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**Datasheet for the decision
of 19 May 2021**

Case Number: T 0624/17 - 3.2.02

Application Number: 09789690.6

Publication Number: 2340066

IPC: A61M1/00

Language of the proceedings: EN

Title of invention:

OPEN-CAVITY, REDUCED-PRESSURE TREATMENT DEVICES AND SYSTEMS

Patent Proprietor:

KCI Licensing, Inc.

Opponent:

Smith and Nephew, Inc.

Headword:

Relevant legal provisions:

EPC Art. 84
EPC R. 43(7)

Keyword:

Clarity - main and auxiliary request (no)

Decisions cited:

T 1129/97

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 0624/17 - 3.2.02

D E C I S I O N
of Technical Board of Appeal 3.2.02
of 19 May 2021

Appellant: Smith and Nephew, Inc.
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
2 January 2017 concerning maintenance of the
European Patent No. 2340066 in amended form.**

Composition of the Board:

Chairman M. Alvazzi Delfrate
Members: M. Stern
N. Obrovski

Summary of Facts and Submissions

I. The opponent lodged an appeal against the interlocutory decision of the Opposition Division concerning the maintenance of European patent 2 340 066 in amended form.

In the appealed decision it was held that claim 1 of the second auxiliary request then on file fulfilled the requirements of the EPC, including the clarity requirements of Article 84 EPC.

II. Oral proceedings before the Board were held on 19 May 2021.

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 dismissed and that the patent be maintained as upheld by the Opposition Division or, alternatively, on the basis of the first auxiliary request filed with the submission dated 20 October 2020.

III. Claim 1 of the request upheld by the Opposition Division, the current **main request**, reads as follows:

"1. An open-cavity, reduced-pressure treatment device (102) for treating a tissue site (104) in a body cavity, the treatment device (102) comprising: a central connection member (112, 308), wherein the central connection member (112, 308) has a connection manifold member (154)

and a lower surface characterized by a plurality of encapsulated leg members (106, 306), the encapsulated leg members (106, 306) an having an interior portion (162) with a leg manifold member (160, 318) disposed in the interior portion (162) the plurality of encapsulated leg members (106, 306) formed with fenestration (114, 116, 118, 120) operable to allow fluid now into the interior portion (162), and wherein the leg manifold members (160, 318) are in fluid communication with the connection manifold member (154) and the lower surface extending below and between the plurality of encapsulated leg members (106, 306) and the central connection member (112, 308), wherein the fenestration (114, 116, 118, 120) extend through the lower surface, wherein the aspect ratio of the length to the width of each encapsulated leg member (106, 306) is in the range of 2.0 to 8.0."

IV. Claim 1 of the **first auxiliary request** reads as follows (amendments to claim 1 of the main request highlighted by the Board):

"1. An open-cavity, reduced-pressure treatment device (102) for treating a tissue site (104) in a body cavity, the treatment device (102) comprising:

a central connection member (112, 308), wherein the central connection member (112, 308) has a connection manifold member (154) and a lower surface characterized by

a plurality of encapsulated leg members (106, 306), the encapsulated leg members (106, 306) ~~an~~ having an interior portion (162) with a leg manifold member (160, 318) disposed in the interior portion (162);

the plurality of encapsulated leg members (106, 306) formed with fenestrationsg (114, 116, 118, 120)

operable to allow fluid ~~now~~ flow into the interior portion (162), and wherein

the leg manifold members (160, 318) are in fluid communication with the connection manifold member (154) and the lower surface extending below and between the plurality of encapsulated leg members (106, 306) and the central connection member (112, 308),

wherein the fenestrations (114, 116, 118, 120) extend through the lower surface,

wherein the aspect ratio of the length (L1) to the width (W1) of each encapsulated leg member (106, 306) is ~~in the~~ in range of 2.0 to 8.0."

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

The terms "length" and "width" in the context of the claimed reduced-pressure treatment device were unclear. The extracts of the Oxford English Dictionary filed by the respondent provided definitions of these terms, but did not help to clarify the interpretation of the wording of the claim. It was not defined where the start point and end point of the claimed leg members were located. Without such an identification, the term "length" had no well-defined meaning. Moreover, there was no clear generally applicable disclosure about how the "width" of the leg members was defined.

