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**Datasheet for the decision
of 16 July 2024**

Case Number: T 1247/22 - 3.2.01

Application Number: 18210484.4

Publication Number: 3476367

IPC: A61F2/24

Language of the proceedings: EN

Title of invention:

LOW PROFILE TRANSCATHETER HEART VALVE

Patent Proprietor:

Edwards Lifesciences Corporation

Opponent:

Abbott Cardiovascular Systems, Inc.

Headword:

Relevant legal provisions:

EPC Art. 76(1), 123(2), 52(1), 54, 56, 112(1)(a)

Keyword:

Divisional application - added subject-matter (no)

Amendments - added subject-matter (no)

Novelty - main request (yes)

Inventive step - main request (yes)

Referral to the Enlarged Board of Appeal - (no)

Decisions cited:

T 0329/99, T 1018/02, T 0495/06, T 0824/06, G 0002/10

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

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Case Number: T 1247/22 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 16 July 2024

Appellant: Abbott Cardiovascular Systems, Inc.
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
11 March 2022 concerning maintenance of the
European Patent No. 3476367 in amended form.**

Composition of the Board:

Chairman G. Pricolo
Members: V. Vinci
O. Loizou

Summary of Facts and Submissions

I. The appeal filed by the appellant (opponent) is directed against the decision of the opposition division maintaining the European patent No. 3 476 367 in amended form. The patent originated from the European patent application N° 18210484.4 filed as divisional application of the International patent application WO 2009/149462 A2.

In its interlocutory decision the opposition division found that the patent as amended according to the main request filed on 26 November 2021 met the requirements of Articles 83, 76(1) and 123(2) EPC. Furthermore, the opposition division held that the claimed priority was valid and the subject-matter of independent claim 1 according to the main request, identical to claim 1 as granted, was novel and involved an inventive step within the meaning of Articles 52(1), 54 and 56 EPC in view of the following prior art documents:

D3 : WO 2008/011261 A2
D4 : WO 2008/070244 A2
D5 : WO 2008/079962 A1
D7 : WO 2009/052188 A1
D8 : US 2006/0287717 A1
D10: US 5 853419
D11: WO 01/66035 A2

II. With the communication according to Article 15(1) RPBA dated 14 May 2024, the Board informed the parties of its preliminary assessment of the case.

Oral proceedings pursuant to Article 116 EPC were held

before the Board on 16 July 2024 by videoconference.

- III. The appellant (opponent) requested that the decision of the opposition division be set aside and that the patent be revoked. Furthermore the appellant requested that the questions submitted with letter dated 10 July 2024 be referred to the Enlarged Board of Appeal.

The respondent (patent proprietor) requested that the appeal be dismissed (main request) or, in the alternative, that the patent be maintained in amended form on the basis of one of the auxiliary requests 1 to 5 filed with their reply to the statement of grounds of appeal of the appellant (opponent).

- IV. Independent claim 1 according to the patent as maintained reads as follows (labelling of the features according to the contested decision introduced by the Board):

F1 *"An assembly for implanting a prosthetic aortic valve (10) in a native aortic valve of a patient's body, the assembly comprising:*

F2 *a delivery catheter (100) comprising an inflatable balloon (110); and*

F3 *a prosthetic aortic valve (10) configured to be radially collapsible to a collapsed state for introduction into the body on the delivery catheter (100) and radially expandable using the balloon (110) of the delivery catheter (100) to an expanded state for implanting the prosthetic aortic valve (10) at the native aortic valve in the body,*

F4 *the prosthetic aortic valve (10) comprising: a*

radially collapsible and expandable annular frame (12),

F5 the frame having three angularly spaced commissure attachment posts and

F6 a plurality of angularly spaced, axial struts that are interconnected by at least three rows of circumferential struts including

F7 a first row of circumferential struts defining an inflow end of the frame (12),

F8 a second row of circumferential struts defining an outflow end of the frame (12), and

F9 a third row of circumferential struts positioned axially between the first and second rows of angled struts along the length of the frame (12) and adjacent the second row of circumferential struts,

F10 each row of circumferential struts including struts arranged in a zigzag pattern extending around the circumference of the frame (12);

F11 an annular skirt member (16) positioned inside of and secured to the frame (12); and

F12 a leaflet structure comprising three leaflets, the leaflet structure having a scalloped lower edge portion secured to an inner surface of the skirt member (16) and three commissures formed at adjacent sides of the leaflets, each commissure being attached to one of the commissure attachment posts,

