-matter, contrary to Article 123(2) EPC

Source: epo.org

Technical Board of Appeal, 19 October 2004

(P. Alting van Geusau, H. Meinders, R. T. Menapace)

Case Number: **T 0540/02 - 3.2.6**

D E C I S I O N of the Technical Board of Appeal 3.2.6 of 19 October 2004

Appellant (Proprietor of the patent): THE PROCTER & GAMBLE COMPANY, One Procter & Gamble Plaza, Cincinnati, Ohio 45202 (US)

Representative: Samuels, Lucy Alice, Gill Jennings & Every, Broadgate House, 7 Eldon Street, London EC2M 7LH (GB)

Respondents:

(Opponent 01) SCA Hygiene Products AB, S-405 03 Göteborg (SE), Representative: Harrison, Michael Charles, AlbiHns GmbH, Bayerstrasse 83, D-80335 München (DE)

(Opponent 02): 3M Innovative Properties Company Office of Intellectual Property Counsel, P.O. Box 33 427, St. Paul, Minnesota 55 133-3427 (US). Representative: VOSSIUS & PARTNER, Siebertstrasse 4, D-81675 München (DE)

Decision under appeal: Decision of the Opposition Division of the European Patent Office posted 27 March 2002 revoking European patent No. 0704196 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. 0 704 196, granted on application No. 94115429.6, was revoked by the Opposition Division by decision announced on 28 February 2002 and posted on 27 March 2002. In its decision the Opposition Division considered that claim 1 as amended by the Appellant in the oral proceedings before it was not clear (Article 84 EPC) and contained subject-matter which extended beyond the content of the application as originally filed (Article 123(2) EPC.

II. On 24 May 2002 the appellant (proprietor) filed a notice of appeal against this decision and paid the appeal fee the same day. A replacement notice of appeal was filed on 31 May 2002. The statement of grounds of appeal was received on 5 August 2002.

III. In a communication in preparation of oral proceedings, dated 13 July 2004, the Board gave its preliminary opinion on the case, including the admissibility of the appeal, and indicating that it would be discussed in the oral proceedings whether the case should be remitted to the first instance or whether the Board would decide at least on novelty, in view of the opinion expressed by the Opposition Division on that issue in the course of the opposition proceedings, taking into account (a.o. documents):

D3: EP-A-0 487 758.

IV. Oral proceedings were held on 19 October 2004. The Appellant requested to set aside the decision under appeal and to maintain the patent with a set of claims according to a main request or according to one of five auxiliary requests, filed with letter of 16 September 2004.

The Respondents 01 and 02 (Opponents 01 and 02) requested dismissal of the appeal and revocation of the patent.

V. Claim 1 according to the main request reads as follows: "Fastening tape in combination with a sanitary article, particularly disposable diaper, for fastening of

the article on the body of a person, the fastening tape being attached to the article at one of its end portions (18) and being provided with a fastening means (22) on one surface of the other end portion (20), a stretchable elastic portion (30) being provided between the end portions, a tape section (32) of a stretchable elastic material being secured to the fastening tape (10) at least at both ends (32a, 32b) of the tape section (32) of stretchable elastic material, to bridge a section of the fastening tape (10) which is longer than the stretchable elastic tape section (32), the material of the fastening tape being non-stretchable and non-elastic, characterized in that said section of the fastening tape (10) being longer than the stretchable elastic tape section (32) is provided with zigzag-shaped folding extending laterally with respect to the length of the fastening tape."

Claim 1 according to the first auxiliary request reads as follows:

"Fastening tape in combination with a sanitary article, particularly disposable diaper, for fastening of the article on the body of a person, the fastening tape being attached to the article at one of its end portions (18) and being provided with a fastening means (22) on one surface of the other end portion (20), a stretchable elastic portion (30) being provided between the end portions, a tape section (32) of a stretchable elastic material being secured to the fastening tape (10) at least at both ends (32a, 32b) of the tape section (32) of stretchable elastic material, to bridge a section of the fastening tape (10) which is longer than the stretchable elastic tape section (32), wherein the fastening tape (10) determines the maximum extension of the tape section (32) of stretchable elastic material to avoid rupture of the tape section (32) of stretchable elastic material, characterized in that said section of the fastening tape (10) being longer than the stretchable elastic tape section (32) is provided with zigzag-shaped folding extending laterally with respect to the length of the fastening tape."

