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**Datasheet for the decision
of 12 February 2019**

Case Number: T 0413/16 - 3.2.06

Application Number: 06813646.4

Publication Number: 1924730

IPC: D06F37/30, D06F37/20, H02K11/00

Language of the proceedings: EN

Title of invention:
MOTOR AND CONTROLLER ASSEMBLY FOR A HORIZONTAL AXIS WASHING
MACHINE

Patent Proprietor:
Nidec Motor Corporation

Opponent:
Electrolux Appliances Aktiebolag

Headword:

Relevant legal provisions:
EPC Art. 123(2), 84
EPC R. 103(1) (a)
RPBA Art. 13(1)

Keyword:

Amendments - added subject-matter (yes)

Claims - clarity - auxiliary request (no)

Substantial procedural violation - violation of the right to be heard (yes)

Reimbursement of appeal fee - (yes)

Decisions cited:

G 0002/10

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 0413/16 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 12 February 2019

Appellant: Electrolux Appliances Aktiebolag
(Opponent) St Göransgatan 143
105 45 Stockholm (SE)

Representative: Electrolux Group Patents
AB Electrolux
Group Patents
105 45 Stockholm (SE)

Respondent: Nidec Motor Corporation
(Patent Proprietor) 8050 West Florissant Avenue
St. Louis, MO 63136 (US)

Representative: Bryn-Jacobsen, Caelia
Kilburn & Strode LLP
Lacon London
84 Theobalds Road
London WC1X 8NL (GB)

Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
22 December 2015 concerning maintenance of the
European Patent No. 1924730 in amended form.**

Composition of the Board:

Chairman M. Harrison
Members: M. Hannam
W. Ungler

Summary of Facts and Submissions

- I. An appeal was filed by the appellant (opponent) against the interlocutory decision of the opposition division in which it found that European patent No. 1 924 730 in an amended form met the requirements of the EPC.
- II. The appellant requested that the case be remitted to the opposition division due to violation of its right to be heard (Article 113(1) EPC). It further requested that the decision be set aside and the patent be revoked.
- III. The respondent (patent proprietor) requested that the appeal be dismissed.
- IV. The following document, referred to by the appellant in its grounds of appeal, is relevant to the present decision:

E1 US-A-4 668 898
- V. The following additional document (numbered by the Board as R1 for ease of reference) was referred to by the opposition division in its decision:

R1 US-A-4 556 827
- VI. The Board issued a summons to oral proceedings and a subsequent communication containing its provisional opinion, in which it indicated *inter alia* that the appellant's right to be heard indeed appeared to have been denied before the opposition division. It further indicated that the subject-matter of claim 1 appeared not to meet the requirement of Article 123(2) EPC.

- VII. With letter of 4 February 2019, the respondent filed an auxiliary request (denoted as auxiliary request 2).
- VIII. With its communication of 6 February 2019 the Board issued a communication in which it indicated that claim 1 of this auxiliary request appeared to lack clarity, contrary to Article 84 EPC.
- IX. With letter dated 7 February 2019 the respondent indicated that it would not attend the scheduled oral proceedings.
- X. Oral proceedings were held before the Board on 12 February 2019 in the absence of the respondent, during which the appellant withdrew its request for remittal of the case to the opposition division. The final requests of the parties were thus as follows:

The appellant requested that the decision under appeal be set aside and the European patent be revoked.

The respondent (patent proprietor) requested in writing that the appeal be dismissed (main request), auxiliarily that the patent be maintained in amended form on the basis of auxiliary request 2 filed with letter dated 4 February 2019.

- XI. Claim 1 of the main request (corresponding to the request denoted 'auxiliary request 1' as found allowable by the opposition division in its decision) reads as follows (with feature annotation as used by the opposition division in its decision):

"F1 An electric motor and controller (100)
F2 for a horizontal axis washing machine,
F3 the assembly (100) comprising an electric motor

(102) and a controller,
F4 the controller (104) including software for
controlling operation of the electric motor in the
horizontal axis washing machine,
F5 the electric motor including at least one
endshield (114)
F6 and a stator (108) having an inner bore, wherein
F7 a rotor (110) is situated for rotation within
the inner bore of the stator (108),
F8 the controller includes a housing (120, 120a,
120b)
F9 attached to an external portion of the endshield
(114)
characterised in that
F10 a heat sink (109) is positioned on the
endshield,
F11 and a heat producing controller component
(122a) is thermally coupled to said heat sink
F12 by physically attaching said heat producing
controller component to said heat sink using fasteners
and/or adhesives."

