

Internal distribution code:

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

**Datasheet for the decision
of 17 October 2007**

Case Number: T 1185/05 - 3.2.02

Application Number: 97929455.0

Publication Number: 0923345

IPC: A61B 17/068

Language of the proceedings: EN

Title of invention:

A flexible annular stapler for closed surgery of hollow organs

Applicant:

Toledano, Haviv

Opponent:

-

Headword:

-

Relevant legal provisions:

EPC Art. 82, 123(2), 54, 56

Keyword:

"Unity, novelty, inventive step - (yes, after amendments)"
"Extension of the subject-matter - (no, after amendments)"

Decisions cited:

-

Catchword:

-



Case Number: T 1185/05 - 3.2.02

D E C I S I O N
of the Technical Board of Appeal 3.2.02
of 17 October 2007

Appellant: Toledano, Haviv
19, rue Léon Giraud
F-75019 Paris (FR)

Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 2 May 2005
refusing European application No. 97929455.0
pursuant to Article 97(1) EPC.

Composition of the Board:

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

Summary of Facts and Submissions

- I. The applicant lodged an appeal on 28 June 2005 against the decision of the examining division posted on 2 May 2005 rejecting the application for lack of novelty (claim 1 then on file) and lack of inventive step (claim 11 then on file). Additionally the examining division pointed out that the set of claims then on file lacked unity and did not meet the requirements of Article 123(2) EPC.

The fee for the appeal was paid simultaneously and the statement setting out the grounds for appeal was received on 31 August 2005.

- II. The following documents have been cited in the contested decision:

D1 = FR - A - 2 689 749

D2 = US - A - 5 104 025.

- III. Oral proceedings took place on 17 October 2007.

The appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of claims 1 to 31 as filed at the oral proceedings.

- IV. Claim 1 reads as follows:

"A flexible annular surgical stapler for stapling together two parts of hollow organs usable in both closed and open surgical conditions, the stapler comprising:

a) an elongated flexible tubular body having two ends;

b) a handle attached to a first end of said body,
c) a first jaw (18 or 11) having an axial jaw hole therethrough and two faces, a first of said faces being attached to the second end of said body;
d) a cable slidably disposed inside said body and through said jaw hole, said cable consisting of two portions; first of said portions defining an end segment (83); said end segment being stiff whereas the second one of said portions of said cable being flexible; at least part of said end segment protruding from the second of said faces of said first jaw; and
e) a second jaw (11 or 18), forming a head, being attachable to said end segment; wherein said jaw hole having a non-circular cross-sectional shape and said end segment having a complementary cross-sectional shape such as to allow easy sliding of said end segment through said hole while keeping their mutual angular orientation about the axis of said hole fixed; any of said first and second jaws including a hammer while the other of said first and second jaws including an anvil."

Claims 2 to 31 are dependent claims.

Reasons for the Decision

1. The appeal is admissible.
2. *Article 82 EPC*

The objection of lack of unity raised in the decision under appeal is overcome since the newly filed set of claims contains only a single independent claim.

3. *Article 123(2) EPC*

The newly filed claim 1 is based on claim 1; on the description, page 6, lines 18 to 20; page 12, line 17 to page 13 line 18 of the application as originally filed and published (WO-A-98/04196). Consequently the amended claim 1 complies with Article 123(2) EPC and overcomes the objection raised in the decision under appeal.

4. *Novelty*

As correctly pointed out by the examining division D1 represents the most relevant state of the art. This document discloses (see in particular Figure 1) a flexible annular surgical stapler for stapling together two parts of hollow organs usable in both closed and open surgical conditions (see pages 3 and 4, point 4), the stapler comprising:

- a) an elongated flexible tubular body (26) having two ends;
- b) a handle attached to a first end of said body,
- c) a first jaw (18) having an axial jaw hole therethrough and two faces, a first of said faces being attached to the second end of said body;
- d) a cable (21) slidably disposed inside said body and through said jaw hole, wherein said cable consists of two portions; a first of said portions defines an end segment, at least part of said end segment protruding from the second of said faces of said first jaw; and
- e) a second jaw (11), forming a head, being attachable to said end segment; wherein said jaw hole has a non-circular cross-sectional shape and said end segment has

a complementary cross-sectional shape (see Figures V to VII); and wherein any of said first and second jaws includes a hammer while the other of said first and second jaws includes an anvil.

However, D1 does not disclose that the end segment of said cable is stiff whereas the second one of said portions of said cable is flexible.

D2, which has been cited by the examining division only with respect to claim 11 then on file, shows less features of the present claim 1 than D1.

Hence the subject-matter of claim 1 is novel.

5. *Inventive step*

Starting from D1, the object to be achieved by the present invention has to be seen in avoiding misalignment between the staple pins in the head and the grooves in the face of the anvil, which may cause malfunctioning of the staple action (see application, page 4, lines 5 to 11).

According to claim 1 this object is achieved by the provision of a cable which comprises a stiff end segment whereas the remaining portion of the cable is flexible.

Since no document of the available prior art discloses such a cable, its provision in a stapler according to D1 is not obvious.

Accordingly the subject-matter of claim 1 also implies an inventive step.

6. Since the decision under appeal was exclusively based on independent claims 1 to 11 then on file, the board considers it appropriate to remit the case to the first instance for further prosecution, in particular for the examination of the dependent claims and the adaptation of the dependent claims and of the description to the newly filed claim 1.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the first instance for further prosecution on the basis of claims 1 to 31 as filed at the oral proceedings.

The Registrar:

The Chairman:

V. Commare

T. Kriner