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**Datasheet for the decision
of 16 March 2016**

Case Number: T 0035/11 - 3.2.02

Application Number: 05019001.6

Publication Number: 1614438

IPC: A61M1/36, G06F17/50

Language of the proceedings: EN

Title of invention:

Method and apparatus for configuring a blood circuit

Patent Proprietor:

JMS Co., Ltd.

Opponent:

Fresenius Medical Care Deutschland GmbH

Headword:

Relevant legal provisions:

EPC Art. 123(2), 123(3), 100(c)
RPBA Art. 13

Keyword:

Amendments - added subject-matter (yes) - broadening of claim
(yes)

Late-filed auxiliary request - admitted (yes)

Decisions cited:

Catchword:



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Case Number: T 0035/11 - 3.2.02

D E C I S I O N
of Technical Board of Appeal 3.2.02
of 16 March 2016

Appellant: Fresenius Medical Care Deutschland GmbH
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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted on 4 November 2010 rejecting the opposition filed against European patent No. 1614438 pursuant to Article 101(2) EPC.**

Composition of the Board:

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

Summary of Facts and Submissions

- I. On 4 November 2010 the Opposition Division posted its decision to reject the opposition against European patent 1614438.
- II. An appeal was lodged against this decision by the opponent by notice received on 10 January 2011, with the appeal fee being paid on the same day. The statement setting out the grounds of appeal was received on 9 March 2011.
- III. By communication of 3 March 2015, the Board forwarded its provisional opinion to the parties and summoned them to oral proceedings.
- IV. With its letter of 9 July 2015, the patent proprietor requested postponement of the oral proceedings scheduled for 15 July 2015. With its letter of 10 July 2015, it further requested that the above-mentioned letter and the attached medical certificate be excluded from file inspection.
- V. Oral proceedings were held on 16 March 2016.

The final requests of the parties were as follows:

The appellant (opponent) requested that the decision under appeal be set aside and that the patent be revoked.

The respondent (patent proprietor) requested that the appeal be dismissed or, in the alternative, that the decision under appeal be set aside and that the patent be maintained on the basis of the auxiliary request filed during the oral proceedings.

VI. Claim 1 of the patent as granted reads (with the feature denotation proposed in the statement of grounds of appeal being indicated at the left margin):

- 11 "A method of configuring a blood circuit for medical application, the blood circuit comprising a plurality of unit sections (A-G) each of which comprises at least one unit component (A-1, A-2, B-1-1, B-1-2, B-2-1, B-2-2, C-1-1, C-1-2, C-2-1, C-2-2, D-1, D-2, D-3, E-1-1, E-1-2, E-1-3, E-2-1, F-1, F-2, G-1, G-2, G-3, G-4) composed of at least one component (1-13, 21-29, 31-34, 41-45, 51-57, 61-67) the method comprising:
 - 12 using a blood circuit system database (201) in which data with respect to the unit sections (A-G) and the unit components contained in a blood circuit system are stored,
 - 13 the blood circuit system being formed by dividing a blood circuit into a plurality of unit sections (A-G) and preparing a plurality of selectable sets of the unit components for each unit section (A-G),
 - 14 inputting one of the unit sections (A-G) on a basis of the blood circuit system database (201) as an assigned unit section (A-G) to the computer (S101),
 - 15 extracting the data of a plurality of the corresponding unit components from the blood circuit system database (201) by the computer based on the input assigned unit section (A-G), and displaying the extracted data on a display (S102),

- 16 inputting at least one unit component selected from the displayed unit components as a selected unit component to the computer (S103),
- 17 after carrying out the above-mentioned procedures in the assigned unit sections (A-G), by the use of the blood circuit system database (201), displaying an assembly drawing showing an entire configuration of the blood circuit obtained by combining the input selected unit components and at least one of a full length of the blood circuit or an amount of filled blood on a display, and then
- 18 inputting a command for changing the selection of the unit components or a command for confirming the configuration of the blood circuit in the computer (S104)."

Claim 1 of the auxiliary request corresponds to claim 1 as recited above with the words "sets of the" being deleted in front of the term "unit components" in feature 13.

- VII. The appellant's arguments are essentially those on which the following reasons of this decision are based.
- VIII. The respondent's arguments, as far as relevant to this decision, are summarised as follows:

It was clear from the description and claims that only unit components were selected step by step for each unit section, and not complete sets of unit components. The wording in the claim was possibly ambiguous in this respect, but any such possible ambiguity was in fact resolved by feature 16 according to which "at least one unit component selected from the displayed unit

components" was input to the computer. Accordingly, claim 1 of the granted patent did not comprise added subject-matter going beyond the content of the application as originally filed.

