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**Datasheet for the decision
of 11 August 2016**

Case Number: T 0088/12 - 3.2.06

Application Number: 06757485.5

Publication Number: 1899522

IPC: D06F39/00, D06F39/08, D06F39/12

Language of the proceedings: EN

Title of invention:
Drying machine

Patent Proprietor:
LG Electronics Inc.

Opponent:
Electrolux Home Products Corporation N.V.

Headword:

Relevant legal provisions:
EPC Art. 123(2), 111(1)
RPBA Art. 13(1), 13(3)

Keyword:

Amendments - added subject-matter (yes)
Late-filed auxiliary requests - admitted (no) - amendments
after arrangement of oral proceedings - requests clearly
allowable (no) - adjournment of oral proceedings would have
been required (yes)

Decisions cited:

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

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Case Number: T 0088/12 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 11 August 2016

Appellant: Electrolux Home Products Corporation N.V.
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Decision under appeal: **Interlocutory decision of the Opposition**
Division of the European Patent Office posted on
8 November 2011 concerning maintenance of the
European Patent No. 1899522 in amended form.

Composition of the Board:

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

Summary of Facts and Submissions

- I. The appellant (opponent) filed an appeal against the interlocutory decision of the opposition division, posted 8 November 2011, in which the opposition division found that the European patent No. 1 899 522, in an amended form, met the requirements of the EPC.
- II. Facts from the opposition procedure relevant for the present appeal may be summarised as follows:
- (a) Claim 1 of the granted patent reads:
- "A laundry machine comprising:
a laundry machine body (100);
a drum (300) mounted in the laundry machine body to receive laundry;
a steam supply unit (400) mounted in the laundry machine body (100) to generate steam, and
a primary steam supply part (610) for supplying the steam into the drum (300);
characterised in that the steam supply unit (400) is constructed to receive water manually supplied by a user through a water inlet port (141) exposable to an outside of the laundry machine body."
- (b) In reply to the notice of opposition the proprietor submitted as its main request a set of amended claims. Claim 1 thereof and of all subsequently filed requests in the opposition procedure was directed to "[a] drying machine comprising:...".
- (c) Amended claim 1 found allowable by the opposition division reads:

"A drying machine comprising:
a machine body (100);
a drum (300) mounted in the machine body (100) to receive laundry, the drum (300) being rotatable around a horizontal axis;
a steam supply unit (400) including a case (410) for storing water for steam generation therein and a heater (420) for heating the water for steam generation, the case (410) being located at a lower portion of the machine body (100) to generate steam, and
a primary steam supply part (610) for supplying the steam into the drum (300);
wherein the case (410) is constructed to receive water manually supplied by a user through a water inlet port (141) exposable to an outside of the machine body (100) through a cover part (140), and wherein the water inlet port (141) communicates with an upper surface or an upper front part of the machine body (100)."

- (d) In the reasons for its interlocutory decision, the opposition division found *inter alia* the objections under Article 123(2) EPC raised by the opponent unconvincing.

These objections, considered in the context of the proprietor's then pending main request, concerned the change of subject-matter of claim 1 to a "drying machine" and the introduction of the feature "being rotatable around a horizontal axis" in relation to the application as filed (see item 2.3.1, first two paragraphs, and item 2.3.3 of the decision) under Article 123(2) EPC.

Also, on the issue of inventive step, the opposition division considered some of the prior art referred to by the opponent as being incompatible with the closest prior art (see 5th paragraph on page 9 of the decision).

- III. In the appeal grounds the appellant maintained *inter alia* its objections under Article 123(2) EPC.
- IV. The respondent (patent proprietor) replied with its letter of 23 July 2012 and submitted auxiliary requests 2, 2a, 3, 3a, 4 to 10.
- V. The parties were summoned to oral proceedings before the Board. In a communication sent in preparation for the oral proceedings, the Board informed the parties of its preliminary opinion on the case. In regard to the main request, the Board expressed doubts whether the requirements of Article 123 EPC were met.
- VI. With its letter dated 11 July 2016, the respondent submitted auxiliary requests 11 to 26.
- VII. Oral proceedings before the Board were held on 11 August 2016, in the course of which the respondent submitted an amended auxiliary request 1 to replace auxiliary request 1 submitted with the letter dated 23 July 2012, as well as a new auxiliary request 2.
- VIII. The appellant requested that the decision under appeal be set aside and the patent be revoked. Furthermore, the appellant requested that the case be remitted to the department of first instance for further prosecution, in case one of the auxiliary requests be examined for novelty and/or inventive step.