In claim 1 of the first auxiliary request only the reference signs W1 and L1 were introduced. However, according to Rule 43(7) EPC, reference signs should not be construed as limiting the claim. Hence, claim 1 of the main and the first auxiliary requests comprised exactly the same scope of protection and exactly the same wording.

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

The Boards of Appeal have made it clear (for example in T 1129/97, Reasons 2.1.2) that the wording of a claim must be clear from the actual terms of the claim, without the need to look to the description. This was the case for the current claim; the terms length and width were normal everyday terms which the reader would fully understand and have no difficulty interpreting. There was no need to look any further. According to the Oxford English Dictionary, length was defined as "The linear magnitude of any thing as measured from end to end; the greatest of the three dimensions of a body or figure", and width was defined as "The linear extent of something as measured across or from side to side; breadth". Thus, where a leg member had multiple widths, the broadest width should be used to calculate the aspect ratio. The skilled person would be capable of identifying the length and width of all regular and irregular objects. In the current case the terms in the claims were clear in themselves and accordingly the claim complied with Article 84 EPC.

It was only where there were questions as to the meaning of a claim that the description was consulted. Even if the skilled person did look to the description, further clarity was provided. The description only described the length and width of the leg/elongate members in two paragraphs (page 12, first full paragraph, and page 20, first full paragraph; reference was made to the application as originally filed) and on both occasions this was a reference to clearly identified dimensions (L1 and W1) which were shown in Figure 5. If the skilled person looked to the

description they would use the definitions they found there, not ignore those and proceed to try to find other definitions. It was clear from the description that the central member in Figure 3A extended to the edge 332. The extent of the leg members was also shown clearly in Figure 3A by numeral 306, which pointed to the light dashed line, and the extent of the central member was made clear by numeral 332 which pointed to the bold dashed line. The same applied to Figure 5 in the form of numeral 506 for the light dashed line, and the bold dashed line (unlabelled) surrounding the central member 512. The length of the leg members extended from a proximal end at the central member (page 20, lines 9-11) to the distal end at the end of the elongate/leg members, as shown and described by numeral L1 in Figure 5. The width of the leg/elongate members was also shown clearly on the figures as W1, as referenced in the text. Claim 1 referred to the width of the leg members, not the narrower dimension belonging to the connecting members.

Moreover, this was not a case where there were contradictory definitions or statements in the claims and description which could lead to a lack of clarity. There was only one explanation of length and width in the description, which was consistent with the claim language. The description therefore, in fact, supported the clarity of claim 1.

Claim 1 of the first auxiliary request included the references "(W1)" and "(L1)" after the words length and width. These amendments addressed the objections under Article 84 EPC since they clearly specified the meaning of length and width by reference to the relevant aspects of the description and figures, and increased

the intelligibility of the claims in accordance with Rule 43(7) EPC.

Reasons for the Decision

1. The invention relates to an open-cavity, reduced-pressure treatment device for treating a tissue site in a body cavity (e.g. inside the abdominal cavity). When surgery or trauma involves the abdominal cavity, it is often necessary to provide care of the cavity allowing or facilitating re-entry into the cavity and removing unwanted fluids from the cavity (paragraph [0003]).

2. The open-cavity, reduced-pressure treatment device of claim 1 (of both requests) comprises, in essence, a plurality of encapsulated leg members (106, 306) (Figures 1A, 3A, 5) with a leg manifold member in an interior portion of the leg members, and a central connection member (112, 308) with a connection manifold member (154), the leg manifold members being in fluid communication with the connection manifold member. Claim 1 defines, moreover, that **the aspect ratio of the length to the width of each encapsulated leg member is in the range of 2.0 to 8.0.**

The latter feature was added during opposition proceedings to claim 1 of the patent as granted. It was extracted from page 12, lines 5 to 8 of the description of the application as originally filed (or column 8, lines 51 to 56 of the granted patent). Hence, the clarity objections raised by the appellant against this feature need to be considered.

