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Datasheet for the decision of 2 July 2018

Case Number: T 0348/14 - 3.2.04

Application Number: 01941438.2

Publication Number: 1282376

IPC: A47L15/50

Language of the proceedings: EN

Title of invention:
DISHWASHER BASKET WITH VERTICALLY ADJUSTABLE RACK

Patent Proprietor:
Arçelik A.S.

Opponent:
BSH Bosch und Siemens Hausgeräte GmbH

Headword:

Relevant legal provisions:
EPC Art. 123(2), 54, 111(1)
RPBA Art. 13(3)

Keyword:
Amendments - added subject-matter - main request, auxiliary request 1 (yes)
Late-filed auxiliary requests - request clearly allowable (yes)
Novelty - auxiliary requests (yes)
Remittal to the department of first instance - (yes)

Decisions cited:

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

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Case Number: T 0348/14 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 2 July 2018

Appellant: (Patent Proprietor)	Arçelik A.S. E5 Ankara Asfalti Üzeri, Tuzla 81719 Istanbul (TR)
Representative:	Grünecker Patent- und Rechtsanwälte PartG mbB Leopoldstraße 4 80802 München (DE)
Respondent: (Opponent)	BSH Bosch und Siemens Hausgeräte GmbH Carl-Wery-Str. 34 81739 München (DE)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 29 November 2013 revoking European patent No. 1282376 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman	A. de Vries
Members:	G. Martin Gonzalez
	C. Heath

Summary of Facts and Submissions

I. The Appellant (Proprietor) lodged an appeal, received 10 February 2014, against the decision of the Opposition Division posted 29 November 2013 to revoke European patent No. 1 282 376 and simultaneously paid the appeal fee. The statement of the grounds of appeal was received 9 April 2014.

II. Opposition had been filed against the patent as a whole based inter alia on Article 100(a) EPC in combination with Articles 54 and 56 EPC for lack of novelty and inventive step, and on Article 100(c) EPC for added subject-matter.

III. In their decision the opposition division held that the claims of various requests added subject-matter or were not new vis-a-vis documents K1 and K3; or the division did not admit requests as late filed. It considered the following documents among others:

K1: DE 3 022 484 A1
K2: DE 8 335 417 U1
K3: US 5 480 035
K4: US 1 041 880

IV. The parties were summoned to oral proceedings with summons of 20 March 2018. In an accompanying communication pursuant to Article 15(1) RPBA the Board set out its provisional opinion regarding the issues it considered central to the decision. The oral proceedings were duly held before the Board on 2 July 2018.

V. The appellant requests that the decision under appeal be set aside and that the patent be maintained in amended form based on a Main Request, or,

alternatively, on Auxiliary Request 1, 1A, 1B, 2 to 7, where the main request and auxiliary requests 1 and 2 to 7 were filed with the grounds of appeal, and auxiliary requests 1A and 1B were filed with letter dated 1 June 2018.

The Respondent (Opponent) requests that the appeal be dismissed.

VI. The wording of claim 1 of the requests that are relevant for this decision is as follows:

Main Request:

"A dishwasher basket (1) comprising a vertically adjustable rack (3) that comprises a carrying surface (11) on which the crockery such as cups, mugs etc. are placed, the dishwasher basket (I) further comprising bearings (5), support pieces (4) that prevent the vertically adjustable rack (3) from making an undesirable rotational movement when the crockery such as cups, mugs etc. are placed characterized in that, the vertically adjustable rack (3) can be held at three different positions, an upright position (position A), a lower horizontal position (position B) and an upper horizontal position (position C) and, further comprises claws (6) which claws are arranged at the rack (3) and that enable the vertically adjustable rack (3) to be held at the desired height and connection pieces (7) that are engaged to the bearings (5) and enable the vertically adjustable rack (3) to be attached to the side wall (2) of the basket."

Auxiliary Request 1

Claim 1 is as claim 1 of the main request but inserts the following text (underscored):

"...further comprising bearings (5) which form the rotational axis of the vertically adjustable rack (3), support pieces (4) that prevent the vertically adjustable rack (3)..."