Claim 1 according to the second auxiliary request reads as follows:

"Fastening tape for a sanitary article, particularly disposable diaper, for fastening of the article on the body of a person, the fastening tape being attached to the article at one of its end portions (18) and being provided with a fastening means (22) on one surface of the other end portion (20), a stretchable elastic portion (30) being provided between the end portions, a tape section (32) of a stretchable elastic material being secured to the fastening tape (10) at least at both ends (32a, 32b) of the tape section (32) of stretchable elastic material, to bridge a section of the fastening tape (10) which is longer than the stretchable elastic tape section (32), characterized in that said section of the fastening tape (10) being longer than the stretchable elastic tape section (32) is provided with zigzag-shaped folding extending laterally with respect to the length of the fastening tape."

Claim 1 according to the third auxiliary request reads as follows:

"Fastening tape in combination with a disposable diaper, for fastening of the diaper on the body of a person,

the fastening tape being attached to the diaper at one of its end portions (18) and being provided with a fastening means (22) on one surface of the other end portion (20), a stretchable elastic portion (30) being provided between the end portions, a tape section (32) of a stretchable elastic material being secured to the fastening tape (10) at least at both ends (32a, 32b) of the tape section (32) of stretchable elastic material, to bridge a section of the fastening tape (10) which is longer than the stretchable elastic tape section (32), characterized in that said section of the fastening tape (10) being longer than the stretchable elastic tape section (32) is provided with zigzag-shaped folding extending laterally with respect to the length of the fastening tape."

Claim 1 of the fourth auxiliary request (filed as fifth auxiliary request with letter of 16 September 2004) reads as follows:

"Method for manufacturing a fastening tape for a sanitary article, particularly disposable diaper, for fastening of the article on the body of a person, the fastening tape being attached to the article at one of its end portions (18) and being provided with a fastening means (22) on one surface of the other end portion (20), a stretchable elastic portion (30) being provided between the end portions, a tape section (32) of a stretchable elastic material being secured to the fastening tape (10) at least at both ends (32a, 32b) of the tape section (32) of stretchable elastic material, to bridge a section of the fastening tape (10) which is longer than the stretchable elastic tape section (32), wherein said section of the fastening tape (10) being longer than the stretchable elastic tape section (32) is provided with zigzag-shaped folding extending laterally with respect to the length of the fastening tape, characterized in that the elastic tape section (32) is secured at least at the ends (32a, 32b) of the elastic tape section (32) to the fastening tape to bridge a central portion thereof, and that the laminate comprising the fastening tape and the elastic tape section is inserted into a zigzag-shaped gap of two dies."

Claim 1 of the fifth auxiliary request (filed as fourth auxiliary request with letter of 16 September 2004) reads as follows:

"Fastening tape for a sanitary article, particularly disposable diaper, for fastening of the article on the body of a person, the fastening tape being attached to the article at one of its end portions (18) and being provided with a fastening means (22) on one surface of the other end portion (20), a stretchable elastic portion (30) being provided between the end portions, a tape section (32) of a stretchable elastic material being secured to the fastening tape (10) at least at both ends (32a, 32b) of the tape section (32) of stretchable elastic material and in intervals between the ends (32a, 32b) of the tape of elastic material, to bridge a section of the fastening tape (10) which is longer than the stretchable elastic tape section (32), characterized in that said section of the fastening tape (10) being longer than the stretchable elastic tape section (32) is provided with zigzag-shaped folding extending laterally with respect to the length of the fastening tape."

VI. In support of its requests the Appellant argued

essentially as follows:

Main request:

Claim 1 as amended according to this request was in agreement with Article 123(2) EPC in respect of the material of the fastening tape being non-stretchable and non-elastic. Claim 1 now related to the combination of the sanitary article with the fastening tape, the latter having a separate stretchable tape section secured to it, thus the indicated properties of the fastening tape were those when attached to the article, i.e. when in use. Basis for the amendment could be found on page 3, lines 15-19 of the application as originally filed, which mentioned the material of the fastening tape as being "more or less non-stretchable and non-elastic under the conditions the fastening tape is used in the present context". Where the original application mentioned the fastening tape as being stretchable, this was before and during production of the fastening tape, where it went through zigzag-shaped ring rolls, which stretched it, together with the elastic tape section. After this process step the material of the fastening tape was no longer stretchable in use; the elastic tape section secured to the fastening tape, however, remained so.