Claim 1 of the auxiliary request (denoted as auxiliary
request 2 by the respondent) reads as for claim 1 of
the main request with the following feature appended:

"in which the heat producing component (122a) is
thermally coupled to the heat sink (109) after the
circuit board (118) is attached to the housing base
(120a)."

XII. The appellant's arguments may be summarised as follows:

The subject-matter of claim 1 of the main request did
not meet the requirement of Article 123(2) EPC. There
was no basis *inter alia* for the feature added to claim

1 concerning the controller housing being attached to an external portion of the endshield. If Fig. 3 were relied upon for this feature, this disclosed several further features in combination with that adopted into claim 1. An intermediate generalisation was thus present in claim 1.

The opposition division had committed a substantial procedural violation through having violated the appellant's right to be heard in relation to the disclosure in R1. Only on receipt of the written decision had it become clear that this document had been pivotal in the opposition division's interpretation of E1, yet there had been no discussion of R1 either in writing or during the oral proceedings. The same applied to the commercial activities of the assignee in E1 which the opposition division had alleged to be the case only in its written decision.

XIII. The respondent's arguments may be summarised as follows:

As regards the main request, the subject-matter of claim 1 met the requirement of Article 123(2) EPC. Regarding the feature of the housing being attached to an external portion of the endshield, this was evident to the skilled person from the entire disclosure, in particular from Fig. 3. According to the test in G2/10, the skilled person was presented with no new technically relevant information by this amendment to claim 1. Further, with reference to paras. [0008] and [0029] of the application as filed, further support for the housing to be attached to an external portion of the endshield could be found.

As regards the alleged procedural violation, the

appellant was given ample opportunity to present its arguments with respect to E1 and, with R1 being cited therein, the chance had been given to comment on that disclosure as well.

Reasons for the Decision

1. *Main request* (denoted 'auxiliary request 1' by the respondent)

Article 123(2) EPC

The subject-matter of claim 1 does not meet the requirement of Article 123(2) EPC.

- 1.1 Relative to claim 1 as filed, present claim 1 has been amended *inter alia* to include features F8 and F9, i.e. that 'the controller includes a housing attached to an external portion of the endshield'. In the application as filed there is no explicit disclosure of it being 'an external portion' of the endshield to which the housing is attached; this wording is nowhere to be found. The respondent's reference in this regard to Fig. 3 fails to provide a direct and unambiguous disclosure of this feature in its claimed generality. Fig. 3 presents an exploded view of the electric motor and controller assembly of Fig. 1 (see para. [0012]) and thus discloses a very specific embodiment of the invention. If Fig. 3 can even be considered to disclose the housing being attached to 'an external portion' of the endshield, it does so in combination with several further technically and functionally related features of the assembly, such as the housing being a two part housing (comprising the housing cover 120b and the housing base 120a) and the housing enclosing a circuit

board on which the heat producing controller component 122a is located. Absent at least these technically and functionally related features to the housing being attached to an external portion of the endshield, the subject-matter of claim 1 extends beyond the content of the application as filed.

1.2 The respondent's argument that no new technically relevant information is added to claim 1 by this amendment is not accepted. The isolated addition of the housing being 'attached to an external portion of the endshield' is disclosed nowhere in the application as filed in such generality. As indicated above, Fig. 3, the sole basis provided by the respondent for this feature, discloses many more features in a technical relationship with the isolated addition. As a consequence, the omission of those features (at least the two part housing enclosing a circuit board) disclosed in combination with that adopted into claim 1 (the housing attached to an external portion of the endshield) presents the skilled person with technically relevant information which cannot be directly and unambiguously derived from the application as filed. The test cited by the respondent from G2/10 that 'after the amendment the skilled person may not be presented with new technical information' is thus not met by the subject-matter of present claim 1.

1.3 The respondent's further reference to paras. [0008] and [0029] in support of the housing being attached to an external portion of the endshield is also not convincing. Para. [0008], whilst mentioning the controller housing, fails to mention this housing being related in any way to the electric motor, let alone to the external portion of the endshield of the motor. Similarly para. [0029] discloses the controller housing

but solely in relation to the heat sink being positioned externally to it; no unambiguous relationship between the controller housing and the electric motor, let alone the external portion of the endshield of the motor, is indicated, nor is it directly and unambiguously derivable.

