Internal distribution code:

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

Datasheet for the decision of 19 December 2019

Case Number: T 0296/17 - 3.3.10

Application Number: 11195520.9

Publication Number: 2441475

IPC: A61L2/08, A61F2/06, B65B55/02

Language of the proceedings: EN

Title of invention:
Reduced temperature sterilization of stents

Patent Proprietor:
Abbott Cardiovascular Systems Inc.

Opponent:
Kirkham, Nicholas Andrew

Headword:

Relevant legal provisions:
EPC R. 76(2)(c), 77(1), 139
EPC Art. 99, 114(1)

Keyword:
Admissibility of opposition - (no)

Decisions cited:
G 0009/91, G 0001/12, T 2317/13, T 1198/03

Catchword:

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 0296/17 - 3.3.10

D E C I S I O N
of Technical Board of Appeal 3.3.10
of 19 December 2019

Appellant: (Opponent)	Kirkham, Nicholas Andrew Graham Watt & Co LLP St Botolph's House 7-9 St Botolph's Road Sevenoaks Kent TN13 3AJ (GB)
Representative:	Kirkham, Nicholas Andrew Graham Watt & Co. LLP St. Botolph's House 7-9 St. Botolph's Road Sevenoaks, Kent TN13 3AJ (GB)
Respondent: (Patent Proprietor)	Abbott Cardiovascular Systems Inc. 3200 Lakeside Drive Santa Clara, CA 95054 (US)
Representative:	de Rooij, Mathieu Julien Bardehle Pagenberg S.L. Avenida Diagonal 420, 1° 1ª 08037 Barcelona (ES)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 28 November 2016 rejecting the opposition filed against European patent No. 2441475 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chair	P. Gryczka
Members:	R. Pérez Carlón
	F. Blumer

Summary of Facts and Submissions

I. The appeal lies from the decision of the opposition division rejecting the opposition against European patent No. 2 441 475 as inadmissible.

II. On 11 November 2014 the opponent filed Form 2300E, nineteen pieces of evidence and a one-page notice of opposition. It requested that the patent be revoked in its entirety on the grounds set out in Articles 100(a) (b) and (c) EPC.

III. The opposition division rejected the opposition as inadmissible under Rule 77(1) EPC as the notice did not include the facts and evidence in support of the grounds of opposition, contrary to the requirements of Rule 76(2)(c) EPC. It also rejected the appellant's request for the notice of opposition be corrected under Rule 139 EPC and that the opposition division examine the case of its own motion under Article 114(1) EPC.

IV. The board summoned the parties to oral proceedings and informed them with a communication that it was inclined to concur with the reasoning and conclusions of the opposition division.

V. The appellant (opponent) filed further arguments with a letter dated 18 October 2019. It requested the board to confirm that oral proceedings were no longer necessary.

VI. The board informed the appellant that its arguments had been duly considered and that the date for oral proceedings was maintained. The oral proceedings took place on 19 December 2019 in the absence of the parties, as announced by the appellant by letter dated 15 November 2019 and by the respondent by letter dated

18 December 2019.

VII. The arguments of the appellant were as follows:

The claims of the patent in suit were simple. The appellant's case was straightforward from the evidence filed during the opposition period. For this reason alone, its opposition was admissible.

The opposition division should have allowed the notice of opposition to be corrected. The notice was a document "filed with the EPO" and could thus be corrected on request under Rule 139 EPC.

The appellant argued that the opposition division had an obligation to examine the case of its own motion under Article 114(1) EPC, in the public interest. This article should take precedence over the requirements set in the implementing regulations such as those of Rules 76 and 77 EPC.

The appellant relied on the reasoning and conclusions in T 2317/13 and T 1198/03 to support its case.

VIII. The final requests of the parties were as follows:

- The appellant requested that the decision under appeal be set aside, its opposition deemed admissible and the case remitted to the opposition division for further examination.

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

IX. At the end of the oral proceedings, the decision was announced.

Reasons for the Decision

1. The appeal is admissible.

2. On 11 November 2014 the appellant filed nineteen pieces of evidence, Form 2300E and a notice of opposition which consisted of one page.

   The notice requested revocation of the patent in its entirety on the grounds set out in Article 100(a), (b) and (c) EPC. It neither substantiated any of the grounds nor referred to any relevant paragraph of the evidence filed.

   This was not contested.

3. In the contested decision the opposition division concluded that the notice of opposition failed to comply with the requirements of Rule 76(2)(c) EPC and had to be rejected as inadmissible according to Rule 77(1) EPC.

   The opposition division further rejected the appellant's requests for the notice of opposition to be corrected under Rule 139 EPC and for the opposition division to examine the opposition of its own motion under Article 114 (1) EPC.

4. Compliance with Rule 76(2)(c) EPC

   The appellant argued that the claims of the patent in suit were simple and the case against the patent straightforward. Since the pieces of evidence were filed during the opposition period, the notice of opposition complied with Rule 76(2)(c) EPC.