First auxiliary request:

Claim 1 according to this request now mentioned the fastening tape as determining the maximum extension of the stretchable elastic tape section. Basis for the amendment could be found on page 2, lines 10-13 and page 5, lines 15-20. Second and third auxiliary request: The amendments proposed to claim 1 as granted were in reply to the preliminary opinion of the Board in respect of the phrase "at least at both ends thereof" in claim 1 as granted and objected to, which could refer to the ends of the fastening tape as well as to the ends of the elastic tape section secured to the fastening tape.

As regards novelty, the end portion of the fastening tape fixed to the sanitary article as disclosed in D3 also served as the fixation point of one end of the elastic tape section, thus the elastic portion would not be provided between the end portions of the fastening tape as presently claimed in claim 1. Further, the mention of a "gathered portion" in D3 was not necessarily the claimed zigzag-shaped folding of the section of the fastening tape in the elastic portion.

Fourth auxiliary request:

In appeal proceedings the principle of party disposition over its requests and the order in which these were presented prevailed. The Appellant was therefore entitled to change the order of the fourth and the fifth auxiliary request filed with letter of 16 September 2004. The amendments carried out to claim 8 as granted (now claim 1 of this request) could not be objected to for lack of clarity under Article 84 EPC as these amendments were only a clarification regarding the elastic tape section and the incorporation of the features of the fastening tape of claim 1, which in any case formed part of claim 8 because of its reference "...for manufacturing a fastening tape according to one of claims 1 to 7,...". In accordance with the case law of the Boards of Appeal the application of Article 84 EPC in opposition and opposition-appeal proceedings was restricted to

uncertainty arising from the amendments.

Fifth auxiliary request:

Novelty was given over D3, as this document did not mention the securing of the elastic tape section to the fastening tape in intervals between the ends of the elastic tape section. The gathers mentioned in D3 could also be achieved by other securing means, for instance by securing it over the whole surface, which resulted in micro-gathers.

VII. The Respondents argued essentially as follows:

Admissibility appeal:

Respondent 02 argued that the grounds of appeal did not deal with the reasons on which the impugned decision was based, nor did they give reasons why the decision was alleged to be incorrect, as was required by Rule 64 EPC. Thus the appeal should be found inadmissible.

Main request:

The amendments to claim 1 were not directly and unambiguously derivable from the application as originally filed. In the description the fastening tape was on the one hand mentioned as an entity separate from the elastic tape section, on the other hand it was a laminate comprising the elastic tape section. The conditions of use of the fastening tape were not mentioned in the claim, thus could not provide the necessary link with the passage of the original application referred to by the Appellant. The material of the fastening tape (if seen as an entity separate from the elastic tape section) was stretchable, as evidenced by page 5, lines 7-13 of the application as originally filed, which mentioned that it was stretched zigzag-wise when being moved together with the elastic tape section through the gap of the ring rolls.

First auxiliary request:

The amendment relating to the fastening tape determining the maximum extension of the elastic tape section to avoid rupture thereof was as such not derivable from the application as originally filed. The passages relied upon consistently referred to the fastening tape as being "non-elastic". The presently claimed fastening tape could very well be elastic, amounting to an inadmissible generalisation of features which had been disclosed in a specific combination only.

Second and third auxiliary request:

The amendments were only a clarification, thus not occasioned by grounds of opposition. They were therefore not admissible pursuant to Rule 57a EPC. Further, novelty of the subject-matter of claim 1 according to these requests was at stake when considering the diaper disclosed in D3, column 2, lines 39-58 and figure 7. A gathered portion could be nothing else than a portion in a zigzag-shape.

Fourth auxiliary request:

This request, previously submitted as the fifth request, limited the claimed subject-matter to a method claim for manufacturing a fastening tape for a sanitary article. Because of the change in order of these requests the fifth and last auxiliary request returned to the fastening tape in claim 1 and the method in claim 6. This led to the debate in the oral proceedings to be no longer con-

verging and to an abuse of proceedings. Further, the amount and order of the requests was becoming unreasonable, so this change in the order of the requests should not be allowed.

