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**Datasheet for the decision
of 11 December 2012**

Case Number: T 1791/07 - 3.2.02
Application Number: 99970926.4
Publication Number: 1124599
IPC: A61M 1/36, A61B 5/026,
G01F 9/00
Language of the proceedings: EN

Title of invention:

Device for measuring access flow by dialysis

Applicant:

Gambro Lundia AB

Headword:

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Relevant legal provisions:

EPC Art. 53(c), 111(1), 112
EPC R. 103

Relevant legal provisions (EPC 1973):

EPC Art. 52(4)
EPC R. 51(4)

Keyword:

"Referral to Enlarged Board of Appeal (no)"
"Reimbursement of appeal fee (no)"
"Remittal (yes)"

Decisions cited:

G 0010/93, T 0019/87, T 0863/93, T 0520/01

Catchword:

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Case Number: T 1791/07 - 3.2.02

D E C I S I O N
of the Technical Board of Appeal 3.2.02
of 11 December 2012

Appellant: Gambro Lundia AB
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Representative: Roberts, Mark Peter
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 24 April 2007
refusing European application No. 99970926.4
pursuant to Article 97(1) EPC 1973.

Composition of the Board:

Chairman: E. Dufrasne
Members: P. L. P. Weber
C. Körber

Summary of Facts and Submissions

I. The appeal is against the decision of the Examining Division posted on 24 April 2007 to refuse the application Nr.99970926.4 because the claimed method belonged to the methods excepted from patentability pursuant to Article 52(4) EPC 1973.

The notice of appeal was filed on 4 June 2007 and the appeal fee paid on the same day. The statement setting out the grounds of appeal was filed on 23 August 2007.

II. In its statement setting out the grounds of appeal, apart from bringing arguments as to why the impugned decision should be set aside, the Appellant requested that a number of questions, all in relation to method claims falling under the exception pursuant to Article 52(4) EPC 1973, be referred to the Enlarged Board of Appeal. Additionally it requested that the appeal fee be reimbursed because of an alleged substantial procedural violation by the Examining Division, in that the latter did not properly apply the European Patent Convention, the existing case law of the Boards of Appeal and/or Enlarged Board of Appeal.

III. On 25 January 2007, during the examination proceedings a communication under Rule 51(4) EPC 1973 was issued by the Examining Division on the basis of a request not comprising any method claim.

IV. In the appeal proceedings, with letter dated 21 September 2012, the Board summoned the appellant to oral proceedings (which were subsequently cancelled).

In the annex to the summons the Board explained why it considered the then valid requests comprising method claims not to be allowable. Further, the Board expressed its opinion that it could not see any substantial procedural violation in the way the Examining Division had proceeded, and that the questions requested to be referred to the Enlarged Board of Appeal either had been answered by more recent decisions or were not relevant for the case at issue.

- V. With letter dated 8 November 2012 the appellant requested as main request, the grant of a patent having a text the same as the text attached to the communication under Rule 51(4) EPC 1973 dated 25 January 2007. The appellant auxiliarily requested the grant of a patent on the basis of a first or a second auxiliary request, none of them comprising any method claim.

Reasons for the Decision

1. The appeal is admissible.

Main request

2. The decision under appeal was only based on the exception to patentability of the method claims pursuant to Article 52(4) EPC 1973. Since none of the requests now on file contains any method claim anymore, the reasons for the decision are no longer applicable to any of these requests.

Questions to be referred to the Enlarged Board of Appeal.

3. All the questions submitted by the appellant in its statement setting out the grounds of appeal and requested to be referred to the Enlarged Board of Appeal relate to method claims excepted from patentability under Article 52(4) EPC 1973, now Article 53(c) EPC.

The requests on file, as already mentioned, do not contain any method claim anymore, so that the questions submitted are no longer relevant to any of these requests, which would have been one of the necessary conditions for a Board to consider a referral of questions to the Enlarged Board of appeal under Article 112 EPC. In other words, none of the answers to any of the questions is necessary to deal with the present requests, i.e. with this appeal (T 520/01).

Thus, the Board decides not to refer the questions to the Enlarged Board of Appeal.

Reimbursement of the appeal fee

4. In accordance with Rule 103 EPC the reimbursement of appeal fees shall be ordered where the appeal is allowable and reimbursement is equitable by reason of a substantial procedural violation. It is the established case law of the Boards of Appeal that in order to fall within Rule 103 EPC a procedural violation as opposed to an error of judgment must have occurred (for example T 19/87 OJ EPO 1988, 286, or T 863/93). In the present case it is clear that no procedural violation has

occurred. Even if the appellant were right in that the Examining Division did not properly apply the existing case law on the exceptions pursuant to Article 52(4) EPC 1973, this would be a matter of judgment by the Examining Division, which cannot be considered a *procedural* violation and which does not justify the reimbursement of the appeal fee.

Accordingly the Board rejects the request for reimbursement of the appeal fee.

Remittal

5. It is established case law that, even in ex-parte cases, the main purpose of the appeal proceedings is to examine the decision under appeal (G 10/93, OJ EPO 1995, 172, point 4 of the reasons).

In the present case, the reasons of the impugned decision are no longer applicable to the requests on file, and the claims according to the main request were found allowable by the Examining Division, so that the Board does not see any reason to further prosecute with the appeal proceedings and exercise any power within the competence of the first instance department under Article 111(1) EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside

2. The case is remitted to the department of first instance for further prosecution on the basis of the application documents intended for grant of a patent in the communication under Rule 51(4) EPC 1973 of 25 January 2007.

The Registrar:

The Chairman:

D. Hampe

E. Dufrasne