

Internal distribution code:

- (A) Publication in OJ
(B) To Chairmen and Members
(C) To Chairmen
(D) No distribution

D E C I S I O N
of 27 April 2006

Case Number: T 0705/04 - 3.2.02

Application Number: 98101294.1

Publication Number: 0846450

IPC: A61F 2/06

Language of the proceedings: EN

Title of invention:
A flexible expandable stent

Patentee:
MEDINOL LIMITED

Opponents:
Scimed Life Systems, Inc.
Cordis Medizinische Apparate GmbH
JANSSEN PHARMACEUTICA N.V.
BVBA Cordis Holding Belgium

Headword:
-

Relevant legal provisions:
EPC Art. 123(2)

Keyword:
Extended subject-matter - (yes) "

Decisions cited:
-

Catchword:
-



Case Number: T 0705/04 - 3.2.02

D E C I S I O N
of the Technical Board of Appeal 3.2.02
of 27 April 2006

Appellant II: Cordis Medizinische Apparate GmbH
(Opponent 02) Rheinische Strasse 2
D-42781 Haan (DE)

Representative: Ahme, Johannes
Uexküll & Stolberg
Patentanwälte
Beselerstrasse 4
D-22607 Hamburg (DE)

Appellant III: JANSSEN PHARMACEUTICA N.V.
(Opponent 03) Turnhoutseweg 30
BE-2340 Beerse (BE)

Representative: 't Jong, Bastiaan Jacobus
Arnold & Siedsma
Advocaten en Octrooigemachtigden
Sweelinckplein 1
NL-2517 GK Den Haag (NL)

Appellant IV: BVBA Cordis Holding Belgium
(Intervener) Elkelenbergstraat 20
BE-1700 Dilbeek (BE)

Representative: Prins, Hendrik Willem
Arnold & Siedsma
Advocaten en Octrooigemachtigden
Sweelinckplein 1
NL-2517 GK Den Haag (NL)

Appellant V:
(Patent Proprietor)

MEDINOL LIMITED
Kiryat Atidim
PO Box 58165
Tel Aviv 61581 (IL)

Representative:

Kuhnen & Wacker
Patentanwaltsgesellschaft GmbH
Prinz-Ludwig-Strasse 40 A
D-85354 Freising (DE)

Decision under appeal:

Interlocutory decision of the Opposition
Division of the European Patent Office posted
21 May 2004 concerning maintenance of European
patent No. 0846450 in amended form.

Composition of the Board:

Chairman: T. Kriner
Members: D. Valle
E. Dufrasne

Summary of Facts and Submissions

- I. Opposition was filed against the European patent 846 450 as a whole and based on the grounds of extended subject-matter (Article 100b EPC), lack of novelty and lack of inventive step (Article 100a EPC).

The opposition division issued an interlocutory decision on 21 Mai 2004 on the amended form in which the patent could be maintained.

- II. An appeal has been lodged by opponent I (appellant I), opponent II (appellant II) and by an intervener during the opposition proceedings (appellant III). A further party has filed an intervention during the appeal proceedings (appellant IV) and the proprietor of the patent (appellant V) has filed an appeal as well.

The appellant I has withdrawn his opposition with letter of 10 October 2005.

Appellant II lodged the appeal on 1 July 2004, the fee for appeal was paid simultaneously, and the statement setting out the grounds for appeal was received on 23 September 2004.

Appellant III lodged the appeal on 2 July 2004, the fee for appeal was paid simultaneously, and the statement setting out the grounds for appeal was received on 20 September 2004.

The intervention of appellant IV complies with Article 105 EPC. The intervener has received a writ and summons on 20 April 2004 and has filed the intervention

at the EPO with the statement setting out the grounds for appeal on 20 July 2004. The fee for appeal was paid simultaneously.

Appellant V lodged the appeal on 22 July 2004, the fee for appeal was paid simultaneously, and the statement setting out the grounds for appeal was received on 30 September 2004.

III. Documents

The following documents cited during the appeal proceedings have been considered for the present decision:

D5: EP-A-0 540 290

D9: EP-A-0 754 016 = WO-A-95/26695

D10P: US-A - 2005/00021130

D11: Presentation sheets "serpentine" = "meander"
= "wave" = "undulating" (5 pages)

D12: EP-A-879 584.

