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**Datasheet for the decision
of 15 January 2019**

Case Number: T 0414/17 - 3.2.06

Application Number: 11185162.2

Publication Number: 2581485

IPC: D06F39/00, A47L15/42

Language of the proceedings: EN

Title of invention:

A method for assembling a front panel for a domestic appliance and a corresponding front panel

Patent Proprietor:

Electrolux Home Products Corporation N.V.

Opponent:

Whirlpool EMEA S.p.A.

Headword:

Relevant legal provisions:

EPC Art. 100(a), 100(b), 107, 108, 111(1), 112(1)(a)
EPC R. 76(2)(c), 99(1)(c), 99(2), 103(1)(a)

Keyword:

Admissibility of appeal - notice of appeal - request defining subject of appeal - yes
Admissibility of opposition - allegation of prior use - substantiation - yes
Referral to the Enlarged Board of Appeal - point of law of fundamental importance - no
Substantial procedural violation - (no)
Reimbursement of appeal fee - (no)
Appeal decision - remittal to the department of first instance - yes

Decisions cited:

T 0358/08, T 0620/13

Catchword:



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Case Number: T 0414/17 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 15 January 2019

Appellant: Whirlpool EMEA S.p.A.
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Respondent: Electrolux Home Products Corporation N.V.
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 15 December
2016 rejecting the opposition against European
patent No. 2581485 as inadmissible pursuant to
Rule 77(1) EPC.**

Composition of the Board:

Chairman M. Harrison
Members: E. Kossonakou
T. Rosenblatt

Summary of Facts and Submissions

- I. The present appeal lies from the decision of the opposition division dated 15 December 2016 to reject the opposition, filed against European patent N° 2 581 485 based on the grounds of Article 100(a) and (b) EPC, as inadmissible for not meeting the requirements of Rule 76(2)(c) EPC.
- II. The opponent (hereinafter "the appellant") filed an appeal against this decision by letter dated 14 February 2017 and paid the appeal fee on the same date. The statement setting out the grounds of appeal was filed by letter dated 10 April 2017.
- III. The appellant contended that the opposition division erred in its decision and argued in its statement of grounds in particular that admissibility of an opposition ought to be considered at the expiry of the nine-month opposition period and on the basis of the opposition as a whole, i.e. not on the basis of an isolated ground for opposition.

The appellant also argued that the opposition division committed a procedural violation in not addressing this issue in the communication accompanying the summons to oral proceedings while using it as the exclusive basis for its decision.

Finally, the appellant submitted that the opposition division apparently confused the issues of (formal) admissibility and (substantive) allowability of an opposition and argued that its right to be heard at the oral proceedings had been unduly restricted, thus preventing it from presenting a proper defence of its case.

The appellant's main request as per its written submissions was thus to set the contested decision aside, i.e. to declare the opposition admissible, and to remit the case to the opposition division for further consideration.

- IV. In its reply to the grounds of appeal the patent proprietor (in the following "the respondent") contested the admissibility of the opposition centering on the argument that "the notice of opposition fails to indicate facts and evidence concerning the prior use" and also argued that the appeal was inadmissible (p.4, D., second paragraph, "the opponent ... does not really indicate the reasons for setting aside the decision impugned, or the extent to which it is to be amended, contrary to the requirements of Rule 99 EPC").

The respondent requested (in writing) rejection or dismissal of the appeal.

- V. Oral proceedings were held before the Board on 15 January 2019, in accordance with the respective requests of both parties.

In its communication issued in preparation of the oral proceedings and notified together with the summons, the Board set out its provisional opinion on the issues to be discussed.

For the essential details of the oral proceedings, reference is made to the minutes thereof. Further to the requests presented in writing the appellant requested reimbursement of the appeal fee and the respondent the referral of a question to the Enlarged Board of Appeal (infra, Reasons 2.2.7).

At the end of the oral proceedings the Chairman announced the Board's decision.

Reasons for the Decision

1. Admissibility of the appeal

- 1.1 The appeal was filed within the prescribed time limit (Article 106 EPC). The appeal fee was timely paid. The statement setting out the grounds of appeal was filed within the prescribed time limit.
- 1.2 The appellant's entitlement to appeal has not been disputed in writing. However, at the oral proceedings the respondent referred to the change in status and name of the appellant according to their submission dated 14 December 2018 and requested that the Board verify that the transfer, that had taken place, allowed the current party to legitimately participate in the proceedings as opponent/appellant.

The Board reminded the parties (during oral proceedings) that party entitlement, in particular in cases of transfer of opposition is systematically examined at the EPO. In the case at hand, the change in status and name is the result of merger, i.e. of universal succession, and as such not objectionable. The respondent did not contest the Board's finding on this matter.

