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**Datasheet for the decision
of 3 December 2014**

Case Number: T 0682/11 - 3.2.02

Application Number: 99949217.6

Publication Number: 1121163

IPC: A61M1/00, A61M27/00

Language of the proceedings: EN

Title of invention:

APPARATUS FOR NEGATIVE PRESSURE THERAPY USING WALL SUCTION

Patent Proprietor:

KCI Licensing, Inc.

Opponent:

Smith and Nephew, Inc.

Headword:

Relevant legal provisions:

EPC Art. 56, 84, 123(3), 101(3) (a)

RPBA Art. 12(2), 13(1), 12(4)

EPC R. 99(2)

Keyword:

Admissibility of appeal (yes)

Substantiation of clarity objection (yes), substantiation of
inventive-step objection (no)

Admissibility of late-filed objections (no)

Clarity objection against a feature of a granted claim (no)

Decisions cited:

G 0009/91, T 0301/87

Catchword:



**Beschwerdekammern
Boards of Appeal
Chambres de recours**

European Patent Office
D-80298 MUNICH
GERMANY
Tel. +49 (0) 89 2399-0
Fax +49 (0) 89 2399-4465

Case Number: T 0682/11 - 3.2.02

D E C I S I O N
of Technical Board of Appeal 3.2.02
of 3 December 2014

Appellant: Smith and Nephew, Inc.
(Opponent) 1450 Brooks Road
Memphis, TN 38116 (US)

Representative: Smith & Nephew
Group Research Centre
York Science Park
Heslington
York YO10 5DF (GB)

Respondent: KCI Licensing, Inc.
(Patent Proprietor) 12930 IH 10 West
San Antonio TX 78249-2248 (US)

Representative: Cordina, Kevin John
Olswang LLP
90 High Holborn
London WC1V 6XX (GB)

Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
26 January 2011 concerning maintenance of the
European Patent No. 1121163 in amended form.**

Composition of the Board:

Chairman E. Dufrasne
Members: M. Stern
C. Körber

Summary of Facts and Submissions

- I. The opponent lodged an appeal against the decision of the Opposition Division concerning maintenance of the European patent No. 1 121 163 in amended form.
- II. During opposition proceedings, in order to overcome an objection under Article 100(c) EPC, the proprietor amended claim 1 of the granted patent as follows (amendment highlighted by the Board):

"Apparatus for applying negative pressure therapy to a wound site, which comprises an open celled foam pad (1) for application to the wound, a suction tube (2) connecting the foam pad (1) to a collection canister (3, 32), a pressure detecting means (10, 20) connected to the suction tube (2) between the foam pad (1) and the canister (3, 32) for indicating when the pressure in the suction tube (2) ~~reaches~~ **falls below** a predetermined level whereby the apparatus also includes a tube (4) for connecting the canister (3, 32) to a wall suction point (7) or to a vacuum bottle, wherein the canister (3, 32) includes a shut-off valve (140) which closes the outlet from the canister (3, 32) when it is full, and in that the apparatus includes a flow limiting valve (8) disposed between the canister (3, 32) and the suction source (7)."

In the impugned decision, the Opposition Division held that claim 1 as thus amended satisfied, inter alia, the requirements of Articles 84, 123(2) and (3), and 56 EPC. In particular, the decision ruled on the clarity of the term "flow limiting valve" in claim 1 (last paragraph of point 3 of the decision) and, regarding inventive step, considered inter alia the combination of documents P1 and P4 (point 7.7 of the decision). The

decision also indicated that the amendment made to paragraph [0009] of the patent specification was necessary to overcome an objection under Article 123(2) EPC.

III. The statement of grounds of appeal, filed on 25 May 2011, contains a single section entitled "Article 84 EPC" in which it was argued that the term "flow limiting valve" in claim 1, and thus the claim as a whole, was unclear. The section ends with the following remark: "Further, the special meaning given to the phrase 'flow limiting valve' is required in claim 1 to achieve inventive step in view of P1 and P4 in combination."

IV. Oral proceedings took place on 3 December 2014.

The appellant (opponent) requested that the decision under appeal be set aside and that the patent be revoked.

