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**Datasheet for the decision
of 6 June 2012**

Case Number: T 0511/08 - 3.2.02

Application Number: 99947765.6

Publication Number: 1119386

IPC: A61M 16/04

Language of the proceedings: EN

Title of invention:
Laryngeal mask airway device

Patent Proprietors:
Indian Ocean Medical Inc.
The Laryngeal Mask Company Limited

Former Opponent (opposition withdrawn):
Ambu A/S

Headword:
-

Relevant legal provisions:
EPC Art. 83, 84, 101(3)(a), 111(1), 123(2)

Keyword:
"Extended subject-matter: no"
"Sufficiency of disclosure: yes"
"Clarity: yes"

Decisions cited:
T 0367/96

Catchword:
-



Case Number: T 0511/08 - 3.2.02

D E C I S I O N
of the Technical Board of Appeal 3.2.02
of 6 June 2012

Appellants:

(Patent Proprietors)

Indian Ocean Medical Inc.
Revolution Avenue
P.O. Box 18
Mahé (SC)

The Laryngeal Mask Company Limited
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Victoria, Mahé (SC)

Representative:

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Decision under appeal:

Decision of the Opposition Division of the
European Patent Office posted 5 March 2008
revoking European patent No. 1119386 pursuant
to Article 101(3)(b) EPC.

Composition of the Board:

Chairman: C. Körber
Members: M. Stern
A. Pignatelli

Summary of Facts and Submissions

- I. On 5 March 2008 the Opposition Division posted its decision to revoke European patent No. 1 119 386.
- II. An appeal was lodged against this decision by the patent proprietors by notice received on 11 March 2008, with the appeal fee being paid on the same day. The statement setting out the grounds of appeal was received on 15 July 2008.
- III. After having filed a counter-statement, the opponent withdrew its opposition with letter dated 2 May 2011.
- IV. The appellants requested that the impugned decision be set aside and that the patent be upheld according to the main request or on the basis of one of the auxiliary requests I to III filed with the statement of grounds of appeal.
- V. With letter of 21 December 2011 the appellants withdrew their request for oral proceedings.
- VI. The independent and only claim of the main request reads as follows:

"1. A laryngeal-mask airway device (20) comprising:
an inflatable main-cuff (55) which, when inflated, has the shape of a torus generated by an asymmetrical oval having a wider proximal region (57) and a narrower distal region (60), said main-cuff having an inflation port (65) connected to said proximal region and being a molded product of relatively thin and softly pliant elastomeric material; and

a backplate (52) comprising a bowl (90) having a transversely concave laryngeal-side (97) and a convex pharyngeal-side (95), said backplate being hermetically bonded to a periphery (75) of said main-cuff establishing separation between a laryngeal-chamber region and a pharyngeal region, said backplate further comprising an external tube-joint (92) adjacent to said proximal region of said main-cuff, said tube-joint being formed on said pharyngeal-side and extending from said pharyngeal-side into said pharyngeal region, said tube-joint further including a passageway (110) extending through said backplate for communication between said pharyngeal and laryngeal-chamber regions, **characterised by** said bowl having a longitudinal distal reinforcing rib (105) incorporated into the distal end of the inflatable cuff for longitudinally supporting the distal region of said main-cuff, wherein said distal rib (105) is seated on the anterior surface of the distal region of said main-cuff."

VII. The appellants' arguments are summarised as follows:

Claim 1 of the main request was based on original claims 1 and 4 in combination with lines 13 to 14 of page 2 of the description as originally filed. Even though there was no disclosure of the subject-matter of claim 4 in the description, it was clear that the teaching of claim 4 was applicable to all explicitly described embodiments covered by original claim 1.

The features added from the description to the combination of claims 1 and 4 fulfilled the requirement of clarity.

Instructions as to the manufacture of devices according to the invention were set out in detail at page 12, line 27 to page 13, line 8 of the description. In the embodiment of Figure 10, a configuration was described in which the distal rib 105a was applied to the posterior surface of the distal region 60a of the main cuff. In lines 26 et seq. of page 13 it was stated that the distal rib 105a could be effectively constituted by a thickening of the posterior wall of the distal region 60a. This teaching could also be applied to a rib seated on the anterior surface of the distal region of the main cuff as claimed in the main request. The patent thus clearly disclosed to the skilled worker how to form the devices of the invention and in particular how to form distal ribs in different places and in different ways.

With respect to patentability, it was sufficient to make reference to the proprietor's comments filed during the opposition procedure since claim 1 of the main request was substantially similar to the claims in the previously filed request.

Reasons for the Decision

1. The appeal is admissible.
2. Amendments

Claim 1 of the main request is based on original claims 1 and 4 in combination with lines 13 to 14 of page 2 of the description as originally filed.

