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**Datasheet for the decision  
of 11 December 2019**

**Case Number:** T 2277/19 - 3.2.02

**Application Number:** 12739909.5

**Publication Number:** 2667792

**IPC:** A61B17/00, A61B17/04,  
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A61B17/08, A61B17/10

**Language of the proceedings:** EN

**Title of invention:**

SYSTEMS FOR SEALING A TISSUE WALL PUNCTURE

**Applicant:**

Apica Cardiovascular Limited

**Headword:**

**Relevant legal provisions:**

EPC Art. 97(1), 107, 113(2)  
EPC R. 71(3), 71(6), 73(1), 101(1)  
RPBA Art. 20(1)

**Keyword:**

Admissibility of appeal - appellant not adversely affected by  
decision to grant a patent

**Decisions cited:**

T 1003/19, T 2081/16

**Catchword:**

T 1003/19, T 2081/16 not followed



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Case Number: T 2277/19 - 3.2.02

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.02**  
**of 11 December 2019**

**Appellant:** Apica Cardiovascular Limited  
(Applicant) Unit 202 Galway Business Innovation Centre NUI  
University Road  
Galway (IE)

**Representative:** Dehns  
St. Bride's House  
10 Salisbury Square  
London EC4Y 8JD (GB)

**Decision under appeal:** **Decision of the Examining Division of the  
European Patent Office dated 7 March 2019  
to grant a European patent pursuant to  
Article 97(1) EPC.**

**Composition of the Board:**

**Chairman** W. Sekretaruk

**Members:** S. Böttcher

D. Ceccarelli

## **Summary of Facts and Submissions**

- I. The appeal lies from the decision of the examining division dated 7 March 2019 to grant a patent on the basis of the application documents indicated in the communication under Rule 71(3) EPC dated 25 September 2018 following examination of European patent application No. 12739909.5.
- II. Notice of appeal was received on 13 May 2019. The statement setting out the grounds of appeal was received on 17 July 2019.
- III. The original application contained description pages 1 to 32, claims 1 to 21 and drawing sheets 1/18 to 18/18. During the examination proceedings, by letter dated 20 February 2018 the applicant filed amended drawing sheets 1 to 7 to replace drawing sheets 1 to 18 of the application as filed.
- IV. The examining division issued a communication under Rule 71(3) EPC dated 25 September 2018 on Form 2004. The list of documents included drawing sheets 1/18 to 7/18 filed on 20 February 2018 and 8/18 to 18/18 as published. The Druckexemplar also included drawing pages 8/18 to 18/18 as published, together with the drawings filed on 20 February 2018, which were numbered pages 1/7 to 7/7.
- V. By letter dated 31 January 2019 the appellant approved the text for grant, subject to some minor amendments in the description.
- VI. On 7 March 2019 the examining division issued the decision to grant a European patent pursuant to Article 97(1) EPC.

- VII. In a letter dated 6 March 2019, received on 7 March 2019, the appellant noted that the text intended for grant erroneously included figure pages 8/18 to 18/18 and requested that these figure pages be deleted.
- VIII. Oral proceedings before the board took place on 11 December 2019.

At the oral proceedings, the appellant submitted a document containing a question for referral to the Enlarged Board of Appeal, which reads as follows:

"In Rule 71(3) EPC, does the phrase "text in which it *intends* to grant" a patent refer to the true will of the Examining Division, or to the text as set out in the Druckexemplar, regardless of whether the Examining Division actually intended to grant a patent in such a form."

At the oral proceedings before the board, the appellant requested that the decision under appeal be set aside and that the examining division be instructed to issue a new communication under Rule 71(3) EPC, containing the correct documents, or that the above question be referred to the Enlarged Board of Appeal.

- IX. The appellant's submissions may be summarised as follows.

The decision to grant was appealed on the basis that the granted text was not that approved by the applicant, since the patent had been granted with superfluous drawing pages 8/18 to 18/18. As a result, the appellant had been adversely affected by the decision to grant.

As explained in the document "Correcting the Text of a

Published Patent" by Luigi Petrucci, which was published at <https://information.patentepi.com/2-16/Correcting-the-Text-of-a-Published-Patent/>, a decision to grant could be appealed when there was a discrepancy between the list of documents on Form 2004 and the documents contained in the Druckexemplar. In the present case, there was such a discrepancy. The Druckexemplar included the (amended) drawing pages 1/7 to 7/7 and, in addition, the previous (supposedly deleted) drawing pages 8/18 to 18/18, whereas Form 2004 mentioned drawing sheets 1/18 to 7/18 filed on 20 February 2018 and 8/18 to 18/18 as published. The erroneous inclusion of the superfluous pages of drawings was a direct or indirect consequence of this discrepancy.

The text proposed for grant had been approved, since the correct drawing pages 1/7 to 7/7 were included in the Druckexemplar, so it could be assumed that only these drawings were intended for publication.

Furthermore, the present case concerned facts that were very similar to those of decision T 1003/19. In the case underlying that decision, the communication under Rule 71(3) EPC and the Druckexemplar contained only one figure, although the application had been filed with drawing sheets 1/7 to 7/7, and no amendment to the drawings had been suggested by the examining division or requested by the applicant. The board in that case concluded that it was not the real intention of the examining division to grant a patent including only Figure 1, and that therefore neither the Druckexemplar nor the communication under Rule 71(3) EPC corresponded to the text in which the examining division intended to grant the patent. The board further referred to earlier case T 2081/16, which held that, in situations where the text intended for grant was not communicated to the applicant, approval of this text in accordance with Rule

71(5) EPC was not decisive. According to T 2081/16, grant of a patent where the applicant had not been provided with the text intended for grant would be in breach of Article 113(2) EPC. Hence, the board in T 1003/19 held that the appeal against the decision to grant was admissible because the applicant was adversely affected by it.

