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**Datasheet for the decision  
of 6 October 2011**

**Case Number:** T 0651/08 - 3.2.08  
**Application Number:** 99972520.3  
**Publication Number:** 1131022  
**IPC:** A61F 5/44, A61M 25/01  
**Language of the proceedings:** EN

**Title of invention:**

A urinary catheter assembly with integrated catheter applicator

**Patent Proprietor:**

Coloplast A/S

**Opponent:**

AstraZeneca AB

**Headword:**

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**Relevant legal provisions:**

EPC Art. 54(1)(2), 84, 113(2)  
RPBA Art. 15(3)

**Relevant legal provisions (EPC 1973):**

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**Keyword:**

"Main and first auxiliary request: novelty - no"  
"Second auxiliary request: support by the description - no"

**Decisions cited:**

T 0986/00, T 0109/02, T 0181/02, T 0776/05

**Catchword:**

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Case Number: T 0651/08 - 3.2.08

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.08  
of 6 October 2011

**Appellant:** Coloplast A/S  
(Patent Proprietor) Holtedam 1  
DK-3050 Humlebaek (DK)

**Representative:** Nilausen, Kim  
c/o Coloplast A/S  
Holtedam 1  
DK-3050 Humlebaek (DK)

**Respondent:** AstraZeneca AB  
(Opponent) S-151 85 Södertälje (SE)

**Representative:** Lind, Urban Arvid Oskar  
AWAPATENT AB  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 18 January 2008  
revoking European patent No. 1131022 pursuant  
to Article 101(3)(b) EPC.

**Composition of the Board:**

**Chairman:** T. Kriner  
**Members:** M. Alvazzi Delfrate  
U. Tronser

## Summary of Facts and Submissions

I. By decision posted on 18 January 2008 the opposition division revoked European patent No. 1 131 022. The opposition division held that the requests then on file were not allowable for lack of novelty in view of

D1: W0-A-98 11 932; or

D6: W0-A-98 06 642.

II. The appellant (patent proprietor) lodged an appeal against this decision on 28 March 2008, paying the appeal fee on the same day. The statement setting out the grounds for appeal was filed on 27 May 2008.

III. Although duly summoned the appellant did not attend the oral proceedings before the board of appeal and requested in writing that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of request A filed with the statement of grounds for appeal. As an auxiliary request it requested that the patent be maintained according to request G or request H, also filed with the statement of grounds for appeal.

The respondent (opponent) requested that the appeal be dismissed.

IV. Claim 1 of the main request reads as follows:

"A urinary catheter assembly comprising at least one urinary catheter (1) having a proximal end, and a flexible tubular catheter package comprising a hose member (4) with a cavity (5) narrowly surrounding said

at least one catheter (1), the package further comprising a tubular compartment (10) connected with said hose member (4) for accommodation of said proximal end of the at least one catheter (1), whereby said compartment (10) is closed in a first open end by a detachable cover member (11), a second opposite end it is detachably connected with said hose member (4) and the compartment being formed with a wall (14) of a thin flexible material so as to permit arrangement of said compartment (10) on the at least one catheter (1) for use as an applicator for guided non-contaminating insertion of the catheter (1) into the urethra (15) after detachment of said cover member (11) and detachment of the compartment (10) from the hose member (4) so as to allow the compartment wall to be squeezed by moderate finger pressure, wherein the compartment is adapted to be arranged on the shaft of the catheter so that the compartment wall can be squeezed into engagement with the catheter (1) when the compartment is arranged on the shaft of the catheter."

Claim 1 of the first auxiliary request differs from claim 1 of the main request by the additional feature according to which the catheter has a hydrophilic surface coating throughout the part of the length intended for insertion into the urethra.

Claim 1 of the second auxiliary request differs from claim 1 of the main request by the addition of the following features:

"wherein a distal end of the hose member (4) remote from its connection with said compartment (10) is closed by a detachable closure (7), said proximal end

of the at least one catheter (1) being formed for connection with said distal end of the hose member (4) such that after removal of said closure (7) and detachment of said cover member (11), the hose member is connectable by its distal end with said proximal end of the at least one catheter (1) to form an extension member in flow communication with the catheter (1)."

V. The arguments relevant to the present decision put forward by the appellant can be summarised as follows:

According to page 11, lines 8-18 of D1 the tubular compartment could be opened either at its distal end or at its proximal end. Since these two opening possibilities were not disclosed in combination, D1 did not disclose a tubular compartment closed at a first open end by a detachable cover member and detachably connected with a hose member at a second opposite end. Therefore, the subject-matter of claim 1 of the main request was novel in view of D1.