F13 the skirt member (16) disposed between the frame (12) and the leaflet structure (14),

F14 *the rows of circumferential struts include pairs of circumferential struts extending between two axial struts (30), wherein the struts of each pair have adjacent ends interconnected by a generally U-shaped crown portion (26) defining a gap (28) between the adjacent ends,*

F15 *an upper edge of the skirt member (16) has a zig-zag shape that generally follows the zig-zag pattern of and is attached with sutures to the third row of struts (22).*

V. The questions to be referred to the Enlarged Board of Appeal as submitted by the appellant (opponent) are the following:

1. In the claims, for assessing if the requirements of Art. 76(1) EPC and/or Art. 123(2) EPC are met, is it admissible to disregard the clear and credible technical meaning of a first term?

2. In the claims, for assessing if the requirements of Art. 76(1) EPC and/or Art. 123(2) EPC are met, is it admissible to interpret the first term which has a clear and credible first technical meaning in such a manner that this first term is interpreted to correspond to a second term which has a clear and credible second technical meaning different from the first technical meaning?

3. If the answer to question 2 is yes, does this also apply when the first term as well as the second term are both used in the same claim, resulting in a scenario that two different terms in the same claim are interpreted such that they refer to the same part of

the claimed subject-matter?

4. If the answer to question 3 is yes, does this also apply when the first term is not used in the patent application as originally filed, and the first term appears only in a claim as a result of an amendment of the application documents made by the applicant during examination proceedings?

5. If the answer to question 4 is yes, what requirements must be met for interpreting the first term in a manner that the first term corresponds the second term when neither the claims nor the description of the granted patent nor the patent application as originally filed contain any information relating to the first term or any definition of the first term? In particular, what requirements must be met to recognize that (a) the first term should not be interpreted in accordance with its first technical meaning resulting from its literal sense, and (b) the first term should be interpreted in such a manner to particularly refer to the second technical meaning of the second term?

Reasons for the Decision

MAIN REQUEST - PATENT AS MAINTAINED

Articles 76(1) and 123(2) EPC - Amendments

1. The patent as maintained meets the requirements of Articles 76(1) and 123(2) EPC as correctly held by the opposition division in the decision under appeal.
 - 1.1 As pointed out by the opposition division (point 14.1 of the decision) the parent application and the application as filed have in common the description and the drawings (with the exception of paragraph [086] of the description of the application as filed which recites the claims of the parent application). This implies that if the parent application provides a basis for a claim of the patent in suit, the application as filed will also provide a basis for that claim. Accordingly, reference is made herein below primarily to the parent application WO 2009/149462 A2.
2. With their statement of grounds of appeal the appellant (opponent) contested the conclusion of the opposition division that the subject-matter of independent claim 1 complied with the requirements of Articles 76(1) and 123(2) EPC. The following amendments were objected:

Feature F6

- 2.1 This feature introduced in independent claim 1 requires that the assembly according to the contested patent comprises a plurality of angularly spaced, axial struts that are interconnected by *"at least three rows of*

circumferential struts".

2.1.1 The appellant (opponent) maintained that paragraph [0009] and claim 5 of the parent application, indicated as a basis for the introduction of this feature in claim 1, disclosed a plurality of angularly spaced, axial struts that are interconnected by a plurality of rows of circumferential struts (emphasis added), hence a number of rows of circumferential struts in a range of discrete value between 2 and infinity. It was argued that the replacement in feature F6 of independent claim 1 of the originally disclosed expression "*a plurality*" by the expression "*at least three*" resulted in an unallowable undisclosed selection of a sub-range (number of rows of circumferential struts ≥ 3) from a disclosed range (number of rows of circumferential struts ≥ 2). The appellant (opponent) pointed out that this selection excluded the possibility covered by the teaching of paragraph [0009] and claim 5 of the parent application that the axial struts were interconnected by only two rows of circumferential struts. In view of the above the appellant (opponent) concluded that the wording of feature F6 introduced undisclosed information and therefore - contrary to assessment of the opposition division - did not comply with the requirements of Articles 76(1) and 123(2) EPC.

