Internal distribution code:

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

Datasheet for the decision of 23 June 2020

Case Number: T 0400/16 - 3.2.02

Application Number: 05750101.7

Publication Number: 1761176

IPC: A61B17/04

Language of the proceedings: EN

Title of invention:
SUTURE DEVICES

Patent Proprietor:
Ethicon LLC

Opponent:
Covidien LP

Headword:

Relevant legal provisions:
EPC Art. 123(2), 54, 56
RPBA Art. 12(4)
RPBA 2020 Art. 25(2)

This datasheet is not part of the Decisior
It can be changed at any time and without notic

Keyword:
Added subject-matter (no)
Novelty (yes)
Inventive step (yes)
Admissibility of a late-filed document (no)

Decisions cited:
G 0007/93, T 0640/91, T 0823/96

Catchword:

This datasheet is not part of the Decisior
It can be changed at any time and without notic

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

Boards of Appeal

Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 0400/16 - 3.2.02

D E C I S I O N
of Technical Board of Appeal 3.2.02
of 23 June 2020

Appellant: (Opponent)	Covidien LP 15 Hampshire Street Mansfield, MA 02048 (US)
Representative:	Maschio, Antonio Maschio & Soames IP Limited 30 Carlton Crescent Southampton SO15 2EW (GB)
Respondent: (Patent Proprietor)	Ethicon LLC 475 Calle C, Suite 401 Los Frailes Industrial Park Guaynabo 00969 (PR)
Representative:	Small, Gary James Carpmaels & Ransford LLP One Southampton Row London WC1B 5HA (GB)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 10 December 2015 rejecting the opposition filed against European patent No. 1761176 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman	M. Alvazzi Delfrate
Members:	M. Stern
	L. Bühler

Summary of Facts and Submissions

I. The opponent lodged an appeal against the decision of the Opposition Division rejecting the opposition against European patent No. 1 761 176. The Opposition Division held that claim 1 of the granted patent satisfied the requirements of Articles 123(2), 54 and 56 EPC.

II. The following documents are relevant for the present decision:

D1: DE-A-43 02 895
D2: US-A-4 950 285
D5: WO-A-2004/030520
D7: E. Croce et al.: "Intracorporeal Knot-Tying and Suturing Techniques in Laparoscopic Surgery: Technical Details", Journal of the Society of Laparoendoscopic Surgeons, 2000, 4, pages 17-22

III. The appellant (opponent) requested that the decision under appeal be set aside and that the patent be revoked. No request for oral proceedings was filed.

IV. The respondent (patent proprietor) requested that the appeal be dismissed.

V. Claim 1 of the patent as granted reads as follows:

"A barbed suture (190) comprising:
an elongated body;
one pointed end;
a plurality of barbs (94) extending from the periphery of the body, the barbs (94) being configured to permit movement of the suture through the tissue (194) in the

direction of movement of the pointed end and resist movement of the suture (190) through the tissue in a direction opposite the direction of movement of the pointed end by engagement of the barbs with the tissue; and one end opposite the pointed end having a loop (192) through which the elongated body may pass to secure tissue as an anchor, the anchor preventing movement of the suture (190) in the direction of movement of the pointed end; characterized in that a plurality of cuts in the elongated body provide the plurality of barbs wherein each of the plurality of barbs is provided by a cut."

VI. The arguments of the appellant which are relevant for the present decision may be summarised as follows.

Article 123(2) EPC

The granted patent contained added subject-matter as a result of a new combination of features in claim 1, which was not disclosed in the application as filed, contrary to Article 123(2) EPC. In particular, the provision of cut barbs was not described in connection with sutures having anchors or loops. The use of a loop was claimed in claim 16 as originally filed and shown in Figures 24 and 25, as one of at least 21 possibilities of anchors. Regarding the barbs, there was no disclosure anywhere in the patent concerning the formation of barbs. The skilled person had no idea, from the application as filed, that the proprietor intended barb cutting to be seen as part of the invention. Not even in the sole "Example" presented on page 14, line 35 to page 15, line 6 was it explicitly stated that the barbs were formed by cutting. It was merely stated that certain barb parameters related to features of a cut, in particular the cut depth, length,

angle and distance between cuts, with specific values being given in Table 1 on page 15. One of the two alternative parameter configurations (Design A) was not plausible, since it failed to meet the US Pharmacopeia minimal standards for suture strength (page 16, lines 1 and 2 of the application). The teaching of the Example could not be generalised such that the cutting itself provided the advantage of the invention. Moreover, the sutures in the Example were barbed sutures in which barbs were cut in opposing directions, i.e. bi-directional sutures. These sutures did not have, and did not need, anchors. Accordingly, the Example did not fall within the scope of the claim of the patent. The subject-matter of the claim combined the teaching of the Example relating to cut barbs in bi-directional sutures with the teaching of the specification relating to the use of anchors in mono-directional sutures.

