

Internal distribution code:

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

**Datasheet for the decision
of 7 July 2009**

Case Number: T 0552/09 - 3.3.04

Application Number: 03796052.3

Publication Number: 1603594

IPC: A61K 35/36

Language of the proceedings: EN

Title of invention:

Pharmaceutical compositions of cell lysate and processes for the production and use thereof

Applicant:

Celltran Limited

Headword:

Cell lysate/CELLTRAN

Relevant legal provisions:

EPC R. 103(1)(a)

Keyword:

"Reimbursement of the appeal fee - (no)"

Decisions cited:

G 0003/03

Catchword:

-



Case Number: T 0552/09 - 3.3.04

D E C I S I O N
of the Technical Board of Appeal 3.3.04
of 7 July 2009

Appellant: Celltran Limited
(Applicant) The Innovation Centre
217 Portobello
Sheffield S1 4DP (GB)

Representative: Hutter, Anton
Venner Shipley LLP
20 Little Britain
London EC1A 7DH (GB)

Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 5 November 2008
refusing European Patent application
No. 03796052.3 pursuant to Article 97(2) EPC

Composition of the Board:

Chair: U. Kinkeldey
Members: M. Wieser
R. Moufang

Summary of Facts and Submissions

- I. The appeal was lodged by the Applicant (Appellant) against the decision of the Examining Division to refuse under Article 97(2) EPC the patent application EP 03796052.3 (published as WO 2004/050121), having the title: "Pharmaceutical compositions of cell lysate and processes for the production and use thereof".
- II. The decision under appeal dealt with claims 1 to 16 filed with Appellant's submission dated 1 July 2007. Claim 1 read as follows:
- "A pharmaceutical composition comprising a non-viable cell lysate and at least one antiflocculant and/or antisedimentation agent(s), wherein said antiflocculant and/or antisedimentation agent is xanthan gum."
- III. According to the decision the closest state of the art was represented by document (D1; US-A-5 866 167), disclosing non-viable keratinocyte lysate for promoting wound healing. The technical problem as identified by the Appellant was to overcome the complex formulation and flocculation resulting from the lysis of the cells. The solution according to claim 1 was the addition of xanthan gum. However, the application did not provide data showing that xanthan gum alone had an antiflocculant and/or antisedimentation effect when compared to a negative control. Accordingly, in the absence of the alleged technical effect, the technical problem as defined by the Appellant was not accepted by the Examining Division, which saw the technical problem underlying the invention merely in the provision of an alternative composition for wound treatment comprising

a non-viable cell lysate. The solution to this problem according to claim 1, namely the addition of xanthan gum, was found to be obvious in the light of the disclosure in document (D1) in combination with (D3; US-A-6 046 178) and did not meet the requirements of Article 56 EPC.

- IV. In the notice of appeal, submitted with letter dated 15 January 2009, the Appellant requested that the decision be set aside and a patent be granted on the basis of claims 1 to 16 filed with Appellant's submission dated 1 July 2007, i.e. the claims that were before the Examining Division. Moreover he requested that the appeal fee be reimbursed in accordance with Rule 103 EPC.

He referred to a telephone conversation between the undersigned representative and the primary examiner of the Examining Division, wherein "... the Examiner has agreed that this application may be granted with the claims currently on file under interlocutory revision pursuant to Article 109 EPC."

- V. In the letter setting out the grounds for appeal, dated 23 January 2009, the Appellant argued that the application in fact provided evidence to support the technical effect that xanthan gum prevents flocculation when used on its own, compared to a correct control. This was clear from tables 2 and 3 on pages 19 and 21 of the application. The correct objective technical problem that has been solved by the claimed subject-matter was therefore the provision of a cell lysate with improved properties in terms of flocculation and/or sedimentation.

Oral proceedings were requested as an auxiliary measure.

- VI. By decision dated 23 February 2009 the Examining Division rectified the appealed decision under Article 109(1) EPC but did not allow the Appellant's request for reimbursement of the appeal fee. In that respect the case was referred to the Boards of Appeal.
- VII. With letter dated 9 June 2009 the Appellant withdrew the request for oral proceedings in respect of the request for reimbursement of the appeal fee.