2.1.2 The arguments submitted by the appellant (opponent) are not convincing for the following reasons:

The Board concurs with the opposition division and the respondent (patent proprietor) that the limitation to "*at least three*" rows of circumferential struts is directly and unambiguously derivable from Figures 1, 4, 7 and 9 disclosing embodiments with exactly three rows

of circumferential struts as well as from Figures 8 and 10 disclosing embodiments with more than 3 rows of circumferential struts taken in combination with the information of paragraph [0009] that a plurality of rows of circumferential struts are provided which has to be read in the technical context of the invention as claimed. In this respect and contrary to the appellant's (opponent's) allegation, the person skilled in the art despite the information of paragraph [0009] generally teaching a plurality of rows of circumferential struts, rules out an embodiment with only 2 rows of circumferential struts because (1) such a specific embodiment is not presented in the application as originally filed, and (2) it is also not compatible with the limitations imposed by features F7 to F9 of claim 1 of the patent as granted implying at least 3 rows of circumferential struts. In view of all the above, the person skilled in the art directly and unambiguously derives from the parent application as originally filed a number of rows number of circumferential struts ≥ 3 as recited in feature F6. Finally, the Board observes that the amendment under discussion is nothing but a deletion of one alternative, namely the possibility to have 2 rows of interconnecting circumferential struts, from all the alternatives disclosed in paragraph [0009], namely a number of rows of circumferential struts ≥ 2 . No undisclosed information can result from the deletion of an originally disclosed alternative.

Feature F9

- 2.2 Feature F9 introduced in claim 1 literally requires that a third row of circumferential struts is positioned axially between "the first and second rows of angled struts" (emphasis added). The appellant

(opponent) objected that there was no literal basis in the parent application for the term "*angled struts*", let alone for the feature "*rows of angled struts*" of feature F6. This is not contested. Indeed the description as originally filed only mentions a first and a second row of circumferential struts according to feature F7 and F8 and a third row of circumferential struts according to feature F9 of claim 1 respectively. Nowhere in the originally filed parent application there is a disclosure for the the expression "*rows of angled struts*" of feature F9.

2.2.1 The arguments brought forward by the appellant (opponent) in support of their allegation that feature F9 infringed Articles 76(1) and 123(2) EPC can be summarized as follows:

2.2.2 The expression used in feature F9 of claim 1 "*rows of angled struts*" and the disclosed expression "*row of circumferential struts*" had clearly different technical meanings and implications whereby - contrary to the view of the opposition division - feature F9 introduced undisclosed information in claim 1. By referring to the decision under appeal, the appellant (opponent) pointed out that the opposition division correctly identified an evident error in claim 1 in that although the feature "*first and second rows of angled struts*" were introduced by the definite article "*the*", it lacked any antecedent basis in the claim. However, the appellant (opponent) criticized the fact that the opposition division instead of applying the most straightforward correction of the error, i.e. the deletion of the definite article "*the*" in the first line feature F9, resorted to the description and the drawings from where it was inferred that the only possible and logical correction consisted in reading the undisclosed but

technically clear term "*angled*" as "*circumferential*", thereby artificially restoring compliance with Article 76(1) and 123(2) EPC (reference was made to page 10 of the decision, second paragraph onwards). It was objected that this approach had nothing to do with a correct application of the "*gold standard*". The appellant (opponent) alleged that the reasoning adopted by the opposition division regarding the assessment of compliance with Articles 76(1) and 123(2) EPC of feature F9 was clearly in violation of established case law of the Boards of Appeal. Reference was made in particular to the conclusions of the decision T 1018/02, Reasons 3.8 and 3.9, according to which, for the purpose of the assessment of compliance with Article 123(2) EPC, the description could not be used to give a different meaning, in the present case "*rows of circumferential struts*", to a feature recited in the claim, in the present case "*row of angled struts*", which however imparted on its own a clear, credible technical teaching to the skilled reader as here was clearly the case. The appellant (opponent) stressed that the Board in T 1082/02 made clear that if an approach as the one adopted by the opposition division in the present case was allowed, Article 123(2) EPC "*would become meaningless in respect of amendments to the claims.*" (see T 1018/02, reason 3.8, last sentence) with severe and unpredictable consequences on legal certainty. It was also stressed that a further unacceptable consequence of the wrong approach of the opposition division was that also Article 54 EPC could become meaningless in view of the the "*uniform concept of disclosure*" emphasized by the Enlarged Board of Appeal in the decision G2/10. The appellant (opponent) explained that the term "*rows of angled struts*" had a clear meaning for the skilled reader and made technically sense in the context of claim 1. This