3. Article 84 EPC requires the claims to be clear, which serves the purpose of ensuring that the public is not

left in any doubt as to the subject-matter covered by a claim. From this principle of legal certainty it follows that there is a lack of clarity if a claim does not allow this distinction to be made. A claim must be clear in itself when read by the person skilled in the art, without any reference to the content of the description (Case Law of the Boards of Appeal, 9th Edition 2019, II.A.3.1).

4. The treatment device of claim 1 has been limited by defining the aspect ratio of "**length**" to "**width**" of each encapsulated leg member to be within the range of 2.0 to 8.0. However, it is not unequivocally clear how the length and the width of an object (here the "leg members" of a treatment device) with an irregular and not standardised shape should be defined.
5. It is undisputed that "length" and "width" are common everyday terms which the skilled person understands. According to the Oxford English Dictionary, "length" is defined as "the linear magnitude of any thing as measured from end to end", and "width" is defined as "the linear extent of something as measured across or from side to side".
6. However, these terms do not have an unequivocally clear meaning when they concern objects with an irregular and not standardised shape as that of the present "leg members" of an open-cavity, reduced-pressure treatment device.
 - 6.1 In this respect, it is instructive to consider the embodiment of Figure 3A of the patent:

as filed. The respondent argued that the length of the leg members extended from a proximal end at the central member (page 20, lines 9 to 11) to the distal end at the end of the leg members, as shown and described by numeral L1 in Figure 5. Following this second interpretation, the length of all six leg members in Figure 3A would result to be rather similar.

The Board considers that claim 1 does not only cover the latter interpretation of the length of the leg members of the embodiment of Figure 3A, just because it is mentioned in the description of the patent. Rather, the claim certainly covers the first interpretation, too. In fact, claim 1 covers many other different embodiments which are not even mentioned in the description, and for which various ways of defining the length of irregularly shaped leg members arise.

Therefore, each of the aforementioned interpretations of the length of the leg members of Figure 3A is legitimate and reasonable. As it is not unequivocally clear where the proximal end of the leg members in Figure 3A (or Figure 5) should be located, the length of the leg members is ill-defined. As the respondent himself correctly indicated (referring, for example, to T 1129/97, Reasons 2.1.2), it is established jurisprudence that the wording of a claim must be clear from the actual terms of the claim, without the need to resort to the description.

6.2 Likewise, the irregular shape of "leg members" of an open-cavity, reduced-pressure treatment device may be such that the leg members do not have a unique width. For example, as shown in the embodiment of Figure 5 of the patent, the leg members comprise portions with a certain width (W1) joined by portions with a narrower

width. It is thus not unequivocally clear which of these widths should be taken to calculate the claimed aspect ratio. It should be noted that the aspect ratio is a calculated parameter which itself does not appear to have a clear technical purpose in the context of the patent. Therefore, this does not assist in deciding which of the two widths should be used for the calculation of the aspect ratio.

The Board does not share the respondent's view that where a leg member has multiple widths, the broadest width should be used to calculate the aspect ratio. The standard definition in the Oxford English Dictionary of the term width as "the linear extent of something as measured across or from side to side; breadth" does not allow to unequivocally establish what the width of "leg members" of variable width should be, in particular, for the calculation of the claimed aspect ratio.

7. The Board concludes that the terms "length" and "width" of the leg members of the claimed open-cavity, reduced-pressure treatment device do not have an unequivocally clear meaning so that the aspect ratio of claim 1 is ill-defined. As a consequence, doubts may arise as to whether a certain object falls under the terms of the claim or not, contrary to the clarity requirements of Article 84 EPC (see point 3 above).
8. Apart from some obvious typographical errors (see point IV above), claim 1 of the first auxiliary request differs from that of the main request only in that reference signs "L1" and "W1" were introduced in parentheses after the terms length and width, respectively.

However, according to Rule 43(7) EPC, reference signs shall not be construed as limiting the claim.

Hence, claims 1 of the main and the first auxiliary request define the same subject-matter.

9. It follows that claim 1 of both the main and the first auxiliary request does not fulfil the clarity requirements of Article 84 EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



D. Hampe

M. Alvazzi Delfrate

Decision electronically authenticated