Novelty

The subject-matter of claim 1 lacked novelty over D1. The Opposition Division established that D1 failed to disclose that the plurality of barbs extended from the periphery of the body of the suture. The patent and D1 did not provide details of the cutting procedure. Hence, the patent and D1 had to be read broadly. The attached declaration by Mr Timothy Kosa of the Opponent showed unequivocally that the barbs in sutures which are produced by cutting do extend beyond the surface of the suture. The suture used was a conventional commercial suture sold by Quill Medical. The tests showed that it would be expected that the barbs would extend beyond the suture surface.

Inventive step

Starting from D1, the skilled person would consider that engineering the barbs such that they extended beyond the surface of the suture would increase the ease of securing the suture of D1 to its loop (loop 5 and eyelet 4) because the engagement of the barbs with the loop would be facilitated. The barbs would also be in a much better position to interact with loop 5, and thus provide a much more secure fastening. Non-extending barbs required loop 5 to extend within the diameter of the suture in order to interact with the indentations. The lip of loop 5 had to be resilient enough to allow passage of the suture through the loop, but sufficiently rigid to interact with incisions in the suture such that the suture could not be pulled through the loop in reverse. If resilience was undesirable in the barbs, as asserted by the Opposition Division, it was equally undesirable in the loop. Therefore, there was no discouragement to the skilled person to manufacture a suture with barbs which extended beyond the surface of the suture. The performance of the suture would be enhanced in this case. Such an arrangement was shown in any one of Figures 4a, 4b, 4c or 4e; the skilled person would have adapted this approach to the loop example shown in Figure 4d.

In D2 the barbs were provided by moulding. The Opposition Division held that the skilled person would not be motivated to provide barbs created by cuts for three reasons for which there was no evidence. In particular, there was no evidence that producing barbs by cutting resulted in weakening the suture to an unacceptable degree; at any rate, no more than the degree to which sutures were shown to be weakened in the opposed patent. Hence, manufacture by moulding was not necessary to provide the requisite strength, as

argued in the decision. There was also no evidence that it would be cumbersome and timeconsuming to produce barbs by cutting, when the loop was already produced by moulding, and there was no evidence that barbs created by cuts were sharp and would damage the loop.

The subject-matter of claim 1 also lacked inventive step when starting from D5 and having regard to the common general knowledge as represented by D7. The formation of barbs by cutting was a common technique in the art before the priority date of the opposed patent, as demonstrated by D5. The use of loops to anchor sutures was also commonly known in the art, as demonstrated by D7. The reasoning used by the Opposition Division to deem D7 inadmissible was incorrect. D7 could not have been filed earlier in the proceedings, because it was not known to the Opponent.

VII. The arguments of the respondent which are relevant for the present decision may be summarised as follows.

Article 123(2) EPC

The granted patent complied with the requirements of Article 123(2) EPC. Page 15, lines 1 to 2 clearly disclosed that the barbs of Figure 56 were formed by cutting. The disclosure of the barb configuration shown in Figure 56 was not limited to the bi-directional sutures of the "Example". The general description of this figure on page 5, line 25 stated only that it is "a detail view of an embodiment according to the present invention of a barb configuration". There was no indication in the application as filed that the barb configuration of Figure 56 would be suitable for use only with a specific one of the illustrated suture anchor embodiments. As stated on page 6, lines 11 to

12, "like numerals designate corresponding or similar elements throughout the different views". Therefore, the combination of a barbed suture with a loop anchor with cut barbs was directly and unambiguously disclosed in the application as filed.

Novelty

The incisions 7 of Figure 4d) of D1 did not provide a plurality of barbs which extended from the periphery of the suture body as claimed. The incisions 7 merely provided recesses from the surface or periphery of the suture body into which a portion 5 of the eyelet 4 might extend. It was not their purpose to create projections which extended from the periphery of the body, and no part of the illustrated embodiment did so. In D1 there was no direct and unambiguous disclosure, as required by the case law to acknowledge a lack of novelty, of barbs extending from the periphery of the suture body.

