

Internal distribution code:

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

**Datasheet for the decision
of 20 September 2022**

Case Number: T 2040/18 - 3.2.06

Application Number: 13191158.8

Publication Number: 2708216

IPC: A61F15/00, A61F13/00, A61M1/00,
A61M27/00

Language of the proceedings: EN

Title of invention:
Self contained wound dressing apparatus

Patent Proprietor:
Smith & Nephew, Inc.

Opponent:
KCI Licensing Inc.

Headword:

Relevant legal provisions:
EPC Art. 76(1)

Keyword:
Divisional application - subject-matter extends beyond content
of earlier application (yes)

Decisions cited:

Catchword:



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 2040/18 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 20 September 2022

Appellant: KCI Licensing Inc.
(Opponent) 12930 IH 10 West
San Antonio , TX 78249 (US)

Representative: Simmons & Simmons
City Point
One Ropemaker Street
London EC2Y 9SS (GB)

Respondent: Smith & Nephew, Inc.
(Patent Proprietor) 1450 Brooks Road
Memphis, TN 38116 (US)

Representative: HGF
HGF Limited
1 City Walk
Leeds LS11 9DX (GB)

Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
27 June 2018 concerning maintenance of the
European Patent No. 2708216 in amended form.**

Composition of the Board:

Chairman M. Harrison
Members: T. Rosenblatt
J. Hoppe

Summary of Facts and Submissions

I. The appellant (opponent) filed an appeal against the interlocutory decision of the opposition division in which it found that European patent No. 2 708 216 in an amended form met the requirements of the EPC.

II. The patent had been granted on a divisional application of an earlier application, published as WO 2007/030599, in the following also called the parent (application).

III. In a communication pursuant to Article 15(1) of the Rules of Procedure of the Boards of Appeal (RPBA 2020), the parties were informed of the Board's preliminary opinion on the case.

IV. Oral proceedings were held on 20 September 2022.

The appellant's final requests were that the decision under appeal be set aside and the patent be revoked.

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

V. Amended claim 1 underlying the impugned decision has the following wording :

"A wound dressing apparatus (100) comprising:
a composite wound dressing with multiple layers arranged in a superposed relation, the multiple layers including a porous and non-adherent base layer (106), an absorbent layer (108) and a non-porous adherent top layer (110), wherein the top layer further includes a vacuum port (112) in fluid communication with the interior of the wound dressing;

a pump system (104) comprising an internal self-contained battery source (122), a pressure sensor or transducer (124) to monitor pressure within the wound dressing, and self-contained regulation or control means (126); a vacuum source (114); an inlet tubing (116) connecting an inlet side of the vacuum source to the vacuum port; and a collection cannister (118), wherein the collection cannister is connected to an outlet side of the vacuum source by outlet tubing (120) or is disposed between the vacuum source and the wound dressing; wherein the vacuum port is adapted to be releasably connected to the pump system; and wherein the pressure sensor is disposed within the interior of the wound dressing and is in electrical connection with the control means through an electrical wiring (128)."

VI. The arguments of the appellant may be summarised as follows.

Claim 1 defines a wound dressing apparatus comprising as separate features a composite wound dressing, a pump system, a vacuum source, an inlet tubing and a collection canister. The earlier application as filed only discloses however the pump system to include the vacuum source, the inlet tubing and the collection canister.

Moreover, claim 1 lacks clarity since the added feature "wherein the vacuum port is adapted to be releasably connected to the pump system" leaves it open in which way or for which functionality the releasable connection between the port and the pump system must be adapted.

VII. The arguments of the respondent may be summarised as follows.

The appellant's objection under Article 76(1) EPC appeared at best to be a clarity objection, which was not a ground for opposition.

The punctuation used in claim 1 could not be used to determine its technical meaning. Writing conventions may be different in, for example, the US, Great Britain or Germany. The skilled person thus would refer to the content of the application as a whole to determine the meaning of claim 1. Moreover, the presentation of the features being separated by semicolons did not preclude these features being related to each other and did not mean that the vacuum source, inlet tubing and collection canister could not be part of the pump system. Also the other features of claim 1, in particular the added feature, only made sense if *inter alia* the vacuum source was understood to be included in the pump system. The appellant's concept of "separate entities", covering pump systems with a separate vacuum source was illogical in view of the remaining features of the claim and in regard to the original disclosure.