Auxiliary Request 1A

(Amendments vis-a-vis claim 1 of the main request highlighted by the Board with underscoring indicating added text, ~~strike-through~~ indicating deleted text)

"A dishwasher basket (1) comprising a vertically adjustable rack (3) that comprises a carrying surface (11) on which the crockery such as cups, mugs etc. are placed, the vertically adjustable rack ~~dishwasher basket (1)~~ further comprising bearings (5) which form the rotational axis of the vertically adjustable rack (3), and support pieces (4) that prevent the vertically adjustable rack (3) from making an undesirable rotational movement when the crockery such as cups, mugs etc. are placed, characterized in that the vertically adjustable rack (3) can be held at three different positions, an upright position (position A), a lower horizontal position (position B) and an upper horizontal position (position C), wherein the vertically adjustable rack (3) is brought to the upright position (position A) by pivoting it around the bearings (5), ~~and~~ wherein the vertically adjustable rack (3) further comprises claws (6) ~~which claws (6) are arranged at the vertically adjustable rack (3) and~~ that enable the vertically adjustable rack (3) to be held at the desired height, and wherein the vertically adjustable rack (3) further comprises connection pieces

(7) that are engaged to the bearings (5) and enable the vertically adjustable rack (3) to be attached to the side wall (2) of the basket, wherein the connection pieces (7) comprise a pin (8) providing rotation of the vertically adjustable rack (3) using the bearings (5) as the rotational axis and a groove (9) that enables the vertically adjustable rack (3) to be attached to the side wall (2) of the basket (1), and wherein the vertically adjustable rack (3) consists of the carrying surface (11), the bearings (5), the support pieces (4), the claws (6) and the connection pieces (7)."

Auxiliary Request 1B

Claim 1 is as in auxiliary request 1A but inserts the following text (underscored):
"...further comprises claws (6) that are part of the vertically adjustable rack (3) and enable the vertically adjustable rack (3) to be held ...."

VII. The Appellant argued as follows:

The omission from claim 1 of the main request of a feature vis-a-vis originally filed claim 1 as well as addition of features to that claim and claim 1 of the auxiliary request 1 from the description have a basis in the originally filed application.

Auxiliary requests 1A and 1B are filed in response to the Board's communication. In either case the amendments to claim 1 resolve the issues raised under Art.123(2) EPC. Furthermore, the claimed subject-matter is now clearly distinct from the cited prior art and thus novel.

The case should be remitted to the first instance for examination of the remaining issue of inventive step.

VIII. The Respondent argued as follows:

The omission of a feature and further addition of features from the description result in added subject-matter for claim 1 of the main and auxiliary request 1.

The auxiliary requests 1A and 1B are late filed. As they represent a change of case, result in further issue of clarity and/or added subject-matter they should not be admitted. The added features are also found in K1 and K3, so that the claimed subject-matter is not novel.

As regards remittal there is no comment.

Reasons for the Decision

1. The appeal is admissible.

2. Background of the invention

The invention is concerned with a dishwasher basket with a vertically adjustable rack that attaches to the sidewall of the basket and folds up out of the way, see figure 3. The main focus is the connection between basket sidewall and rack that allows the rack to be positioned in two, lower and upper, horizontal positions in addition to an upright (folded away) position. To this end claim 1 of the main request requires claws 6 that are arranged at the rack to hold it at the desired height, and connection pieces 7 that engage with the (folding) bearings 5 which allow the

rack to be attached to the basket sidewall as shown in figures 4 to 6 in greater detail.

3. Added subject-matter

3.1 Main Request

3.1.1 The main request corresponds to the main request (filed 9 September 2013) discussed and decided on at the oral proceedings but for an amendment ("claws are arranged at the vertically adjustable rack"). The Respondent contends that this request would have been withdrawn at the oral proceedings before the division and is therefore not admissible under Art 12(4) RPBA. However, the minutes (not contested) do not record the withdrawal of the main request but merely that the new main request was not the granted claims (point 2), that it was discussed for added s/m and then found unallowably amended (points 5 to 7). This is entirely consistent with the decision, points 2 (see heading), 2.2.1 and 2.3, where the relevant feature is discussed as having been unallowably omitted.

3.1.2 In the communication accompanying the summons, section 4.2, the Board indicated it provisional opinion that amendments to claim 1 of the main request added subject-matter contrary to Article 123(2) EPC.

In particular, "[the] division held **added subject-matter** as a result of omission of the feature that the bearings *form the rotational axis of the vertically adjustable rack* vis-a-vis originally filed claim 1. This would appear to result in generalization to all types of bearings, e.g sliding bearings, where the original disclosure only ever referred to rotational

bearing or pivoting about bearings (as filed description p4, ln.2-3; p4, ln.26; cl.1,2)."

"The respondent repeats further objections relating to the alteration of features or introduction of features from the description:

- dishwasher basket comprising the bearings and support pieces, where in the original claim 1 it was "*the adjustable rack that comprises ... bearings*". This modification would appear to mean that the bearings are no longer specifically associated with the rack, which does not appear to have any basis in the original application.
- the 3 positions are added from p.4, ln.1 to 8, of the originally filed description. There, however position A was arrived at *by pivoting about the bearings* a feature not added. As position A and the bearing are closely linked in function and structure, this would appear to result in an unallowable intermediate generalization, cf. CLBA, II.E.1.7.