The declaration by Mr Kosa was irrelevant to the question of whether the suture of Figure 4d) of D1 comprised barbs which extended from the periphery of the suture. The barbs of the suture tested by Mr Kosa were intended to work in the manner described in the opposed patent, engaging the tissue along the length of the suture. The declaration told absolutely nothing about the suture of D1, which was not intended to work in this way.

Therefore, claim 1 was novel over D1.

Inventive step

The skilled person would not modify the incisions of the suture of Figure 4d) of D1 to form barbs which extended from the periphery of the suture, because it would lead to a weakening of the locking effect of the interaction between the incisions 7 and the eyelet 4, in contradiction to the intended purpose of D1. This was even illustrated in the images provided in the annex of the declaration of Mr Kosa filed by the opponent with its statement of grounds. Nor would Figures 4a), 4b), 4c) and 4e) of D1 lead the skilled person to adapt the embodiment of Figure 4d) to comprise barbs which extended beyond the surface of the suture, because the elevations 2 in Figures 4a), 4b), 4c) and 4e) were described in D1 as an alternative to the depressions 7 of Figure 4d). Hence, claim 1 was inventive over D1.

The barbs of the suture of D2 were formed by moulding and not provided by cuts, as claimed. The suture of D2 worked in a fundamentally similar way to the suture of D1: each individual barb on the suture of D2 was provided for the purpose of engaging protuberances 511 to lock the suture in a closed loop encircling tissue. Thus, the skilled person would not adapt the suture of D2 to comprise barbs which extended from the periphery of the suture body and were provided by cuts in the elongated body, because to do so would lead to a weakening of the locking effect of the interaction between the barbs and the protuberances, which was in contradiction to the intended purpose of D2.

D7 was not admitted into the proceedings by the Opposition Division for lack of a compelling reason for the belated submission and lack of prima facie relevance of the document. The finding of the

Opposition Division was correct, and D7 should not be admitted into the appeal proceedings either.

Reasons for the Decision

1. The appeal is admissible.

2. *The invention*

The invention relates to a barbed suture including an elongated body, one pointed end, a plurality of barbs extending from the periphery of the body, and one end opposite the pointed end having a loop through which the elongated body may pass to secure tissue as an anchor. The barbs permit movement of the suture through the tissue in the direction of movement of the pointed end and prevent movement of the suture in a direction opposite the direction of movement of the pointed end.

3. Article 100(c) in combination with Article 123(2) EPC

3.1 A barbed suture with a loop at the end opposite to the pointed end as defined in the preamble of claim 1 corresponds to the suture of independent claim 16 of the application as filed.

3.2 In the context of an example on page 14, line 34 to page 15, line 6, the application as filed states that "the barb geometries were characterised by four different parameters: **cut** angle (Φ); **cut** depth (D_C); calculated **cut** length (L_C); and the distance between **cuts** (FIG. 56)" [emphasis added] (page 15, lines 1 and 2). From the use of the word "cut", it is directly and unambiguously derivable that the barbs shown in Figure 56 were created by a cut. The description

explains that Figure 56 is "a detail view of an embodiment according to the present invention of a barb configuration" (page 5, line 25). A summary of the barbed sutures of the "present invention" is given on page 1, lines 21 to 30, while definitions of the sutures of the "present invention" are given in five independent product claims, i.e. original claims 1, 12, 14, 16 and 18. The "barb configuration" shown in Figure 56 is the only one disclosed in the application.

The Board therefore considers it directly and unambiguously derivable that any of the barbed sutures of "the present invention", particularly the barbed suture of original independent claim 16 on which present claim 1 is based, has a cut barb configuration as shown in Figure 56.

In view of the mentioned disclosure, it is not relevant that page 14, lines 35 to 37 explains that in the aforementioned example testing was performed by comparing the tissue holding capacity of a bi-directional barbed suture with two different barb geometry designs listed in Table 1 on page 15, as argued by the appellant. Bi-directional sutures are sutures having barbs extending in one direction at one end and opposing barbs at the other end, which prevents movement of the suture through tissue in either direction between two pointed ends (page 1, lines 10 to 12; Figures 26 and 28 to 37), with no loops serving as anchors.

3.3 Moreover, in the single-directional barbed sutures shown in Figures 1 to 25, the barbs are labelled with numeral "94", which is the same numeral used to label the barbs of bi-directional barbed sutures in Figures 26 and 28 to 37. According to page 6, lines 11

and 12, in the drawings "like numerals designate corresponding or similar elements throughout the different views". Therefore, in view of the different figures depicting sutures with corresponding barbs and Figure 56 providing a detailed view of such barb, the skilled person understands that the barbs of any of the illustrated sutures of Figures 1 to 25 (including the loop embodiment of Figures 24 and 25) may be as shown in Figure 56.