IV. Oral proceedings took place on 27 April 2006.

Appellants II, III, and IV requested that the decision under appeal be set aside and the patent be revoked.

The appellant III additionally requested that D11 and D12 be not admitted into the proceedings since they were late filed and not relevant.

Appellant V requested that the decision under appeal be set aside and the patent be maintained as granted (main request) or alternatively on the basis of the auxiliary requests 0 to 5 (six auxiliary requests) filed with letter of 27 March 2006.

V. Claim 1 as granted (main request) reads as follows:

"A stent comprising:

a) at least odd and even alternating serpentine sections (11o, 11e), each having first areas of inflection, wherein said odd serpentine section (11o) is out of phase from said even serpentine section (11e) such that the first areas of inflection on said odd serpentine section (11o) are adjacent the first areas of inflection on said even serpentine section (11e); and

b) at least one flexible connector, comprising a plurality of flexible links connecting adjacent first areas of inflection of each adjacent even and odd serpentine section (11o, 11e), wherein each flexible link has at least two portions connected by at least one second area of inflection, and wherein the first and second areas of inflection define first and second angles whose bisecting lines are at angles one to another."

The claim has been amended in comparison to claim 1 of the application as filed by the insertion of the feature according to which the adjacent first areas of inflection of each adjacent even and odd serpentine section are connected by the plurality of flexible links.

This additional feature is also contained in claim 1 of all auxiliary requests.

V. The appellants argued essentially as follows:

Appellants II to IV:

The introduction of the term "each" in claim 1 of all present requests resulted in an extension of the content of the application as filed.

The originally filed description and figures disclosed a particular stent having periodic meander patterns around straight centrelines extending in a first direction, wherein the first meander patterns were connected by second periodic meander patterns around straight centrelines extending in a second direction.

The originally filed claim 1 did not refer to a stent having such meander patterns, but to a stent having serpentine sections which were connected by flexible links of a connector.

Since there was no support for this stent in the description and drawings of the application as filed, there was no disclosure that each of its adjacent even and odd serpentine sections were connected by the flexible links.

Furthermore, since a connection of each adjacent even and odd meander pattern was exclusively disclosed in combination with the particular stents shown in the originally filed figures, this kind of connection could

not be claimed in isolation from the other features of the stents according to the figures without an unallowable generalisation.

Appellant V:

The introduction of the term "each" into the claims was only for the sake of clarification.

Since the present claims had to be read in the light of the description and drawings, it was clear that they defined the same stent as shown in the figures.

Therefore the terms "serpentine sections" and "meander patterns" were equivalent metaphors for the same element. That was true at the philological (literal) level and within the technical meaning of these terms - as proved by the use of the terms in the state of the art documents - as well. In the prior art and in the terminology of the patent in suit itself both terms could be used interchangeably, as it was illustrated in D11 submitted at the oral proceedings. Therefore the term "each" disclosed in combination with the connection of the meander patterns could also be used for the serpentine sections without extending the originally disclosed subject-matter.

Furthermore it was obvious that all parts of the claimed stent had to be connected. Therefore the feature according to which each adjacent even and odd serpentine section was connected by the flexible links was also disclosed in isolation and not exclusively in connection with the preferred embodiments shown in the figures where the two meander patterns ran orthogonally.

Reasons for the Decision

1. The appeal is admissible.
2. *Late filed documents*

D11 and D12 have been filed by the proprietor during the oral proceedings on 27 April 2006.

The presentation sheets according to D11 are basically admitted into the appeal proceedings, since they are of simple nature and illustrate documents already on file. D12 on the other hand and those portions of D11 referring to this document are not admitted into the proceedings since they were late filed and not highly relevant.

3. *Amendments*
 - 3.1 In comparison with the originally filed claim 1, claim 1 of all present requests contains the additional feature according to which the adjacent first areas of inflection of each adjacent even and odd serpentine section are connected by the plurality of flexible links.