IX. The respondent (patent proprietor) requested that the appeal be dismissed (main request), or that the patent be maintained in amended form according to one of the auxiliary requests 1 and 2 filed during the oral proceedings of 11 August 2016, or according to one of the auxiliary requests 2, 2a, 3, 3a, 4 to 10 submitted with the letter dated 23 July 2012, or according to one of the auxiliary requests 11 to 26 filed with the letter dated 11 July 2016. Furthermore, the patent proprietor requested that the case be remitted to the department of first instance for further prosecution.

X. Claim 1 of auxiliary request 1 submitted during the oral proceedings before the Board reads:

"A laundry machine comprising:

a machine body (100);

a drum (300) mounted in the machine body (100) to receive laundry;

a steam supply unit (400) mounted in the machine body (100) to generate steam, the steam supply unit (400) including a case (410) for storing water for steam generation therein and a heater (420) for heating the water for steam generation, the case (410) being located at a lower position than the middle part of the machine body in the machine body (100);

a primary steam supply part (610) for supplying the steam into the drum (300); and

a water inlet pipe (500) having one end communicating with a water inlet port (141) and the other end communicating with the case (410), for supplying water for steam generation to the case (410) from the water inlet port (141);

wherein the case (410) is constructed to receive water manually supplied by a user through the water inlet

port (141) exposed to an outside of the machine body (100), and wherein the water inlet port (141) communicates with an upper front part of the machine body (100)."

XI. Claim 1 of auxiliary request 2 submitted during the oral proceedings before the Board reads:

"A washing machine comprising:
a machine body (100) constituting an external appearance of the laundry machine and having a laundry inlet hole (110) formed at a front part thereof;
a drum (300) mounted in the machine body (100) to receive laundry, the drum (300) being disposed such that an open side of the drum (300) is directed to the laundry inlet hole (110) of the machine body (100);
a steam supply unit (400) mounted in the machine body (100) to generate steam, the steam supply unit (400) including a case (410) for storing water for steam generation therein and a heater (420) for heating the water for steam generation, the case (410) being located at a lower position than the middle part of the machine body in the machine body (100);
a primary steam supply part (610) for supplying the steam into the drum (300); and
a water inlet pipe (500) having one end communicating with a water inlet port (141) and the other end communicating with the case (410), for supplying water for steam generation to the case (410) from the water inlet port (141);
wherein the case (410) is constructed to receive water manually supplied by a user through the water inlet port (141) exposable to an outside of the machine body (100) through a cover part (140),
wherein the water inlet port (141) communicates with an upper surface of the machine body (100)."

XII. The subject-matter of claim 1 of auxiliary requests 2, 2a, 3, 3a, 4 to 10, submitted with the letter dated 23 July 2016, and of auxiliary requests 11 to 17 and 25, submitted with the letter dated 11 July 2016, is directed to "[a] drying machine" comprising *inter alia* the feature

"the drum (300) being rotatable around a horizontal axis".

The subject-matter of claim 1 of auxiliary requests 18 to 24 and 26, submitted with the letter dated 11 July 2016, is directed to "[a] laundry machine" and comprises *inter alia* also the above feature defining the horizontal axis.

XIII. The granted patent, as well as a number of the sets of amended claims submitted in the present appeal, also contains an independent method claim. Since the outcome of the present appeal does not depend on the subject-matter of this claim, it has not been recited here.

XIV. In the following, all references to the content of the application relate to the publication WO-A-2006/129916 of the corresponding international application underlying the patent in suit.

XV. The arguments of the appellant may be summarised as follows:

(a) Main request - Article 123 EPC

The change of the subject-matter of granted claim 1 from a general laundry machine to a general drying machine with the features of present claim 1 had no

basis in the application as originally filed.

The references in the introductory part of the description to drying machines were general, they related to the background art and they were not unambiguously linked to the invention. A general drying function of a laundry machine using steam was nowhere disclosed in the application as filed. Rather the general teaching of the patent application related to the use of steam for the purpose of washing, as shown for example in paragraphs 1, 54 or 158.

In the context of the invention underlying the patent, a drying machine was only mentioned in paragraph 73 as an alternative to the first embodiment of the invention, which was a washing machine, without however indicating which features it comprised.

The possibility of omitting an additional water supply in such a laundry machine was not sufficient to support an unambiguous disclosure of a general drying machine with the features of claim 1, since all embodiments related to washing machines which could comprise a principal water supply.

The machine of paragraph 73 anyway concerned a specific embodiment comprising other features which had been unduly omitted when amending claim 1.

