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**Datasheet for the decision
of 29 January 2009**

Case Number: T 1865/07 - 3.2.04

Application Number: 99200334.3

Publication Number: 0981989

IPC: A47J 37/00

Language of the proceedings: EN

Title of invention:

Protective device of the supports of the grills of home appliances

Patentee:

BSH Fabricacion, S.A.

Opponent:

MERLONI ELETTRODOMESTICI S.p.A.

Headword:

-

Relevant legal provisions:

EPC Art. 52(1), 54, 56, 84, 102(3), 123(2),(3)
EPC R. 152(1)

Keyword:

"Novelty (no - main, 1st - 4th auxiliary requests)"
"Inventive step (yes - auxiliary request 6)"
"Added subject-matter (no)"
"Extension of the scope of protection (no)"
"Clarity objection in opposition"
"Authorisation in the case of a professional representative"

Decisions cited:

T 0059/87

Catchword:

-



Case Number: T 1865/07 - 3.2.04

D E C I S I O N
of the Technical Board of Appeal 3.2.04
of 29 January 2009

Appellant: MERLONI ELETTRODOMESTICI S.p.A.
(Opponent) Via Pinerole 25
I-10060 None (TO) (IT)

Representative: Dini, Roberto
Metroconsult S.r.l.
Via Sestriere 100
I-10060 None (TO) (IT)

Respondent: BSH Fabricacion, S.A.
(Patent Proprietor) Avda. Eudardo Garcia del Rio, 30
ES-39011 Santander
ES-Cantabria (ES)

Representative: Lang, Michael
BSH Bosch und Siemens Hausgeräte GmbH
Zentralabt Gewerblicher Rechtsschutz /
Abt. ZTG
Carl-Wery-Strasse 34
D-81739 München (DE)

Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 10 September 2007
rejecting the opposition filed against European
patent No. 0981989 pursuant to Article 102(2)
EPC.

Composition of the Board:

Chairman: M. Ceyte
Members: A. de Vries
C. Heath

Summary of Facts and Submissions

- I. The Appellant (Opponent) lodged an appeal, received 6 November 2007, against the decision of the Opposition Division posted 10 September 2007 to reject the opposition against European Patent No. 0 981 989, and simultaneously paid the appeal fee. The statement setting out the grounds was received 10 January 2008.
- II. Opposition was filed against the patent as a whole and based on Article 100(a) together with Articles 52(1) and 56 EPC 1973, for lack of novelty and inventive step, and on Article 100(b) for insufficient disclosure of the invention.

The Opposition Division held that the grounds for opposition under Article 100 EPC 1973 did not prejudice the maintenance of the patent as granted having regard in particular to prior art cited in the specification. An alleged prior use, "Merloni" as shown in technical drawings D2 to D4, was found not to be proven beyond a reasonable doubt and disregarded as prior art.

- III. During the appeal proceedings the Board considered the following document of its own motion:
D12: US-A-5 669 372
This document is cited as in paragraph [0001] of the patent specification.
- IV. Oral proceedings in appeal were duly held before this Board on 29 January 2009.
- V. The Appellant (Opponent) requested that the decision under appeal be set aside and the patent be revoked in

its entirety. Additionally he requested that the representative for the Respondent (Proprietor), Mr Lang, be barred from making submissions on behalf of the Respondent.

The Respondent (Proprietor) requests that the appeal be dismissed, alternatively, that the patent be maintained in amended form based on one of the set of claims of auxiliary requests 1 to 4 filed with letter of 8 May 2008, or of auxiliary requests 6, 7 filed during the oral proceedings before the Board. (A fifth auxiliary request was withdrawn at the oral proceedings).

VI. The wording of the independent claim 1 of the relevant requests is as follows:

Main request (claims as granted)

1. "Protective device of the supports of the grills of home appliances, these grills to be used especially for stoves and worktops, at the same time that the grills are basically made up of a frame that has parts that are located above the heat sources of the appliance and having some projections that are support legs of the grill on the base-worktop of the appliance; being constituted as of some protective elements that are coupled to the legs of the grill by means of some fastening means; characterized in that these fastening means of the protective elements are defined by some open windows (5 and 9) that communicate with the outside and that are located in the end sections of the legs (2), the respective protective elements being coupled in correspondence with the open windows (5 and 9) by means of some anchoring means."

