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**Datasheet for the decision
of 9 July 2024**

Case Number: T 0964/21 - 3.2.06

Application Number: 13770970.5

Publication Number: 2879636

IPC: A61F13/02, A61F13/00

Language of the proceedings: EN

Title of invention:

WOUND DRESSING

Patent Proprietor:

Smith & Nephew PLC

Opponents:

KCI Licensing Inc.
Dr. H. Ulrich Dörries
Pajaro Limited

Headword:

Relevant legal provisions:

EPC Art. 123(2), 104(1)

Keyword:

Amendments - extension beyond the content of the application
as filed (yes)

Apportionment of costs - not equitable

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 0964/21 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 9 July 2024

Appellant: Smith & Nephew PLC
(Patent Proprietor) 15 Adam Street
London WC2N 6LA (GB)

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

Appellant: Dr. H. Ulrich Dörries
(Opponent 2) Fünf Höfe, Theatinerstr. 16
80333 München (DE)

Representative: Tostmann, Holger Carl
Wallinger Ricker Schlotter Tostmann
Patent- und Rechtsanwälte Partnerschaft mbB
Zweibrückenstrasse 5-7
80331 München (DE)

Appellant: Pajaro Limited
(Opponent 3) 12 New Fetter Lane
London
EC4A 1JP (GB)

Representative: Alt, Michael
Bird & Bird LLP
Maximiliansplatz 22
80333 München (DE)

Party as of right: KCI Licensing Inc.
(Opponent 1) P.O. Box 659508
San Antonio , TX 78265 (US)

Representative: Simmons & Simmons
City Point

One Ropemaker Street
London EC2Y 9SS (GB)

Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
1 June 2021 concerning maintenance of the
European Patent No. 2879636 in amended form.**

Composition of the Board:

Chairman M. Harrison
Members: T. Rosenblatt
 W. Ungler

Summary of Facts and Submissions

I. The patent proprietor and opponents 2 and 3 (appellants) each filed an appeal against the interlocutory decision of the opposition division, in which the opposition division found that European patent No. 2 879 636 in an amended form met the requirements of the EPC. The appellant-proprietor's appeal lies also against the opposition division's decision to apportion costs against it.

II. The following facts of the opposition proceedings are relevant to the present decision:

In the opposition proceedings two oral proceedings were held, the first one on 8 October 2019, which was adjourned in order to examine the issue of validity of the priorities of D22 (WO 2013/175306) and of the subject-matter of claim 1 of the then auxiliary request 13. The second oral proceedings before the opposition division was held on 26 April 2021. Due to the adjournment of the first oral proceedings, the opposition division decided on the apportionment of costs to the detriment of the patent proprietor.

III. The parties were summoned to oral proceedings before the Board. In a subsequent communication pursuant to Article 15(1) of the Rules of Procedure of the Boards of Appeal (RPBA), the parties were informed of the Board's preliminary opinion. The Board considered that the subject-matter of claim 1 according to the appellant-proprietor's main request and according to its request found allowable by the opposition division extended beyond the content of the application as

filed.

IV. At the end of the oral proceedings held before the Board, the parties' requests were the following:

The appellant-proprietor requested as a main request that the decision under appeal be set aside and the patent be maintained on the basis of auxiliary request 12 underlying the impugned decision, or as an auxiliary measure that the appeals of appellant-opponents 2 and 3 be dismissed (i.e. maintenance of the patent in the version found to be allowable by the opposition division). Furthermore, it requested that the opposition division's decision as regards the apportionment of costs be set aside.

The appellant-opponents 2 and 3 requested that the decision under appeal be set aside and the patent be revoked.

Furthermore, the appellant-opponent 3 requested that the appellant-proprietor's appeal be dismissed.

The respondent-opponent 1 requested that the appellant-proprietor's appeal be dismissed.