From the disclosure of front access machines in the figures, it could not be concluded that the drum's rotation axis necessarily had to be horizontal. The prior art comprised machines with drums rotating around a slightly inclined, hence non-horizontal

axis, which would be considered by the skilled person as comprised in the class of "drum type washing machines" mentioned in paragraph 2. Whilst the skilled person would have understood that the embodiment of paragraph 73 could indeed have a horizontal axis, this was however not an unambiguous disclosure that it necessarily had to have such orientation.

A combination of a cover part with a water inlet port communicating with an upper front part of the machine body was nowhere disclosed.

The replacement of the wording "mounted in" of granted claim 1 by "being located at" in the amended claim broadened the scope of protection.

(b) Auxiliary request 1

This request should not be admitted because it was filed too late. All objections raised against the main request had already been presented during the opposition procedure.

By changing the subject-matter of claim 1 from a drying machine to a laundry machine, the whole case had completely changed in a way for which the appellant could not adequately prepare. As is apparent from the decision of the opposition division, page 9, the limitation of the claimed subject-matter from a general laundry machine to a drying machine excluded some of the prior art relied upon in the objections on inventive step. This prior art would now have to be unexpectedly considered again.

The amendments based on the embodiment of Figure 11 violated Article 123(2) EPC. The inlet pipe shown there was exposed to the outside on the upper front, see par. 170. Contrary to claim 1, it did not communicate with a separate water inlet port.

Moreover, the amendments of claim 1 were not in conformity with the principles set out in G 1/99. Other options of amendment were available, which would have lead to a more limited claim, if instead of deleting the combination of features "upper surface" and "cover part" only the feature "upper front part" would have been deleted.

- (c) Auxiliary request 2 submitted during the oral proceedings

The request should not be admitted because it was not prima facie allowable. The claim was not a pure combination of claims. The combination of the features of dependent claims 12 and 13 was not immediately disclosed by these claims, since claim 13 was not dependent on claim 12. According to the claim, the steam supply unit and the case could be at different positions, whereas according to the embodiment disclosed in paragraph 73, they would be at the same position. Similarly a heater used for steam generation employed in the embodiment was not defined in the claim.

Also, these amendments were contrary to the intention of G 1/99, because the change from a "drying machine" to a "washing machine" constituted a shift of subject-matter.

- (d) Other auxiliary requests submitted in writing

During the oral proceedings before the Board, the appellant did not present any additional arguments on these requests.

In writing, the appellant submitted that auxiliary requests 2, 2a, 3, 3a and 4 to 10 should be rejected because they did not satisfy various requirements of the EPC (see letter of 11 July 2016, page 1).

XVI. The arguments of the respondent may be summarised as follows:

(a) Main request - Article 123 EPC

The content of the application as a whole should be considered through the eyes of a skilled person.

Claim 1 was based on a combination of original claims 1, 6, 10 and 13, in which *inter alia* the limitations to a drying machine and the feature defining the horizontal drum axis had been taken from the description.

The skilled person knew that laundry machines included washing machines and drying machines, as was clear from paragraph 3. The original and granted claims covered both types of machines.

The reference in paragraph 1 to the use of steam did not limit the laundry machines particularly to washing machines, but instead it covered the use of steam in laundry machines for sterilising or the like.

Having regard to the particular problems with prior art machines and to the objectives and advantages to be achieved by the invention, as disclosed in particular in paragraphs 17, 23 to 25, 26 to 27 as well as 51 and 52, the skilled person would have recognised that these were directed especially to drying machines which could be installed at an area where no external water supply facility was provided.

Paragraph 73 disclosed a laundry machine according to a first embodiment being a drum type washing machine or a drying machine, whereby in the case of a drying machine this could comprise or not comprise a tub. This drying machine comprised the same features as the washing machine, in as far as they contributed to solving the specific problem identified for drying machines. Thus, it included the features of original claim 1, since this claim disclosed the invention in its broadest sense which thus covered washing machines and drying machines.

A drum rotatable around a horizontal axis was derivable from all figures and from the definition of the drum type laundry machine in paragraphs 2 and 4, 6 and 31, read in connection with the disclosure of the embodiments of a drum type laundry machine in paragraph 57, 58, 73, 74 and 79.

The skilled person would also have understood that a cover part was intended to be used wherever the inlet port opened to the front part of the machine, as was apparent from paragraphs 169 to 172. The embodiment of Figure 11 concerned only a further modification of the first embodiment, in which all features were present, including the cover part,

but the position of the inlet port remained unchanged.