3.4 The parameters mentioned on page 15, lines 1 and 2 in relation to Figure 56, i.e. the depth, the length and the angle of the cut, as well as the distance between cuts, are all parameters inherent to a cut. It therefore does not amount to an unallowable generalisation to retain just the disclosed underlying concept of the cutting itself. Moreover, it is clear that the specific values for these parameters listed in Table 1 on page 15 are just exemplary or optional values which the cut barbs may have. In fact, Table 1 contains two alternative parameter configurations - even if one of these configurations (Design A) may not be plausible, as argued by the appellant, since it failed to meet the US Pharmacopeia minimal standards for suture strength (page 16, lines 1 and 2 of the application).

3.5 The Board is therefore of the view that the application as filed directly and unambiguously discloses that each of the plurality of barbs of a barbed suture with one pointed end and a loop as defined in original independent claim 16 and depicted in Figures 24 and 25 are provided by a cut.

3.6 As a consequence, the subject-matter of claim 1 of the granted patent satisfies the requirements of Article 123(2) EPC.

4. Novelty

4.1 Document D1 discloses a suture comprising an elongated body (1), one pointed end (3) (Figure 1), a plurality of cuts in the elongated body (incisions 7 in Figure 4d); column 2, line 61 to column 3, line 2), the end opposite the pointed end having a loop (eyelet 4). Although the incisions 7 in Figure 4d) are disclosed as cuts ("Einschnitte") in the elongated body of the suture, no part of the suture is disclosed to extend "from the periphery of the body" of the suture, as required by claim 1. The incisions 7 merely provide recesses from the surface or periphery of the suture body into which a portion 5 of the eyelet 4 may engage. It is not the purpose of the incisions 7 to create projections which extend from the periphery of the body, and no part of the illustrated embodiment of Figure 4d) is depicted to do so.

4.2 According to established case law, it is a prerequisite for the acceptance of lack of novelty that the claimed subject-matter is "directly and unambiguously derivable from the prior art". In other words, it has to be "beyond doubt - not merely probable - that the claimed subject-matter was directly and unambiguously disclosed in a patent document" (Case Law of the Boards of Appeal, 9th edition 2019, I.C.4.1). In particular, it is a generally applied principle that for concluding lack of novelty, there must be a direct and unambiguous disclosure, either explicit or implicit, in the state of the art of subject-matter falling within the scope of what is claimed, implicit disclosure meaning no more

than the clear and unambiguous consequence of what is explicitly mentioned (T 823/96, point 4.5 of the Reasons).

4.3 Therefore, following the established case law mentioned above, it is not merely incumbent on the appellant to show that one possible suture made in accordance with the disclosure of D1 may also comprise the features of claim 1. To demonstrate lack of novelty, the appellant must show that any suture which the skilled person would make in accordance with the teaching of D1 must inevitably comprise the claimed features and that the claimed features are the clear and unambiguous consequence of following the disclosure of D1.

4.4 Whether a cut provides a barb which extends from the periphery of the body of a suture depends on a range of factors, including the properties of the suture material, the geometry of the cuts, the geometry and relative movement of the cutting blade, and any subsequent treatment of the barbs after cutting. D1 does not provide a disclosure of materials from which the disclosed sutures may be formed or what way the incisions 7 may be made. The appellant failed to show that it is inevitable that a suture the skilled person would form in accordance with the disclosure of the embodiment of Figure 4d) of D1 would comprise barbs which extend from the periphery of the suture body as required by claim 1. It is irrelevant in this respect that the patent in suit does not give details as to the cutting procedure to be used.

4.5 The declaration by Mr Timothy Kosa, an employee of the appellant, filed with the statement of grounds of appeal is irrelevant to the question of whether the suture of Figure 4d) of D1 comprises barbs which extend

from the periphery of the suture, as claimed. The barbs of the Quill 2-0 Monoderm suture tested by Mr Kosa are intended to work in the manner described in the opposed patent, by the plurality of barbs engaging the tissue along the length of the suture. The declaration tells nothing about the suture of D1, which is not intended to work in this way. Each of the depressions 7 of the suture of Figure 4d) of D1 is designed and intended to engage the eyelet 4, not tissue. Regardless of whether the suture of D1 inadvertently engages tissue, this is not the purpose of the depressions; therefore, in contrast to the barbed suture tested by Mr Kosa, the extension of the barbs from the periphery of the suture of Figure 4d) of D1 is not necessary for that suture to work as intended.