V. Claim 1 of the appellant-proprietor's main request reads as follows:

"A wound dressing (110, 300, 400, 500, 2100, 3400, 3900) comprising:
an acquisition distribution layer (3440, 3740, 3940);
wherein the acquisition distribution layer (3440, 3740, 3940) is configured to horizontally wick fluid as the fluid is absorbed upward through the wound dressing (110, 300, 400, 500, 2100, 3400, 3900);

an absorbent layer (402, 2110, 3430) over the acquisition distribution layer (3440, 3740, 3940); a backing layer (2140, 3410) above the absorbent layer (402, 2110, 3430); and characterised in that a fluidic connector (721, 731, 2410, 2420, 3500) connects the backing layer (2140, 3410) to a source of negative pressure; and wherein the acquisition distribution layer (3440, 3740, 3940) comprises a plurality of fibers, a majority of the fiber volume extends horizontally, the fibers extend horizontally, and wherein the acquisition distribution layer (3440, 3740, 3940) comprises a plurality of fibers, and a majority of the fibers span a distance perpendicular to the thickness of the acquisition distribution layer (2105, 3450) that is greater than the thickness of the acquisition distribution layer (3440, 3740, 3940)."

The preamble of claim 1 of the auxiliary request reads as for claim 1 of the main request, whereas the characterising portion reads:

"characterised in that a fluidic connector (721, 731, 2410, 2420, 3500) connects the backing layer (2140, 3410) to a source of negative pressure; the acquisition distribution layer (3440, 3740, 3940) comprises a plurality of fibers, and a majority of the fiber volume extends horizontally; and in that the dressing further comprises a transmission layer (2105, 3450, 3730, 3950) between a wound contact layer (2102, 3466, 3960) and the acquisition distribution layer (3440, 3740, 3940), wherein the transmission layer (2105, 3450, 3730, 3950) is configured to vertically wick fluid, and wherein the transmission layer (2105, 3450, 3730, 3950) comprises a top fabric layer, a bottom fabric layer,

and a plurality of filaments extending perpendicularly between said top fabric layer and said bottom fabric layer."

- VI. The arguments of the appellant-proprietor as far as relevant to the present decision may be summarised as follows.

Main request and auxiliary request - Article 123(2) EPC

The opposition division had noted that the subject-matter of claim 1 of the main request was directly and unambiguously derivable from original claims 1, 2, 3, 4, 6, 8 and 9. Contrary to the appellant-opponents' objections, claim 1 of the main request and of the auxiliary request and original claim 2 required a fluidic connector to be present, hence no difference existed between the claims in this regard. Verbatim basis was not required. The key question was merely whether a fluidic connector that connects the backing layer to a source of negative pressure was directly and unambiguously derivable from the disclosure of the application as filed. Although original claim 2 indicated that the fluidic connector was configured to connect the backing layer to a source of negative pressure, it would have been directly and unambiguously clear that it was the fluidic connector that connected the backing layer to a source of negative pressure. Conversely, if the fluidic connector connected the backing layer to a source of negative pressure then the fluidic connector must also be configured to connect the backing layer to a source of negative pressure; otherwise, the fluidic connector could not connect the backing layer to a source of negative pressure. The expression "configured to" implied that the wound dressing also had corresponding means and was adapted

to perform the said function, meaning that at some time it was indeed connected. This expression required the presence of more technical means than the expression "suitable for" (cf. Guidelines F-IV 3.9.1). Moreover, the term "comprising" used in claim 1 meant that all technical features, including the fluidic connector and the source of negative pressure, were part of the claimed subject-matter. Rule 43 EPC required that the subject-matter for which protection was sought should be defined by the technical features of the claim; thus by definition all features specified in claim 1 were features of the wound dressing. Further evidence supporting the understanding that a broad meaning should be given to the expression "wound dressing", whereby other components like the fluidic connector and the source of negative pressure were a part of such wound dressing, was found in the last sentence of paragraph 68. Also, original claim 2 did not require a direct attachment of the fluidic connector to the wound dressing. The connector could either be separate or pre-attached, as evident from for example, paragraph 74, in particular the second sentence thereof on page 16 of the application as filed. Similarly, according to page 6, lines 10 to 14 of the application as filed, the fluidic connector may be connected either "directly" to the vacuum source or by a tube.