Auxiliary request 1

Claim 1 is as in the *main* request but for replacing in the opening line the wording "Protective device ..." with "Grill of home appliances including a protective device".

Auxiliary request 2

Claim 1 is as in the *main* request but for the following insertion, indicated in italics by the Board: "being constituted as of some protective elements that *consist of elastic plugs and* are coupled ..." .

Auxiliary request 3

Claim 1 is as in the *2nd auxiliary* request but for replacing in the opening line the wording "Protective device ..." with "Grill of home appliances including a protective device".

Auxiliary request 4

Claim 1 is as in the *main* request but adds the following features at the end of the claim :
"and the protective elements consisting of some solid plugs (1) provided with at least one through hole (3) or with at least two opposite holes (4)".

Auxiliary request 6

"1. Grill of home appliances including a protective device of the supports of the grill, this grill to be used especially for stoves and worktops, at the same time that the grills are basically made up of a frame that has parts that are located above the heat sources of the appliance and having some projections that are support legs of the grill on the base worktop of the appliance; the protective device being constituted as of some protective elements that are coupled to the legs of the grill by means of some fastening means; characterized in that these fastening means of the protective elements are defined by some open windows (5 and 9) that communicate with the outside and that are located in the end sections of the legs (2), the respective protective elements being coupled in correspondence with the open windows (5 and 9) by means of some anchoring means and the protective elements consisting of some solid plugs (1) provided with at least one through hole (3); the anchoring means consisting of a bottom prolongation or branch (13) originating as a result of the window (9) open on one side, the elastic plug (1) coupling in the cited branch (13) by means of its through hole (3), within which the branch (13) is housed."

VII. The Appellant argued as follows:

Mr Lang had not been validly authorized by the proprietor and therefore should not be allowed to speak on his behalf.

Claim 1 of the main, second and fourth auxiliary requests, due to its unclear wording, could be construed as relating to the protective device in isolation from the grill. In particular the feature of the "open window" did not represent any clear distinction. The features of the protective device per se as defined in any of these versions - and for the fourth auxiliary request taking the second alternative of the final feature - were derivable from D12, figure 21 and the corresponding passages.

Claim 1 of the first and third auxiliary requests, on the other hand, could be read onto the prior art described in paragraphs [0005] to [0008] of the specification. That the window described there might be "closed", as opposed to the "open" window as claimed had no clear significance and could be disregarded.

The shift to the grill with protective device (auxiliary request 6) added subject-matter as the original disclosure had focussed exclusively on the protective device itself. Moreover, protection was now extended to grills, where previously it encompassed only the protective device, contrary to Article 123(3). Also, the amendment to claim 1 introduced a lack of clarity, as the features of the grill, which previously could be disregarded when construing the claims, must now be considered, and these were unclear and contradictory.

In any case, the claimed grill with protection device was not novel over the "Merloni" grill. That grill at points K and X of its support frame showed a protection

device in the form of a solid elastic plug inserted in a window in the frame, with a part of the frame formed by an added bottom piece extending through a hole formed between a bottom lip and the plug main bodying a hole.

VIII. The Respondent argued as follows:

The issue of authorization had been resolved to the EPO's satisfaction following the opposition oral proceedings.

Claim 1 of the main, second and fourth auxiliary requests was directed to the protective device in combination with the grill, the features of which were also to be considered. The device of D12 was not connected to the legs of the grill nor suitable for connection thereto. It also did not feature an open window in the sense that something could pass through it. Finally, regarding auxiliary request 4, the ring shaped opening was not a hole in the sense of the claim.

It was unproven that the prior art cited in the specification was publicly available at the priority date, and it could refer to an internal state of the art. In any case it lacked fastening means, an open window and anchoring means as required by claim 1 of the second and fourth auxiliary requests.

