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**Datasheet for the decision  
of 17 September 2021**

**Case Number:** T 2115/16 - 3.2.02

**Application Number:** 06746616.9

**Publication Number:** 1908486

**IPC:** A61M1/14, A61M1/16

**Language of the proceedings:** EN

**Title of invention:**  
APPARATUS FOR DIALYTIC THERAPY

**Patent Proprietor:**  
NIKKISO COMPANY, LTD.

**Opponent:**  
Fresenius Medical Care Deutschland GmbH

**Headword:**

**Relevant legal provisions:**

EPC R. 111(2), 103(1)(a)  
EPC Art. 111(1)  
RPBA Art. 11

**Keyword:**

Appealed decision - sufficiently reasoned (no) - substantial procedural violation (yes)

Reimbursement of appeal fee - (yes)

Remittal to the department of first instance - (yes)

**Decisions cited:**

T 1231/03, T 0647/93

**Catchword:**



**Beschwerdekammern**

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Case Number: T 2115/16 - 3.2.02

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.02**  
**of 17 September 2021**

**Appellant:** Fresenius Medical Care Deutschland GmbH  
(Opponent) Else-Kröner-Strasse 1  
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**Representative:** RCD Patent  
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**Respondent:** NIKKISO COMPANY, LTD.  
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**Representative:** Grosse Schumacher Knauer von Hirschhausen  
Patent- und Rechtsanwälte  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 7 July 2016  
rejecting the opposition filed against European  
patent No. 1908486 pursuant to Article 101(2)  
EPC.**

**Composition of the Board:**

**Chairman** M. Alvazzi Delfrate  
**Members:** A. Martinez Möller  
Y. Podbielski

## **Summary of Facts and Submissions**

- I. The appeal is directed against the decision of the Opposition Division rejecting the opposition filed against European patent No. 1908486.

In its decision the Opposition Division found inter alia that the subject-matter of granted claim 1 was novel in view of each of D1 (US 2005/0102165 A1) and D2 (WO 2004/074966 A2) and involved an inventive step starting from each of the documents D1, D2, D3 (US 2003/0212316 A1), D4 (DE 10103048 A1) and D5 (WO 93/00938 A1).

- II. In a communication pursuant to Article 15(1) RPBA 2020, the Board indicated its preliminary opinion that the impugned decision was tainted by substantial procedural violations which justified remittal to the Opposition Division for further prosecution and reimbursement of the appeal fee.
- III. Oral proceedings took place on 17 September 2021.
- IV. The appellant (opponent) requested that the decision under appeal be set aside and that the patent be revoked and, as an auxiliary measure, that the case be remitted to the Opposition Division for further prosecution. The appellant also requested reimbursement of the appeal fee because of substantial procedural violations.

The respondent (proprietor) requested that the appeal be dismissed or that the patent be maintained on the

basis of one of the auxiliary requests 1-4 filed on 3 May 2016.

V. Claim 1 of the patent as granted, with added feature numbering in bold, reads as follows:

**1.1.** "A hemodialysis treatment apparatus for carrying out a hemodialysis treatment by performing hemodialysis and ultrafiltration upon an extracorporeally-circulating blood of a patient, characterized by comprising:

**1.2.** a circulating blood volume variation rate detecting means (10) for successively detecting a variation rate of a volume of circulating blood of said patient as a hemodialysis treatment time passes;

**1.3.** a vital sign detecting means (9) for successively detecting a vital sign of said patient as a hemodialysis treatment time passes;

**1.4.** a display means (13) capable of displaying a value detected by said circulating blood volume variation rate detecting means (10) and

**1.5.** a value detected by said vital sign detecting means (9) on a time basis on an identical screen, and

**1.6.** a storage means for storing values detected on a time basis by said circulating blood volume variation rate detecting means (10) in past hemodialysis treatments, characterized in that

**1.7.** said display means (13) is configured to display past detected values stored in said storage means on said identical screen (13a) on a time basis in addition to the values detected by said circulating blood volume variation rate detecting means (10) and said vital sign detecting means (9) in said hemodialysis treatment."

VI. The arguments of the appellant, as far as they are relevant for the decision, can be summarised as follows:

The impugned decision rejected the appellant's interpretation of feature 1.7 within the novelty analysis over D1 and D2 by merely referring to the patent as a whole. This represented an insufficient reasoning.

Moreover, on the issue of inventive step when starting from any of documents D3, D4 or D5, extensive arguments were provided in writing. The impugned decision did not indicate which features were not disclosed by these documents and why the documents could not define a valid starting point in the problem and solution approach.

VII. The arguments of the respondent, as far as they are relevant for the decision, can be summarised as follows:

It was not relevant for assessing compliance of the decision with Rule 111(2) EPC whether the decision addressed each and every argument nor whether it was accurately reasoned. The jurisprudence, e.g. T 1231/03 and T 647/93, indicated that even a deficient or ill-founded reasoning was sufficient if it assessed the main issues under dispute.

The appellant's argument on interpretation of claim 1 as granted as regards the relationship between features 1.6 and 1.7 was based on the omission of the article "the" in feature 1.7. This interpretation was neither technically meaningful nor supported by any sensible

reason, so that the brief reasoning in the decision was commensurate to the argument. Moreover, the argument was reproduced in the impugned decision and it was clear from point 14 of the decision that it had been considered. The reasoning was brief but accurate and the appellant could respond to it. A reference to the teaching of the patent as a whole was sufficient: on one hand, the patent specification did not contain anything supporting the appellant's interpretation, so that there was nothing that could be cited; on the other hand, a glance at a few passages of the patent specification sufficed to confirm the finding of the Opposition Division.