meaning could not be ignored or replaced by a different one somehow inferred from the description when assessing compliance with Articles 76(1) and/or 123(2) EPC. In the appellant's (opponent's) view the term "*rows of angled struts*" was understood by a person skilled in the art reading the claim in its technical context as meaning rows of struts extending radially outwardly with an angle to the longitudinal axis of the valve frame as for example shown in Figure 27 of document US 6 730 118 B2. It was further argued that such an interpretation, which clearly resulted in undisclosed subject-matter, was perfectly compatible with the structure of the assembly as defined in claim 1 and therefore there was no reason to disregard and replace it by a different technical feature when construing claim 1 in order to assess whether its subject-matter extended beyond the content of the parent application as originally filed. The appellant (opponent) also put forward that the "*gold standard*" required that the whole combination of features was directly and unambiguously derivable from the parent application for a person skilled in the light of common general knowledge and alleged that this could not be the case for feature F9. In this respect reference was made to the the EPO "*Guidelines*", Section H-V-3.2 and to the case law cited therein confirming the principle that the fact that a resulting claimed combination could be seen as "*non inconsistent*" with the description (T 495/06) or "*reasonably plausible*" (T 824/06) or "*obvious*" in view of the application (T 329/99), as it could be argued for the present case, that it was not sufficient for an amendment to be allowable under Article 123(2) EPC, since its direct and unambiguous disclosure was required. In view of all the above, the appellant (opponent) summarized that the opposition division, when construing claim 1 for the purpose of

the assessment of compliance with Articles 76(1) and 123(2) EPC, erred in disregarding the clear technical implication for the claimed subject-matter of the term "*row of angled struts*" and in replacing it by the term "*row of circumferential struts*", which had a completely different technical implication, thereby coming to the erroneous conclusion that feature F9 was directly and unambiguously disclosed in the parent application as originally filed.

2.2.3 The respondent (patent proprietor) pointed out that the skilled reader found through independent claim 1 multiple instances of the term "*rows of circumferential struts*" (see features F6, F7, F8, F9, F10 and F14) and only one instance of the disputed term "*rows of angled struts*" (second part of feature F9). It was argued that after reading features F7 and F8 the skilled reader was expected to find in the following feature F9 the teaching that the third row of circumferential struts recited therein was positioned between the first and second circumferential struts defined just above. Surprised by the unexpected occurrence of the new term "*rows of angles struts*" which also lacked any antecedent basis in the claim, the person continuing reading immediately encountered feature F10 starting with the wording "*each row of circumferential struts*". In view of all the above, the respondent (patent proprietor) alleged that the appropriate correction of the inconsistency detected by the reader in feature F9 was already inherent in the wording of the claim taken on its own. It was therefore alleged that the person skilled in the art, without any need to consult the description and the drawings, promptly realized that the only possible and logic correction/construction of feature F9 in the technical and linguistical context of claim 1 was that the third row of circumferential

struts was positioned between the first and second rows of circumferential struts defined in the immediately preceding features F7 and F8. This interpretation was confirmed by the next feature F10 consistently referring to the previously defined three rows of circumferential struts. It was concluded that the structure of the frame as resulting from the above construction of claim 1 was clearly disclosed in the parent application as originally filed. Finally, the respondent (patent proprietor) pointed out that as a construction of claim 1 was possible only on the basis of its own wording, the case law cited by the appellant (opponent) was not relevant in the present case.

2.2.4 The arguments submitted by the respondent (patent proprietor) are convincing for the following reasons:

The Board takes the view that the issue of the claim construction is a decisive question that must be beforehand answered irrespective of the objection to be assessed, be this compliance with Article 123(2) EPC or patentability. In accordance with the arguments provided by the respondent (patent proprietor) the Board is convinced that the person skilled in the art reading claim 1 on its own, i.e. without resorting to the description and drawings, in particular in view of features F7 and F8, realizes that the first and second rows of angled struts of feature F9 are - as intended by the applicant - nothing but the first and second rows of circumferential struts just previously defined and included in the expression "*each row of circumferential struts*" of following feature F10. In alternative, as explained by the respondent (patent proprietor), the person skilled in the art may explain the unexpected occurrence of term "*angled*" in feature