The appellant's objection to clarity of the amendments to claim 1 according to the sixth auxiliary request were based on a wilful misinterpretation of the claim. The as filed figures and description clearly detailed the interaction between the grill and device and the

grill had therefore always been included in the original disclosure. Similarly, the grill represented further features and thus further limited the scope of the claim rather than extending it.

As for novelty and inventive step, the "Merloni" grill is of substantially different construction. It does not have legs, much less end sections of legs where fastening means might be located. The through-opening shown in the cross-sections is also not open to one side, but has an additional rectangular element forming its lower barrier. These differences are not known from any of the cited prior art.

Reasons for the Decision

1. The appeal is admissible.
2. *Formal matters*
 - 2.1 Substantiation

The Board is satisfied that the opposition ground of lack of novelty and inventive step based only on an alleged prior use was sufficiently substantiated in the statement of grounds filed 13 May 2004. The statement indicates the facts and evidence in sufficient detail to establish *what* was made public (the hob of catalogue D5 of a type listed in D1 referring to grid drawings D2 to D4), and *when* and *under what circumstances* (by offer of sale in catalogue D5 in its edition year 1997, by Ariston). Following established jurisprudence, see e.g. the Case Law of the Boards of Appeal of the EPO, 5th

edition, December 2006 or CLBA, VII.C.4.5.3 and the decisions cited therein, the Board thus regards this ground as validly raised in opposition and thus open to discussion in the present appeal.

2.2 Authorization

2.2.1 In accordance with Rule 152(1) EPC the President of the EPO in the decision of 12 July 2007, see OJ EPO, Special Edition N.3, L.1., pages 128-129, has determined the instances in which a professional representative is required to file a signed authorization. These provisions are unchanged in substance with respect to the relevant provisions under the EPC in its 1973 version. Paragraph (2) relating to change of representation is applicable in the present case and specifies that, if the EPO is informed of a change and there is no notification of termination of a previous representative's authorization, the new representative must file an individual authorization or a reference to a general authorization.

2.2.2 In the present case, Mr Schenkel, a professional representative of BSH Hausgeräte GmbH informed the EPO with letter of 6 November 2000 (during examination proceedings) of a change of representation with reference to general authorization "AV Nr.591". The EPO then notified Mr Ungria Lopez, the previous representative for the then applicant and present respondent, BSH Fabricación S.A. by letter of 27 November 2000, of the change.

2.2.3 The register shows that the number given is in fact incorrect. However, a general authorization from BSH

Fabricación S.A does exist under AV No. 41280 and is dated 16 December 1999. It is mentioned in a letter dated 12 April 2002 from a further professional representative of BSH Hausgeräte GmbH, Dr Richter. The (correct) general authorization of this number lists both Mr Schenkel and Dr Richter, who were thus both authorized by BSH Fabricación S.A to act on its behalf.

2.2.4 With letter of 15 May 2007 Dr Richter (again citing the incorrect general authorization number AV 591) then issued a sub-authorization to Mr Lang, a professional representative also employed in the patent department of BSH Hausgeräte GmbH.

2.2.5 The Board notes that the mention of an incorrect number of the general authorization is of no consequence. Decisive is whether the respondent had issued a general authorization to the relevant persons at the time the EPO was informed of a change of representation and whether this authorization was still effective at the time of the oral proceedings before the Board. In both cases and in the light of the above the answer is yes.

That Mr Schenkel's and Dr Richter's letters or any other letters are written on stationery of BSH Hausgeräte GmbH rather than that of the patent proprietor is equally immaterial. It is of consequence only that both persons were duly authorized - as is clear from general authorization AV No. 41280 - and clearly acted on behalf of the patent proprietor. Importantly, the respondent-proprietor has himself to date, after almost eight years, never questioned the change of representation.

2.2.6 The Board can therefore only but conclude that Mr Lang is validly (and duly) authorized to act for the respondent, via the general authorization AV 41280, which includes Dr Richter, and Dr Richter's sub-authorization.