The claim to the manufacturing method was unclear in that the sequence of the steps in this method was not given, nor was it clear which method steps related to the technical features of the fastening tape now incorporated in the method claim.

Fifth auxiliary request:

Novelty of the subject-matter of claim 1 was not given, as D3 considered the elastic tape section 11b1 to be gathered after fixing it to the fastening tape 11b2 or 11b3. This could only be achieved if the elastic tape section were fixed also in intervals between its ends, otherwise it would simply hang loose on the fastening tape between its end fixation points.

Reasons for the Decision

1. Admissibility of the appeal

The Board considers that on the issue of admissibility of appeals the case law in general requires the statement of grounds of appeal to specify the legal or factual reasons on which the case for setting aside the decision is based. By presenting on appeal a new, further amended main request the appellant has given the factual reason for setting aside the decision under appeal, as claim 1 on which the revocation of the patent was based is no longer maintained. By arguing on the clarity of this amended claim in paragraphs 1-3 of page 2 of the statement of grounds of appeal the appellant has further presented the required reasoning against the decision under appeal.

T 220/83 does not appear to be applicable in the present case, as it concerns the absence of reasoning on inventive step in the statement of grounds of appeal against a decision revoking the patent on the basis of that ground of opposition.

T 213/85 neither appears to apply, as it concerns the absence of reasoning on the sufficiency of substantiation of the opposition in the statement of grounds of appeal against a decision rejecting the opposition as inadmissible for lack of substantiation.

Since also the other requirements regarding admissibility are fulfilled the appeal is admissible.

2. Order of the requests submitted by the Appellant for decision by the Board

2.1 The main request and the first, second and third auxiliary request consist of a set of claims having an independent claim for a product and an independent claim for a method for manufacturing a product, the product claim being more and more limited following the order of these requests. The fourth auxiliary request involves a set of claims which relates only to the method for producing the product, whereas the fifth auxiliary request presents a set of claims involving again an independent product claim as well as an independent method claim. The order of these two requests as filed with letter of 16 September 2004 was reversed by the Appellant during the oral proceedings.

2.2 According to Article 113(1) EPC the Board is bound to the requests of the applicant or the proprietor.

In case of main and auxiliary requests this means that it is also bound to the order of these requests as requested by the party (see e.g. T 169/96 and T 488/94).

2.3 In any case, considering that according to Article 64(2) EPC the protection conferred by a patent relating to a process extends to the products directly obtained by such process, the product resulting from the method of manufacturing as presently claimed in claim 1 of the fourth auxiliary request is less limited in its technical features than the product claimed in claim 1 of the fifth auxiliary request. In the latter the elastic tape section is secured to the fastening tape not only at the ends of the elastic tape section, but also in intervals between these ends. Thus there is also a logical reason for this reversal in the order of the requests: the last auxiliary request relating to a product which is more limited in its technical features than the penultimate auxiliary request.

2.4 Thus the Board sees no reason to object to the reversal of the order of the fourth and fifth auxiliary request.

3. Amendments (Article 123(2) EPC)

3.1 Main request:

Claim 1 as granted has been amended (a.o.) in that the material of the fastening tape is "non-stretchable and non-elastic".

The Board notes that the application as originally filed mentions the fastening tape on a number of occasions in connection with a stretching property. Page 3, lines 15-19 states that "the material of the fastening tape is more or less non-stretchable and nonelastic under the conditions the fastening tape is used in the present context". Page 4, lines 27 and 28 mentions the fastening tape 10 as comprising an "elastically stretchable center portion 30 between the end portions 18, 20". Page 2, line 35 – page 3, line 2 and page 5, lines 1-13 refer to the central portion of the fastening tape and the tape section as separate entities which are moved together as a laminate through the gap of the ring rolls, by which process step both layers are stretched. Even when taking account of the Appellant's argument that the fastening tape and the elastic tape section are two separate entities forming a laminate, the Board cannot conclude from these passages that the material of this fastening tape is directly and unambiguously derivable as being "non-stretchable". Neither its conditions of use nor those of the article are mentioned in claim 1, resulting in this claim lacking a relationship with this passage on page 3 of the application as filed. Further, the mentioned "more or less non-stretchable"-property cannot be equated to the presently claimed explicit "non-stretchable"-property of the fastening tape material. Finally, the end portions of the initially stretchable fastening tape, which have not been passed through the zigzag gap between the ring rolls, will in any case still be of "stretchable material", even when attached to a sanitary article, the attachment merely impeding, but not taking away the actual stretchability.