F9 with the fact that according to feature F10 the struts are arranged in a zig-zag pattern and therefore can be also qualified as "*angled*". To summarize, the Board takes the view that the person skilled in the art reading and construing claim 1 on its own and with a mind willing to understand has no doubt, without the need to consult the description and the drawings, that the "*first and second rows of angled struts*" recited in feature F9 in absence of any antecedent basis are nothing else than the first and second rows of circumferential struts defined in feature F7 and F8 and recalled in features F10 and F14. Therefore, no undisclosed technical information has been introduced in claim 1 of the patent as maintained. As also correctly argued by the respondent (patent proprietor), the cited case law which relates to situation where - contrary to the case at issue - information from the description is taken into account in order to construe the independent claim, is not relevant.

Feature F15 (first part)

- 2.3 This feature introduced in claim 1 requires that "*an upper edge of the skirt member (16) has a zig-zag shape*".
- 2.3.1 The appellant (opponent) alleged that there was no support in the parent application for a skirt member that, on its own, showed a zig-zag shaped upper edge. They argued that the upper edge of the skirt shown in the original Figures 16 and 17 referred to by the opposition division consisted in a plurality of adjacent trapezoidal elements and could not thus be considered zig-zag shaped as confirmed by the information contained in paragraph [0062] of the originally filed description. The appellant (opponent)

drew the attention of the Board to the fact that the parent application as originally filed purposively distinguished between the "*zig-zag pattern*" of the struts (feature F10) and the "*undulated shape*" of the upper edge of the skirt described in paragraph [0062]. Therefore, it was justified to conclude that - contrary to the view of the opposition division - "*undulated*" and "*zig-zag shaped*" had a different technical meaning also in the context of the patent, and therefore that the upper edge of the skirt in Figures 16 and 17 could not be said to be zig-zag shaped as required by feature F15. Regarding Figure 1 also cited as basis for the amendment, the appellant (opponent) argued that the upper portion of the skirt was here rolled over the frame and hence not visible in front view, whereby nothing could be inferred from this figure regarding the shape of the upper edge of the skirt. Finally, the appellant (opponent) alleged that in order to secure the skirt to the frame the trapezoidal shape of the upper edge shown in Figures 16 and 17 was required, while a zig-zag shaped upper edge would not allow the connection.

2.3.2 The arguments submitted by the appellant (opponent) are not convincing for the following reasons:

Irrespective of the disputed question whether the profile of the upper edge of the skirt shown in Figures 16 and 17 can qualify as zig-zag shaped or not, the Board concurs with the respondent (patent proprietor) that the person skilled in the art reads feature F15 in the context of independent claim 1 which is directed to an assembly, i.e. to a combination of components assembled together, as referring to the upper edge of the skirt as it results and is visible after it has been secured to the the frame and not - as assumed by

the appellant (opponent) - as the upper edge of the skirt itself before being secured to the frame. That said, Figure 1 shows that the pattern of the visible upper edge of the skirt secured to the frame coincides with the pattern of struts and is thus zig-zag shaped. Furthermore, the Board concurs with the respondent (patent proprietor) that the statement in paragraph [0062] of the parent application as originally filed teaching that the upper edge of skirt desirably has an undulated shape that *"generally follows the shape of the second row of struts 22 of the frame"* also supports an upper edge of the skirt with a zig-zag shape. In fact, the expression *"generally follows"* implies the possibility that the upper edge exactly follows the zig-zag shape of the strut (22) of the frame. Finally the arguments of the appellant (opponent) that, in order to be rolled over the strut and secured thereto, the upper edge of the skirt must be shaped as a succession of adjacent trapezoidal elements as shown in Figures 16 and 17 is not convincing. In fact the Board cannot see why a zig-zag shaped upper edge, i.e. an upper edge formed as a sequence of adjacent triangular elements could not be rolled over the the stent and secured thereto.

- 2.4 Regarding the further objections raised under Articles 76(1) and 123(2) EPC by the appellant (opponent) with their statement of grounds of appeal and expressly maintained at the oral proceedings , the parties relied at the oral proceedings on their written submissions and did not make any further comments. The Board has thus no reason to deviate from its preliminary assessment provided with the communication pursuant to Article 15(1) RPBA dated 14 May 2024 which is herewith confirmed and read as follows:
- Combination of angled and circumferential rows of

struts

- 2.4.1 Following the alleged lack of disclosure of rows of angled struts according to feature F9, the appellant (opponent) maintained that there was no direct and unambiguous disclosure in the parent application as originally filed for an embodiment including three rows of circumferential struts (feature F10) combined with two rows of angled struts (feature F9).
- 2.4.2 However, this objection presupposes that the objections regarding the expression "*first and second rows of angled struts*" in feature F9 is followed. However, as this is not the case for the reasons presented under sections 2.2.4 above, this objection is void.