3. *Background*

The invention concerns a device, which includes a protective element for protecting the surface of a home appliance, such as a stove, from wear and tear caused by support legs of a grill resting on the surface. It focuses in particular on the way this element is arranged at the ends of the support legs so that it does not come loose during cleaning, the problem identified on page 3, third paragraph of the application as filed.

In the embodiments, see figures 2, 3 or 6, the elements are elastic plugs inserted into "windows" at the leg ends. These plugs have openings that cooperate with projections surrounding the window and so hold the plug in place.

4. *Main request and auxiliary requests 2 and 4*

4.1 Claim 1 of the main request (as granted) and of auxiliary requests 2 and 4 is directed to a "[p]rotection device of the supports of the grills of home appliances" and is defined in part in terms of the grill (elements are "coupled to the legs" of the grill at open windows "located in the end sections of the legs"). As a result when determining what exactly the claim is intended to protect, this is found to be

ambiguous. The subject of the claim can be regarded as the protection device as an entity separate of the grill, or, alternatively, as an integral part of the grill, i.e. the grill with device. In the first reading (device as separate entity) the constitutive elements of this device, in view of the problem and the solution outlined above, include not only the *protective element* (the elastic plug in the embodiments) but also the *support legs* with a *fastening* and *anchoring means* thereof. However, it does not include the features of the grill or features specific thereto, and these can be disregarded in assessing novelty.

The Board further reads the term "open window" in the end section of the support leg as meaning nothing more than an opening, which by being open necessarily "communicate[s] with the outside" as claimed. All windows are open in this sense. It does not imply that this opening is a through-opening, passing through the leg.

- 4.2 D12, see figure 11 and column 5, lines 7 to 9, and column 7, lines 21 to 25, shows a protective device or arrangement in the form of suction cups 160 attached to the support legs or feet of a cooking range stove. To provide suction these elements are necessarily of elastic material and perforce protect the underlying surface. A cup 160 is shown in cross-section in figure 21 and has a central and surrounding upward projection. As will be immediately clear to the skilled person this cross-section is intended to provide a resilient mating with a correspondingly formed end of the leg to hold the cup in place. Thus, the central projection will snugly fit into an implicit opening of

the leg - its "open window" or fastening means - at the bottom end section of the leg. The side walls of the opening in turn snugly fit into the groove between the side and central projections, and so form further anchoring means.

This known device or arrangement is suitable also for a grill resting on a support surface. The Board does not doubt that the skilled person would be able to apply it to the support legs of a grill, by dimensioning it appropriately if necessary. Moreover, the prior art cited in paragraphs [0005] to [0008] of the specification, not to mention the preferred embodiments of the claimed invention itself, shows that rubber is and can be used in spite of the heat produced by the stove and should form no hindrance in applying D12's arrangement to the grill itself.

All features of claim 1 of the main request, as well as the feature added to claim 1 in the second auxiliary request (elastic material of the plug) are thus directly derivable from D12.

- 4.3 Figure 21 of D12 also shows a downward recess located within the cup and opposite to the groove or recess formed between the side and central projections on the upper side of the cup. Both recesses represent "holes" in the sense of the "blind holes" 4, 4' of the embodiment of figure 9 of the patent, see paragraph [0020], second sentence. This second of the two alternative features added to claim 1 in the fourth auxiliary request is thus also known from D12.

4.4 In conclusion, the subject-matter of claim 1 of these requests lacks novelty over D12.

5. *Auxiliary requests 1 and 3*

5.1 Claim 1 in these requests is directed to a grill of home appliances including a protective device. The grill is itself now also included in the scope of the claim.

5.2 The application as filed, on page 2, line 33, to page 3, line 8, corresponding to paragraphs [005] to [008] of the patent specification, in the section entitled "background of the invention" describes as known an otherwise unidentified arrangement to avoid wear in the base caused by the grill discussed in the immediately preceding paragraph. This arrangement comprises "protective elements on said support legs", in reference to the opening paragraph of the description (as filed and in the specification) describing a grill with support legs. These elements "are made up of some elastic plugs" and are "introduced in a closed window of the support leg ... located close to the support end". The plug has a lip-shaped prolongation that "goes around the end of the leg" acting, much in the manner as the side projections in D12, as anchoring means.