Paragraph 193 of the application as filed had only been referred to for emphasising the fact that no new matter had been added. Although the passage did not state that the fluidic connector connected the wound dressings to a source of negative pressure, the connection of the fluid connector (when the device was used) was nevertheless directly and unambiguously disclosed. Moreover, despite referring to a specific connector, paragraph 193 was not referred to for generalising the

corresponding embodiment. The reference to paragraph 193 rather highlighted that, once it was disclosed that a connector was intended for doing something, the possibility of the connector actually doing that something was automatically also disclosed.

Apportionment of costs

The apportionment of costs to the detriment of the patent proprietor was not justified. Opponent 1 had for the first time at the oral proceedings before the opposition division raised an objection of lack of novelty based on the two figures B34 of D22 against the subject-matter of claim 1 of the then auxiliary request 13. In view of this objection, the patent proprietor then contested that D22 constituted prior art according to Article 54(3) EPC since the subject-matter of claim 1 of auxiliary request 13 enjoyed the same priority date as the relevant embodiment of D22. The opposition division then adjourned the oral proceedings to analyse the priority situation. Auxiliary request 13 was identical to auxiliary request 26, which had been filed on 8 August 2019, i.e. two months before the date of the oral proceedings. Therefore, the argument of opponent 1 that the novelty objection based on the figures B34 could not have been raised before the oral proceedings was not correct. The set of claims of 4 October 2019 were submitted in order to streamline the procedure. The number of requests had been reduced from 29 to 16, meaning that they had not been submitted in abuse of any rights. Of the 16 requests submitted on 4 October 2019, only six requests (main request and auxiliary requests 1 to 5) were new in the sense that they were not identical to requests that were already on file. Even if these requests were submitted late, opponents can be expected to prepare for the question

of their admissibility as for instance held in T 1848/12.

- VII. The arguments of the appellant-opponents and of the respondent-opponent 1 as far as relevant to the decision may be summarised as follows.

Main request and auxiliary request - Article 123(2) EPC

Claim 1 of the main request and of the auxiliary request recites the feature "*characterised in that a fluidic connector (721, 731, 2410, 2420, 3500) connects the backing layer (2140, 3410) to a source of negative pressure*", whereas original claim 2 defined the wound dressing as "*comprising a fluidic connector configured to connect the backing layer to a source of negative pressure*". Original claim 2 thus defined the fluidic connector as an integral part of the wound dressing, whereas claim 1 of the main request and the auxiliary request no longer required that the wound dressing comprised the fluidic connector. Paragraph 193 to which the opposition division had referred, besides relating to a very specific embodiment of a flexible port of a fluidic connector 3500, did not support the contention that the two expressions "*configured to connect*" and "*connects*" were equivalent. Also claim 2 as filed, due to the wording "*configured to connect*", related to a device (such as the fluidic connector) that was suitable to be connected in some way, but it did not disclose that actual connection occurred. In contrast thereto, the term "*connects*" unambiguously specified that there was an actual connection. The wording of claim 1 of both requests implied that the negative pressure source became part of the wound dressing, contrary to the disclosure in the application as filed.

Apportionment of costs

The decision on the apportionment of costs was a discretionary decision that should only be overturned if it was evident that the boundaries of discretion had been exceeded. The repeated and late filing of a large number of requests by the patent proprietor had caused considerable additional work in the preparation of the first oral proceedings and the argument challenging the validity of the priority of D22 only at the oral proceedings had necessitated an adjournment of the oral proceedings, which had given rise to the costs of the second oral proceedings. In particular it should be taken into account that the patent proprietor filed auxiliary requests 1 to 28, which were highly non-convergent, on 8 August 2019, followed by two further auxiliary requests on 2 October 2019 and then a new main request and new auxiliary requests 1 to 15 replacing all previous requests, which were also non-convergent, on 4 October 2019, i.e. four days prior to oral proceedings. Additional costs were incurred because the patent proprietor did not adequately identify the changes in each request. The patent proprietor chose to point out certain changes in comparison to previous requests, but this made it difficult to assess the changes against the claims as granted. Furthermore, it was clear from the preparatory communication of the opposition division of 21 January 2019 that D22 would be a central document in the proceedings since it was regarded as prejudicial to novelty for the subject-matter of claim 1 of the then main request. It was therefore incumbent on the patent proprietor to have challenged the validity of D22's priority in good time before the oral proceedings.