The auxiliary request should be admitted since it was covered by the search report and had a clear basis in the application documents as originally filed. The fact that in its communication attached to the summons to oral proceedings the Board had indicated that the above-mentioned issue was to be discussed during the oral proceedings, did not imply that the Board had already indicated its preliminary opinion in this respect.

There was actually no difference between the possibilities of selection as defined in feature 13 of claim 1 of the granted patent and in the auxiliary request. Accordingly, the scope of protection was the same, rather than being extended.

Reasons for the Decision

1. The appeal is admissible.
2. Main request - amendments

Claim 1 of the patent as granted is directed to a method of configuring a blood circuit comprising a plurality of unit sections each of which comprises at least one unit component composed of at least one component. Feature 13 comprises the step of preparing a plurality of selectable sets of the unit components for each unit section. This step was not comprised in claim 1 of the application as originally filed.

The Board shares the respondent's argument that it is clear from the original description and claims that only unit components are selected step by step for each unit section, and not complete sets of unit components. The respondent argued further that the wording in the claim was possibly ambiguous in this respect, but that any such possible ambiguity was in fact resolved by feature 16, according to which "at least one unit component selected from the displayed unit components" is input to the computer. The Board notes, however, that feature 16 refers to at least one unit component for which data have been extracted for display from the blood circuit system database, as defined in the preceding step 15. Accordingly, the selected unit component or components in feature 16 are specifically processed and are not the ones generically defined in feature 13 as parts of each unit section of the blood circuit system database.

In the Board's view, the term "plurality of selectable sets of the unit components" implies that a selection can be made between **sets** of unit components, i.e. between pluralities of unit components that have been grouped together, thus forming "sets". A plurality of such "selectable sets" are prepared for each unit section, according to feature 13. The application as originally filed is devoid of any teaching supporting a preparation procedure of this kind.

For this reason alone, claim 1 of the patent as granted comprises added subject-matter not disclosed in the application documents as originally filed, contrary to the requirements of Article 123(2) EPC.

Hence, the ground of opposition under Article 100(c) EPC prejudices the maintenance of the patent as granted.

3. Under these circumstances there is no need for the Board to deal with the other grounds of opposition brought forth thereagainst by the respondent.

4. Auxiliary request

4.1 Admissibility

This request was only filed during the oral proceedings, i.e. at a very late stage of the appeal procedure, whereas the above-mentioned objection of added subject-matter was already raised in the statement of grounds of appeal. Nevertheless, the Board found it appropriate to exercise its discretion under Article 13 RPBA to admit this request since the amendment is uncomplicated and directly addresses the above-mentioned objection of added subject-matter.

4.2 Basis

A basis for feature 13 can be found, for instance, in paragraph [0012] of the original application as published. Accordingly, the requirements of Article 123(2) EPC are met in this respect.

4.3 Scope of protection

The step of "preparing a plurality of selectable sets of the unit components for each unit section" in feature 13 of claim 1 of the patent as granted implies that certain unit components are sub-assembled into groups or "sets" and that a selection can be made

between such **sets** of unit components. Such an intermediate step of sub-assembling is not present in feature 13 of the auxiliary request, according to which the selection can be made directly among the unit components. The implicit presence of this intermediate step in method claim 1 as granted provides a restriction of scope of protection which is not present in method claim 1 of the auxiliary request. For that reason, the Board does not accept the respondent's argument that there is actually no difference between the possibilities of selection as defined in both claims.

The omitted words "sets of the" in claim 1 of the auxiliary request results in claim 1 of the patent being amended in such a way that the protection it confers is extended, contrary to Article 123(3) EPC.

5. Documents excluded from file inspection

With its letter of 9 July 2015, the appellant requested postponement of the oral proceedings scheduled for 15 July 2015 for the reason of serious illness of its representative, as further explained in the letter and evidenced by a medical certificate attached thereto.

With its letter of 10 July 2015, the appellant requested that the above-mentioned letter and its attachment be excluded from file inspection. Since this request is credibly motivated by the fact that it concerns a private, medical condition and is considered to be prejudicial to the legitimate personal interest of the representative, these documents are excluded from file inspection in accordance with the "Decision of the President of the EPO dated 12 July 2007

concerning documents excluded from file inspection" (Special edition No. 3, OJ EPO 2007, J3).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



D. Hampe

E. Dufrasne

Decision electronically authenticated