1.4 It thus follows that at least the feature of claim 1 regarding the controller including a housing attached to an external portion of the endshield lacks a direct and unambiguous basis in the application as filed, contrary to the requirement of Article 123(2) EPC. The main request is thus not allowable.

2. *Auxiliary request 1* (denoted 'auxiliary request 2' by the respondent)

Admittance (Article 13(1) RPBA)

2.1 With this request having been filed but a week before the scheduled oral proceedings, it may be admitted and considered at the Board's discretion, which is set out in Article 13(1) RPBA, such discretion being exercised *inter alia* in view of the need for procedural economy. As is established case law of the Boards of Appeal, such procedural economy implies that amended requests should at least be *prima facie* allowable in order to be admitted.

2.2 Claim 1 of this request includes the newly added feature 'in which the heat producing component is thermally coupled to the heat sink after the circuit board is attached to the housing base' and thus defines a specific order for assembly of the heat producing component, the heat sink, the circuit board and the housing base. Claim 1 is however directed to 'an

electric motor and controller for a horizontal axis washing machine' such that it is unclear how the newly added feature relating to a specific order for component assembly would be recognisable as a structural feature of the device itself. The lack of clarity in claim 1 of this request was also indicated in the Board's communication of 6 February 2019. In the absence of the respondent at oral proceedings, no argument in defence of the clarity of claim 1 has been presented. The Board thus finds that claim 1 *prima facie* lacks clarity contrary to the requirements of Article 84 EPC.

2.3 Therefore, the subject-matter of claim 1 is not *prima facie* allowable. Accordingly, the Board exercised its discretion under Article 13(1) RPBA not to admit this request into the proceedings.

3. *Reimbursement of the appeal fee (Rule 103 EPC)*

3.1 In point 2.4.1.4 of its decision, the opposition division refers to R1. This document was however not on file before the opposition division, it simply being mentioned in the 'background of the invention' section of E1. In its decision the opposition division details how R1 clearly discloses vertical axis washing machines and uses this as a justification for its conclusion that E1, therefore, 'clearly does not suggest the use of the described motor in horizontal axis washing machines'. The opposition division thus based its reasoning on this evidence.

3.2 In its grounds of appeal, the appellant maintained that R1 was a point of discussion neither in the written opposition procedure nor during oral proceedings before the opposition division. This was notably not

contradicted by the respondent, which simply maintained that the appellant had been given ample opportunity to present arguments on E1 during the oral proceedings. However, despite being cited in E1 amongst several other documents, the content of R1 was evidently never a point of discussion before the opposition division and the appellant was given no reason to believe that the disclosure in R1 would be of any significance in the opposition division's decision. The appellant was thus not given an opportunity to present its comments on R1.

- 3.3 It should also be added that the further reasoning mentioned in item 2.4.1.4 of the interlocutory decision to establish that E1 was only related to vertical axis washing machines, referred to alleged commercial activities since 1986 of the assignee named in E1, for which no evidence has been given by the opposition division. Also in this regard, the appellant argued that it was not given any opportunity to present its comments. The respondent did not dispute this and there is indeed no indication in the minutes or the decision that could allow the Board to arrive at a different conclusion.
- 3.4 It thus follows that the opposition division used the content of R1 and the alleged commercial activities of the assignee named in E1 in its decision without the appellant at least having been given the chance to be heard on its content, contrary to Article 113(1) EPC. A party being denied their right to be heard amounts to a substantial procedural violation.
- 3.5 According to Rule 103(1)(a) EPC, the appeal fee shall be reimbursed in full if such reimbursement is equitable by reason of a substantial procedural

violation. It is clear from the opposition division's reasoning in its decision that the appellant being denied its right to be heard with respect to R1 and the alleged commercial activities of the assignee in E1 had a direct influence on the interpretation of E1 (see point 2.4.1.4 of the opposition division's decision), and thus also had a causal effect on the decision regarding both novelty (see points 2.4.1.4 and 2.4.1.5) and inventive step (see point 2.4.8). In view of the above, the Board finds it equitable by reason of the substantial procedural violation for the appeal fee to be reimbursed in full.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.
3. The appeal fee is to be reimbursed.

The Registrar:

The Chairman:



M. H. A. Patin

M. Harrison

Decision electronically authenticated