No broadening of the scope of protection had occurred by the replacement of the wording "mounted in" by "located at a lower portion of the machine body". The amended feature was narrower than the original wording and anyway implied that the case of the steam supply unit was mounted inside the machine body.

(b) Auxiliary request 1

Claim 1 was based on a combination of original claims 1, 6, 10 and 12 and a feature taken from the embodiment of figure 11 in combination with paragraph 170.

The request should be admitted because the respondent had been taken by surprise by the severity of the Board's opinion for the first time on the objections under Article 123 EPC. During the opposition proceedings, the opposition division had agreed with the proprietor and never expressed any doubts in regard to the allowability of the change of the subject-matter from a laundry to a drying machine or as concerned the addition of the feature "rotatable around a horizontal axis".

Discussions on inventive step before the opposition division never took place. It was thus not clear whether the reasons for not considering some of the prior art were only based on the mentioned differences. There could be other reasons why some documents were not compatible; for example, in one of the documents, the type of steam unit was

different. Remittal should be allowed because these issues had never been discussed.

Concerning the requirement of Article 123(2) EPC, the skilled person would be aware that the "inlet port" in the embodiment of Figure 11 was constituted by the inlet portion or opening of the inlet pipe. Since claim 1 defined the invention and Figure 11 disclosed an embodiment of the invention, see paragraph 170, it was covered by and was thus consistent with the original claim.

The amendments carried out did not violate the principles of G 1/99. In particular, claim 1 found allowable by the opposition division included an alternative and could thus also be understood as constituting two alternative independent claims. The proprietor could always limit the claimed scope of protection by just dropping part of its subject-matter, here by cancelling one of the two independent claims. The remaining second independent claim could then be amended by deleting the inadmissibly added feature in line with G 1/99.

(c) Auxiliary request 2 submitted during the oral proceedings

Claim 1 was limited to a washing machine, in line with paragraphs 73 and 74, and relied on a combination of original claims 1, 6, 10, 12 and 13.

An objection of lack of convergence of the requests should not be accepted, because in order to overcome the objections under Article 123(2) EPC while at the same time observing the principles of G 1/99, meant that some features, like the water

inlet port and, linked thereto, the features "cover part" and the "upper surface", could not be omitted. Consequently the subject-matter had to be directed to a washing machine.

The combination of the features of the original claims was further supported by the disclosure in the general part of the description and the summary of the invention. All features combined in claim 1 had been disclosed in these parts of the description as preferred features and were also embodied in the preferred embodiments, such as in that of paragraph 73.

Not admitting the request would be extremely unfair for the respondent-proprietor, considering that the opposition division was responsible for the error which the proprietor would then not be allowed to correct.

(d) Other auxiliary requests submitted in writing

During the oral proceedings the respondent chose not to provide any additional comment on these requests.

In writing, the respondent had submitted similar arguments in regard to the admittance of the auxiliary requests filed in writing as with respect to auxiliary requests 1 and 2 filed during the oral proceedings, based essentially on the severe doubts on compliance with Article 123 EPC mentioned for the first time by the Board (see letter of 11 July 2016, bottom of page 4).

Reasons for the Decision

Main request - Article 123 EPC

1. Claim 1 found allowable by the opposition division contains subject-matter which extends beyond the content of the application as originally filed, contrary to the requirement of Article 123(2) EPC.
2. The respondent stated that amended claim 1 relied on a combination of original claims 1, 6, 10 and 13 to which *inter alia* the features "drying machine" and "[drum] being rotatable around a horizontal axis" had been added, using the description as a basis for this addition.
3. The Board notes that with respect to the features said to be based on the original claims the resulting wording is not derivable from a simple combination of the claims. It rather comprises a number of other amendments compared to the wording of the original claims.
 - 3.1 For the purpose of the present decision, it is sufficient to consider whether or not the application as filed provides a basis for a "drying machine" with the combination of features of claim 1 including *inter alia* a drum being rotatable around a horizontal axis. As set out below, this is not the case.
 - 3.2 The other amended features, such as, for example, the arguably unallowable combination of the equally added "cover part" feature with the two different positions at which the water inlet port communicates with the

outside of the machine body, are structurally and functionally unrelated to the change of subject-matter from a laundry to a drying machine and to the addition of the "horizontal axis" feature. These amendments thus do not change the Board's conclusion on the above-identified issue. The respondent also did not argue that the other amendments in the claim had any impact on the allowability of the amendments mentioned in item 3.1.

