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**Datasheet for the decision
of 6 April 2011**

Case Number: T 1348/09 - 3.2.02

Application Number: 04076389.8

Publication Number: 1447052

IPC: A61B 17/064

Language of the proceedings: EN

Title of invention:

Gerd treatment apparatus and method

Applicant:

NDO Surgical, Inc.

Headword:

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Relevant legal provisions:

EPC Art. 84, 123(2), 76(1)

Relevant legal provisions (EPC 1973):

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Keyword:

"Clarity (yes), after amendment"

"Extended subject-matter (no), after amendment"

Decisions cited:

-

Catchword:

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Case Number: T 1348/09 - 3.2.02

D E C I S I O N
of the Technical Board of Appeal 3.5.03
of 6 April 2011

Appellant: NDO Surgical, Inc.
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Representative: Tunstall, Christopher Stephen
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 20 January 2009
refusing European patent application
No. 04076389.8 pursuant to Article 97(2) EPC.

Composition of the Board:

Chairman: D. Valle
Members: C. Körber
J. Geschwind

Summary of Facts and Submissions

I. The appellant (applicant) lodged an appeal on 30 March 2009 against the decision of the Examining Division posted on 20 January 2009 to refuse the application on the basis of Articles 123(2), 84 and 76(1) EPC. The fee for appeal was paid on the same day and the statement of grounds for appeal was filed on 1 June 2009.

II. Following the communication of the Board dated 27 December 2010, the appellant filed with letter of 5 April 2011 a main request composed of claims 1 to 13 and with letter of 7 March 2011 an auxiliary request composed of claims 1 to 12 and requested that the case be remitted to the first instance for further prosecution if the Board found that the main request complied with Articles 123(2), 84 and 76(1) EPC. In that case he would withdraw the auxiliary request.

III. Claim 1 of the main request reads as follows:

"An apparatus for reconfiguring stomach tissue comprising:

an elongate shaft (710) dimensioned to permit transoral access to the stomach;

a flexible device (784) extending into the shaft from a distal end of the shaft (710) and mounted to the shaft, having a distal end configured for deployment to said body tissue;

a distal end effector (718), said end effector (718) including first and second jaw members (720, 722) which are adapted to engage tissue, mounted on a distal portion of the flexible device (784);

an implant (730) having two bars (824a, 824b) coupled by a suture (822);

wherein the first jaw member (720) is configured to include said bars (824a, 824b) and said suture (822) and the two jaw members (720, 722) are operable to deploy the implant (730) in a patient such that the bars (824a, 824b) are deployed at a predetermined relative distance; and

an elongate cable assembly (716) passing through the elongate shaft including at least first and second cable pairs for moving said jaws towards and away from each other."

- IV. The appellant argued that claim 1 of the main request was supported by the original disclosure and by the earlier application on which the application was based. Claim 1 was also clear.

Reasons for the Decision

1. The appeal is admissible.
2. Main request
 - 2.1 Articles 123(2) and 76(1) EPC

The new claim 1 is supported by the original disclosure. In the following, the passages supporting each feature of the claim and in particular the features objected to in the decision under appeal are given:

An apparatus for reconfiguring stomach tissue (page 43, line 13) comprising an elongate shaft dimensioned to permit transoral access to the stomach (page 43, line 18); a flexible device extending into the shaft from a distal end of the shaft and mounted to the shaft (page 45, lines 8-10), having a distal end configured for deployment to said body tissue; a distal end effector, said end effector including first and second jaw members which are adapted to engage tissue (page 43, line 28), mounted on a distal portion of the flexible device; an implant having two bars coupled by a suture (claim 1, page 46, paragraph 4; Figures 43A and B); wherein the first jaw member is configured to include said bars and said suture and the two jaw members are operable to deploy the implant in a patient (page 51, line 19) such that the bars are deployed at a predetermined relative distance; and an elongate cable assembly passing through the elongate shaft including at least first and second cable pairs for moving said jaws towards and away from each other (page 43, lines 28 - 30).

Accordingly claim 1 of the main request complies with Article 123(2) EPC.

The same considerations can be made with respect to the earlier application on which the present application is based (published under The PCT as WO-A-00/78227).

Accordingly, the present application complies also with Article 76(1) EPC.

2.2 Article 84 EPC

The objection raised in the decision under appeal that the functional relationship between the flexible device and the elongate shaft is not clear since the flexible device may, for instance, extend through or along the shaft entirely, even be separate therefrom, or be attached to its distal end, cannot be accepted. The possibility of alternative embodiments of the invention - when practically feasible - can not be taken as evidence for lack of clarity.

In this case, however, since the shaft has the purpose of permitting access to the stomach through it, it is clear that the flexible device - being deployed on the body tissue of the stomach - extends through the shaft entirely. This is also in part expressed by the wording of the claim that the flexible device extends "into" the shaft.

The further objected term: "at least one member" has been removed from the claim.

Accordingly, claim 1 of the main request complies with Article 84 EPC.

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 the set of claims 1 to 13 filed as main request with letter of 5 April 2011.

The Registrar:

The Chairman:

D. Sauter

D. Valle