Reasons for the Decision

1. As to the competence of the Examining Division on the request for reimbursement of the appeal fee, the decision of the Examining Division is in line with decision G 3/03 (OJ EPO 2005, 344). Therein the Enlarged Board of Appeal ruled that in the event of interlocutory revision under Article 109(1) EPC, the department of the first instance (i.e. the Examining Division) whose decision has been appealed is not competent to refuse a request from the Appellant for reimbursement. Rather, the Board of Appeal which would have been competent under Article 21 EPC to deal with the substantive issues of the appeal if no interlocutory revision had been granted is competent to decide on that request.
2. The Appellant's request for reimbursement of the appeal fee can only be granted if, arriving at their decision

of refusal, the Examining Division had committed a substantial procedural violation (Rule 103(1)(a) EPC).

Although the Appellant does not explicitly allege that a substantial procedural violation has taken place in the procedure before the department of first instance, the Board has reviewed this procedure on the basis of the file. It can be summarised as follows.

3. In the communication sent with the summons to attend oral proceedings and dated 20 March 2008, the Examining Division noted that the subject-matter of claim 1 differed from the disclosure in document (D1), representing the closest state of the art, in that it additionally comprised xanthan gum. The Examining Division expressed their opinion that the technical effect that the Appellant attributed to this additional compound, namely the prevention of flocculation, had not been demonstrated in the application. It was said that the only example with a correct negative control was shown in table 1, where inhibition of flocculation was demonstrated if xanthan gum and maltodextrin were present. Therefore the technical problem underlying the invention was not the prevention of flocculation but merely the provision of an alternative composition compared to the composition of document (D1). The solution to this problem according to claim 1 was considered to be obvious in the light of the disclosure in document (1) and, amongst others, document (D3).

On page 2, fourth paragraph of this communication the Examination Division said:

"However, the Examining Division agrees with the argumentation of the Applicant that an antiflocculant effect of xanthan would not be expected from the prior art. If an antiflocculant effect could be demonstrated for xanthan only (compared to a negative control), inventive step could thus be acknowledged."

4. Thus, the Appellant was given more than half a year (the oral proceedings were scheduled for 7 October 2008) to provide evidence and/or arguments to convince the Examining Division that in fact xanthan gum alone acts as an antiflocculant and/or antisedimentation agent.

The only letter of the Appellant in this period was a short notice, dated 22 September 2008, wherein the Examining Division was informed that the Appellant will not attend the oral proceedings.

5. The oral proceedings before the Examining Division took place on 7 October 2008 in the absence of the Appellant (see minutes of the oral proceedings before the Examining Division).

In point (2) of their decision, dated 5 November 2008, the Examining Division decided that claim 1 did not meet the requirements of Article 56 EPC. The reasons given, which have also been summarized in section (III) above were those already indicated in the communication dated 20 March 2008 (see point (3) above).

6. After the despatch of this decision the EPA was informed by the Appellant of a change of

representation. The newly assigned representative contacted the Examining Division by telephone on 15 January 2009 and filed an appeal against the decision of the Examining Division on the same day.

The Board notes that no documentation of the content of this telephone conversation between the Examining Division and the Appellant's representative is on file.

7. With the letter setting out the grounds for appeal, dated 23 January 2009, the Appellant submitted arguments why he considered the Examining Division's approach to inventive step of the subject-matter of claim 1 not to be correct (see section (V) above).

In reaction to these arguments the Examining Division on 23 February 2009 decided to rectify the appealed decision under Article 109(1) EPC.

8. In the Board's view the prosecution history summarised above does not justify the conclusion that a substantial procedural violation has occurred. Even if the appealed decision were based on a wrong assessment of the claimed invention, this as such would have to be regarded only as a substantive error, but not as a procedural violation (see Case Law of the Boards of Appeal of the EPO, 5th edition 2006, chapter VII.D.15.4.5).

The Board furthermore considers that the reimbursement of the appeal fee would not be equitable (Rule 103(1)(a) EPC) in the present case since during the procedure before the department of first instance the Appellant has not reacted to the communication of the

Examining Division dated 20 March 2008 in a substantive manner and has not tried to overcome the objections raised in this communication.

Order

For these reasons it is decided:

The request for reimbursement of the appeal fee is refused.

Registrar:

Chair:

P. Cremona

U. Kinkeldey