As regards the objection of inventive step over documents D3 to D5, the impugned decision indicated that D3 to D5 did not define suitable starting points for inventive step attacks because they each disclosed fewer features than documents D1 and D2. This already was a reasoning and the appellant could respond to it. Moreover, when dealing with this issue at the oral proceedings before the Opposition Division, the appellant had merely referred to its arguments in the written procedure. Hence, it was not plausible to allege now that the Opposition Division did not provide sufficient reasoning if the issue was not relevant enough to be discussed orally.

## **Reasons for the Decision**

1. Reasoned decision - Rule 111(2) EPC
- 1.1 Novelty of claim 1 as granted as regards to feature 1.7
- 1.1.1 The appellant had submitted in opposition proceedings that the wording "past detected values" in feature 1.7

did not refer to the "values detected ..." in feature 1.6 but could be values from the same treatment. It argued that this claim interpretation not only resulted from the claim wording but that it was also supported by paragraphs [0044], [0046] and [0054] of the patent specification relating to figures 5 and 6 (section I on pages 2-4 of the opponent's submission dated 4 May 2016). Based on this claim construction, the appellant had submitted that this feature was disclosed in D1 and D2 and that the subject-matter of claim 1 was not novel over any of D1 or D2.

1.1.2 The appealed decision refers in points 12.1 i) and 14 of its reasons to these arguments stating that they did "not take into account the teaching of the patent as a whole".

1.1.3 A general reference to the patent specification as a whole, neither indicating which parts of the disclosure played a role nor why these parts of the disclosure went against the appellant's arguments, leaves the reader in the dark as to the factual and legal aspects leading the Opposition Division to its conclusion. Hence, it does not represent a sufficient reasoning on why the claim construction submitted by the appellant was not found convincing. It is not up to the parties or to the Board to speculate on the passages which may have served to refute the appellant's submission or on why the passages referred to by the appellant did not convincingly support its submission. Hence, the reasoning provided does neither allow the appellant to respond to the decision nor the Board to review it.

1.1.4 It is true, as submitted by the respondent and indicated in decisions T 1231/03 and T 647/93, that a decision can be reasoned also if it contains some gaps



in its reasoning, applies the wrong legal provisions or reaches the wrong conclusions. However, the case at hand is different in that the only reasoning provided for the issue under dispute is a reference to the patent as a whole; a reference which does not allow the parties or the Board to understand the specific facts and reasons on which the decision was based.

- 1.1.5 Therefore, the Board concludes that the impugned decision is not reasoned in respect of novelty of feature 1.7.
  
- 1.2 Lack of inventive step starting from any of D3/D4/D5
  - 1.2.1 The appellant had submitted with its notice of opposition that the subject-matter of claim 1 as granted was not inventive over any of D3, D4 or D5 in view of the common general knowledge of the person skilled in the art. These objections were supported by a detailed feature analysis and accompanying arguments on pages 10 to 20 of the notice of opposition.
  
  - 1.2.2 It is true that for these objections the parties referred to the arguments in the written proceedings rather than discussing them at the oral proceedings before the Opposition Division (point 6 of the minutes). By explicitly referring to its arguments in the written proceedings, the appellant confirmed that it did not withdraw the objections and that it wanted to have them duly considered in the decision. Therefore, also for these objections the decision must be reasoned within the meaning of Rule 111(2) EPC.
  
  - 1.2.3 The impugned decision deals with these objections under point 20 as follows:

*Documents D3, D4 and D5 each disclose fewer features of claim 1 than documents D1 and D2. Hence they are not considered to be as relevant as D1 and D2 for the question of inventive step.*

1.2.4 According to points 13 and 17 of the decision, the Opposition Division was of the opinion that D2 did not disclose features 1.6 and 1.7 and that D1 did not disclose feature 1.7. In its notice of opposition, the appellant submitted that D4 and D5 each disclosed all features of claim 1 except feature 1.7. Hence, at least for the objections starting from documents D4 and D5, the impugned decision does not contain a logical chain of facts and reasons allowing the reader to understand why the Opposition Division concluded that they disclosed less features than D1 and D2 and why they were considered less relevant than D1 and D2 for the question of inventive step.

1.2.5 It follows that also in this respect the decision is not reasoned.

2. Remittal and reimbursement of the appeal fee

2.1 As established above, the appealed decision is not reasoned within the meaning of Rule 111(2) EPC for issues under dispute which are relevant for the outcome of the case. This constitutes a substantial procedural violation. In view of that, and since the parties did not point out any reasons against a remittal upon that finding and the Board does not see any either, the case should be remitted to the Opposition Division for further prosecution pursuant to Article 111(1) EPC and Article 11 RPBA 2020.

2.1.1 In view of the above findings reimbursement of the appeal fee pursuant to Rule 103(1)(a) EPC is equitable by reason of a substantial procedural violation.

## Order

### **For these reasons it is decided that:**

The decision under appeal is set aside.

The case is remitted to the Opposition Division for further prosecution.

The appeal fee is reimbursed.

The Registrar:

The Chairman:



D. Hampe

M. Alvazzi Delfrate

Decision electronically authenticated