Reasons for the Decision

Main request - Article 123(2) EPC

1. The appellant-proprietor's main request is not allowable because the subject-matter of claim 1 extends beyond the content of the application as filed, contrary to the requirement of Article 123(2) EPC. The corresponding reasoning in the impugned decision as well as the further arguments provided by the appellant-proprietor in the appeal proceedings are found unconvincing by the Board for reasons set out below.

When referring to the application as filed, reference is made to the published international application, WO 2014/020440 A1, underlying the patent in suit.

2. The subject-matter of claim 1 is alleged by the appellant-proprietor to be based on the combination of *inter alia* claims 1 and 2 of the application as filed.

Claim 1 of the application as filed is directed to a wound dressing which comprises an acquisition distribution layer, an absorbent layer and a backing layer. Claim 2 reads "*The wound dressing of Claim 1, further comprising a fluidic connector configured to connect the backing layer to a source of negative pressure.*" According to the combination of claims 1 and 2 of the application as filed, the wound dressing comprises a fluidic connector, which means that the connector is an actual feature of, or an integral part of, the wound dressing.

However, this is not required anymore in amended claim

1 of the main request.

Claim 1 of the main request is still directed, according to its preamble, to a "wound dressing comprising" *inter alia* an acquisition distribution layer, an absorbent layer and a backing layer. It further specifies the wound dressing to be "*characterised in that a fluidic connector (721, 731, 2410, 2420, 3500) connects the backing layer (2140, 3410) to a source of negative pressure [...]*". Contrary to the wording used in the preamble, this first part of the wording of the characterising portion does not define that the fluidic connector or the source of negative pressure is "comprised" by the wound dressing. The further features in the characterising portion specify further properties of the acquisition distribution layer defined in the claim's preamble, where again the expression "comprises" is repeatedly used.

There is thus nothing in claim 1 of the main request which would define the fluidic connector to be comprised by the wound dressing.

Its subject-matter is rather directed to a wound dressing in a state of use, where a fluidic connector connects the wound dressing's backing layer to a source of negative pressure. This definition leaves it open whether the fluidic connector is a part of the wound dressing itself or whether it is provided as a separate component of a kit of parts. Hence, for example, prior to its use it constitutes a connector item with e.g. an adhesive, separate from the wound dressing and which for use is then adhered to the backing layer in order to establish the connection to the source of negative pressure. The latter embodiment covered by claim 1 of

the main request is not disclosed by claims 1 and 2 of the application as filed, nor by the other dependent claims of the application which were referred to by the opposition division and the appellant-proprietor as a basis for its subject-matter. The remaining parts of the application as filed do also not disclose such generalised subject-matter as defined by the features of claim 1.

The Board therefore concludes that the subject-matter of claim 1 of the main request extends beyond the content of the application as filed, contrary to the requirement of Article 123(2) EPC.

3. The reasoning adopted by the opposition division and the arguments submitted by the appellant-proprietor are found unconvincing for the following reasons.
 - 3.1 Contrary to the unsubstantiated statement of the opposition division by which it considered the change in wording to not substantially change the subject-matter (see the impugned decision, point 46 discussing these features, albeit in regard to auxiliary request 11), the Board considers for the reasons set out already above that the change in wording from claims 1 and 2 as filed to that of claim 1 of the main request changes the subject-matter; originally it was directed to a wound dressing comprising a fluidic connector and it changed to a wound dressing encompassing a kit of parts in a state of use.
 - 3.2 The key question to be asked is not that as argued to a large extent by the appellant-proprietor, namely whether a fluidic connector that connects the backing layer to a source of negative pressure was directly and unambiguously derivable from the disclosure of the

application as filed. Rather it has to be decided whether the application as filed discloses a wound dressing with the features of claim 1 of the main request and in which the fluidic connector is however not a feature comprised by the wound dressing, as originally defined by claims 1 and 2 of the application as filed and which were given as a basis for claim 1.

