

Internal distribution code:

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

**Datasheet for the decision
of 04 June 2008**

Case Number: T 1880/06 - 3.2.02

Application Number: 96301970.8

Publication Number: 0733376

IPC: A61M 1/00

Language of the proceedings: EN

Title of invention:
Diaphragm breast pump

Patentee:
Avent Limited

Opponent:
The First Years Inc.

Headword:
-

Relevant legal provisions (EPC 2000):
EPC Art. 115, 123(2),(3)

Keyword:
"Extension of protection (no)"
"Added subject-matter (no)"

Decisions cited:
-

Catchword:
-



Case Number: T 1880/06 - 3.2.02

D E C I S I O N
of the Technical Board of Appeal 3.2.02
of 04 June 2008

Appellant: Avent Limited
(Patent Proprietor) North London Business Park
Oakleigh Road South
London N11 1SS (GB)

Representative: Damen, Daniel Martijn
Philips International B.V.
Intellectual Property & Standards
P.O. Box 220
NL-5600 AE Eindhoven (NL)

Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 11 October 2006
revoking European patent No. 0733376 pursuant
to Article 102(1) EPC 1973.

Composition of the Board:

Chairman: T. Kriner
Members: S. Chowdhury
A. Pignatelli

Summary of Facts and Submissions

I. The appellant (patent proprietor) lodged an appeal against the decision of the opposition division to revoke European patent No. 0 733 376. The decision was dispatched on 11 October 2006.

The appeal was received on 6 December 2006 and the fee for the appeal was paid on the same day. The statement setting out the grounds of appeal was received on 21 February 2007.

The opposition was filed against the whole patent and based on Article 100 (a) EPC 1973 (lack of novelty and inventive step of the claimed subject-matter) and Article 100 (c) EPC 1973. Subsequently, by letter dated 31 July 2006, the opponent withdrew its opposition, but the opposition division continued the opposition procedure of its own motion.

Third party observations were also filed at the opposition stage and in the appeal procedure.

The opposition division held that claim 1 of all requests did not comply with Article 123(3) EPC 1973 and revoked the patent, accordingly.

The appellant requests cancellation of the contested decision and that the patent be maintained on the basis of claims 1 to 20 of the first auxiliary request or on the basis of the auxiliary requests A1, B1, or C1, all filed with its letter of 21 February 2007.

II. Claim 1 of the first auxiliary request reads as follows:

"A single handed breast pump comprising:

(a) a body (1) having an inlet (10) thereto;

(b) a breast receiving portion (9,57) connected to the inlet and shaped to receive a portion of a user's breast and nipple;

(c) means (58,59) for releasably connecting an expressed milk collecting container (60) to the body;

(d) a readily demountable diaphragm base (20,51) formed with means to enable it to be releasably fitted to the body (1) to make a fluidtight seal therewith and

connector means (26) extending from said base (20,51);

(e) valve means (11,80) in the body (1) operable so that a negative pressure is cyclicly generated and released in the inlet (10); and

(f) actuating means (40,53) connected to the connector means (26) and operable to cyclicly move said diaphragm (20,51) to generate a negative pressure in the inlet (10), characterised in that the actuating means (40,53) is mounted on the body (1) and is configured to be operated with the users hand, and in that the connector means (26) releasably connects the actuating means (40,53) to the diaphragm base (20,51)".

Claims 2 to 20 are dependent claims.

Reasons for the decision

1. The appeal is admissible.

2. *Article 123(3) EPC*

The wording of present claim 1 corresponds to the wording of claim 1 as granted, except that the valve means in the body is now stated to be operable so that a negative pressure is cyclicly generated and released in the nipple region. This wording is narrower than that in the granted version of the claim, and the objection under Article 123(3) EPC has been met.

3. *Article 123(2) EPC*

3.1 The feature which the opponent and the opposition division (as well as the observation under Article 115 EPC) objected to was feature (e) of claim 1 as granted. The objection was that the claim defined "valve means (11, 80) in the body (1) for cyclicly releasing the negative pressure which is generated in the inlet (10)", for which there was no support in the description since the plug valve 11 of Figure 2 and the button valve 80 of Figure 8 did not perform the function of cyclicly [sic] releasing the negative pressure which was generated in the inlet (10). To the contrary, the plug valve 11 and the button valve 80 helped to maintain negative pressure on the inlet side of the valve means.

This objection would also be applicable to feature (e) of claim 1 of the first auxiliary request. However, the Board is of the opinion that claim 1 is clearly supported by original claim 1 which, in respect of this feature, reads: "valve means in the body operable so that a negative pressure is cyclicly generated and released in the nipple region". Thus, the wording of

present claim 1 corresponds to original claim 1 in this respect.

- 3.2 There is a discrepancy between claim 1 and the description with respect to feature (e) if the "valve means (11, 80)" of the claim is equated with the plug valve 11 of Figure 2 or the button valve 80 of Figure 8, as is suggested by the use of only the reference numerals (11, 80). However, if the "valve means (11, 80)" of the claim is taken to mean the plug valve 11 together with the diaphragm 20, its fluid-tight sealing with the cup-shaped portion 2, etc., then there is no inconsistency between the description and claim 1.

That the latter interpretation is correct is supported by the fact that the items 11 and 80 are termed "valve" in the description, whereas claim 1 refers to "valve means", which is generally broader. Moreover, comparing the wording of column 1, lines 19 to 21 of EP-A2 0 733 376 with column 1, line 58 to column 2, line 3, it is seen that "valve means" is the same as "valve system", which latter term clearly means more than just the valve itself.

Therefore, feature (e) of claim 1 is supported by the application as originally filed and free from objection under Article 123(2) EPC. An objection regarding the incorrect use of reference numerals is outside the scope of an examination under Article 123(2) EPC.

4. Since the opposition division has not given a decision on novelty or inventive step, the case is remitted to the department of the first instance to resume examination of the oppositions as regards the

requirements of Article 52 (1) EPC 1973, as agreed by the appellant.

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 processing on the basis of Claims 1 to 20 of the first auxiliary request filed with the letter of 21 February 2007.

The Registrar

The Chairman

V. Commare

T. Kriner