Features F7 and F8: first and second rows of circumferential struts defining an inflow end and an outflow end fo the frame

- 2.5 Features F7 and F8 require that the first and second rows of circumferential struts define an inflow end and an outflow end of the frame respectively. The appellant (opponent) argued that the parent application nowhere disclosed that a row of circumferential struts defined an end of the frame, let alone an inflow and an outflow end of the frame. In their opinion only inflow and outflow ends of the valve were disclosed.
- 2.5.1 The Board cannot follow the arguments of the appellant and shares the reasoning and the conclusions of the opposition division:

That the first and second circumferential rows define an end of the frame is directly and unambiguously supported by Figures 1 and 2 as correctly stated by the

opposition division. That these ends are further qualified as "*inflow end*" and "*outflow end*" has the only purpose to define their axial location with respect to the intended orientation of the valve upon installation in the human body. No new information is introduced.

Feature F15: Upper edge of the skirt following a zig-zag pattern

2.6 The second part of feature F15 requires that the upper edge of the skirt follows the zig-zag pattern of the third row of struts. In the appellant's (opponent's) view, paragraph [062] of the parent application merely disclosed a skirt having an undulated shape that generally follows the shape of the second row of struts. It was alleged that the fact that the skirt upper edge followed a zig-zag pattern of the third row of circumferential struts was not directly and unambiguously derivable from this paragraph.

2.6.1 However, the Board shares the conclusion of the opposition division that this feature is unambiguously supported by Figures 1 and 2 interpreted in the light of paragraph [0062] of the parent application (see also section 2.3.2 above).

Omission of features

2.7 The appellant (opponent) objected to the allegedly unallowable omission in claim 1 of the features regarding the "*two side flaps*" and of the "*reinforcing bar*". Also the omission in claim 1 of the feature of original dependent claim 14, i.e. that "*struts of the first row are thicker than struts of the second row*"

was contested.

- 2.7.1 However, the Board takes the view that these features can be omitted without infringing Articles 76(1) and 123(2) EPC in view of the information presented in paragraphs [0008], [0026] [0050], [0058] and [0059] of the parent application where they are introduced by the verb "*can*" that makes clear for the person skilled in the art that they are optional.
- 2.7.2 Further, the appellant (opponent) objected in writing that together with the whole features of dependent claim 14 also the features of claim 5 as filed should have been introduced into claim 1 of the patent as maintained due to the dependencies of claim 14 from claim 5 and of claim 5 from claim 1. It was observed that dependent claim 5 of the parent application additionally included the feature that "*the circumferential struts extend between the axial struts*", and not only that they interconnected the axial struts as recited in feature F14. In the appellant's (opponent's) view, the omission of this feature in claim 1 resulted in a further unallowable intermediate generalisation infringing Articles 76(1) and 123(2) EPC.
- 2.7.3 However, as pointed out by the respondent (patent proprietor) in their reply, this feature is already recited in feature F14 of claim 1 as maintained. This assertion of the respondent (patent proprietor) that the Board considers convincing was not contested either in writing nor at the oral proceedings by the appellant (opponent).

Dependent Claims

2.8 The appellant (opponent) maintained with their statement of grounds of appeal the objections raised at the first instance proceedings against dependent claims 2 to 7 and 15.

2.8.1 Also in this respect the Board is satisfied with the the arguments of the opposition division and submitted by the respondent (patent proprietor) and takes the view that the objections raised under Articles 76(1) and 123(2) EPC against certain dependent claims are not justified.

2.8.2 Regarding the subject-matter of dependent claims 2 to 6, the Board agrees with the opposition division that sufficient basis is provided by paragraphs [0009], [0010] and [0049] of the originally filed parent application. Contrary to the view of the appellant (opponent), the Board does not see any reason for the person skilled in the art not to apply the U-shaped crowns portion presented in association with certain embodiments to all the embodiments of the assembly irrespective of the number of rows of circumferential struts. Also regarding the alleged omission of the specific features presented in the second and fourth sentence of paragraph [0049], the Board agrees with the opposition division that they are implicitly claimed in view of the other features specified in the dependent claims under discussion.

