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**Datasheet for the decision
of 2 October 2019**

Case Number: T 0101/19 - 3.2.06

Application Number: 14159520.7

Publication Number: 2742921

IPC: A61F13/00

Language of the proceedings: EN

Title of invention:
Product for dressing a wound

Applicant:
Abigo Medical Ab

Headword:

Relevant legal provisions:

EPC Art. 84, 123(2)
RPBA Art. 13(1)

Keyword:

Claims - clarity - main request (no)
Amendments - added subject-matter - main request (yes)
Late-filed auxiliary request - request clearly allowable (no)

Decisions cited:

Catchword:



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Case Number: T 0101/19 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 2 October 2019

Appellant: Abigo Medical Ab
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 30 April 2018
refusing European patent application No.
14159520.7 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman M. Harrison
Members: P. Cipriano
J. Hoppe

Summary of Facts and Submissions

- I. The appellant (applicant) filed an appeal against the decision of the examining division refusing European patent application No. 14 159 520.7.
- II. The Board issued a summons to oral proceedings and a subsequent communication containing its provisional opinion, in which it indicated *inter alia* that claim 1 was not clear contrary to Article 84 EPC and its subject-matter appeared to contravene Article 123(2) EPC.
- III. With letter dated 2 September 2019 the appellant filed an amended main request and an auxiliary request.
- IV. The oral proceedings before the Board took place on 2 October 2019. During the oral proceedings, the appellant filed an amended auxiliary request replacing its previous auxiliary request.

The appellant's final requests were that the decision under appeal be set aside and that a patent be granted based on the claims of the main request, filed with letter dated 2 September 2019, or as an auxiliary measure, based on the claims of the auxiliary request, filed during the oral proceedings on 2 October 2019.

- V. Claim 1 of the main request reads as follows:
"A product for dressing a wound, comprising:

- a wound dressing consisting of a pad made of one or more liquid permeable layers of a hydrophobic, bacteria-adsorbing, physiologically innocuous material containing a hydrophilic fabric that has been rendered

hydrophobic by chemical treatment with a compound containing hydrophobic groups to bind microorganisms; and

- an apparatus for the treatment of a wound on patient which applies negative pressure therapy to the wound dressing pad placed such that the hydrophilic fabric that has been rendered hydrophobic faces the wound, whereby microorganisms in the wound surface adhere to the dressing through hydrophobic interaction."

Claim 1 of the auxiliary request reads as follows:

"A device for dressing and treating a wound, comprising:

- a wound dressing consisting of a layer of woven cellulose acetate fabric that has been rendered hydrophobic by chemical treatment with dioctadecyl carbamoyl chloride or alkyl ketene dimers making a covalent bond therebetween to bind microorganisms; and

- an apparatus for the treatment of a wound on patient, for applying negative pressure therapy to the wound dressing placed such that the hydrophobic fabric faces the wound, whereby microorganisms in the wound surface adhere to the dressing through hydrophobic interaction."

VI. The appellant's arguments relevant to the present decision may be summarised as follows:

Main request - admittance, extension of subject-matter and clarity

The main request should be admitted into the proceedings and the requirements of Articles 84 and 123(2) EPC were met.

It was clear that the product claim comprised only the wound dressing and the apparatus which applied negative pressure therapy. The skilled person reading the claim understood that the feature "fabric facing the wound" merely expressed a possibility and was neither limiting nor defined by its use.

Claim 1 was based on originally filed claim 1 as well as paragraph [0032] when taking into consideration further the disclosure of [0001], [0023], [0028], [0041] and [0057].

A specific pad was disclosed in paragraph [0032] in lines 18 to 21, which formed the basis for the subject-matter of claim 1. The feature "woven or nonwoven fabric" was a non-limiting feature, since it encompassed all possible fabrics and thus did not need to be included in claim 1.

The application as originally filed disclosed more than one example of a pad consisting only of hydrophobic material, combined with negative pressure therapy, e.g. in paragraphs [0001], [0028], [0032] and [0041]. The hydrophilic layer was systematically considered as optional in the application as originally filed as could be seen in paragraphs [0001], [0023] or [0041] or from the fact that it was only defined in "dependent clause 5" of paragraph [0057].

Auxiliary request - admittance

The auxiliary request was *prima facie* allowable.

Examples 1 to 5 and particularly paragraphs [0040], [0041] and [0055] of the application formed the basis for the subject-matter of claim 1. The claimed wound dressing was taken from paragraphs [0040] and [0041] which disclosed a wound dressing with a hydrophobic layer requiring only a cellulose acetate fabric. Additional layers, and particularly a hydrophilic layer, were disclosed solely as "optional" in paragraph [0041].

Paragraph [0040] stated that the wound dressing was a "standard" wound dressing manufactured based on the invention. This was a link to the pad and corresponding treatment of paragraph [0032] that did not disclose any requirement regarding the amount of dioctadecyl carbamoyl chloride (DACC) or alkyl ketene dimers (AKD).