No reasons are therefore given on the allowability of other amendments in respect of Article 123(2) EPC.

4. Although original and granted claim 1 cover *inter alia* drying machines and washing machines, neither discloses by itself specifically a drying machine. It is a generally established principle that a generic term or embodiment (in this case "a laundry machine") does not disclose a specific term or embodiment (in this case "a drying machine") unless the application teaches otherwise. The Board has no reason to deviate from this principle established in the case law of the Boards of Appeal.
5. The respondent argued essentially that the skilled person would have derived the subject-matter of claim 1 directly and unambiguously from the complete teaching of the application as filed, when taking into account the objectives to be achieved by the invention.

The Board does not accept this argument for the following reasons.

6. From the general part of the description, the skilled person is taught that the patent relates to laundry machines which use steam for washing, see paragraph 1.

That the purpose of using the steam could encompass also sterilisation by steam in a drying machine, as argued by the respondent, is not found or otherwise supported in the application as filed.

Drying machines, in general, are mentioned in paragraph 3 as an alternative to laundry machines capable of washing, without however any particular reference to the invention being explained in the application or to the features such machines were supposed to have in the context of such invention.

Although the technical problems to be solved in the application are drafted so as to relate to general laundry machines, the problems identified with the prior art machines primarily relate to drum type washing machines equipped with a steam supply unit. They address costs, manufacturing complexity and fire hazard, all linked *inter alia* to an additional valve needed to feed water into the steam supply unit, as well as the washing efficiency of known steam washing machines, linked to the location at which steam was injected into the drum, see paragraphs 17 to 22, 26, 27, 51, 53, 54. From these problems and the respective advantageous effects, nothing is derivable with respect to drying machines.

7. Paragraphs 23 to 25 relate to drying machines equipped with steam supply units and address particularly their perceived "lowered usefulness" due to the need for being installed at a place where a water supply facility was present, compared to conventional drying machines which only required a power supply facility. A further problem to be solved is thus to provide a

laundry machine in which an additional water supply facility is not necessary, see paragraphs 28 and 52.

8. The Board can accept the respondent's view that the particular problems and advantageous effects mentioned in paragraphs 28 and 52 would be understood by the skilled person to relate to drying machines with steam supply units.

However, as far as the combination features in claim 1 is concerned, paragraphs 23 to 25, 28 and 52 do not disclose such a combination.

9. Similar to the original claims, the general disclosure of the invention ("Technical solution", at paragraphs 30 - 50) makes no mention of a drying machine, nor of a horizontal axis.

This portion does not even address the issue of laundry machines to be installed at places where no water supply facility is present.

10. The description of the preferred embodiments does not mention this particular issue either. To the contrary, all preferred embodiments and their modifications described in detail relate exclusively and consistently to (drum type) washing machines and address the problems identified in the introductory part of the description for this type of machine. The appellant pointed in this respect as an example to paragraphs 54 and 158, where in particular washing efficiency is addressed. The description of the preferred embodiments is nevertheless densely packed with further references to washing machines, washing water, and washing efficiency, see for example paragraphs 76, 78, 80, 103, 158, 167, 173, 175 or 191. The direct and unambiguous

disclosure of the preferred embodiments thus relates essentially to (drum type) washing machines.

11. The only passage in the description of the preferred embodiments cited by the respondent and mentioning a drying machine is indeed paragraph 73.
- 11.1 Paragraph 73 contains a general introduction to the first embodiment of a laundry machine according to the invention, i.e. a drum type washing machine. It lists some of its features, some but not all of which being also defined in original and granted claim 1 and its amended version considered here.
- 11.2 The paragraph finally states that "[i]n the case that the laundry machine is a drying machine, the tub, in which washing water is received, is not necessarily provided for the drying machine".
- 11.3 In the Board's view this statement *per se* does not disclose anything explicit in regard to the features a drying machine should comprise apart from that it might or might not comprise a tub.

Taken in its context in which it addresses an alternative to a laundry machine according to the first preferred embodiment of the invention, its teaching with respect to the features of such alternative embodiment being a drying machine still remains, to say the least, ambiguous. This is so because the immediately preceding disclosure of features of the drum type washing machine as an embodiment of the invention recites features, a tub and a water inlet pipe, which are not defined in claim 1. According to the respondent, claim 1 as filed defined the features which all embodiments of the invention, and hence also

drying machines as part of the class of laundry machines covered by the claim, had to have in common. The Board notes, that contrary to the tub, which is not defined in claim 1 and is presented explicitly in the cited paragraph as being optional for drying machines, nothing similar in this respect is stated in regard to the water inlet pipe in paragraph 73. The Board concludes, that the skilled person is already left in doubt whether a drying machine as mentioned in paragraph 73 does or does not comprise a water inlet pipe.