  ...

- the feature that the connection pieces *are engaged to the bearings* has been lifted from p3, ln25-30, that also refers to the connection piece comprising a pin interacting with the bearings, as well as a groove for attachment to the basket side wall, neither of which features are included. All these features again appear to be closely linked in function and structure, so that isolation of the one feature would appear to result in an unallowable generalization."

3.1.3 The Board notes that in its provisional opinion on the non-allowability of the omission it does not rely on the hypothetical example given by the Respondent in its reply to the statement of grounds. The essence of the Board's argument that without the omitted feature the claim is generalized to include all types of bearings remains unaddressed. Absent any argument the Board has no compelling reason to change its original viewpoint.

Nor is the Board bound by the Opposition Division's finding regarding the first addition/introduction of features (basket comprising bearings and support pieces). Otherwise, the Appellant provides no cogent argument why the Board would be wrong in its provisional opinion.

The Board is also unconvinced by the argument that the fact that the rack is held in one of three positions and that it is brought into one of them by pivoting would be "different issues". As is clear from page 4, lines 1 to 8, read in conjunction with figures 2 and 3, and also in the broader context, position A is arrived at by rotation (pivoting) about the bearings from one of the two other positions B and C. Clearly, the bearings link positions B and C structurally and functionally with position A. Otherwise the issue had already been addressed at least in part in the opposition brief, page 16 and is thus not new.

As regards the feature of the connection pieces added out of context, it may well be that other modes of realizing connection pieces might occur to the skilled person. However, that is not a matter of direct and unambiguous disclosure, an issue of fact, but rather of equivalent alternatives, i.e. a matter of obviousness.

3.1.4 For the above reasons the Board confirms its provisional opinion, that the above amendments add subject-matter extending beyond the original disclosure, contrary to Article 123(2) EPC.

3.2 Auxiliary Request 1

In the communication accompanying the summons, section 5, the Board also opined that none of the then auxiliary requests appeared to resolve the above issues. Without any further argument from the Appellant the Board confirms this view. Indeed, claim 1 of the main request only reinstates the omitted feature but does not address any of the other issues discussed above. For that reason the amendments to claim 1 also add subject-matter contrary to Article 123(2) EPC.

4. Admissibilty of Auxiliary Requests 1A, 1B

4.1 Auxiliary requests 1A and 1B were filed with letter of 1 June 2018 after issuance of the summons to attend oral proceedings. They thus represent a change of a party's case, the admission of which is at the discretion of the Board under Articles 13(1) and (3) RPBA. According to established jurisprudence, see e.g. Case Law of the Boards of Appeal, 7th edition 2018 (CLBA), IV.E.4.2.5., requests filed at this late stage are admitted only into the proceedings if there are sound reasons for their late filing, they do not extend the scope of discussion and if they are clearly allowable. The latter requirement means that it must be immediately apparent, with little or no investigative effort that the amendments successfully address the issue raised (here added subject-matter) without raising new ones.

4.2 In the present case the Board holds that all three criteria are met.

4.2.1 Firstly, these requests can be seen as a reaction to the issues raised in part by the Board in its communication. In particular the final feature of claim 1 of either request of the vertical rack *consisting of* the features listed aligns the claim wording with similar wording on page 3, lines 16 to 23 cited by the Board in its communication (point 3.2). In this regard it is meant to avoid a further Article 123(2) objection, and is thus clearly occasioned by a ground of opposition as required by Rule 80 EPC.

4.2.2 In that the amendments to claim 1 of either request address the issues raised in relation to Article 123(2) EPC by reinstating the omitted features and incorporating the further features of the context out of which features had been added to claim 1 in isolation, the scope of discussion moreover remains the same as before.

4.2.3 Finally,the board has no difficulty in establishing that those issues have been successfully addressed.

Thus, claim 1 of auxiliary request 1A and 1B now specifies that the vertically adjustable rack comprises the bearings and that these form its rotation axis; that position A is arrived at by pivoting the rack around the bearings; and that the connection piece comprises a pin for rotation of the rack using the bearings as axis and a groove for attaching the rack to the basket side wall. Clearly the issues identified above in section 3.1.2 above have been addressed so that the amendments to claim 1 comply with Article 123(2) EPC.