Paragraph [0032] referred to paragraph [0023], in which it was also only generally disclosed that the acetate gauze needed to be treated with DACC or AKD without any reference to specific amounts. Also paragraphs [0001] and [0028], which referred to the invention, did not disclose a wound dressing comprising specific amounts for the treatment of the hydrophobic layer.

The skilled person would thus understand that since paragraphs [0023], [0032] and [0041] referred to the same treatment, a treatment of a cellulose acetate fabric without a specific amount of DACC or AKD was directly and unambiguously disclosed in the application as a whole.

Reasons for the Decision

1. Main request - admittance, extension of subject-matter and clarity
 - 1.1 The issue of possible non-admittance of the main request into proceedings need not be addressed, since the request is anyway clearly not allowable at least for the following reasons.
 - 1.2 Claim 1 defines *inter alia* that the apparatus applies negative pressure to the wound dressing pad placed such that the hydrophilic fabric that has been rendered hydrophobic faces the wound.
 - 1.3 The product of claim 1 is thus defined through its use, i.e. the way the wound dressing is positioned in relation to an entity (the wound) that is not a part of the product. It is thus not clear to the skilled person what structural features or limitations of the wound dressing product itself are implied by the defined use, noting also that it is unclear which elements of the claim, as such, are intended to be limitations (as also mentioned in the Board's communication (see item 3)).

The appellant argued generally that it was clear that the product claim comprised only the wound dressing and the apparatus which applies negative pressure therapy and that the feature expressed only a possibility that was not limiting in any sense. However, this argument does not alter the foregoing conclusion. The Board finds that the use cannot be simply ignored, since it defines the placement of a specific part of a wound

dressing pad specifically placed facing the wound ("applies negative pressure therapy ... placed such that the hydrophilic fabric... faces the wound").

- 1.4 Thus, claim 1 does not meet the requirements of Article 84 EPC.
- 1.5 Further, the subject-matter of claim 1 of the main request also extends beyond the content of the application as originally filed.
- 1.6 Contrary to the argument of the appellant, paragraph [0032] did not provide an unambiguous basis for a wound dressing with the combination of features defined in claim 1 irrespective of the disclosure in paragraphs [0001], [0023], [0028] and [0057] and of the fact that the originally filed claim 1 possibly disclosed the further features of claim 1.
- 1.7 The wound dressing of claim 1 consists of a pad made of one or more liquid permeable layers of a hydrophobic, bacteria-adsorbing, physiologically innocuous material containing a hydrophilic fabric that has been rendered hydrophobic by chemical treatment with a compound containing hydrophobic groups to bind microorganisms.
- 1.8 The Board does not follow the appellant who argued that such a specific pad was disclosed in paragraph [0032] in lines 18 to 21. As stated already in the Board's preliminary opinion, the first non-optional component disclosed in this passage includes the feature "the physiologically innocuous material is a woven or a nonwoven fabric", which is not in claim 1.

The appellant argued that the feature "woven or nonwoven fabric" was a non-limiting feature since it

encompassed all possible fabrics. However this argument is not persuasive. The skilled person reading the application knows that a nonwoven fabric does not encompass all fabrics that are not woven (as the name might suggest to someone not skilled in the art) but refers to fabric-like materials made in particular of staple fibres bonded together by chemical, mechanical, heat or solvent treatments, such as stapling, melt-blowing or spunbonding. For example, a knitted fabric is neither a woven nor a nonwoven fabric. Thus, the feature "woven or nonwoven fabric" limits the pad in paragraph [0032]. Since the pad defined in claim 1 does not comprise at least this feature, it does not correspond to the one disclosed in paragraph [0032] on lines 18 to 21 from which it is supposed to be unambiguously derivable.

The further paragraphs [0001], [0023], [0028], [0041] and clause 5 of paragraph [0057] mentioned by the appellant also do not disclose a specific pad as defined in claim 1 and furthermore it cannot be derived from these paragraphs that the specific pad of paragraph [0032] does not necessarily need to be made of a woven or nonwoven fabric.

- 1.9 The further arguments of the appellant regarding whether paragraphs [0001], [0023], [0028], [0032], [0041] or clause 5 of paragraph [0057] relate to the provision of a basis for the disclosure of a pad without a hydrophilic layer (i.e. a different objection discussed by the Board) are therefore not relevant at this point.
- 1.10 The subject-matter of claim 1 thus extends beyond the content of the application as originally filed contrary to Article 123(2) EPC.

2. Auxiliary request - admittance

2.1 Claim 1 of auxiliary request 1 was filed during oral proceedings and includes the amendment that the wound dressing consists of a layer of woven cellulose acetate fabric that has been rendered hydrophobic by chemical treatment with dioctadecyl carbamoyl chloride or alkyl ketene dimers making a covalent bond therebetween to bind microorganisms.