Similarly, also the question considered by the opposition division of whether the two expressions in the respective claims "configured to connect" (claim 2 as filed) and "connects" (main request) are equivalent or not is of no relevance for the point at issue here. It rather relates to another issue as raised by the appellant-opponents, namely whether the application as filed discloses a wound dressing in a state connected to the source of negative pressure. A decision on this question was however not required, as should be evident from the Board's reasoning in item 2 above.

3.3 The appellant-proprietor's core argument in regard to the matter to be decided, is that the wording of present claim 1 requires the presence of a fluidic connector which thus constituted a feature of the wound dressing. This argument fails however, since the presence of a fluidic connector in the connected state of use of a wound dressing does not necessarily mean that the connector is a part of the wound dressing itself as required by claims 1 and 2 as originally filed.

3.3.1 The appellant-proprietor's interpretation is not supported by the claim language. In regard to all the other features of the claimed wound dressing, in particular in regard to its three layers, the claim language makes consistent use of the expression

"compris[ing/es]" in order to define the features of the wound dressing and its different layers.

3.3.2 A skilled person would also not understand a combination encompassing a wound dressing *per se* and a source of negative pressure, connected by means of a fluidic connector during use, to constitute a "wound dressing". Whereas it is indeed conceivable that a package containing (as separate parts) a wound dressing, a fluidic connector and a source of negative pressure might be labelled "wound dressing", there is no indication in the application as filed that this was indeed the meaning intended by the designation of the subject-matter of the originally filed claims 1 and 2.

3.3.3 The passages referred to by the appellant-proprietor on pages 13 and 16, i.e. in paragraphs 68 and 74 of the application as filed, do not support its argument either.

The first sentence in paragraph 68 makes a clear distinction between a pump (source of negative pressure) and a wound dressing. The second sentence thereof, on which the appellant proprietor relied in particular, stating "*[T]he apparatuses and components comprising the wound overlay and packing materials, if any, are sometimes collectively referred to herein as dressings*", cannot be read as a generally applicable definition of the expression "wound dressing" to comprise a fluidic connector and a source of negative pressure, even if for the sole reason that the connector and the source of negative pressure are not even mentioned here. The appellant-proprietor did not cite any other passage of the application as filed from which such specific meaning of the expression "wound dressing" in combination with the entirety of features

of claim 1 of the main request would have indeed appeared.

Paragraph 74 refers to a specific embodiment of "a TNP wound treatment system comprising a wound dressing in combination with a pump" (first sentence, emphasis added by the Board), thus again confirming the common understanding that a wound dressing and a pump are separate items. The same holds true for the fluidic connector for which a specific embodiment is described further down in that same paragraph.

Hence, the cited passages of the application do not support an understanding of the wording of claim 1 of the main request to mean that the wound dressing itself comprises the fluidic connector (and the source of negative pressure) as feature(s).

3.3.4 Additionally it may be noted that whereas claim 2 of the application as filed specifies the wound dressing according to claim 1 to comprise a fluidic connector, claims 45 to 50 of the application as filed relate to a negative pressure wound therapy kit, comprising *inter alia* a (general) wound dressing (claim 45) and a fluidic connector attached to the wound dressing (claim 46). This confirms again that the expression "wound dressing" does not necessarily comprise a fluidic connector as a part of it.

3.3.5 Rule 43 EPC does not lead to a different conclusion. Stipulating that the claims shall define the matter for which protection is sought in terms of the technical features of the invention, does not mean in the case at issue that all technical features mentioned in claim 1 are necessarily technical features of the wound dressing. Although not decisive by itself, this is

already apparent from the fact that the fluid referred to in its preamble cannot be said to be a technical feature of the wound dressing, but instead is used to define suitability characteristics of the acquisition distribution layer. The matter for which protection is sought according to claim 1 of the main request is a wound dressing in a state of connection of its backing layer with a source of negative pressure, rather than a wound dressing *per se*, and does therefore not support the contention that the fluidic connector is necessarily comprised by the wound dressing.