The respondent (patent proprietor) requested that the appeal be rejected as inadmissible or be dismissed, or, in the alternative, that the decision under appeal be set aside and that the patent be maintained on the basis of the first auxiliary request filed with letter dated 7 October 2014.

V. The arguments of the appellant relevant for the present decision are summarised as follows:

- The appeal was admissible as the requirements of Rule 99(2) EPC were met. During opposition proceedings, claim 1 and paragraph [0009] of the granted patent had been amended. As a basis for the amendments, the claim in its entirety was open to an assessment as to whether

it met the requirements of Article 84 EPC. In response to the interpretation of the term "flow limiting valve" in the impugned decision, the statement of grounds of appeal explained in a reasoned way that the language in paragraph [0009] conferred an explicit definition on the term "flow limiting valve", whereby claim 1 in its post-grant amended form violated Article 84 EPC. Moreover, the statement of grounds of appeal indicated that the inventiveness of the subject-matter of claim 1 was at issue. The appellant's comments on clarity in the grounds of appeal were provided to give context to the inventive-step objection.

- Amended paragraph [0009] of the patent gave the term "flow limiting valve" a meaning which was missing in current claim 1. To comply with the requirements of Article 123(2) EPC (point 2 of the decision), it had been added that the flow limiting valve was devised "to prevent the flow in the suction tube exceeding a pre-set level", an essential feature of the valve which was missing in claim 1.

- The appeal was allowable in view of the objections under Articles 84 and 56 EPC presented in the statement of grounds of appeal, and expanded on in the letter filed on 24 October 2014. This letter contained, moreover, arguments concerning the objection under Article 123(3) EPC decided upon in the contested decision. The Board had the discretion to admit the objections under Articles 56 and 123(3) EPC, especially since they were simple and highly relevant.

VI. The arguments of the respondent relevant for the present decision are summarised as follows:

- The opponent's appeal should be considered to be inadmissible for failure to comply with Rule 99(2) EPC. The statement of grounds of appeal was confined to the objection that claim 1 was not allowable under Article 84 EPC since the term "flow limiting valve" in claim 1 was unclear. However, this term was already included in claim 1 of the contested patent and had not been amended during the opposition proceedings. Consequently, the clarity of the term "flow limiting valve" could not be challenged in the present appeal. Moreover, the appellant had not challenged any aspects of the decision and so the appeal should be deemed inadmissible. The statement of grounds of appeal did not present any other "reasons for setting aside the decision impugned" as required by Rule 99(2) EPC.

- The term "flow limiting valve" had not been amended in opposition and therefore this term could not be challenged on appeal. The skilled person would fully understand the meaning of this term from the claim alone, or with the assistance of paragraph [0009] of the description. Even if the term was open to objection under Article 84 EPC, it should be found to be in compliance with that article.

- The objections under Articles 56 and 123(3) EPC had been raised only a few weeks before the oral proceedings. They were therefore late-filed and should not be admitted. Their late filing was nothing more than an attempt to gain a tactical advantage by depriving the proprietor of a proper chance to respond and prepare fully for the oral proceedings. If the Board intended to consider these objections, the oral proceedings should be postponed to allow the respondent a proper chance to respond.

Reasons for the Decision

1. Admissibility of the appeal

The Board considers that the statement of grounds of appeal contains a substantiated objection pursuant to Article 84 EPC concerning lack of clarity of claim 1 due to the allegedly unclear term "flow limiting valve". Contrary to the assertion by the proprietor-respondent, the impugned decision (in the last paragraph of point 3) addressed and decided upon the clarity of this very term.

The Board therefore finds that the appellant-opponent has challenged at least one aspect of the impugned decision in a substantiated way. The statement of grounds of appeal thus contains at least one reason for setting aside the decision impugned, as required by Rule 99(2) EPC. For the purpose of establishing the admissibility of the appeal it is hence immaterial whether the arguments are, upon a subsequent examination of their merit, found to be unconvincing (as is indicated under point 2 below to be the case here), or whether other aspects addressed by the impugned decision are found to be insufficiently substantiated in the statement of grounds of appeal (as is indicated under point 3.1 below to be also the case here).