The window is qualified as "closed", where claim 1 refers to an "open window". As noted previously, the term "open window" is read as meaning "opening". In that the plugs are "introduced in" the "closed window", that window must be open to receive the plug. The Board is thus unable to read any distinction in this qualification. This window also represents fastening

means in the same manner as the window of claim 1. In conclusion, all features of claim 1 of the first and third auxiliary request (with the additional feature of the element being of elastic material) may be identified in the arrangement described in the above paragraphs.

5.3 As stated above the description, both as filed and in the specification, acknowledges this arrangement as known ("in order to avoid these inconveniences the use of some protective elements ... is known"). Not until the oral proceedings before the Board did the respondent first suggest that it might represent an internal state of the art; however, no evidence was put forward to support this allegation. The Board sees no compelling reason to depart from what the description acknowledges as known. It finds confirmation of this view in the fact that, apart from the application to a grill, the central features of the coupling between elastic plug and leg correspond to those of D12 retrieved during search.

5.4 As this known arrangement discloses all the features of claim 1 of first and third auxiliary request, the subject-matter of claim 1 in either version lacks novelty.

6. *Auxiliary request 6*

6.1 Article 123(2) EPC

Claim 1 incorporates into as filed claim 1 the features of as filed dependent claims 2 and 6 (dependent on claim 2) and which therefore form the basis for these

amendments. Furthermore, the claim is now directed at a "grill of home appliances including a protective device" rather than at the protective device. This amendment resolves the ambiguity noted in section 4.1 above.

The Board is in no doubt how the skilled person, who is intent on making technical sense of the description and drawings as filed with a view to carrying out the claimed invention (the main purpose of the description and drawing), understands them. He reads these as relating to an improved way of attaching a protective element to support legs, which are themselves part of a grill, see for example, the opening paragraph (page 2), last sentence, and which prevent wear and tear caused by the grill unit itself, see page 2, second paragraph. Grills incontrovertibly form the sole area of application of the invention. The skilled person, in carrying out the invention, will arrive at nothing other than a grill with support legs and protective elements attached to their ends. The grill itself thus also forms part of the original disclosure.

This is not in contradiction to the finding above that the wording of claim 1 is ambiguous when considering the scope of protection. The different purposes of claims, on one hand, and description and drawings, on the other, mean that they are read differently. Description and drawings are read to provide technical instructions on how to realize an invention (to enable it); as many an instruction manual shows it may be full of inaccuracies and contradictions and yet, as a whole, still convey a clear technical teaching. Claims on the other hand are intended to create legal certainty as

regards what is protected, and are thus much more susceptible to textual imprecision.

The Board finds that the amendments to claim 1 do not infringe Article 123(2) EPC.

6.2 Article 123(3) EPC

The Board is also not able to see any extension in scope in the shift from the protection device to the combination of grill and protection device. The features of the grill add detail and thus limit the scope of protection rather than extend it.

This will be clear from a consideration of the purpose of Article 123(3) EPC to provide legal certainty. An amendment to a patent should not have the consequence that an activity that previously did not infringe the patent, after the amendment does do so, see e.g. T 59/87 (OJ EPO 1988, 347) reasons 2. The amendment clearly reduces the effect of the patent, which is thus more limited rather than extended.

6.3 Article 84 EPC

In accordance with established jurisprudence Article 102(3) EPC allows objections under Article 84 EPC to be raised only insofar a lack of clarity arises from the amendments themselves, see e.g. CLBA, VII.C.6.2, and the decisions cited therein.

Apart from the amendment to the opening lines of claim 1 the wording remains unchanged with respect to granted claims 1, 2 and 6. The textual lack of clarity

noted by the Appellant resides in this unchanged part of the claim, and was thus already present in the claims as granted. That the relevant features might not represent valid limitations in one reading of the claim is of no import. This is by no means the only possible reading. In the alternative reading, pertaining to the grill with device, the inconsistencies and contradictions now objected to would come into play. This lack of clarity is thus not a consequence of the amendment itself (which removes the ambiguity). For this reason it must be excluded when examining the amended claims for compliance with the EPC under Article 102(3) EPC.