12. The question concerning which features of such a drying machine could be considered as being directly and unambiguously derivable from the application as filed is also not clarified, even when taking the specific problem identified in paragraphs 23 to 25 for drying machines into account. It is nevertheless noted that the statement in paragraph 73 contains no link to this anyway.
13. The Board has no doubt that in the light of the cited problem and on the basis of paragraph 73, original claim 1 and the details of the disclosed preferred embodiment of a drum type washing machine the skilled person was able and could have conceived without difficulty a drying machine incorporating the combination of features as defined by claim 1. This is however not the issue to be dealt with when regarding whether the requirement of Article 123(2) EPC is met or not. In this regard, only subject-matter which is directly and unambiguously derivable from the application is to be considered and not subject-matter which the skilled person might arrive at upon further reflection, even if this were only based on the skilled person's common general knowledge.

14. Moreover, if for the sake of argument it were admitted - which the Board nevertheless does not accept - that the skilled person would have understood the cited sentence in paragraph 73 as referring specifically to drying machines identical in their major components required for the drying function to those disclosed for the drum type washing machine, concluding thus that such drying machine comprised the features explicitly defined in original claim 1, whereas for example the dampers shown in all figures of the preferred drum type washing machine embodiments or the previously mentioned water inlet pipe, could be dispensed with in a drying machine, a drying machine with a drum rotatable around a horizontal axis could still not be directly and unambiguously derived from the application as filed.
- 14.1 Firstly because the orientation of the drum's axis is not linked to the specific problem for drying machines. The skilled person would thus have had no reason to select this particular feature, if it were disclosed (see below) in combination with the other features to solve such problem.
- 14.2 Secondly, and as indicated, the feature "horizontal axis" *per se* is not directly and unambiguously derivable from the application as filed. As pointed out by the appellant, the skilled person knew as part of common general knowledge that a front access laundry machine could well have a drum axis which was slightly inclined. The respondent did not contest this argument. The Board further accepts the appellant's argument that the precise angle of the drum's axis of rotation cannot be derived from the schematically drawn figures of the application referred to by the respondent as a basis for this feature. The Board thus concludes that the

schematic drawings in Figures 1 to 4, 10 to 16 and similarly the description of a front opening in paragraphs 74 and 79 do not allow to directly and unambiguously derive a drum rotatable around a horizontal axis.

- 14.3 The respondent had in this respect also pointed to paragraph 2.

This paragraph contains the only reference in the application of a horizontal drum axis. It mentions, in the section concerning background art, as an example of a general laundry machines with such a horizontal axis a "drum type washing machine". A washing machine is indeed the type of laundry machine according to the preferred embodiments of the invention. The Board finds however that the general classification of paragraph 2 would not have been understood by the skilled person to constitute a definition of what should fall under a "drum type washing machine". The Board finds that this paragraph would in particular not be understood by the skilled person to exclude embodiments with slightly inclined axes from falling in the class of "drum type washing machine", as referred to by the appellant. Furthermore, the statement does not relate unambiguously to drying machines, but merely to laundry machines in general.

15. The Board thus concludes that the skilled person would not directly and unambiguously derive a drying machine with the features defined by claim 1 from the description and the figures taken as whole. The subject-matter of the claim thus extends beyond the content of the application as originally filed, contrary to Article 123(2) EPC.

16. As a consequence, the patent cannot be maintained with the claims found allowable by the opposition division.

Auxiliary request 1 filed during the oral proceedings

17. This request was filed after the time limit for filing the response to the appeal grounds of the appellant (Article 12(1) and (2) of the Rules of Procedure of the Boards of Appeal, RPBA) and therefore constitutes an amendment to the respondent's case.

18. According to Article 13(1) RPBA, any amendment to a party's case may be admitted and considered at the Board's discretion. The discretion shall be exercised in view of *inter alia* the complexity of the new subject-matter submitted, the current state of the proceedings and the need for procedural economy.

In order to be in line with the requirement of procedural economy, amendments should be *prima facie* allowable in the sense that they at least overcome the objections raised against previous requests without giving rise to any new ones.

19. In addition, an amendment sought to be made after oral proceedings have been arranged shall not be admitted if it raises issues which the Board and the other party cannot reasonably be expected to deal with without adjournment of the oral proceedings, see Article 13(3) RPBA.