2.2 According to Article 13(1) RPBA, any amendment to a party's case (e.g. the amendment made to claim 1 by way of this request filed during the oral proceedings) may be admitted and considered at the Board's discretion. The discretion shall be exercised in view of *inter alia* the complexity of the new subject-matter submitted, the current state of the proceedings and the need for procedural economy. In order to be in line with the requirement of procedural economy, amendments should be *prima facie* allowable in the sense that they at least overcome the objections raised against previous requests without giving rise to any new ones.

2.3 The appellant argued that Examples 1 to 5 and particularly paragraphs [0040], [0041] and [0055] formed the basis for claim 1. The claimed wound dressing was disclosed in paragraphs [0040] and [0041], which disclosed a wound dressing with a hydrophobic layer requiring only a cellulose acetate fabric. Additional layers, and particularly a hydrophilic layer, were disclosed solely as "optional" in paragraph [0041].

The Board can accept that paragraphs [0040] and [0041] disclose a wound dressing layer comprising a single

hydrophobic layer. However, paragraph [0041] further discloses that this layer is produced according to a treatment disclosed in patent US 4 617 326 and more specifically by applying an amount of DACC or AKD as disclosed in this patent to a cellulose acetate fabric making a covalent bond between the materials. Thus, the wound dressing of Example 1 disclosed in paragraphs [0040] and [0041] is quite clearly more specific than the one defined in claim 1, not least due to the fact that the amount applied of DACC or AKK in that patent has not been specified in claim 1.

2.4 The appellant argued also that paragraph [0040] stated that the wound dressing was a "standard" wound dressing manufactured based on the invention. This was alleged to be a link to the pad and corresponding treatment of paragraph [0032] that did not disclose any requirement regarding the amount of DACC or AKD. The appellant further argued that paragraph [0032] referred to paragraph [0023], in which it was also alleged to be only generally disclosed that the acetate gauze needed to be treated with DACC or AKD without any reference to specific amounts. Also paragraphs [0001] and [0028], which referred to the invention, allegedly did not disclose a wound dressing comprising specific amounts for the treatment of hydrophobic layer. The skilled person would thus allegedly understand that, since paragraphs [0023], [0032] and [0041] refer to the same treatment, i.e. a treatment of a cellulose acetate fabric without a specific amount of DACC or AKD which was thus directly and unambiguously disclosed in the patent as a whole.

2.4.1 The Board does not find this argument persuasive. It is not unambiguous that paragraph [0040] refers to paragraph [0032] and that these two paragraphs refer to

the same wound dressing or even to the same way of treating the wound dressing with DACC or AKD. Paragraph [0032] discloses an explicit treatment with DACC and AKD of a Sorbact pad comprising folded acetate gauze together with cotton gauze. This more specific pad comprises also further features (such as the woven or nonwoven fabric discussed above) and does not correspond to the pad of Example 1 which requires more generally a woven cellulose acetate fabric treated with an amount of DACC or AKD and is thus simply a different embodiment of a pad according to the invention.

2.4.2 The pad in paragraph [0032] is also not linked to the one in paragraph [0023], which is a Sorbact pad according to the state of the art. The fact that both pads refer to the Sorbact principle, which is disclosed in paragraphs [0018] and [0019], does not unambiguously link paragraphs [0032] and [0023] to create a single disclosure. The skilled person reading the description understands that the Sorbact principle is known from the prior art and has been used previously to produce pads. However, this does not allow a skilled person to derive a combination of the prior art pad of paragraph [0023] and the one of paragraph [0032] according to the invention to arrive at a disclosure of a single pad.

2.4.3 Paragraphs [0001] and [0028] disclose generally that the invention relates to a wound dressing method, which method uses a product with a hydrophobic fabric. They do not refer to the device claim comprising a wound dressing with the specific combination of features of claim 1. The skilled person reading the description would not recognize in these paragraphs any instruction regarding the amount of DACC or AKD for treating the specific hydrophobic layer of paragraph [0041] that is

part of the specific wound dressing product of Example 1.

2.4.4 The claimed hydrophobic layer is *prima facie* thus not directly and unambiguously derivable from Examples 1-5 and paragraphs [0040] and [0041], which describe that the hydrophobic layer is produced specifically by applying an amount of DACC or AKD as disclosed in US patent 4 617 326.

2.5 For the reasons above, the subject-matter of claim 1 at least *prima facie* fails to meet the requirement of Article 123(2) EPC. Consequently, the Board exercised its discretion under Article 13(1) RPBA not to admit this request into the proceedings.

Order

For these reasons it is decided that:

The appeal is dismissed

The Registrar:

The Chairman:



M. H. A. Patin

M. Harrison

Decision electronically authenticated