4.6 In the light of the above, D1 does not directly and unambiguously disclose that the suture of Figure 4d) comprises barbs extending from the periphery of the suture body.

Thus, the subject-matter of claim 1 is novel within the meaning of Article 54 EPC.

5. Inventive step

5.1 Starting from D1

5.1.1 Figures 4a) to 4e) of D1 depict alternative variants of surface structures of sutures that latch with the engagement portion 5 of loop 4, which may have the form of elastic flaps (column 2, lines 17 to 20). In Figures 4a), 4b), 4c) and 4e), the surface structures are elevations (2) which extend beyond the surface of the suture (column 2, lines 45 to 60), and in Figure 4d) the surface structures are incisions or

depressions 7 formed on the suture body ("nachträglich eingebrachten Vertiefungen bzw. Einschitten 7"; column 2, line 61 to column 3, line 2). The elevations 2 in Figures 4a), 4b), 4c) and 4e) are described in D1 as an alternative to the incisions or depressions 7 of Figure 4d) ("rastenartige Erhebungen oder Vertiefungen"; column 1, lines 39 to 46). The closest prior-art embodiment in D1 is that of Figure 4d).

5.1.2 The subject-matter of claim 1 differs from the embodiment of Figure 4d) of D1 in that the suture comprises barbs extending from the periphery of the suture body.

5.1.3 A barb formed by a cut which extends from the periphery of the suture body, as claimed, necessarily comprises a strip of suture material which has been (either as part of the cutting process or subsequently) peeled or bent out of the plane of the surface of the suture body. To create this shape, the barb must necessarily be relatively weak and flexible, because the material from which it is formed has already been bent or flexed out of the plane.

Moreover, when a barb extends from a suture body, pressure exerted on any part of the barb outside the periphery of the body is exerted solely on the barb itself. That is, the pressure is exerted on the flexible strip of material which has been bent out of the plane of the suture body and which is not supported or reinforced by the material of the suture body. In contrast, when a force is exerted on an edge of the incision 7 of D1, the material at the edge is supported by all of the suture body material between that incision and the next. Even if the engagement means 5

of the loop 4 have the necessary resilience to slide over the suture body and to latch into and engage with the incisions 7, its stiffness does not need to be appreciably reduced as alleged by the appellant, certainly not to the extent that barbs extending from the periphery of the suture body would.

5.1.4 The flexibility of cut barbs which extend from the periphery of the suture body is not a problem for barbed sutures where the barbs are provided for the purpose of engaging tissue. Barbs which are provided for engaging tissue spread the transfer of tension to the tissue over a large number of barbs along the length of the suture. In contrast, each of the incisions 7 of D1 is provided for the purpose of engaging portion 5 of the loop or eyelet 4; there is no spread of tension over multiple incisions in D1, so each individual incision must be engineered to withstand the full tension of engagement with the eyelet.

5.1.5 The principles discussed above are even illustrated in the images provided in the annex of the declaration of Mr Kosa filed by the appellant. The images show barbs which extend from the periphery of the suture, as claimed. The barbs are, as expected for barbs provided to engage tissue, thin and flexed outwards from the surface of the suture. It would be clear to the skilled person that an eyelet exerting a great pressure on any individual one of those barbs would likely cause the barb to fail by, for example, bending backwards or shearing off.

5.1.6 In the light of the considerations above, the skilled person would not adapt the suture of Figure 4d) of D1 to comprise barbs formed by cuts which extend from the

periphery of the suture body, because to do so would lead to a weakening of the locking effect of the interaction between the incisions 7 and the eyelet 4, which is in contradiction to the intended purpose of D1.

5.1.7 As indicated above, the elevations 2 in Figures 4a), 4b), 4c) and 4e) are described in D1 as an alternative to the incisions or depressions 7 of Figure 4d). There is nothing in D1 suggesting that the incisions into the surface of the suture may produce an elevation extending from the periphery of the suture, nor that the elevations 2 are obtained from incisions or cuts in the elongated suture body.

5.1.8 It is hence not obvious to modify the suture of Figure 4d) of D1 to produce a suture having barbs extending from the periphery of the elongated suture body.

Hence, the subject-matter of claim 1 is not rendered obvious by document D1.