However, there were no less than nineteen pieces of evidence filed. In the absence of a detailed explanation on the relevant passages, the opposition division and the patent proprietor were left in the dark as to why and to what extent this evidence had a bearing on each of the grounds of opposition.

Contrary to the appellant's argument, a considerable amount of explanation was indeed required: the appellant filed eleven pages of reasoning after the nine-month opposition period.

The notice of opposition thus does not comply with the requirements of Rule 76(2)(c) EPC.

5. Consequence of non-compliance with Rule 76(2)(c) EPC

Contrary to the appellant's arguments, the wording of Rule 77(1) EPC "it shall reject the opposition as inadmissible" does not allow the opposition division any discretion if an opposition does not comply with Rule 76(2)(c) EPC.

For this reason alone, the opposition division's decision was correct in this respect.

6. The appellant argued that the opposition division had interpreted the word "indication" in Rule 76(2)(c) EPC in a wholly unreasonable manner and had thus placed an unnecessary burden on any opponent.

However, the grounds for opposition need to enable the patentee and the opposition division to understand the opponent's case and the supporting evidence. This is also the view of the Enlarged Board of Appeal (G 9/91

OJ 1993, 408, Reasons 4). It is the duty of the appellant to put forward its case against the patent, and to do so within the time frame set by the EPC. Otherwise, the EPO looses competence to deal with the patent altogether.

This argument is thus not convincing.

7. The appellant relied on the following case law:

7.1 T 2317/13

This decision dealt with ex-parte proceedings following refusal by an examining division. It concerned the filing of the grounds of appeal, not of opposition. The board tolerated a delay of thirteen minutes and thirty-nine seconds for the last pages of the fax transmission; the first pages were transmitted in time.

The circumstances in T 2317/13 differ from the present situation. There was no other party to the proceedings which could be adversely affected, since it was an appeal arising from examination. Besides, Rule 76(2) EPC does not apply to examination proceedings. The appellant's arguments are therefore not convincing.

7.2 T 1198/03

As above, this decision deals with admissibility in appeal. The board in T 1198/03 used its discretion to admit arguments from a respondent, filed after the time limit set for responding to the grounds of appeal.

The conclusions of the board in this case thus do not apply to the present situation.

8. The appellant further requested that its notice of opposition be corrected under Rule 139 EPC.

The appellant argued that it was obvious that an error had occurred. Under Rule 139 EPC "linguistic errors, errors of transcription and mistakes in any document filed with the European Patent Office may be corrected on request". The appellant's letter dated 11 November 2014 was a document "filed with the EPO" and thus open to correction under Rule 139 EPC.

However, Rule 77(1) EPC provides strict instructions to the opposition division. If the notice does not comply with Rule 76(2)(c) EPC it "shall" reject the opposition as inadmissible, unless these deficiencies have been remedied *before* expiry of the opposition period, which had not been the case. After the nine-month opposition period, no correction of deficiencies with respect to Rule 76(2)(c) EPC is possible, be it under Rule 139 EPC or otherwise.

Besides, even if the request for correction were admissible, it would not be allowable. The boards have developed stringent principles including a heavy burden of proof (see, e.g., G 1/12, OJ 2014, A114, points 34 et seq.), which are not adhered to in this case, as the correction offered by the appellant is not the only option possible.

9. The appellant also argued that, in the public interest, the case should have been examined by the opposition division of its own motion under Article 114(1) EPC.

9.1 According to the appellant, an opposition division had an obligation to examine the facts of a case of its own motion under Article 114(1) EPC.

However, the text of Article 114(1) EPC makes clear that such obligation exists "in proceedings before it". If an opposition is inadmissible, there are no "proceedings before the European Patent Office" pending. For this reason the opposition division could not have carried out an examination of its own motion in the present case under Article 114(1) EPC; see also G 9/91 OJ 1993, 408, Reasons 3 and 4.

9.2 The appellant argued that the provisions of an article, such as Article 114 EPC, should have taken precedence over the provisions of the implementing regulations such as those of Rules 76 and 77 EPC.

Rules 76 and 77 EPC are implementing regulations of Part V of the EPC, i.e. "Opposition and limitation procedure", and relate to Article 99 EPC ("Opposition"). In contrast, Article 114 EPC relates to Part VII of the EPC "Common provisions governing procedure". The board fails to see why Article 114 EPC could or should take precedence over implementing regulations relating to a different part of the EPC. In fact, it cannot see any conflict between these provisions.

This argument from the appellant argument is thus not convincing either.

9.3 The appellant lastly referred to the "Travaux Préparatoires" to the EPC 2000 regarding the changes to Article 99 EPC. The nine-month period and the payment of the corresponding fee were essential conditions for filing an opposition and were thus retained in the article's text. It followed from this that all other requirements were not essential.

The board fails to see any reason in the "Travaux Préparatoires" to disregard the explicit wording of a part of the Convention, such as that of Rules 76 and 77 EPC. If the requirements set out in these rules were of no importance, the legislator should have deleted them, yet it did not.

This argument from the appellant is not convincing either.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chair:

C. Rodríguez Rodríguez P. Gryczka

Decision electronically authenticated