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**D E C I S I O N
of 2 September 1994**

Case Number: J 0018/93 - 3.1.1

Application Number: 92303280.9

Publication Number: 0532149

IPC: A61N 1/365

Language of the proceedings: EN

Title of invention:

Rate responsive pacemaker controlled by isovolumic contraction time

Applicant:

Cardiac Pacemakers, Inc.

Opponent:

-

Headword:

Correction of mistake/CARDIAC

Relevant legal norms:

EPC Art. 60(3), 61

EPC R. 88

Keyword:

"Correction substituting the name of the real applicant"
"Sufficient evidence of proof"

Decisions cited:

J 0007/80, J 0008/80, T 0219/86

Catchword:

A correction substituting the name of the applicant is allowable under Rule 88 EPC.



Case Number: J 0018/93 - 3.1.1

D E C I S I O N
of the Legal Board of Appeal 3.1.1
of 2 September 1994

Appellant: Cardiac Pacemakers, Inc.
Hamline Avenue North 4100
St. Paul
Minnesota 55112-5798 (US)

Representative: MacGregor, Gordon
Eric Potter & Clarkson
St. Mary's Court
St. Mary's Gate
Nottingham, NG1 1LE (UK)

Decision under appeal: Decision of the Receiving Section of the European Patent Office dated 18 August 1993 refusing a request for correction under Rule 88 EPC with respect to European patent application No. 92 303 280.9.

Composition of the Board:

Chairman: R. L. J. Schulte
Members: J. C. M. De Preter
J. Saisset

Summary of Facts and Submissions

I. European patent application No. 92 303 280.9 was filed with the UK Patent Office on 13 April 1992 by a professional representative in the name of Cardiac Pacemakers, Inc. The inventor was given as Raul Chirife.

II. By a letter dated 8 June 1992, the representative requested correction of the applicant's name pursuant to Rule 88 EPC to Raul Chirife, who was also the applicant in the priority application.

It was argued that the filing instructions of the US attorneys had been misunderstood by the representative; rights to the invention had merely been licensed and not assigned to Cardiac Pacemakers, Inc. A copy of the relevant letter of 6 April 1992 was filed as evidence.

III. By a decision of 18 August 1993, the Receiving Section refused the request on the ground that Rule 88 EPC was not intended to allow the substitution of one applicant for another. According to Article 60(3) EPC, a person named as an applicant is deemed to be entitled to exercise the right to the European patent. Thus, the applicant's entitlement is not verified but is accepted by the EPO solely on the basis of his identification as applicant in the request, so that he may not be replaced by way of correction, even if his entitlement is disputed. In the latter case, the Convention provides for a special procedure, which cannot be circumvented by applying Rule 88 EPC, especially in view of the fact that Articles 60(3) and 61 EPC have precedence over Rule 88 EPC (Art. 164, 2 EPC).

Furthermore, no indication of exceptional circumstances could be derived from the documents in the file, as was the case in decision J 07/80, in which correction of the name of the applicant had been allowed. In that case, the use of the Swedish language by a Dutch company (subsidiary of a Swedish company) had raised doubts even at the time of filing as to whether the right person (firm) had been named as applicant in the application, so that it did not therefore come as a surprise that the Swedish company was in fact the applicant.

IV. An appeal against the decision was lodged on 15 October 1993, the appeal fee being paid on the same day, and the Statement of Grounds was filed on 10 December 1993. The principal grounds relied on are the following:

- the decision stating that Rule 88 EPC did not permit substitution of a wrongly-named applicant had no foundation. The Receiving Section even contradicted itself, as it had stated that correction of the applicant's name was permitted in decision J 07/80, due to exceptional circumstances. In that decision, the language aspect was, however, peripheral and correction was in fact permitted because sufficient evidence had been provided. Furthermore, Rule 88 EPC permitted the correction of any document filed at the EPO (J 08/80).
- The provisions of Article 61 EPC did not affect the provisions of Rule 88 EPC, which was concerned with correction of a mistake, not with ownership disputes.

V The Appellant requested:

- that the decision under appeal be set aside and that the named applicant be changed to Raul Chirife under Rule 88 EPC;
- that in the alternative the change be effected under Article 61(1)(a) EPC;
- that the appeal fee be reimbursed under Rule 67 EPC in view of the failure of the Receiving Section to consider the arguments submitted concerning Article 61 EPC.

VI Following a Communication from the Board dated 24 March 1994, a declaration from Cardiac Pacemakers, Inc. was received on 12 April 1994, acknowledging that Raul Chirife should be the applicant and consenting to the register being corrected in this respect.

Reasons for the Decision

1. In Article 60(3) EPC the principle is established that the EPO assumes the applicant to be entitled to the European patent. This fiction only relieves the EPO from any need to investigate the existence of the entitlement. However, when a person referred to in Article 60(1) EPC, other than the applicant, disputes the entitlement to the grant of a European patent, the entitlement may be modified under the conditions provided for in Article 61 EPC.

A modification as to the identity of an applicant is also allowable under Rule 88 EPC concerning the

correction of errors in documents filed with the European Patent Office. Indeed this Rule, which is not in conflict with the provisions of Article 61 EPC, which concerns ownership disputes, provides that mistakes in any such document may be corrected on request, the only additional condition according to the second sentence of that Rule being that, if the request concerns a description, claims or drawings, the correction must be obvious in the sense that it is immediately evident that nothing else would have been intended than what is offered as a correction. This condition does not apply in the present case. Here it is only necessary to verify whether there is sufficient evidence to support the request under Rule 88 EPC, as was decided in decision J 07/80, OJ EPO, 1981, 137 (see reason 3), which allowed the correction substituting the name of the applicant in the absence of any "exceptional" circumstances (cf. also T 219/86 OJ EPO, 1988, 254, concerning the correction of the name of the opponent).

Where the correction of a mistake is requested and the second sentence of Rule 88 is not applicable, the Board must be satisfied that a mistake was made, what the mistake was and what the correction should be. In order to avoid any abuse of the provisions of Rule 88 EPC, the burden of proving the facts must be a heavy one (J 08/80, OJ EPO, 1980, 293).

3. In the present case, the mistake already appears plausible if the priority document filed in the name of Raul Chirife is considered. Moreover, in the letter of 6 April 1992 containing the instructions from the US attorneys to the representative the heading mentions Raul Chirife as applicant, and he is also cited further on as the inventor. Cardiac Pacemakers, Inc., on the

other hand, is only referred to as the licensee. In the same letter, it was also announced that a power of attorney would be forwarded once it had been executed and returned by Dr Chirife.

Having also received the written consent of Cardiac Pacemakers, Inc. to the requested correction, (cf. VI), the Board is satisfied that all the evidence needed has been provided to allow the main request so that it is unnecessary to deal with the auxiliary request. It has also been checked that the professional representative is recorded at the EPO as being the representative of Raul Chirife by virtue of general authorisation No. 30645.

4. The request for reimbursement of the appeal fee has to be rejected. Although in the Board's view, for the reasons set out above, the finding of the decision under appeal was in error, the error by the Receiving Section was an error of judgment and was not a procedural violation. Moreover the Receiving Section did in fact consider the provisions of Article 61 EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. It is ordered that the name of the applicant in European patent application No. 92 303 280.9 be corrected to that of Raul Chirife (Pirevano 137, 1840 Martinez, Buenos Aires, Argentina).
3. The request for reimbursement of the appeal fee is rejected.

The Registrar



M. Beer

The Chairman



R. Schulte