20. Compared to the main request, claim 1 has been amended *inter alia* by

(a) substituting the expression "drying machine" with "laundry machine",

- (b) deleting the feature "[drum] being rotatable around a horizontal axis",
- (c) amending the last feature added to claim 1 during the opposition procedure by the deletion (strike-through by the Board)

"wherein the water inlet port (141) communicates with ~~an upper surface or~~ an upper front part of the machine body (100)".

- 21. The amendments are not *prima facie* allowable in that the requirement of Article 123(2) EPC is still not clearly met since new objections arise.
- 21.1 The feature resulting from the amendment under point 20.(c) above is allegedly based on the embodiment of Figure 11, described in paragraphs 169 to 172. The Figure however does not show a "water inlet port 141". Such "water inlet port 141" is disclosed in all other Figures 3, 4, 10, 12, 13, 16, as a separate feature provided at the end of water inlet pipe 500 and communicating with the upper surface of the machine body. In the description of Figure 11, a water inlet port 141 is notably not mentioned either. Paragraph 170 on the contrary states that "the water inlet pipe 500 communicates with the upper front part of the machine body 100, and therefore, the water inlet pipe 500 is exposed to the outside".
- 21.2 There is apparently no support in the application as filed for the respondent's contention that the skilled person would have understood the feature "port" as being nothing more than the end opening the pipe. The application appears to disclose port and pipe as separate components.

- 21.3 The last feature of claim 1 is thus at least *prima facie* not directly and unambiguously derivable from the application as filed.
22. Furthermore, by reverting the subject-matter of claim 1 to a laundry machine and by deleting the reference to the horizontal axis, the subject-matter of the appeal would have entirely changed compared to the legal and factual framework set by the reasons given in the impugned decision and by the appeal grounds.
- 22.1 As also mentioned by the appellant, for the examination of inventive step the opposition division considered some documents of the prior art as being incompatible with the identified closest prior art, relating to a drying machine having a drum rotatable around a horizontal axis, for the explicit reason that they related to washing machines with a drum rotatable around a vertical axis.
- 22.2 Moreover, the change during the opposition procedure from the subject-matter of the granted claims, directed to a general "laundry machine", to a "drying machine" in combination with the introduction of the horizontal rotation axis, had been made by the respondent-proprietor already in reply to the opposition notice. There was no indication from the opposition division indicating that it should do so. The respondent-proprietor also did not maintain any request directed to the granted subject-matter, or other laundry machine claims. Therefore a discussion on novelty and inventive step concerning general laundry machines never took place before the opposition division, as also uncontested by the respondent.

- 22.3 The Board finds that as a consequence of the change in the claim's subject-matter the division's reasoning would then, for obvious reasons, no longer apply. The examination of inventive step would therefore have to be started from the beginning again.
- 22.4 Discussion of auxiliary request 1 would thus have required a completely new consideration of the prior art already on file, possibly considering different documents as appropriate starting points for the problem-solution approach, considering the previously judged "incompatible prior art" anew and, possibly, due to the further amendments in claim 1, even additional prior art. This clearly would have been too complex to be done without adjournment of the oral proceedings. As set out, in Article 13(3) RPBA, such amendments shall not be admitted.
23. Even in view of the severe consequence the respondent-proprietor suffers by the non-admittance of its auxiliary request(s), and even in view of the fact that the outcome of the case to a certain extent results from the judgment made by the opposition division when examining the amendments submitted to it for compliance with Article 123 EPC, which the Board has overturned, the Board cannot come to a different conclusion on the question of admittance.

In particular, it should be noted that objections against the aforementioned crucial features had been raised already during the opposition procedure by the appellant-opponent and had been maintained in the appeal grounds. The fact that the opposition division did not see any problem with these amendments and did not follow all the opponent's arguments in its decision (see 2.3.3 of the "Grounds of decision") is no reason

for the respondent to rely on the the Board reaching the same conclusions. To do so would be to negate the purpose of the appeal procedure.

In its communication the Board had stated that, preliminarily, it had serious doubts whether the subject-matter of claim 1 was directly and unambiguously derivable from the application as filed. The Board addressed in detail the question of a disclosure in the application as filed of a general drying machine in combination with the other features of claim 1 of the main request (point 1.1.1 of its communication) and also in regard to further features objected to by the appellant, such as the added horizontal axis (last paragraph of point 1.1.2, *ibid.*). That the respondent became aware of the severity of the Board's doubts only at the oral proceedings can thus also not be accepted.

