

Publication in the Official Journal ~~Yes~~ / No

File Number: T 690/90 - 3.2.3

Application No.: 86 900 860.7

Publication No.: WO 87/01307

Title of invention: Method and device for the separation and isolation of
blood or bone marrow components

Classification: B04B 5/04, A61K 35/14, G01N 15/05

D E C I S I O N
of 15 May 1992

Applicant: VERENIGING HET NEDERLANDS KANKER INSTITUT

Headword:

EPC Articles 82, 109(1)

Keyword: "Unity of invention (yes, after amendment); interlocutory
revision"

Headnote



Case Number : T 690/90 - 3.2.3

D E C I S I O N
of the Technical Board of Appeal 3.2.3
of 15 May 1992

Appellant : VERENIGING HET NEDERLANDS KANKER INSTITUT
(NL/NL);
Plesmanlaan 121,
NL-1066 CX Amsterdam (NL)

Representative : VAN DER SAAG, J. et al.;
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Decision under appeal : Decision of Examining Division 2.3.11.100 of the
European Patent Office dated 19 February 1990
refusing European patent application
No. 86 900 860.7 pursuant to Article 97(1) EPC.

Composition of the Board :

Chairman : C.T. Wilson
Members : F. Broesamle
J.-C Saisset

Summary of Facts and Submissions

- I. European patent application No. 86 900 860.7 based on International application PCT/NL86/00002, filed on 13 January 1986 and published on 12 March 1987 under international publication No. WO 87/01307 was refused by the Examining Division with a decision dated 19 February 1990.
- II. In this decision the Examining Division considered that the amended claims filed on 22 August 1989 did not meet the requirements of Article 82 EPC since the subject-matter of independent Claim 25 thereof was not novel over the prior art and hence in the absence of any inventive concept, this subject-matter could not relate to the same inventive concept as the subject-matter defined in independent Claims 1, 2 and 29. It was also felt that the subject-matter of Claim 29 lacked novelty so that again no single inventive concept with the subject-matter of Claims 1, 2 and 25 could be seen.

Only for the sake of completeness the Examining Division expressed in its decision that Claim 2 lacks clarity in the meaning of Article 84 EPC, that, however, this statement could not be commented by the Appellant (Applicant) and that it should therefore not be regarded as a part of the decision to refuse.

- III. With telecopy of 20 April 1990 (in Dutch) confirmed with letter of 20 April 1990 the Appellant appealed against the Examining Division's decision, paying the (reduced) appeal fee in due time. With letter of 27 June 1990, received on 27 June 1990 the Appellant filed the Statement of Grounds of Appeal being based on the following requests:

- main request: set of Claims "A";
- first auxiliary request: set of Claims "B";
- second auxiliary request: set of Claims "C".

The Appellant declared in this context that Claims 25 to 29 underlying the Examining Division's decision "are cancelled without reservation", see page 2 remark II.1 of Appellant's letter under discussion.

IV. Claims 1 and 2 of the main request read as follows:

"1. A method for separating in a centrifuge one or more components of a biological mixture such as blood, such method comprising the steps of centrifuging the biological mixture in a source reservoir at a speed for a time to effect separation of the desired components into layers, maintaining a pressure in the source reservoir for flowing the components therefrom, and pumping, while still centrifuging and maintaining said pressure, a component into a conduit which at least partially extends radially inwardly and is orientated to have a non-zero centrifugal gradient along a portion of its length, characterized in that the step of pumping further includes the steps of controlling flow from the source reservoir to cause at least one intermediate fractional component having a volume not greater than approximately 10% of the mixture to reside in said portion of the conduit and in that when the component resides in the conduit the centrifuge is stopped and said component is isolated in said portion.

and

2. Centrifugal apparatus for separating components of a biological mixture comprising at least one supported flexible source reservoir located on one side of the centrifuge axis and having an outlet located at the radial inner side, with respect to the centrifuge

axis, of the source reservoir, a primary receiving reservoir, and a conduit connected to the outlet and the primary receiving reservoir for transferring a component of said biological mixture from said source reservoir to said primary receiving reservoir, and further comprising support means for holding the conduit in an orientation to have a non-zero centrifugal gradient along a portion of its length, characterized in that the apparatus is adapted for carrying out the method of Claim 1, wherein said portion of the conduit (88; 41; 88) forms at least one secondary receiving reservoir enabling reception therein of a separated intermediate fractional component of said biological mixture, said at least one secondary receiving reservoir comprising a first secondary receiving reservoir (88; 62; 95) having a volume of at least 1% of the volume of the source reservoir (86; 62; 86), and in that the apparatus comprises means (65, 66, 67; 91, 93, 94) spaced along the conduit for isolating said separated intermediate component in said at least one secondary receiving reservoir".