- 3.3.6 The passage cited by the appellant proprietor from the EPO Guidelines for Examination (GL F-IV 3.9.1) - besides anyway not being binding on the Boards of Appeal - has no relevance for the question of disclosure of amended subject-matter in the application as filed to be decided here. The cited passage relates to requirements for claims in view of Article 84 EPC and in view of formal requirements, here in particular for kinds of claims in the fields of computer implemented inventions where all method steps can be fully implemented by generic method steps, which obviously has nothing to do with the present subject-matter. Furthermore, the actual meaning of the expression "configured to" in claim 2 of the application as filed or the limitations implied by this expression are not linked to the question of whether there is a disclosure in the filed application for a wound dressing with the feature of claim 1 of the main request not comprising such fluidic connector as a part of the wound dressing (cf. point 3.2 above).

Auxiliary request - Article 123(2) EPC

4. Since the further amendments in claim 1 of the auxiliary request, relating to the provision of an additional transmission layer, do not affect the above finding, as also acknowledged by the appellant proprietor, the patent may not be maintained on the basis of this request, also for non-compliance with the requirement of Article 123(2) EPC.

For the sake of completeness, the Board notes that under these circumstances no further reasoning is required in regard to the objection by appellant-opponent 2 contesting the admittance of this request into the proceedings.

5. Absent any set of claims meeting the requirements of the EPC, the Board can only accede to the appellant-opponents' request that the patent be revoked.

Apportionment of costs

6. The appellant-proprietor requested that the opposition division's decision as to the apportionment of costs be set aside.

The formulation of that decision is set out in the reasons of the impugned decision (cf. page 35) as follows:

".. the Opposition Division apportions to the Proprietor the costs of the remuneration of the representatives of the parties in respect to oral proceedings and for the undue delaying of the procedure in respect of late filing."

6.1 Firstly, the Board wishes to emphasise that an order on the apportionment of costs under Article 104 EPC must clearly state (at least) the kind of costs to be borne by the burdened party. The order referred to above does not in any way comply with this requirement. In this context, it should be noted that the order is so vague that it is not possible to clearly determine in particular,

- (a) whether the costs for the representatives in preparing for the oral proceedings are included, and
- (b) whether the costs for the representatives for both oral proceedings are included.

In that regard it is also noted that according to the Minutes of the oral proceedings on 8 October 2019 before the opposition division, the costs for both oral proceedings (i.e. for the one of 8 October 2019 and also for the later one on 26 April 2021) should be borne by the patent proprietor (cf. pages 1 and 4 of the Minutes), which however is not properly reflected in the order and cannot be assumed to be covered by that order. Furthermore, in view of the fact that parties to opposition proceedings have a right to oral proceedings, such a ruling - without any limitations of the specific costs to be borne in relation to the oral proceedings and without providing sound reasons for such a decision - would not comply with the right to be heard in oral proceedings as enshrined in the EPC. It should also be noted that the addition in the above-mentioned formulation "*and for the undue delaying of the procedure in respect of late filing*" does not provide a definition of any kind of associated costs and can only be seen as a hint to the reasoning for the decision, which seemingly was based on the principle of

procedural economy.

Even on the basis of the foregoing alone, the decision on the apportionment of costs is to be set aside.

6.2 Furthermore, the opposition division's decision also fails in terms of substance. Irrespective of the question of whether a decision under Article 104 EPC constitutes a discretionary decision, it should first be noted in view of the submissions of appellant-opponent 2 that discretionary decisions can also be reviewed by the Boards in terms of their merits. According to established case law, a Board should overrule a discretionary decision only if they conclude that it was taken in accordance with the wrong principles, without taking the right principles into account or in an arbitrary or **unreasonable way**, thereby exceeding the proper limits of its discretion (cf. Case law of the Boards of Appeal, 10th edition, V.A.3.4.1b; emphasis by the Board). A substantive review of a discretionary decision is therefore not excluded according to established case law.