The appeal is therefore considered to be admissible.

2. *Clarity - Article 84 EPC*

2.1 The appellant objected that the term "flow limiting valve" in claim 1 lacked clarity pursuant to Article 84 EPC.

2.2 However, this term was already included in claim 1 of the contested patent and had not been amended during the opposition proceedings.

2.3 Whilst Article 84 EPC is not a ground for opposition, when substantive amendments are made to a patent during opposition consideration has to be given to whether the amendments are in breach of any provision of the EPC, including Article 84 EPC (G 9/91, point 19 of the Reasons). However, if, for example, a clarity deficiency does not arise out of an amendment made, Article 101(3)(a) EPC does not allow an objection to be based on clarity under Article 84 EPC (T 301/87, point 3.7 of the Reasons).

2.4 The appellant argued that paragraph [0009] of the patent description had been amended during opposition to give the term "flow limiting valve" a meaning which was missing in current claim 1. The amendment consisted in adding the statement that the flow limiting valve is "to prevent the flow in the suction tube exceeding a pre-set level". This was said to be an essential feature of the flow limiting valve which was missing in the claim.

In the Board's view, however, the statement added to paragraph [0009] explaining that the flow limiting valve is to prevent the flow exceeding a certain value does not appear to add anything which is not already contained in the notion of the term. Still less does it

introduce any inconsistency with respect to the technical meaning which the term "flow limiting valve" in claim 1 intrinsically has.

2.5 The Board notes, moreover, that the only amendment made to claim 1 of the granted patent concerns a feature entirely different from that of the valve, namely the feature of pressure detecting means (see point II above). There is clearly no connection between the amendment to the pressure detecting means (10, 20) and the feature of the flow limiting valve (8) (Figure 1; original page 5, lines 10 to 14), a fact which was not even disputed by the appellant.

2.6 The Board therefore concludes that the amendments made during opposition do not affect the clarity of the term "flow limiting valve" already present in claim 1 of the patent in suit. Thus, the clarity objection raised against this term does not succeed.

3. *Admissibility of objections under Articles 56 and 123(3) EPC*

3.1 The statement of grounds of appeal consists of a single section entitled "Article 84 EPC" in which it is argued that the term "flow limiting valve" is unclear. The section ends with the following remark: "Further, the special meaning given to the phrase 'flow limiting valve' is required in claim 1 to achieve inventive step in view of P1 and P4 in combination."

Although this brief remark alludes to the requirement of inventive step, it does not give any reason why the impugned decision was incorrect in holding that the subject-matter of claim 1 involved an inventive step. In fact, the remark appears to deal with something

which is allegedly missing from claim 1, rather than addressing the requirement of inventive step concerning claim 1 in its current version. Thus, the remark cannot be taken as a clearly and concisely presented argument which enables the Board and the other party to understand immediately why the decision is allegedly incorrect on the issue of inventive step in view of P1 and P4.

The Board therefore considers that the ground under Article 56 EPC has not been substantiated in the statement of grounds of appeal, and that it is therefore not part of the appeal under Article 12(2) and (4) RPBA.

- 3.2 A substantiation of this objection, together with a further objection under Article 123(3) EPC which had also been discussed in the impugned decision, was only presented late, in a letter filed about six weeks before the oral proceedings.

The admissibility of the late-filed grounds under Articles 56 and 123(3) EPC is therefore a matter for the Board's discretion pursuant to Article 13(1) RPBA.

In the present case, the appellant has not submitted any objective reason justifying challenging the impugned decision on such grounds at a later stage than with the statement of grounds of appeal. The Board has also considered whether the late-filed grounds appear *prima facie* sufficiently relevant to call into question the maintenance of the patent in suit, and has come to the conclusion (based on the reasons under points 5 and 7.7 of the impugned decision) that they do not.

The Board therefore exercises its discretion not to admit the late-filed grounds relating to Articles 56 and 123(3) EPC, for reasons of procedural economy.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



D. Hampe

E. Dufrasne

Decision electronically authenticated