Moreover, in the present case it was clear from verifiable facts that the examining division never truly intended to grant a patent on the basis of the Druckexemplar text annexed to the communication under Rule 71(3) EPC, since the documents did not correspond to a request by the applicant or a proposal by the examining division. Accordingly, the decision to grant did not comply with Article 113(2) EPC, since it was based on a text which was neither submitted by the applicant nor one that the examining division intended for grant.

The request for referral of a question to the Enlarged Board of Appeal was justified, since the board had indicated that it disagreed with the "true intention" approach applied by the respective boards in the decisions T 1003/19 and T 2081/16. This resulted in a clear and fundamental divergence of decisions of the Boards of Appeal on an important point of law.

## **Reasons for the Decision**

### 1. Admissibility of the appeal

Article 107 EPC, first sentence reads as follows: "Any party to proceedings adversely affected by a decision may appeal." It follows from this sentence that the appeal proceedings are open only to a party which has been adversely affected by the impugned decision.

In the present case, the appeal is not admissible since the appellant is not adversely affected by the decision to grant.

1.1 The board does not concur with the appellant that the erroneous inclusion of the superfluous pages of drawings was a direct or indirect consequence of any discrepancy between the Druckexemplar and Form 2004. The only inconsistency between Form 2004 of the communication under Rule 71(3) EPC and the Druckexemplar consists in the fact that the first seven drawing pages are indicated on Form 2004 as "Drawings, Sheets 1/**18** to 7/**18**", whereas in the Druckexemplar the corresponding sheets are numbered 1/**7** to 7/**7**. Irrespective of the different numbering, the same drawing pages 1 to 7 are mentioned in Form 2004 as are included in the Druckexemplar, namely the drawing pages filed on 20 February 2018. Furthermore, the different numbering does not concern the inclusion of pages 8/18 to 18/18, which according to the appellant should have been omitted. Thus, the board holds that there is no discrepancy of any significance between Form 2004 and the Druckexemplar.

1.2 Furthermore, in response to the communication under Rule 71(3) EPC, the appellant approved the text intended for grant (subject to the correction of some minor errors in



the description) on 31 January 2019. Hence, the examining division legitimately expected the applicant to have checked and verified the Druckexemplar, in particular since the applicant had requested some amendments to the text intended for grant. The examining division did not have any reason to assume that the approval was based on the prerequisite that only drawing pages 1 to 7 were actually intended for publication.

- 1.3 According to Article 113(2) EPC, the European Patent Office shall decide upon a European patent application only in the text submitted or agreed by the applicant.

In the present case, the applicant expressly agreed to the text referred to in the communication under Rule 71(3) EPC in its letter dated 31 January 2019. Moreover, the appellant expressly waived its right to the issue of a further communication under Rule 71(3) EPC. Hence, although Rule 71(6) EPC would have allowed the applicant to request further corrections to the communicated text, the appellant did not apparently realise that the documents referred to in the communication under Rule 71(3) EPC did not correspond to the documents in its previous request, i.e. the application documents as amended by its letter dated 20 February 2018.

The board in decision T 1003/19 held that agreement to the communicated text was not decisive, since the applicant had not been notified of the text in which the examining division intended to grant a patent, and only in that case would the provisions of Rule 71(5) EPC have applied.

However, in the board's view, there is no legal basis in the European Patent Convention for a distinction between the text referred to in a communication under Rule 71(3)

EPC and that reflecting what the examining division actually intended. Moreover, Rule 71(6) EPC addresses the possibility that the text communicated under Rule 71(3) does not reflect the appellant's requests. In the board's judgement, Article 71(3) EPC thus imposes on the applicant a duty to check and verify this text. The fact that an applicant does not exercise its right to request amendments under Rule 71(6) EPC can therefore only be interpreted as approval of the communicated text, i.e. the text intended for grant. Whether the applicant notices a possible error has no effect on the fact that this approval is binding.

- 1.4 Consequently, the text referred to in the communication under Rule 71(3) EPC has to be regarded as the text intended for grant. Since this text on the basis of which the patent was granted was approved by the appellant, the requirements of Article 113(2) EPC were met. Thus, the applicant cannot be considered to have been adversely affected by the decision under appeal within the meaning of Article 107 EPC, first sentence.

Accordingly, the appeal filed by the applicant is inadmissible pursuant to Rule 101(1) EPC.

2. Request to refer a question to the Enlarged Board of Appeal
  - 2.1 The question does not warrant a referral to the Enlarged Board of Appeal, since the board has no doubt as to how to answer the question on the basis of the European Patent Convention (see Case Law of the Boards of Appeal, 9th edition, V.B.2.3.2). As explained above, the phrase "text in which it intends to grant" a patent in Rule 71(3) EPC refers to the text as set out in the Druckexemplar, even if this text contains an error by the

examining division.

- 2.2 The board therefore considers that a decision by the Enlarged Board is not required.

## Order

### For these reasons it is decided that:

1. The request for referral of a question to the Enlarged Board of Appeal is rejected.
2. The appeal is dismissed.

The Registrar:

The Chairman:



D. Hampe

W. Sekretaruk

Decision electronically authenticated