5.2 Starting from D2

5.2.1 Document D2 discloses a suture comprising barbs, teeth or serrations 528 which are inclined from the free end of thread 526 towards the attached end of the thread (Figure 5; column 6, lines 55 to 58). The barbs, teeth or serrations of the suture of D2 are configured to engage with the protuberances 511, 513 of the body member 514 in order to lock the suture in a closed loop encircling tissue (as shown in Figures 7 to 9). The barbs of the suture of D2 are formed by moulding (column 8, lines 39 and 40) rather than by cutting, as defined in claim 1.

5.2.2 The subject-matter of claim 1 differs from that of D2 in that a plurality of cuts in the elongated body provide the plurality of barbs wherein each of the plurality of barbs is provided by a cut.

5.2.3 The appellant accepted that the barbs in D2 were formed by moulding, but gave no reason why it would have been obvious to modify the suture of D2 to comprise a plurality of cuts in the elongated body which provide the barbs.

5.2.4 As correctly concluded by the Opposition Division and argued by the respondent, the manufacture of the suture of D2 by moulding is an important requisite to provide the necessary strength for holding the whole tensioning force at a single locking point. By moulding the barbs, as taught in D2, the barbs withstand the high pressure generated by the engagement with the protuberances 511, 513 of the body member 514. The skilled person would therefore not be motivated to provide cuts which would weaken the locking of the suture.

5.2.5 In contrast, in barbed sutures as claimed, with barbs configured to engage tissue, the transfer of tension to the tissue is spread over a large number of barbs along the length of the suture, and each individual barb needs only to contribute a small fraction of the gripping power of the suture. Therefore, each one of the plurality of barbs intended for gripping tissue as claimed may be more flexible and weaker than barbs provided for engaging protuberances as described in D2 without any adverse effect.

5.2.6 The Board therefore concludes that the subject-matter of claim 1 is not rendered obvious by document D2.

5.3 Admissibility of D7

5.3.1 The appellant argued before the Opposition Division and in the statement of grounds of appeal (point 5.5) that the subject-matter of claim 1 lacked inventive step when starting from D5 and having regard to the common general knowledge as represented by D7.

Document D7 had been filed during the first-instance proceedings after the opposition period and was not admitted by the Opposition Division, since it was not prima facie more relevant than other documents already present in the proceedings.

5.3.2 As stated in G 7/93 (point 2.6 of the Reasons), if in appeal the way in which a first instance department has exercised its discretion is contested, it is not the function of a board of appeal to review all the facts and circumstances of the case as if it were in the place of the department of first instance, in order to decide whether or not it would have exercised its discretion in the same way as the department of first instance. If a department of first instance was required under the EPC to exercise its discretion in certain circumstances, it should have a certain degree of freedom when doing so, without interference from the boards of appeal. A board of appeal should only overrule the way in which a department of first instance had exercised its discretion if it came to the conclusion either that the department had not exercised its discretion in accordance with the proper principles, or that it had done so in an unreasonable way, and had thus exceeded the proper limits of its discretion (see also T 640/91, OJ 1994, 918, point 6.3 of the Reasons).

5.3.3 In the present case, the Opposition Division exercised its discretion in a reasonable way and in accordance with the proper principles. As discussed under point 3.2.1 of the decision, the Opposition Division saw no compelling reason for the belated submission of D7 (the claims were never amended and the opponent could have filed D7 during the opposition period) and found that the document lacked prima facie relevance (the disclosure of D7 is not related in any way to barbed sutures, as claimed; there are other documents on file related to barbed sutures which are more relevant; D7 relates to tying knots in unbarbed sutures and D5 explicitly teaches away from the use of knots in relation to barbed sutures). The Opposition Division did not exceed the proper limits of its discretion, so the Board sees no reason for it to overrule the discretionary decision of the Opposition Division to not admit D7 into the opposition proceedings.

For the same reasons, the Board considers, in the exercise of its own discretion (Article 12(4) RPBA 2007 in combination with Article 25(2) RPBA 2020), that D7 is not to be admitted into the appeal proceedings either.

5.3.4 Under these circumstances, the objection of lack of inventive step based on the combination of documents D5 and D7 is baseless.

5.4 As a consequence, the Board concludes that the subject-matter of claim 1 is not rendered obvious, in accordance with Article 56 EPC.

6. As none of the objections raised prejudices the maintenance of the patent as granted, the appeal fails.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

N. Schneider M. Alvazzi Delfrate

Decision electronically authenticated