Claim 1 of auxiliary request 1B only adds further wording that the claws are part of the vertically adjustable rack. This merely restates in other terms the feature already present in the claim that the rack comprises the claws. Otherwise this claim 1 is identical to that of auxiliary request 1B and the same considerations above apply.

4.3 The Respondent has taken issue with omission of the wording "which claws are arranged at the vertically adjustable rack" and the addition of the final feature that the vertically adjustable rack consists of carrying surface, bearings, support pieces and connection pieces.

4.3.1 The omission of claws at the vertically adjustable rack merely removes a redundancy in the claim wording, which already specifies that vertically adjustable rack comprises the claws. Thus, there is no issue of extension of scope, which would extend beyond the framework of the original discussion. Nor can it be seen to be directed at subject-matter that diverges from that of the requests already discussed.

4.3.2 As regards the final added feature, given that the claim already specifies that the rack comprise the features listed, the formulation "consisting of" merely adds the information that the list is an exclusive list. The Board is unable to see any structural or functional link between this added information and the supporting wire 10 with which the claws engage according to the bottom paragraph of description page 4. Consequently this added feature does not represent an intermediate generalization, let alone an unallowable one. Insofar its addition results

in a lack of clarity due to omission of the supporting wire as essential feature with which the claws must engage, that contention applies equally to the granted claims which already include the claws. According to G3/14 clarity can be considered only if and to the extent that an alleged lack of clarity arises from the amendments. The Board also does not believe that the mere indication of the rack consisting of rather than comprising the listed features would require a further search. Finally, whether or not the Appellant's letter of 1 June 2018 sufficiently explained why this feature had been added, it requires little effort to understand.

4.4 For all these reasons the Board decided to admit the auxiliary requests 1A and 1B into the proceedings, pursuant to Art 13(1) and (3) RPBA.

5. Novelty : Auxiliary Request 1A

5.1 The Respondent contests novelty vis-a-vis K1 and K3. In neither case is the Board able to identify a connection piece that comprises a pin or claws that enable the rack to be held at the desired height.

5.2 In K1, see figures 2 and 3; paragraph bridging pages 4 and 5, the integrally formed elements with guides 3, support part 4 and bearing 5 can be seen to form connection pieces that connect the rack to the basket in a manner defining 3 positions, an upright folded position and at least two positions of the rack at different heights. However, this element does not comprise a pin. Rather, bearing bar ("Lagerstrebe") 6 of the rack fits within the C-shaped bearing surface 5 of the element. The element 3,4,5 cannot reasonably be said to comprise the bar 6 as argued.

A further difference resides in the claws which in claim 1 enable the rack to be held at the desired height. The exact meaning of the the term "claws" is only fully understood in relation to their engagement with supporting wire 10 as described in paragraph [0015] of the patent specification. In Kl the rack is held in place by the clamping of cross ends 8 of the appropriately dimensioned bearing bar 6 against the downward bars 1,2 of the basket, page 5, lines 7 to 17 of K1. In the Board's view the cross ends 8 cannot be termed claws, much less so when interpreted in the light of the description.

5.3 Plates or end caps 22 that connect shelf 20 to the basket side walls in K3 (figures 1, 5, 6) can be considered connection pieces in the sense of the patent. These have C-shaped hubs 50, 51 that receive fingers 32 of wire 24 of the shelf 20. As in the case of K1 this is a kinematic inversion of what is claimed in claim 1, where the connection piece comprises the pin and not the bearing. This is a first difference of the claimed basket over K3. Furthermore, spring fingers pairs 42,43 and 44,45 on the connection piece clamp it to the basket side wall wires 15 but not so as to enable it to be held at a desired height. They are thus not claws in the sense of claim 1 of the auxiliary request 1A.

5.4 The Respondent did not present any argument against novelty based on K2 and K4 which had been cited against novelty for previous versions of claim 1. These documents are clearly much further removed than K1 and K3, in that neither shows a rack that is adjustable to 3 positions, much less claws that allow the rack to be

held at the desired height, or connection pieces with a pin.

5.5 In the light of the above the Board concludes that the subject-matter of claim 1 of the auxiliary request is novel over the cited prior art.

6. Remittal

The decision under appeal considered only the opposition grounds of added subject-matter and novelty but did not examine the opposition ground of inventive step raised in opposition. To allow a full two instance examination of this remaining issue remittal of the case for further prosecution appears appropriate in accordance with established jurisprudence. This is in accordance with the stated preference of the Appellant. The Respondent has not expressed any preference.

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 for further prosecution.**

The Registrar: The Chairman:

G. Magouliotis A. de Vries

Decision electronically authenticated