The claimed combination requires that there must be a longitudinal distal reinforcing rib for longitudinally supporting the distal region of said main cuff and that the said distal rib is seated on the anterior surface of the distal region of said main-cuff.

In the description there are numerous references to distal ribs. In the statements of invention on page 2 for example, the term used is consistently "a reinforcing rib" (page 2, lines 6, 13, 17, 18, 20, 23 and 25). In line 27, simply "the rib" is used, clearly referring to the ribs previously mentioned. In the specific embodiments, the first references to ribs appear on page 10. Thus at line 5, "an elongate integral reinforcing distal rib 105" is mentioned, whilst at the paragraph at lines 18 to 23, the reference is to "the distal rib 105". On page 13, line 8, reference is again made to a "reinforcing distal rib 105", still describing the same embodiment. Even though the terminology used to refer to the ribs in the embodiments is somewhat variable, it is clear to the skilled person reading the original disclosure that all ribs are of the same general type, with words such as "reinforcing", "supporting", "stiffening" etc. being effectively used as synonyms to describe the rib's function. It is also clear that the rib, disclosed to be "reinforcing" and "incorporated into the distal end of the inflatable cuff" (page 2, lines 13 to 14) "for longitudinally supporting the distal region of said main-cuff" (cf. end of original claim 1) when located between the posterior and the anterior surface (Fig. 5), is implicitly also disclosed as fulfilling

these criteria when located on the anterior surface as defined in original claim 4.

Accordingly, the Board is satisfied that claim 1 of the main request meets the requirements of Article 123(2) EPC.

3. Support and Clarity

Granted claim 4 relates back to granted claim 1 and has been incorporated into claim 1 of the main request. This combination of granted claims therefore concerns a specific device which as such was already claimed in the patent as granted. The lack of support in the sense of Article 84 EPC of claim 4 was hence already present in the patent as granted and has not been introduced after grant of the patent. Consequently, following for instance decision T 367/96 (cf. point 6.2 of the Reasons), it is concluded that in the present case Article 101(3)(a) EPC does not allow objections to be based on Article 84 EPC since such objections do not arise from the amendments made.

As mentioned above, the term "incorporated into the distal end of the inflatable cuff" was introduced from the description into claim 1 of the main request and serves to more precisely define the location of the distal reinforcing rib (105) within the distal region (60) of the cuff. In the Board's view the term "distal end" is clear as such and does not lead to any ambiguity or lack of clarity within the meaning of Article 84 EPC.

4. Sufficiency of disclosure

In the description of the specific embodiments of the original disclosure, the reinforcing rib is either located at the posterior surface of the distal region of the main cuff (see reference numeral 105a in Figure 10), or between its anterior and posterior surfaces (see reference numeral 105 in Figure 5). When located at the posterior surface, it is disclosed in the last paragraph of page 13, that the rib can be formed by thickening the posterior wall of the distal region of the main cuff, without piercing the posterior surface thereof. It is disclosed in the third paragraph of page 10 that the rib pierces the proximal, i.e. the posterior surface when located between the posterior and anterior surfaces.

Accordingly, when seated on the anterior surface as claimed in the main request, it is clear to the skilled person that the rib can be formed by thickening the anterior wall of the distal region of the main cuff, with the posterior surface being pierced, even though such an embodiment is not explicitly described. Consequently, the disclosure is sufficient in order to allow the skilled person to obtain the claimed device.

When seated on the anterior surface, the rib's purpose of preventing the cuff from getting folded onto itself during insertion of the device into the patient's throat (see paragraph [0010] of the patent in suit) is also fulfilled. Since the claim is directed to a device rather than to a method of its use, it is not necessary that the disclosure specifies further details of the

insertion techniques in order to comply with the requirement of sufficiency.

The Board is therefore satisfied that the disclosure enables the skilled person to reduce the invention to practice and to obtain the claimed device, the requirements of Article 83 EPC thus being fulfilled.

5. Remittal for further examination

As stated above, the main request is free from objections under Articles 83, 84 and 123(2) EPC. However, the remaining requirements of the EPC, in particular patentability, have not been dealt with during the first instance proceedings, and no substantiation was brought forward by the patent proprietors in this respect.

Accordingly, the Board finds it appropriate to exercise its discretion under Article 111(1) EPC to remit the case to the department of first instance for a resumption of the examination procedure with respect to the remaining requirements of the EPC, in particular those of inventive step. If the Opposition Division comes to the conclusion that the patent is to be maintained in amended form on the basis of claim 1 of the present main request, the description would still have to be adapted thereto, in particular with respect to the embodiment of Figures 10 and 11 which no longer seems to fall under the scope of this claim.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the department of first instance for further prosecution on the basis of the main request filed on 15 July 2008.

The Registrar:

The Chairman:

D. Hampe

C. Körber