24. Consequently, auxiliary request 1 was not admitted into the proceedings (Articles 13(1) and (3) RPBA).

Auxiliary request 2 filed during the oral proceedings

25. Claim 1 of this request is now directed to a washing machine. According to the respondent, its subject-matter results from original claims 1, 6, 10, 12 and 13 in combination with further features taken from the first preferred embodiment disclosed in paragraphs 73 and 74.
26. However, the amendments to claim 1 are *prima facie* not allowable. As argued by the appellant, the subject-matter of claim 1 does, for example, not result from a pure combination of the original (or granted) claims. Dependent original claim 13, defining "a cover part

(140) to allow selective communication between the water inlet port (141) and the outside" indeed comprise no reference to claim 12. Furthermore, its wording is already at first sight different compared to the wording of the corresponding feature in claim 1, "wherein the case (410) is constructed to receive water manually supplied by a user through the water inlet port (141) exposable to an outside of the machine body (100) through a cover part (140)". Although, as a basis for this, the respondent pointed to the general part of the description, where the invention was described in claim-like structure in more general terms, it is not immediately apparent from this part either, i.e. without further substantive investigation, that this amendment would be clearly allowable.

27. Moreover, the subject-matter of this auxiliary request 1 also raises a fresh case which the Board and the other party cannot reasonably be expected to deal with without adjournment of the oral proceedings. The change of the subject-matter from the initially claimed "drying machine" to a "washing machine" raises similar issues as already noted above in relation to a change to a laundry machine (see point 22 above).
28. It is noteworthy here to mention that none of the, in total, 26 auxiliary requests submitted in writing by the respondent in reply to the appeal grounds and in reply to the Board's communication was directed to a washing machine, so that this change of subject-matter could not have been expected let alone prepared for by the appellant and the Board.
29. The Board thus decided not to admit auxiliary request 1 into the proceedings (Article 13(1) and (3) RPBA).

Auxiliary requests 2, 2a, 3, 3a and 4 to 26 submitted in writing before the oral proceedings

30. Auxiliary requests which were numbered 2, 2a, 3, 3a and 4 to 10, and which were not renumbered despite a new auxiliary request 2 being filed, were originally filed in reply to the appeal grounds and would thus normally have to be considered as being part of the appeal procedure. The fact that the respondent requested to have them considered in a different order, i.e. after auxiliary requests 1 and 2 submitted during the oral proceedings however also constitutes an amendment to the respondent's case in the sense of Article 13 RPBA at least in the sense that the chain of requests is altered, which is of procedural significance in the present case, where claims to other devices had been considered.

Auxiliary requests 11 to 26 were anyway filed after the reply to the appeal grounds had been submitted, so that also these requests are subject to the provisions of Article 13 RPBA.

31. The Board decided not to admit any of these requests into the proceedings, because none of them has *prima facie* the potential to overcome the objections made to previous requests.
- 31.1 The subject-matter of claim 1 of auxiliary requests 2, 2a, 3, 3a, 4 to 17 and 25 is directed to a drying machine comprising *inter alia* a drum rotatable around a horizontal axis. For the same reasons as given with respect to the main request the objection of at least Article 123(2) EPC would not be met.

31.2 The subject-matter of claim 1 of auxiliary requests 18 to 24 and 26 is directed to a laundry machine, which would raise the same issues and lead to the same conclusions as drawn in regard to auxiliary request 1 in view of the change of case arising from this amendment.

31.3 It is not immediately apparent and it has also not been argued so by the respondent, that the further amendments carried out in claim 1 of any of these auxiliary requests had the potential to change the above conclusions. Indeed the respondent elected not to make any defence of these further requests.

Requests for remittal

32. According to Article 111(1) EPC, second sentence, the Board of Appeal may either exercise any power within the competence of the department which was responsible for the decision appealed or remit the case to that department for further prosecution.

33. As a premise to a decision by the Board to remit a case to the department of first instance, an admissible request on the basis of which the procedure could be continued would have been required. In the absence of any such request, as in the present case, the Board decided not to remit the case under the provision of Article 111(1) EPC.

34. The respondent had not argued that the procedure before the opposition division was tainted by a fundamental deficiency and the Board can also not find any such deficiency. Remittal on the basis of Article 11 of the Rules of Procedure of the Boards of Appeal (RPBA),

although not explicitly requested, could therefore also not be granted.

35. Absent any request which meets the requirements of the EPC, the patent has to be revoked according to Article 101(3)(b) EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



M. H. A. Patin

M. Harrison

Decision electronically authenticated