As a consequence claim 1 of the main request does not comply with the requirements of Article 123(2) EPC and therefore the main request is not allowable.

3.2 First auxiliary request:

The added feature of the fastening tape determining the maximum extension of the stretchable elastic tape section so as to avoid rupture thereof has been disclosed solely on page 2, lines 10-13 and page 5, lines 15-20 of the application as originally filed. In these passages, however, the fastening tape is nonelastic.

This is mentioned explicitly on page 2, line 11 and it can be derived from the context of the indicated passage on page 5, which relates to the central portion of the fastening tape and the elastic tape section as being moved through the zigzag gap of the ring rolls, whereby the fastening tape is stretched but does not return to its original shape, due to its non-elastic property. According to the consistent case law of the Boards of Appeal it is not permissible to extract isolated features from a set of features which have originally been disclosed in combination (see e.g. T 1067/97 and T 1110/97, Special Edition No. 3 of the OJ EPO 2001, 39 and 40). The present wording of claim 1 not involving the limitation of the fastening tape being non-elastic thus amounts to an extension of subject-matter, contrary to Article 123(2) EPC.

The first auxiliary request is therefore refused.

3.3 Second, third and fifth auxiliary request: Claim 1 as granted has been amended according to the second and the third auxiliary request in that it is now clarified that the elastic tape section is secured to the fastening tape at least at both ends of the elastic stretchable tape section and not at both ends of the fastening tape.

According to the fifth auxiliary request claim 1 as granted has been amended in that it is now clarified that the elastic tape section is secured to the fastening tape at least at both ends of the elastic stretchable tape section as well as in intervals between the ends of the tape of elastic material. The question whether these amendments can qualify as a response to a ground of opposition (Rule 57a EPC) and comply with the requirements of Article 123 EPC needs not to be dealt with in view of the conclusions of the Board in respect of the novelty of the subject-matter of claim 1 of these requests (see below), when accepting the position taken by the Appellant that the requirements of Article 123(2) EPC are fulfilled.

3.4 Fourth auxiliary request: The question whether the amendments to claim 8 as granted (forming the sole independent claim 1 in this request) comply with the requirements of Article 123 EPC needs no discussion in view of the conclusions of the Board in respect of clarity of this claim (see point 4 below).

3.5 Fifth auxiliary request: The question whether the amendments to claim 1 as granted comply with the requirements of Article 123 EPC needs no discussion in view of the conclusions of the Board in respect of novelty of this claim (see point 5 below), when following the position taken by the Appellant.

4. Clarity (Article 84 EPC)

Fourth auxiliary request:

4.1 Claim 8 as granted concerns a "Method for manufacturing a fastening tape according to one of claims 1 to 7, characterized in that the elastic tape section (32) is secured at least at the ends (32a, 32b) thereof to the fas-

tening tape to bridge a central portion thereof and that the laminate comprising the fastening tape and the elastic tape section being inserted into a zigzagshaped gap of two dies".

Claim 1 as granted related to a "Fastening tape for a sanitary article, particularly disposable diaper, for fastening of the article on the body of a person, the fastening tape being attached to the article at one of its end portions (18) and being provided with a fastening means (22) on one surface of the other end portion (20), a stretchable elastic portion (30) being provided between the end portions, a tape section (32) of a stretchable elastic material being secured to the fastening tape (10) at least at both ends (32a, 32b) thereof, to bridge a section of the fastening tape (10) which is longer than the stretchable elastic tape section (32), characterized in that said section of the fastening tape (10) being longer than the stretchable elastic tape section (32) is provided with zigzagshaped folding extending laterally with respect to the length of the fastening tape".

4.2 Claim 1 of the present fourth auxiliary request (see point V above) is unclear (Article 84 EPC) because of the amendment incorporating into it the features of product claim 1 as granted (see above). The phrases starting with "being" ("being attached to the article", "being provided with a fastening means", and "being provided between the end portions.....") now define specific method steps of the manufacturing method. In claim 8 as granted, with the mention of "the fastening tape according to one of claims 1-7", these expressions concerned only the technical characteristics of the fastening tape itself and its use, not the manner in which it had been produced.

