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

Case Number: T 2114/15 - 3.3.06

Application Number: 10155351.9

Publication Number: 2363196

IPC: B01D63/04

Language of the proceedings: EN

Title of invention:

Diffusion and/or filtration device

Applicant:

Gambro Lundia AB

Headword:

Diffusion/filtration device/GAMBRO

Relevant legal provisions:

EPC Art. 123(2), 111(1)

Keyword:

Amendments - allowable (yes) - main request
Remittal (yes)

Decisions cited:

Catchword:



Beschwerdekammern
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Chambres de recours

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Case Number: T 2114/15 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 16 August 2016

Appellant: Gambro Lundia AB
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Representative: Perchenek, Nils
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Decision under appeal: **Decision of the Examining Division of the European Patent Office posted on 3 July 2015 refusing European patent application No. 10155351.9 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman B. Czech
Members: E. Bendl
S. Fernández de Córdoba

Summary of Facts and Submissions

I. The appeal lies from the decision of the examining division to refuse the European patent application No. 10 155 351.9, published as EP 2 363 196 A1.

II. Claim 1 according to the (sole) request then pending before the examining division reads as follows (amendments compared to claim 1 as originally filed made apparent by the board):

"1. A diffusion and/or filtration device comprising:

- a) *housing means, ~~said~~ **the** housing means defining a longitudinally extending internal chamber including a first end and a second end;*
- b) *a bundle of semi-permeable hollow fiber membranes disposed within ~~said~~ **the** internal chamber, ~~said~~ **the** hollow fiber membranes extending longitudinally from ~~said~~ **the** first end of ~~said~~ **the** housing to ~~said~~ **the** second end of ~~said~~ **the** housing, ~~said~~ **the** hollow fiber membranes having an outer surface, and a first end and a second end corresponding to ~~said~~ **the** first end and ~~said~~ **the** second end of ~~said~~ **the** internal chamber, **the lumen of each of the hollow fiber membranes being in fluid connection to both the first end and the second end of the internal chamber;***
- c) *end wall means supporting ~~said~~ **the** first and second ends of ~~said~~ **the** hollow fiber membranes within ~~said~~ **the** internal chamber so as to sealingly separate ~~said~~ **the** first and second ends of ~~said~~ **the** hollow fiber membranes from ~~said~~ **the** outer surface of ~~said~~ **the** hollow fiber membranes between ~~said~~ **the** first and second ends thereof;*
- d) *first inlet means for the introduction of a fluid into ~~said~~ **the** first end of ~~said~~ **the** housing*

means, ~~said~~ **the** first inlet means being defined by a first end cap covering ~~said~~ **the** first end of ~~said~~ **the** housing;

- e) first outlet means for the evacuation of a fluid from ~~said~~ **the** second end of ~~said~~ **the** housing means, ~~said~~ **the** first outlet means being defined by a second end cap covering ~~said~~ **the** second end of ~~said~~ **the** housing, ~~said~~ **the** first and second end caps being applied to ~~said~~ **the** first and second ends of ~~said~~ **the** housing in a fluid-tight manner;
- f) second outlet means for the evacuation of a fluid from ~~said~~ **the** internal chamber at a location between ~~said~~ **the** first and second end of ~~said~~ **the** housing means;

characterized in that the bundle of semi-permeable hollow fiber membranes comprises at least two different types of hollow fiber membranes **uniformly distributed throughout the entire bundle.**"

III. In the appealed decision, the examining division concluded that the amendments made to claim 1 in the course of the examination procedure were objectionable under Article 123(2) EPC, more particularly the insertion, into claim 1, of the feature "*the lumen of the hollow fiber membranes being in fluid connection to both the first end and the second end of the internal chamber*". The reasons given by the examining division essentially focus on the content of the description as filed (page 14, lines 19 to 25). The examining division found, in particular, that the feature in question could not be found *verbatim* in this passage and was not unambiguously derivable therefrom.

IV. In its statement of grounds, the appellant requested that the decision under appeal be set aside and that a

patent be granted on the basis of the claims submitted with letter of 8 February 2012 (main request), or, alternatively, on the basis of the claims according to auxiliary request AR1, submitted under cover of its notice of appeal dated 26 August 2015.