2.8.3 Regarding the objection against dependent claim 7 requiring that *"a lower edge of the skirt member (16) is attached with sutures to the first row of struts (20)"*, contrary to the allegation of the appellant (opponent), direct and unambiguous basis basis can be

found in Figures 1 and 2 of the parent application as argued by the respondent (patent proprietor).

2.8.4 The appellant (opponent) further maintained that the omission in dependent claim 15 of the frame diameter and the number of columns resulted in an unallowable intermediate generalisation of an originally disclosed specific embodiment.

2.8.5 However, the Board concurs with the opposition division that while figure 8 and the relevant paragraph [0052] of the parent application disclose indeed four rows in combination with four columns, the skilled person recognizes that there is no inextricable link between the number of rows and columns. Regarding the omitted limitation to valves with a diameter of 29 mm and more when a frame with exactly 4 rows of circumferential struts is used, the Board concurs with the opposition division that this feature can be omitted in view of the last sentence of paragraph [0052] of the parent application.

2.9 In conclusion and irrespective of the admissibility issues raised by the respondent (patent proprietor) with their reply against a certain number of allegedly new arguments, none of the objections under Articles 76(1) and 123(2) EPC brought forward by the appellant (opponent) with their statement of grounds of appeal is justified.

Article 52(1) and 54 EPC: Novelty

3. The subject-matter of independent claim 1 of the patent as maintained meets the requirements of Articles 52(1) and 54 EPC as correctly assessed by the opposition

division in the decision under appeal.

- 3.1 Regarding this objection, the parties relied at the oral proceedings on their written submissions and did not make any further comments. The Board has thus no reasons to deviate from its preliminary novelty assessment as provided with the communication pursuant to Article 15(1) RPBA dated 14 May 2024 which is herewith confirmed and reads as follows:
- 3.2 The appellant (opponent) objected to the positive novelty assessment of the opposition division in view of document D5 which is a state of the art pursuant to Article 54(3) EPC. Under discussion is the disclosure of features F12, F14 and F15 in this prior art document which was denied by the opposition division in the decision under appeal. Reference is made to the Figures 2 and 15 of D5.
 - 3.2.1 Regarding feature F15, the Board follows the interpretation of the term "*adjacent*" in feature F9 adopted by the opposition division leading to the conclusion that according to Figures 1, 2 and 4 of D5 the row of struts to which the upper edge of the skirt member is attached is not the third one within the meaning of claim 1, namely the row of circumferential struts adjacent to the second row of circumferential struts of the frame defining its outflow end.
 - 3.2.2 Regarding feature F12 the opposition division correctly stated that it has not been convincingly demonstrated by the appellant (opponent) that a harvested natural valve as the one preferably suggested in D5, paragraph [0041], had inherently a scalloped lower edge.

3.2.3 Finally, regarding feature F14, the appellant (opponent) referred to the embodiment in Figure 15 of D5 showing a crown portion located between the struts which in their opinion could be described as being U-shaped. Irrespective of the question whether the portion 422b shown in Figure 15 can be said to be U-shaped, this figure describes a different embodiment as the one in Figures 1, 2 and 4 on which the novelty attack of the appellant (opponent) is based.

3.2.4 Therefore, the Board confirms the conclusion of the opposition division that document D5 does not directly and unambiguously disclose features F12, F14 and F15 of claim 1 of the patent as maintained.

Articles 52(1) and 56 EPC: Inventive Step

4. The subject-matter of claim 1 of the patent as maintained meets the requirements of Articles 52(1) and 56 EPC as correctly found by the opposition division in the decision under appeal.

4.1 Also regarding these objections the parties relied at the oral proceedings on their written submissions and did not make any further comments. The Board has thus no reasons to deviate from its preliminary positive assessment of the presence of an inventive step provided with the communication pursuant to Article 15(1) RPBA dated 14 May 2024 which is herewith confirmed and reads as follows:

4.1.1 The appellant (opponent) maintained the lines of inventive step attacks starting from documents D3, D8, D4 and D7.

D3 as closest prior art

- 4.2 The appellant (opponent) assumed that feature F14 of claim 1 was the only distinguishing feature with respect to disclosure of D3. However, the Board concurs with the view of the opposition division and the respondent (patent proprietor) that also feature F15 and F12 are not directly and unambiguously disclosed in this prior art document for reasons similar to those presented in respect of document D5. Therefore, the reasoning of the appellant (opponent) is based on an erroneous feature analysis and as such cannot convince.

