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**Datasheet for the decision
of 5 July 2007**

Case Number: T 0527/06 - 3.2.02

Application Number: 96931649.6

Publication Number: 0957786

IPC: A61B 17/32, A61B 10/00

Language of the proceedings: EN

Title of invention:
Apparatus for harvesting bone

Patentee:
Maxilon Laboratories, Inc.

Opponent:
C.G.M.S.P.A

Headword:
-

Relevant legal provisions:
EPC Art. 100(c)

Keyword:
"Added subject-matter (no, after amendments)"

Decisions cited:
-

Catchword:
-



Case Number: T 0527/06 - 3.2.02

D E C I S I O N
of the Technical Board of Appeal 3.2.02
of 5 July 2007

Appellant: Maxilon Laboratories, Inc.
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Respondent: C.G.M.S.P.A
(Opponent) Via Modena, 22/24
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Representative: Bonfreschi, Mario
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 7 February 2006
revoking European patent No. 0957786 pursuant
to Article 102(1) EPC.

Composition of the Board:

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

Summary of Facts and Submissions

- I. The appellant (patentee) lodged an appeal on 5 April 2006 against the decision of the opposition division posted on 7 February 2006 revoking the European patent 0 957 786. The fee for the appeal was paid simultaneously and the statement setting out the grounds for appeal was received on 1 June 2006.
- II. The opposition division held that the ground for opposition according to Article 100(c) EPC submitted by the opponent prejudiced the maintenance of the patent as granted, since the patent did not meet the requirement of Article 123(2) EPC.
- III. Oral proceedings took place on 5 July 2007.

The appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of the main and sole request filed on the oral proceedings and consisting of a set of seven claims.

The opponent was not represented at the oral proceedings as announced on 5 July, before the oral proceedings. However, it had previously submitted a written request that the appeal be dismissed.

- IV. Claim 1 reads as follows:

"An instrument for harvesting bone comprising an elongate body having a proximal end and a distal end, said elongate body serving as a handle (20) for the instrument and securing a blade (12) therein so that the blade can be held at an acute angle with respect to

a bone from which bone shavings are to be harvested, said blade (12) having a cutting edge (14) adjacent its distal end, the cutting edge being defined by a curved aperture (16) adjacent the distal end of the blade and a tapered curved convex surface forming the distal end of the blade, said blade and handle cooperating to provide a storage space (32) adjacent the distal end of the blade for receiving harvested bone from the cutting edge, said handle (20) being channel-shaped to provide said storage space and said blade serving as a moveable wall of the storage space."

Reasons for the Decision

1. The appeal is admissible.
2. Despite having been duly summoned, the respondent was not represented at the oral proceedings. The Board decided to hold the oral proceedings in its absence, according to Rule 71(2) EPC and Article 11(3) of the Rules of Procedure of the Boards of Appeal.
3. *Amendments*

The decision of the opposition division is based on the finding that claim 1 as granted contained subject-matter which extended beyond the content of the application as filed, since according to this claim the aperture could be located anywhere at the distal end of the claimed instrument, while the originally filed application exclusively disclosed that this aperture had to be located in the blade.

The features of the present claim 1 according to which the blade has a cutting edge adjacent its distal end, and the cutting edge is defined by a curved aperture adjacent the distal end of the blade, inevitably require that the aperture has to be located in the blade. Hence the objection raised in the decision under appeal is now overcome.

Claim 1 is based on the originally filed claims 14 and 16. The feature according to which the elongate body serves as a handle for the instrument is supported, in particular under consideration of the originally filed drawings (WO-A-97/11646). The replacement of the feature that the body supports the blade by the feature that the body secures the blade is supported by the description on page 5, lines 13, 14 and 23 to 25. The replacement of the term "cutting structure" by the term "cutting edge" is supported by Figures 1, 4A, 5A, 8E and the description on page 6, lines 17 to 21. The feature according to which the blade serves as a moveable wall of the storage space is disclosed on page 5, lines 22 and 23, page 13, lines 28 and 29 and in Figures 7A, B, C.

Claims 2 to 7 correspond to claims 2 to 7 as granted which had not been challenged with respect to Article 123(2) EPC. Claim 7 has been clarified. The corresponding amendment is disclosed on page 6, lines 17 and 18 of WO-A-97/11646.

Accordingly the new claims comply with Article 123(2) EPC.

4. Since the decision of the first instance was exclusively based on Article 123(2) EPC it appears expedient to restrict the appeal proceedings to this issue and to remit the case to the first instance for further prosecution in order to give the parties the opportunity to present their submission before two instances.

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 7 filed at the oral proceedings.

The Registrar:

The Chairman:

T. Buschek

T. Kriner