It is obvious and has not been contested by the appellant V that the wording of the originally filed claim 1 has no counterpart in the description. Therefore, in order to evaluate whether or not the introduction of the term "each" into the claims results in an extension of the originally disclosed subject-

matter, it has first to be established whether or not the stent defined in the originally filed claim 1 corresponds to the stents disclosed in the originally filed description and figures. For this purpose in particular the meaning of the terms "serpentine section" and "meander pattern" has to be established.

3.2 The general use of these terms can be basically considered as:

meander (noun) meaning a winding course, e.g. of a river

and:

serpentine (adjective) meaning of the form of a serpent, or resembling a serpent.

It follows that the meaning of the two terms greatly overlaps, but that it does not coincide in the general use.

3.3 However, it could be that both terms are used interchangeably in the specific technical field of the invention. Therefore the technical meaning of the terms in question has to be investigated on the basis of the documents of the relevant state of the art. On this matter the proprietor has submitted D11 which contains a comparative study of three documents (D5, D9 and D10P).

The first document considered by the proprietor (D5, column 2, lines 28 to 47) does not cite the term "meander" but just the term "serpentine", and states

that "serpentine" describes a special case (compare: "e.g." in line 31 of column 2) of an "undulating pattern".

The second document considered by the proprietor (D9, page 21, line 33) has an earlier priority date (1 April 1994) than the earlier priority of 28 July 1994 claimed by the patent in suit, and therefore it is in principle relevant to assess the meaning of the contested terms at the date of the patent in suit. This document contains the wording: "having an undulating or serpentine pattern". In this passage the particle "or" is probably not a disjunctive or, but has to be interpreted in the sense that serpentine is a synonym of undulating. However, in any case the passage does not give any clue about the relationship between the terms "serpentine" and the term "meander", since the latter is not cited in D9.

The last document cited (D10P) is not suitable to establish the technical meaning of the terms used in the patent in suit at its filing date, since it originates from an application filed later than the patent in suit (D10P: 8 July 1998; patent in suit: 16 July 1995).

It follows that it is not proved that in the technical field of the invention the terms "serpentine section" and "meander pattern" were used as synonyms at the filing date of the patent in suit.

- 3.4 Finally the patent in suit itself has to be considered. it contains the following definition of the term "meander pattern" (see column 2, lines 45, 46):

"meander pattern is taken therein to describe a periodic pattern about a center line". This definition differs remarkably from the generally accepted meaning of a meander pattern and it appears to be severely restrictive in comparison to this meaning. The term "serpentine section" on the other hand is used only in the claims and is not defined in the patent in suit.

Although it is obvious from the whole content of the patent specification that the term "meander pattern" used in the description and the term "serpentine section" used in the claims are somehow related to each other, the patent specification does not contain any indication whatsoever which could justify a restriction of the meaning of "serpentine section" to the particular meaning of "meander pattern" used in the patent specification.

3.5 From the above considerations it follows that the meaning of the term "serpentine section" is different from the meaning of the term "meander pattern". Therefore the originally filed application does not disclose that the links of the flexible connector connect the adjacent first areas of inflection of each adjacent even and odd serpentine section, but only adjacent loops of each meander pattern.

3.6 Furthermore, even if the stent defined in the originally filed claim 1 corresponded to the stents disclosed in the originally filed description and figures, the addition of the term "each" would result in a generalization which is not covered by the application as filed. Stents where adjacent loops of each adjacent even and odd meander pattern are

connected by further loops are exclusively disclosed in the originally filed figures. However, since the figures show particular stents and the claims of all present requests define more general stents, the addition of an isolated feature from the embodiments shown in the figures results in stents which are not disclosed as such in the application as filed.

The argumentation of the appellant V according to which it was obvious that all serpentine sections of any stent disclosed in the originally filed documents had to be connected, and that therefore the addition of the term "each" did not result in an unallowable generalization, is not convincing. Although it is correct that all sections of the stent according to the patent in suit have to be connected to ensure the unity of the stent, there is no need to connect in particular each adjacent even and odd serpentine sections of the stent according to the present claims by the plurality of flexible links.

- 3.7 In the light of the above findings, the Board is convinced that claim 1 of all present requests does not comply with Article 123(2) 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:

V. Commare

T. Kriner