The present wording, however, does not disclose any of the features of these method steps, nor of the means employed therein. Thus present claim 1 lacks the features necessary for its comprehension (Article 84 EPC) and therefore the fourth auxiliary request is not allowable.

5. Novelty (Article 54 EPC) - Second and third auxiliary request

5.1 D3 discloses a sanitary article in combination with a fastening tape (11b2 or 11b3) attached thereto at one of its end portions and having a fastening means (adhesive portion 11a) on one surface of the other end portion. A stretchable elastic tape section (tape like elastic body 11b1) is secured at both its ends (see figure 7) to the fastening tape, together forming an elastic portion between the end portions of the fastening tape. The section of the fastening tape which is bridged by the elastic tape section is longer than the stretchable elastic tape section and is provided with zigzag-shaped folding extending laterally with respect to the length of the fastening tape (see figure 7 and column 2, line 58: "gathered portion").

5.2 The Appellant argued that the end portion of the fastening tape fixed to the sanitary article as disclosed in D3 also served as the fixation point of one end of the elastic tape section, thus the elastic portion would not be provided "between" the end portions of the fastening

tape and that furthermore the mention of a "gathered portion" in D3 was not necessarily identical with the claimed zigzag-shaped folding of the section of the fastening tape in the elastic portion. However, claim 1 in its present form does not define the end portions of the fastening tape in terms of a certain longitudinal extension. It states in this respect: "the fastening tape being attached to the article at one of its end portions" (emphasis added by the Board). Thus, the elastic portion, apart from the fact that it is mentioned in isolation in claim 1, i.e. without being explicitly linked to the elastic tape section or the longer fastening tape section bridged by the elastic tape section, can easily be provided between the end portions of the fastening tape. Finally, the fixation of the elastic tape section to the fastening tape tends to make it non-elastic at those locations, thus the elastic portion, if determined by the extent of elastic material between its fixations to the fastening tape, would in any case be situated between the end portions.

5.3 A zigzag-shaped folding of the fastening tape not necessarily means that the fastening tape has sharp folds at the turns in its course, as shown in figures 1, 3 and 4 of the patent in suit; it merely means that the tape makes a series of short sharp turns, which can, however, have a radius of curvature. That kind of arrangement is covered by the term "gathered portion" as employed in D3. This is all the more so as the patent in suit, in its paragraph 0013, refers to another possibility of manufacturing the combination of the fastening tape with the elastic tape section, namely by securing the elastic tape section in a prestretched condition to the fastening tape and connecting them at intervals. There is no information in the patent in suit or elsewhere as to why the result of that measure will not be a "gathered portion". Thus all features of the combination of the fastening tape and the sanitary article of claim 1 are disclosed in D3. The subject-matter of claim 1 according to the second auxiliary request thus lacks novelty (Article 54 EPC).

5.4 As the third auxiliary request only differs from the second auxiliary request in that the sanitary article is more explicitly referred to as a diaper and D3 relates specifically to a diaper, the above reasoning equally applies to claim 1 of the third auxiliary request.

The second and third auxiliary requests are therefore not allowable.

6. Novelty (Article 54 EPC) - Fifth auxiliary request

6.1 The subject-matter of claim 1 according to this request is further limited in respect of claim 1 of the second auxiliary request by the feature of the tape section of stretchable elastic material being secured to the fastening tape, not only at both ends of the elastic tape section, but also in intervals between these ends. It cannot be seen how the tape-like elastic body 11b1 can be fixed to the nonwoven fastening tape 11b2 or 11b3 so as to form a "gathered portion", as disclosed in D3, other than by fixing the elastic tape-like body to it also in intervals between its ends. If this is not done, the elastic tape will hang loose on the fastening tape and can hardly perform its function. The Board considers

this is what the skilled person would be bound to do, when applying the teaching of D3.

6.2 The Appellant has not produced any evidence in support of its argument that gathers ("micro-gathers") could also be arrived at by securing the elastic tape section 11b1 over its whole surface to the fastening tape 11b2 or 11b3. In view of the above, claim 1 according to the fifth auxiliary request does not involve novelty (Article 54 EPC), the request is therefore not allowable.

6.3 None of the requests being allowable the appeal is to be dismissed.

Order

For these reasons it is decided that: The appeal is dismissed.