D8 as closest prior art

- 4.3 The appellant (opponent) put forward that it was obvious to modify the circumferential struts disclosed in this prior art document so as to form U-shaped crown portions according to feature F14 of claim 1 which they considered to be the only distinguishing feature. However, also in this case, the Board is satisfied with the findings of the opposition division that, in addition to feature F14, also feature F12 and in part feature F15 (in particular that upper edge of the skirt member attached with sutures to the third row of circumferential struts; see reasons provided in respect of D5) are not directly and unambiguously disclosed in this prior art document, this circumstance rendering the reasoning of the appellant (opponent) void.

Validity of the priority and inventive step attacks starting from D4 and D7

- 4.4 The appellant (opponent) maintained - contrary to the assessment of the opposition division - that the priority claimed by the contested patent was invalid

and therefore documents D4 and D7 represented a state of the art according to Article 54(2) EPC thus relevant for the assessment of inventive step.

- 4.4.1 Irrespective of the question whether the priority is valid, the Board concurs with the arguments of the respondent (patent proprietor) that starting from D4 or D7 it would not be obvious to arrive to the subject-matter of claim 1 of the patent as maintained.
- 4.4.2 The appellant (opponent) essentially literally repeated in their statement of grounds of appeal the reasoning submitted with their notice of opposition in support of the lines of inventive step attack starting from D4 or D7 and maintained that the only distinguishing feature was represented by feature F14 of claim 1 of the patent as maintained (which is identical to claim 1 as granted objected with the notice of opposition). In their opinion, it was obvious for the person skilled in the art in view of common general knowledge or the teaching of documents D5, D10 and D11 to interconnect the ends of each pair of axial struts (30) recited in claim 1 by means of well known U-shaped crown portions in order to facilitate crimping and expanding of the frame. The respondent (patent proprietor) replied by referring to the same counter-arguments submitted during the first instance proceedings as reaction to the notice of opposition of the appellant (opponent).
- 4.4.3 The Board concurs with the respondent (patent proprietor) that - contrary to the allegation of the appellant (opponent) - in addition to feature F14 also features F12 and F15 are not directly and unambiguously disclosed in this prior art documents, whereby the reasoning of the appellant (opponent) based on the assumption that the only distinguishing features is

feature F14 is void. It is noted that the appellant (opponent) did not comment either in writing nor at the oral proceedings on the counter-arguments provided by the respondent (patent proprietor) with their first appeal reply regarding the objection of lack of inventive step starting from D4 and D7 as closest prior art, and that these counter-arguments were considered convincing by the Board in the preliminary opinion dated 14 May 2024.

Request to refer questions to the Enlarged Board of Appeal: Article 112 EPC.

5. The questions 1 to 5 proposed by the appellant (opponent) for referral to the Enlarged Board of Appeal were triggered by the disputed interpretation of the terms "*angled struts*" and "*circumferential struts*" in feature F9 of claim 1 for the purpose of assessment of compliance with Articles 76(1) and 123(2) EPC. However, for the reasons presented under section 2.2.4 above, the Board - based on the wording of the claim on its own - has no doubt regarding how the person skilled in the art understands these terms and consequently how the claim must be construed for the purpose of the assessment of compliance with Articles 76(1) and 123(2) EPC. Accordingly, there is no issue of "*disregarding the clear and credible technical meaning of a first term*" as in question 1, nor of interpreting this first term "*to correspond to a second term which has a clear and credible second technical meaning different from the first technical meaning*" as in question 2. The only relevant issue is that of the claim construction, which in the present case can be assessed by the Board in a straightforward manner. There is therefore no reason to refer any of questions 1 and 2, or questions 3 to 5 that are linked to the answer to question 2, to the

Enlarged Board of Appeal, as they neither serve the purpose of ensuring uniform application of the law, nor do they relate to a point of law of fundamental importance necessary for the outcome of the present case.

Order

For these reasons it is decided that:

1. The appeal is dismissed.
2. The request to refer questions to the Enlarged Board of Appeal is rejected.

The Registrar:

The Chairman:



M. Schalow

G. Pricolo

Decision electronically authenticated