6.4 Claim interpretation

Claim 1 now states that the protective elements consist of "solid plugs ... with at least one through hole". This is technically meaningful only if *solid* is understood in its sense "of strong, firm or substantial nature or quality; not slight or flimsy" (OED) and *hole* in its sense as "perforation; an aperture passing through anything" (OED). The plug is then substantial in shape and mass and has a perforation or hole set in the surrounding mass; this is exemplified by the hole 3 set in the substantially solid cubic plug of figure 8.

Claim 1 now also identifies the anchoring means as a "bottom prolongation or branch (13) originating as a result of the window (9) open on one side". Reading the terms "prolongation" and "branch" as synonyms denoting something elongate with a free end, the Board understands this feature as meaning that the free-ended branch is formed as a result of the window being "open

on one side" at the bottom of the leg. This is best understood in the light of the embodiment of figure 6. There a right-hand portion of the part of the leg framing the window 9 is missing, so that the window is "open on one side" and the bottom portion 13 of the frame is left hanging, as it were, with a free end forming the branch or prolongation.

The claim requires this branch to be located within the through-hole of "the elastic plug" - which can only meaningfully refer to the solid plugs mentioned earlier - and the two are coupled thereby.

In summary, the added features can be reasonably understood, drawing upon description and drawings, as defining a configuration in which the plug sits on a free-ended elongation extending through a hole in the plug's main mass and formed at the bottom part of the leg framing the window by leaving a side part of the frame out.

6.5 Novelty

6.5.1 None of the cited prior art discloses the configuration described above, which is therefore novel. Only the most pertinent possible prior art cited - D12 and the alleged "Merloni" prior use - are considered by the Board. Turning first to D12, cup 160 has no through hole, while the side walls at the end leg frame the opening (receiving the top projection of the cup) on all sides. For this reason alone D12 is not prejudicial to novelty.

6.5.2 Leaving aside the question as to whether this prior use has been proven, the "Merloni" grill with support arrangement as shown in the cross-sections marked "Particolare X" and involving elastic elements ("gomini") also fails to show these features. The bottom segment (with rectangular cross section) has no free end and completes the frame, which thereby surrounds the rectangular window above it on all sides. Moreover, the lower lip of the plug is not contiguous with the plug main body, and the recess formed by the lip and the main body is thus not a through-hole in the plug main mass. Last but not least, the "gomini" are not located on end-sections of support legs of the grill formed as projections of the grill frame as required by the claim. The frame, as shown in the main drawing (as rectangle with convex or concave sides), has no such projections or legs but itself forms the support of the grill. The "Merloni" grill, even if proven to be prior art, would not be prejudicial to novelty.

6.6 *Inventive Step*

6.6.1 If proven the "Merloni" prior use would represent the closest prior art, as it concerns a grill with elastic plug type protective arrangement coupled to its frame. The differences discussed above would than be seen to provide an alternative protective support. The objective technical problem could be formulated accordingly.

6.6.2 Whereas in this case the Board might consider the provision of support legs as routine or obvious from general knowledge, it finds differently for the

particular way in which the plug and end of the legs are adapted to cooperate. It is not known from any of the available prior art, not least from D12 as demonstrated above. Nor does the Board regard the specific adaptations as being generally known. It concludes that the subject-matter of claim 1 also involves an inventive step over the prior art.

6.7 The description having been brought into conformity with the claims as amended, the patent and the invention to which it relates now meets the requirements of the EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance with order to maintain the patent as amended in the following version:

Description: Columns 1 to 4 as filed during the oral proceedings of 29 January 2009

Claims: No.: 1,2 according to auxiliary request 6 filed during the oral proceedings of 29 January 2009

Figures: No.: 1 to 9 of the patent specification

The Registrar

The Chairman

G. Magouliotis

M. Ceyte