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**Datasheet for the decision
of 17 April 2019**

Case Number: T 1372/18 - 3.2.06

Application Number: 13199506.0

Publication Number: 2889424

IPC: D06F39/12

Language of the proceedings: EN

Title of invention:

Laundry appliance

Patent Proprietor:

Electrolux Appliances Aktiebolag

Opponent:

Whirlpool EMEA S.p.A.

Headword:

Relevant legal provisions:

EPC R. 79(1), 103(1)(a), 126(2)

EPC Art. 111(1)

RPBA Art. 11

Keyword:

Right to be heard - substantial procedural violation (yes)
Remittal to the department of first instance - (yes)

Decisions cited:

Catchword:



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Case Number: T 1372/18 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 17 April 2019

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

Representative: Electrolux Group Patents
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Respondent: Whirlpool EMEA S.p.A.
(Opponent) Via Carlo Pisacane 1
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Representative: Spina, Alessandro
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 4 May 2018
revoking European patent No. 2889424 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman M. Harrison
Members: E. Kossonakou
P. Cipriano

Summary of Facts and Submissions

- I. The appeal of the patent proprietor (appellant) contests the revocation decision (lack of novelty over a prior art patent document) of the opposition division issued on 4 May 2018 in the matter of European patent No. 2889424.
- II. The appeal is based on the ground that the appellant's right to be heard was violated since the communication pursuant to Rule 79(1) EPC transmitting the notice of opposition and setting the time period (4 months) for filing observations (and/or requests) was not received by the appellant.
- III. On the appellant's request for information in this matter, the EPO was only able to confirm the proper dispatch of the relevant communication, stating that as more than six months since dispatch had elapsed, it was not possible to investigate whether notification had taken place (see F29110 of 18 May 2018).
- IV. The appellant's main request in appeal is therefore that the contested decision be set aside and the case be remitted to the opposition division in order to be heard.

Linked thereto, the appellant has also requested reimbursement of the appeal fee.

A number of auxiliary requests as well as arguments addressing the contested decision's reasons for revocation of the patent have also been presented, but these will, however, not be addressed in the present decision.

- V. In its reply to the statement setting out the grounds of appeal, the respondent (opponent) requested confirmation of the opposition division's decision on the appellant's main request, "remittal of the opposition case back to the first instance to discuss the [appellant's] Auxiliary Requests" or otherwise oral proceedings.
- VI. In the communication issued on 7 March 2019 in preparation of the oral proceedings summoned for 3 June 2019, the Board informed the parties of its preliminary assessment of the case.
- VII. By letter dated 19 March 2019 the respondent withdrew its request for oral proceedings and agreed to the remittal of the case to the opposition division on the basis of the appellant's main request (i.e. maintenance of the patent as granted).
- VIII. In the absence of any objection or argument against the considerations set out in its preliminary opinion, the Board consequently cancelled the oral proceedings appointed for 3 June 2019.

Reasons for the Decision

The Board's findings on the merits of the present appeal are as follows.

1. Rule 79(1) EPC foresees a communication setting a time period for filing observations to an opposition. No reminder or any other measure is provided to ensure that any response from a patent proprietor does indeed reach the file. This entails however the unintended consequence that a proprietor which does not receive the communication under Rule 79(1) EPC will not realise the omission, until - potentially - too late.
2. Relief is to be found in the provisions regulating notification, in particular Rule 126(2) EPC, which stipulates that "where notification is effected in accordance with paragraph 1 (i.e. notification by registered letter), ... in the event of any dispute, it shall be incumbent on the European Patent Office to establish that the letter has reached its destination or to establish the date on which the letter was delivered to the addressee, as the case may be".
3. In the case at hand, the addressee contends that it never received the communication concerned and the EPO confirmed its inability to establish that the letter had reached its destination or indeed even to be able to investigate the notification process.
4. In light of these circumstances the Board must conclude that the letter never reached the addressee. Thus, it was not notified as foreseen in Rule 79(1) EPC and hence it cannot have produced any legal effect. In

particular, it did not give rise to the time limit for responding to the notice of opposition.

5. This conclusion necessarily leads to the following consequences, namely that the opposition procedure was tainted by a substantial procedural violation, which was the violation of the proprietor's right to be heard (Article 113(1) EPC), with the result that the decision resulting therefrom has to be set aside.

6. Since the appellant was not heard, the Board considers that the only reasonable way to exercise its discretion under Article 111(1) EPC is to remit the case to the opposition division. Indeed, were the Board instead to have decided to consider the claims underlying the contested decision, it would be doing so as both the first and the last instance; this approach is not considered as either equitable or procedurally appropriate, or indeed even compatible with the judicial character of the appeal proceedings (see also Article 11 RPBA).

7. In the circumstances of the case, the Board further considers it equitable that the appeal fee be reimbursed (Rule 103(1)(a) EPC).

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.
3. The appeal fee is to be reimbursed.

The Registrar:

The Chairman:



M. H. A. Patin

M. Harrison

Decision electronically authenticated