- V. The appellant was informed over the telephone that in the board's view, the main request appeared to meet the requirements of Article 123(2) EPC, and that the board thus intended to remit the case to the examining division for further prosecution.

Thereupon, by fax of 22 August 2016, the appellant withdrew its earlier auxiliary request for oral proceedings.

- VI. The appellant's arguments of relevance here, i.e. regarding the compliance of main request with Article 123(2) EPC, can be summarised as follows:
- Filtering devices as defined in the pre-characterising part of claim 1 were known to the skilled person.
 - Such known devices required that fluid entering from one end was evacuated from the second end,
 - therefore, both ends had to be in fluid connection in prior art devices.
 - This was also the case for the devices as claimed.
 - The application as filed moreover disclosed a process for preparing the claimed devices.
 - The insertion of the feature in question found basis in the application as filed.
 - The requirements of Article 123(2) EPC were therefore met.

Reasons for the Decision

Main request - Allowability of the amendments

1. The examining division argued in its decision (points 10.1 and 10.2) that the feature "*the lumen of the hollow fiber membranes being **in fluid connection** to both the first end and the second end of the internal chamber*", was not disclosed in the application as filed and that its insertion into claim 1 was, therefore, objectionable under Article 123(2) EPC.

2. The Board notes, however, that features d) and e) of claim 1 (unamended but for the multiple replacement of "said" by "the") require that the two ends of the housing are covered by end caps applied to them in a fluid tight manner and defining an inlet and an outlet for the introduction and the evacuation of a fluid into and from the housing, respectively.

Moreover, according to feature c) of claim 1 (also unamended but for the multiple replacement of "the" by "said") the device also comprises end walls supporting the first end second ends of the hollow fibre membranes arranged with the internal chamber formed by the housing, said end walls sealingly separating the ends of the hollow fibre membranes from their outer surface between their two ends.

3. For the board, the person skilled in the art of membrane separation modules reading these features in combination understands that the hollow fibre membranes of the bundle arranged within the housing must implicitly be **open towards the inlet and outlet defined by the two end caps** in order to permit the intended use of the claimed device as diffusion and/or filtration

device: Said use comprises the introduction of fluid to be filtered through one end cap defining inlet means and the evacuation of retentate and permeate through the first and second outlet means, respectively.

4. In other words, features c), d) and e) in combination imply that the lumina of the hollow fibres are in fluid connection to both ends of the internal chamber formed by the housing, as expressly required by amended feature b). The amendment objected to by the examining division thus merely consists in the insertion of wording literally expressing a feature already implied by features c), d) and e) present in claim 1 of the application as filed.
5. Hence, in the Board's judgement, the amendment in question does not generate subject-matter extending beyond the content of the application as filed. The inserted wording could possibly be considered as redundant, but its insertion does not amount to adding subject-matter which was not disclosed in the application as filed.
6. Since the Board comes to this conclusion based on a mere comparison of the wordings of claim 1 of the application as filed and of claim 1 at issue, there is no need to consider in detail issues relating to the disclosure of those parts of the application as filed which describe a process for the preparation of the device according to the invention. For the sake of completeness, the board observes, however, that the process described appears to be perfectly suitable for the preparation of devices wherein the lumina of all the hollow fibre membranes forming the bundle are open on both sides.

7. No objections were raised by the Examining Division as regards the other amendments in the claims according to the main request. The Board is also satisfied that they find basis in the application as originally filed, as indicated below:

7.1 The feature "*uniformly distributed throughout the entire bundle*" inserted into claim 1 stems from dependent claim 10 of the application as originally filed.

7.2 For the Board the replacement of the term "*said*" by "*the*" does not generate subject-matter not disclosed in the application as filed.

7.3 The remaining claims of the request at issue correspond to claims 2 to 9 and 11 to 15 of the application as filed.

8. In the Board's judgement, the set of claims according to the main request at issue thus meets the requirements of Article 123(2) EPC.

9. In the decision under appeal, the examining division did not address other issues than compliance with Article 123(2) EPC.

The board thus considers it appropriate to remit the case to the examining division pursuant to 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 examining division for further prosecution.

The Registrar:

The Chairman:



D. Magliano

B. Czech

Decision electronically authenticated