The added feature also did not introduce a lack of clarity. In view of the other features defined in claim 1 relating to the vacuum port and the inlet tubing, it was clear that the adaptation concerned the fluidic connection.

Reasons for the Decision

1. Contrary to the requirement of Article 76(1) EPC, the subject-matter of amended claim 1 extends beyond the content of the earlier application as filed underlying the present divisional application on which the opposed patent was granted.
- 1.1 From a normal, straightforward reading of the wording of claim 1, taking into account *inter alia* the punctuation (commas, semicolons) and the conjunction "and" employed in it, the skilled person understands that the wound dressing apparatus of claim 1 comprises a composite wound dressing, a pump system, a vacuum source, an inlet tubing and a collection canister as separate features. According to the wording of claim 1, the pump system comprises or includes some further (sub-) features. These (sub-) features are drafted in the form of a comma-separated list, in which the final (sub-) feature, the self-contained regulation or control means, is additionally preceded by the conjunction "and" and followed by a semicolon. The skilled person would understand that the immediately following feature is not considered as a (sub-) feature comprised or included in the pump system, but rather constitutes some separate entity in addition to it, implying thereby that the pump system is operationally independent of the vacuum source. Put another way, as also argued by the appellant, the claim is divided into three distinct "levels", the top level being "A wound dressing apparatus comprising:" followed by a second level of the components comprised within the wound dressing (i.e. those features separated by semi-colons)

and a third level which are the individual elements of the second level components (some of which included lists with commas separating the individual elements and ending with an "and" before the last element), such that the vacuum source is not necessarily included in the pump system.

The claim thus covers technically meaningful embodiments of an apparatus comprising *inter alia* a pump system (which, as one example, might simply deliver reduced pressure, for whatever purpose) and a separate vacuum source, such as for example wall suction as also argued by the appellant, so to say multiple sources of reduced pressure, one of which could be battery operated (the pump system) and one which could be stationary (the vacuum source).

1.2 The parent application as filed discloses on page 9, lines 5 to 12:

"Referring still to Figure 1, the pump system 104 will be discussed. The pump system 104 includes a vacuum source 114, inlet tubing 116 connecting the inlet side of the vacuum source 114 to the vacuum port 112 of the wound dressing 102 and a collector canister 118 connected to the outlet side of the vacuum source 114 by outlet tubing 120. In the alternative, the collection canister 118 may be disposed "in-line" between the vacuum source 114 and the wound dressing 102. Vacuum source 114 may be any type of pump that is biocompatible and maintains or draws adequate and therapeutic vacuum levels."

This passage thus discloses *inter alia* the vacuum source to be included in the pump system, rather than

constituting a separate entity which could be in addition to the pump system. There is no further disclosure in the parent application from which it could be directly and unambiguously derived that the pump system and the vacuum source (as well as the inlet tubing and collection canister) could be embodied as such separate features as covered by claim 1 and indicated above in point 1.1.

1.3 As a consequence, the subject-matter of claim 1 extends to embodiments which are not directly and unambiguously derivable from the content of the earlier application as filed.

2. The respondent's counter-arguments were found unconvincing for the following reasons.

2.1 At the outset it is to be noted that contrary to the respondent's contention, the appellant's attack is not a mere clarity objection. Despite being based on an interpretation of the claim wording, the substance of the objection is not directed to the determination of the limits of protection conferred by claim 1. On the contrary, it concerns the question of whether the subject-matter resulting from a technically reasonable interpretation of the claim language is disclosed in the parent application.

2.2 Concerning the respondent's argument that claim 1 did not preclude that the vacuum source, inlet tubing and canister could be part of the pump system, the Board considers that the claimed subject-matter is nevertheless not limited to such specific embodiment, let alone to the specific arrangement of a pump system disclosed in the cited passage on page 9.

2.3 No evidence was submitted by the respondent supporting its contention that the writing conventions in regard to the use and purpose of punctuation, in particular concerning commas and semicolons, could be somewhat inconsistent throughout the different languages and nations, for example in the US, Great Britain or in Germany. The Board considers therefore that there is no reason to construe the groups of features resulting from the use of commas, semicolons and the conjunction "and" in claim 1 so as to be at variance from the straightforward understanding as set out above in point 1.1.