- V. The Appellant requests therefore that the impugned decision "be reversed"; with respect to the decision T 139/87, published in OJ EPO, 1990, 68 the Appellant declared that he "would be pleased if a procedure according to Article 109(1) EPC would be possible". For precautionary reasons oral proceedings were requested.

Reasons for the Decision

The appeal is admissible.

Main request:

1. Article 123(2) EPC

- 1.1 Claim 1 combines the features of originally filed Claims 1 and 2, whereby the feature that the conduit "at least partially extends radially inwardly" can clearly be seen from originally filed Figure 6, see reference sign "36".
- 1.2 Claim 2 is based on features which can be derived from originally filed Claims 11, 31 ("on one side of the centrifuge ... and located at the radial inner side, with respect to the centrifuge axis") and 24/25 ("means spaced along the conduit ...") as well as originally filed Figures 9, 11 and 12 (conduit as secondary receiving reservoir), whereby the feature relating to the volume "of at least 1% of the volume of the source reservoir" can be derived from originally filed page 33, lines 7 and 8 thereof. A "flexible" source reservoir can be seen from originally filed page 24, lines 13 to 15.
- 1.3 As a result of the foregoing the independent claims of the main request are not open to an objection under Article 123(2) EPC.

2. Unity of invention (Article 82 EPC):

- 2.1 Article 82 EPC prescribes that the European patent application shall relate to one invention or to a group of inventions so linked as to form a single general inventive concept.
- 2.2 The basic technical teaching of Claim 1 (method for separating ...) is the way in which the biological mixture is centrifuged, in which way a pressure is maintained in the centrifuge system and how a conduit is orientated within the centrifuge, so that - see characterising clause thereof - the pumping and centrifuging can be carried out

such that at least one intermediate fractional component having a volume not greater than approximately 10% of the mixture can be separated in the conduit.

- 2.3 The technical teaching of Claim 2 (centrifugal apparatus) defines the structural means which are necessary to carry out the teaching of Claim 1, such as the location of a source reservoir, a support means for the conduit to hold the latter in a specific orientation, isolating means being arranged along the conduit, whereby the conduit forms one secondary receiving reservoir for a separated intermediate fractional component with a volume of at least 1% of the volume of the flexible source reservoir, so that it appears possible to carry out the method of Claim 1 (independent method-claim), namely centrifuging, pumping and isolating of a biological mixture respectively its components.
- 2.4 Under these circumstances there cannot be seen any reason why Claims 1 and 2 should not relate to one invention or to a group of inventions linked by a single general inventive concept within the meaning of Article 82 EPC. In fact the Examining Division in their impugned decision have not given reasons why Claims 1 and 2 underlying the decision would not be linked by a single general inventive concept, since only Claims 25 and 29 underlying the impugned decision were dealt with in combination with Claims 1 and 2, see page 3 last but one paragraph and page 4 paragraph three of the impugned decision.
- 2.5 In the Statement of Grounds of Appeal (English version) received on 27 June 1990 the Appellant has clearly set out that Claims 25 to 29 underlying the impugned decision "are cancelled without reservation", see page 2 remark II.1 thereof. This statement for the Board clearly reflects that the Appellant not only has made an attempt to

overcome the objection under Article 82 EPC but has actually overcome that objection, since the two claims forming the basis for the Examining Division's negative findings (Claims 25 and 29) were cancelled "without reservations". The Appellant - in good faith - relying on the decision T 139/87 requested that a procedure according to Article 109(1) EPC be carried out.

3. Under these circumstances the impugned decision - as requested by the Appellant - has to be "reversed" and the case has to be remitted to the first instance for further prosecution, since the main request (set "A") has overcome the reasons for refusing the application in suit (Article 82 EPC). The Examining Division itself has declared on page 4 last but one paragraph that the objection under Article 84 EPC has not been communicated to the Appellant i.e. constitutes a "new reason", and that this objection consequently should not be regarded as a part of the decision to refuse.

Following the principles laid down in the decision T 139/87 the Examining Division has no discretion in allowing interlocutory revision in cases where the Appellant has clearly met the objections on which the contested decision relies.

Oral proceedings

The request for oral proceedings (auxiliary request) needs not to be followed, since the Board was in a position to accept the main request under Article 82 EPC.

Order

For these reasons, it is decided that:

1. The impugned decision is set aside.
2. The case is remitted to the first instance for further prosecution.

The Registrar:



N. Maslin

The Chairman:



C.T. Wilson