With respect to the auxiliary requests G and H, the appellant explained only which feature had been added in comparison with claim 1 of the main request.

VI. The arguments of the respondent relevant to the present decision can be summarised as follows:

D1 disclosed a urinary catheter assembly comprising all the features of claim 1 of the main request. In particular, Figure 4 showed a tubular compartment closed in a first open end by a detachable cover member and detachably connected with a hose member at a second

opposite end. Therefore, the subject-matter of claim 1 lacked novelty.

Since D1 was concerned with a hydrophilic urinary catheter, the subject-matter of claim 1 of the auxiliary request G was not novel either.

The subject-matter of claim 1 of auxiliary request H did not involve an inventive step in view of the combination of D1 and D6, since the latter document taught the use of part of the package as a drainage extension of the catheter.

Moreover, the second auxiliary request did not comprise an adapted description, and the description of the patent as granted was in contradiction with the claims. Since a patent proprietor who chose not to be represented at oral proceedings should ensure that he had filed all amendments that he wished to be considered, in accordance with decision T 986/00, the second auxiliary request was not allowable also for this reason.

## **Reasons for the Decision**

1. The appeal is admissible.
  - 1.1 D1 discloses (Figure 4) a urinary catheter assembly comprising one urinary catheter (1, 2) having a proximal end, and a flexible tubular catheter package comprising a hose member (17) with a cavity (18) narrowly surrounding said at least one catheter, the package further comprising a tubular compartment (19)

connected with said hose member for accommodation of said proximal end of the at least one catheter.

Figure 4 shows that said compartment is closed in a first open end by a detachable cover member (21). Moreover, it shows that the second opposite end is detachably connected (via the fracture-defining segment 20) with said hose member. Hence, contrary to the appellant's view, these features are disclosed in combination.

The material of the compartment is flexible (see page 11, line 3-7). Therefore the compartment is formed with a wall of a thin flexible material so as to permit arrangement of said compartment on the at least one catheter for use as an applicator for guided non-contaminating insertion of the catheter into the urethra after detachment of said cover member and detachment of the compartment from the hose member so as to allow the compartment wall to be squeezed by moderate finger pressure, wherein the compartment is adapted to be arranged on the shaft of the catheter so that the compartment wall can be squeezed into engagement with the catheter when the compartment is arranged on the shaft of the catheter.

Accordingly, the subject-matter of claim 1 lacks novelty in view of D1.

2. First auxiliary request (G)

D1 further discloses that the catheter has a hydrophilic surface coating (6) throughout the part of the length intended for insertion into the urethra (see

abstract and claim 1). Accordingly, the subject-matter of claim 1 lacks novelty too.

3. Second auxiliary request (H)

The European Patent Office can consider and decide only on the text of the European patent submitted to it, or agreed, by the proprietor (see Article 113(2) EPC 1973). Moreover, any party duly summoned to oral proceedings cannot rely on the proceedings being continued in writing or the case being remitted to the department of first instance solely because he failed to appear at the oral proceedings (see Article 15(3) RPBA). Hence, a patent proprietor has to make sure, in the event that he decides not to attend oral proceedings, that all the required documents, including a description adapted to the claims, on the basis of which the maintenance of the patent could be ordered are on file, so that a decision can be taken by the board at the end of the oral proceedings if a given request is found allowable (see decisions T 986/00, OJ 2003, 554, T 181/02 of 13 October 2003, T 109/02 of 20 January 2005 and T 776/05 of 27 April 2006).

In the present case the appellant did not file a description adapted to the claims of the second auxiliary request.

According to the description of the patent as granted, the feature that the compartment is formed with a wall of a thin flexible material is optional (see paragraphs [0016] and [0031]). The same applies to the feature according to which a distal end of the hose member remote from its connection with the compartment is



closed by a detachable closure, the proximal end of the at least one catheter being formed for connection with the distal end of the hose member such that after removal of said closure and detachment of said cover member the hose member is connectable by its distal end with said proximal end of the at least one catheter to form an extension member in flow communication with the catheter (see paragraphs [0018] and [0034]). These features have been introduced into the independent claim by amendments carried out in the post-grant proceedings. Therefore, as a result of the amendments the claims are not supported by the description, contrary to the requirements of Article 84 EPC 1973. Therefore, the patent cannot be maintained on the basis of the second auxiliary request.

## **Order**

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

The appeal is dismissed.

The Registrar:

The Chairman:

V. Commare

T. Kriner