- 1.3 Regarding the question whether the notice of appeal contains "a(n explicit) request defining the subject of the appeal" as foreseen in Rule 99(1)(c) EPC, it is

noted that to the extent that the contested decision - which is adequately identified - rejects the opposition as inadmissible, the request can be clearly inferred from the file and it can only be that the decision be set aside in its entirety.

- 1.3.1 Reference is made to decision T 358/08, which contains a detailed analysis of the situation under Rule 64(b) EPC 1973 as compared to the provisions of Rule 99(1) and (2) EPC as even currently in force as well as an exhaustive review of the relevant preparatory documents for the revised EPC and the related Boards of Appeal decisions, see in particular Reasons 2.3 and Reasons 5.
- 1.3.2 Regarding decision T 620/13, also cited in the Case Law of the Boards of Appeal (8th edition 2016, IV.E.2) and perhaps at first sight appearing as if reaching a different conclusion than T 358/08, it is noted that the underlying facts were radically different to the extent that it was not entirely clear whether the purported "appeal letter" was indeed a notice of appeal in due form at all.
- 1.4 Regarding the issue of whether the statement of grounds of appeal indicates "the extent to which it (the decision impugned) is to be amended" and the legal and/or factual reasons to be specified pursuant to Rule 99(2) EPC, the Board finds that the grounds of appeal filed on 10 April 2018 address the reasoning of the contested decision and explain why, in the appellant's view, it should be set aside: in point "1. Annex to summons" reference is made to the argument in the decision that the parties had been informed in the annex to the summons about the lack of substantiation of the alleged prior use and the relevant wording in the annex to the summons. Under the heading "2.

Requirement of Rule 76(2)(c) EPC" in the second full paragraph on page 2 of the submission, it is discussed whether the subsequent withdrawal of a ground of opposition (here the one pursuant to Article 100(b) EPC) can render the opposition inadmissible. Finally, in the next paragraph on page 2, the appellant refers to the potential confusion between admissibility and allowability of an opposition. Whether the arguments are conclusive enough to be convincing is immaterial in the context of this discussion, as long as it is possible to establish that (parts of) the decision is (are) contested and grounds therefor are given.

1.5 It follows that the appeal complies with Articles 106 to 108 and Rule 99 EPC and is therefore admissible.

2. *Admissibility of the opposition*

2.1 Article 100(b) EPC

The Board, in confirmation of its preliminary opinion set out in the communication in preparation of the oral proceedings, finds that the ground of opposition pursuant to Article 100(b) EPC was substantiated in the notice of opposition.

This is found sufficient to establish admissibility of the opposition independently of the later fate of the argument, in particular without regard to the fact that it was withdrawn at the oral proceedings before the opposition division. It is established case law that an indication of facts, evidence and arguments in support of even only one ground of opposition is enough to render the opposition admissible as a whole. Further, this should be established on the basis of the documentation and arguments available at the expiry of

the nine-month opposition period (cf. Case Law of the Boards of Appeal, 8th edition 2016, IV.D.2.2.8).

2.2 Article 100(a) EPC

In view of the fact that the ground of opposition pursuant to Article 100(b) EPC was withdrawn and considering that the appellant has requested the remittal of the case for further prosecution, the opposition's admissibility in this particular case needs also to be decided in respect of the ground of opposition pursuant to Article 100(a) EPC and in particular whether the ground of opposition under Article 100(a) EPC has been substantiated. Only if the opposition is found admissible also in this respect, can the requested remittal, the alleged substantial procedural violation and the reimbursement of the appeal fee be decided upon.

2.2.1 The appellant argued that the opposition division apparently confused admissibility and substantive allowability of the opposition when examining the alleged prior use. "An indication of the facts and evidence presented in support of this ground" (Rule 76(2)(c) EPC) had been furnished in the notice of opposition. It had also been established "what" was on offer. The aspects of "when" and "where" in relation to the alleged prior use were to be found in the submitted catalogue. A specific user could not have been named, as the product was intended for the mass market. Means of evidence were also filed (a catalogue, bill of materials, drawings) and a witness had been offered.

2.2.2 The respondent argued that, although the object of the alleged prior use ("what") could be inferred, no facts were indicated in the notice of opposition as to

"where", "when", "how" ("under which circumstances") or by "whom" the use took place. A catalogue was not sufficient proof of a sale, no buyer was ever named and no specific date(s) were mentioned, the mere reference to a time "before the opposed patent's priority date" not being sufficient to establish the relevant time frame with enough specificity.