The further argument of the respondent that the conjunction "and" before the (sub-) feature "self-contained regulation or control means" did not qualify this feature as being the last in a list of features included in the pump system, is also found unconvincing. Moreover, even if this were so in the present case, the alternative interpretation of claim 1 according to which the features separated by semicolons are indeed to be considered as separate from each other, is still not precluded.

2.4 The respondent's claim construction based on a "whole contents approach" to the disclosure of the parent application also fails.

2.4.1 Firstly, there is no basis in the EPC for a limited interpretation of the claim in the light of the content of the parent application as filed when it comes to the examination of the question as to whether some subject-matter extends beyond the content of the original (earlier) application. Therefore the claim cannot be read by ignoring the specific choice of commas, semicolons and of the conjunction "and" so as to limit

its meaning to subject-matter disclosed in the context of page 9, lines 5 to 12 of the parent application.

- 2.4.2 As also argued by the appellant, the language of the claim is clear in regard to the features which are comprised by the wound dressing apparatus. Therefore there would not even be a need to search for a different interpretation based on some disclosure in the originally filed earlier application.
- 2.4.3 Moreover, the respondent's alternative argument submitted for the first time during the oral proceedings before the Board and according to which the whole content of the earlier application as filed supported embodiments in which the vacuum source could in fact constitute a separate entity to the pump system, is also found unconvincing. Neither of the passages referred to by the respondent in this context on page 2, lines 8 to 10, page 3, line 1 or page 9, lines 10 to 12 supports this view. The passages on page 2 and 3 do not even mention these features. An apparatus comprising a pump system and a vacuum source not included in the system is not mentioned in any of these passages. The fact that the vacuum source may be any type of pump (page 9, lines 10 to 12 of the parent) in no way allows the conclusion to be reached that the pump system may not include such vacuum source, contrary to what is specifically disclosed in the immediately preceding lines.
- 2.5 Also in regard to the technical meaning of claim 1 considered by the Board above in point 1.1, the Board does not find that this could contradict its conclusion on the extension of the claimed subject-matter beyond the content of the parent application.

- 2.5.1 The respondent did not contest that the interpretation adopted by the Board, implying for example also the presence of multiple sources of reduced pressure, is technically meaningful and reasonable.
- 2.5.2 Instead, the respondent argued on the one hand that the resulting technical meaning (i.e. with two source of reduced pressure) did not correspond to the teaching derivable from the whole content of the earlier application. This argument is however based on an interpretation of the claim in the light of the content of the earlier application and thus fails, in this case, for the reasons set out above in point 2.4.
- 2.5.3 On the other hand, the respondent argued that the remaining features of claim 1 necessarily implied that *inter alia* the vacuum source constituted a feature of the pump system, other interpretations being illogical.

The Board however finds that the other features of the wound dressing apparatus according to claim 1 do not establish any functional or structural link between the pump system and the vacuum source which would necessarily lead to the respondent's more limited understanding.

There is nothing in claim 1 which contradicts the understanding that the vacuum source could be entirely separate from the wound dressing of such apparatus. Contrary to what the respondent had alleged in its reply to the grounds of appeal, it is not illogical to have other components separate from such a (composite) wound dressing and to consider the entire arrangement as a wound dressing apparatus, which is the wording of the first feature of claim 1. This was also stated in the Board's preliminary opinion (see item 1.3.3) and

was not further contested beyond the arguments already discussed above.

Furthermore, the feature "wherein the vacuum port is adapted to be releasably connected to the pump system", either on its own or in combination with the remaining features of claim 1, does not establish or imply an inclusion of the vacuum source as a feature of the pump system either. Although the vacuum source is indeed connected to the vacuum port according to the preceding features of claim 1 - which connection may however even encompass a releasable connection - the cited feature does not exclude the pump system or some component thereof, be it electrical or mechanical or fluidic in nature, from also being releasably connected to that vacuum port, providing for example the possibility of an electrical connection to the pump system.

3. Amended claim 1 does further not comply with the clarity requirement of Article 84 EPC in regard to the added feature "wherein the vacuum port is adapted to be releasably connected to the pump system". A detailed reasoning can be dispensed with, since maintenance of the patent with this claim is anyway excluded for the reasons given above.
4. Absent any set of claims complying with the requirements of the EPC, the patent has to be revoked (Article 101(3)(b) EPC).

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. Grundner

M. Harrison

Decision electronically authenticated