6.3 According to the Minutes of the oral proceedings on 8 October 2019 the oral proceedings were adjourned due to the fact that the patent proprietor challenged that D22 constituted prior art under Article 54(3) EPC for the first time (ibid. page 4). The proprietor in fact challenged the validity of the earliest priority claimed for D22 in view of the embodiment of Figures B34A and B34B. In that regard it must be taken into account, as pointed out by the appellant-proprietor and not disputed by the appellant/respondent-opponents, that a novelty objection based on the embodiment of Figures B34A and B34B of D22 was raised for the first time in oral proceedings in relation to the then

auxiliary request 13. The argument provided in the contested decision, which was also relied upon by the appellant/respondent-opponents during the appeal proceedings, according to which the priority of D22 should have been challenged by the patent proprietor earlier in the proceedings, is not convincing. Even if a novelty objection based on the embodiment of Figure 1B of D22 was already in the proceedings, this does not mean that the patent proprietor would have been obliged to consider the validity of the priorities of D22 in regard to that objection. It goes without saying that not all the embodiments of a patent application claiming more than one priority necessarily enjoy the right to all of those priorities. It should also be noted that a patent proprietor is free to choose a line of defence that seems appropriate in the light of a particular objection. The argument that the patent proprietor should have challenged (one of) the priority(ies) claimed by D22 earlier in the proceedings is therefore not convincing.

Moreover, the appellant-proprietor's line of defence is also supported by the impugned decision itself, according to which the embodiment of Figure 1B was found as being entitled to the relevant priority, but not the embodiment of Figure B34A (cf. *ibid.* points 59.2.1 and 59.2.2).

For the sake of completeness, it should also be mentioned that D22 was filed after expiry of the time limit for filing an opposition and was used only for the purpose of attacking novelty of claim 1 of the then main request and of the then auxiliary request 11.

Thus, the fact that the patent proprietor did not contest the validity of one of the priorities of D22

until the first oral proceedings before the opposition division cannot justify a different apportionment of costs in the present case.

- 6.4 No further justification for the decision on costs is recognisable in the contested decision. Although page 34 of the decision addresses the repeated and late filing of different sets of claims, which was also underlined by the appellant/respondent-opponents before the Board, it is not clear from the decision itself whether and to what extent these statements were relevant for the decision on costs. In this respect, it is noted that the Board also considers the appellant-proprietor's argument that the late filing of amended requests was also due to the late filing of the objections based on D22 to be convincing. Furthermore, it must also be taken into account that the opposition division admitted the sets of claims filed on 4 October 2019 (namely the main request and auxiliary requests 1 to 15) into the proceedings in view of the principle of procedural economy (cf. point 36 of the contested decision). The opposition division noted in particular that the number of requests had been reduced from 29 to 16, that auxiliary requests 6 to 15 corresponded to previously filed requests and that the requests did not drastically change the framework of the opposition proceedings. These findings of the opposition division were not challenged by the (appellant/respondent-)opponents.

Moreover, as addressed by the Board in the oral proceedings, it is to be noted that the main request and auxiliary requests 1 to 10 had been found to contravene Rule 80 EPC, i.e. they had not been discussed in substance. This means that only auxiliary requests 11 to 13, which corresponded to previously

filed requests, were dealt with in substance during the oral proceedings before the opposition division. In view of the above, the Board does not see any procedurally abusive behaviour on the part of the patent proprietor, nor does the effort of the opponents caused by the late filing of the requests - which in any case was partly due to the late submission of the objections based on D22 - appear to be unduly high. The efforts for the preparation of the issue of admittance of the *newly* filed requests (main request and auxiliary requests 1 to 5) do not appear to the Board to have caused unreasonable expense to the opponents. Moreover, such preparatory work can in no way justify the award of the entire costs of the oral proceedings.

- 6.5 In view of the above there are no reasons that would justify a different apportionment of costs. Thus, the Board finds it appropriate that each party shall bear its own costs. Consequently, the decision of the opposition division as to the apportionment of costs is set aside.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.
3. The decision of the opposition division as to the apportionment of costs is set aside.

The Registrar:

The Chairman:



D. Grundner

M. Harrison

Decision electronically authenticated