- 2.2.3 The Board however notes that according to established case law the substantiation of an alleged prior use for the purposes of admissibility needs answer the questions of "what", "when", "where", "by whom" and "how" only to the extent allowing the opposition division and the patent proprietor to understand the case. It need not be conclusive nor fully supported by appropriate evidence, since these are issues for the substantive examination of the allegation (cf. Case Law of the Boards of Appeal, op. cit. 2.2.9 c)).
- 2.2.4 The notice of opposition refers to April 2009 as the reference date (filing date of the contested patent: 14 October 2011) and to a specific product, including drawings purportedly corresponding to said product and allegedly showing all technical characteristics of the patented product (claim 8). Supported by the catalogue, the notice of opposition also indicates the circumstances under which the product was allegedly made available to the public, i.e. by advertisement and offer for sale.
- 2.2.5 It appears from both the communication in preparation of the oral proceedings and the contested decision that the opposition division was able to understand the case (which would indeed point to an admissible opposition/opposition ground) but had considerable doubts as to whether various aspects were sufficiently proven (which

would call only the possible success of the objection made under the opposition ground into question).

The opposition division was indeed able to proceed to an analysis of the submitted facts and evidence and to draw certain technical conclusions as to their relevance (see point 7 of the communication dated 10 December 2015 in preparation for the oral proceedings).

Also the patent proprietor's reply to the notice of opposition shows sufficient understanding of the case put forward for a meaningful rebuttal. The technical relevance of the allegedly prior used oven is discussed in considerable detail. Also, questions are raised regarding the probatory value of the submitted evidence.

- 2.2.6 The Board considers that the aforementioned elements, identifiable from the notice of opposition, are *per se* already sufficient to establish admissibility. The doubts surrounding in particular the public availability of the product concerned, which are reiterated in more detail in the proprietor's further written submissions and in the contested decision, are matters to be considered in the framework of the substantive allowability discussion.

In this latter context, it is incidentally noted that offering of a witness is an admissible means of evidence (Article 117(1)(d) EPC), the value of which should not be pre-empted on the hypothesis of what the said witness can or cannot say; the probative value of a means of evidence cannot be ascertained before it has been presented and the content of a witness statement cannot be known before the witness is actually heard.

2.2.7 The patent proprietor requested in this context that the Board refers the following question to the Enlarged Board of Appeal (EBA), which it considered as having a particular bearing on the decision to be taken in respect of the admissibility of the ground of opposition pursuant to Article 100(a) EPC and thus, indirectly, of the opposition itself (original text annexed to the minutes of the oral proceedings, where the question was presented for the first time; here, translation into the language of proceedings by the Board):

"Is the indication that a certain product was put on the market before the priority date a sufficient indication to substantiate the presented facts relating to a prior use pursuant to Rule 76(2) (c) EPC?"

The Board finds that in the circumstances of the case no decision of the EBA is required for the purposes of ensuring uniform application of the law or for dealing with a point of law of fundamental importance arising here as required by Article 112(1) (a) EPC. The question can already be answered on the basis of the relevant facts on file. Hence it cannot be considered as giving rise to a point of law of fundamental importance. Specifically, the submission "before the priority date" is supplemented in the present case by the chronology on the catalogue and drawings, so that it becomes clear that the relevant time period is 2009. For the purposes of substantiation this is found to be sufficiently specific.

2.2.8 It follows from the preceding considerations that the allegation of prior use in support of the opposition ground pursuant to Article 100(a) EPC was substantiated

to render both the ground and thereby also the opposition itself admissible.

3. *Alleged procedural violations; reimbursement of the appeal fee*

The appellant argued both in writing and at the oral proceedings that the opposition division committed several (substantial) procedural violations in not mentioning the admissibility problems in its communication, in not considering subsequently filed evidence and by limiting the appellant's right to be heard at the oral proceedings in opposition.

The Board notes that the admissibility of the opposition is to be checked in every phase of the opposition and the ensuing appeal proceedings (Case Law of the Boards of Appeal, op. cit., 2.3.2). Moreover, the admissibility had been contested by the patent proprietor. It was therefore to be expected that it would be the very first topic of discussion at the oral proceedings, as it is the absolute prerequisite to any substantive discussion.

The fact that intermediately filed evidence was not considered can be ascribed to the fact that the admissibility of the opposition was not acknowledged. Non-admissible facts and evidence need not be further examined, if they do not contribute to the admissibility discussion.

In the circumstances of the case the Board cannot find that procedural violations were committed, rather a series of erroneous conclusions were reached. It follows that the conditions of Rule 103(1)(a) EPC are

not met, so that the request for reimbursement of the appeal fee has to be rejected.

4. *Remittal*

Pursuant to Article 111(1), second sentence EPC the Board has discretion regarding the remittal of the case to the opposition division for further prosecution. In view of the issues to be decided in this case, in particular the outstanding proof issues and the potential necessity of hearing of a witness offered by the appellant, the Board decided to exercise its discretion as requested by the appellant, namely to remit the case to the opposition division for further prosecution.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division for further prosecution.

The Registrar:

The Chairman:



M. H. A. Patin

M. Harrison

Decision electronically authenticated