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**Datasheet for the decision
of 13 September 2022**

Case Number: T 1736/18 - 3.2.06

Application Number: 11171038.0

Publication Number: 2381027

IPC: D06F39/02

Language of the proceedings: EN

Title of invention:

Laundry washing machine dispenser for detergent products or similar

Patent Proprietor:

Electrolux Home Products Corporation N.V.

Opponents:

BSH Hausgeräte GmbH
Whirlpool Corporation

Headword:

Relevant legal provisions:

EPC Art. 123(2)
RPBA 2020 Art. 13(2), 25(1)

Keyword:

Amendments - added subject-matter (yes)

Amendment after summons - exceptional circumstances (no)

Decisions cited:

G 0002/10, T 0331/87, T 1852/13

Catchword:



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Case Number: T 1736/18 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 13 September 2022

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
1 June 2018 concerning maintenance of the
European Patent No. 2381027 in amended form.**

Composition of the Board:

Chairman P. Cipriano
Members: M. Dorfstätter
 W. Ungler

Summary of Facts and Submissions

I. Appeals were filed by each of the proprietor, opponent 1 and opponent 2 against the interlocutory decision of the opposition division in which it found that, account being taken of the amendments made by the proprietor during the opposition proceedings in auxiliary request 1, the European patent No. 2 381 027 met the requirements of the EPC.

With all parties having appealed, these will be referred to as 'proprietor', 'opponent 1' and 'opponent 2' in the following.

II. The proprietor requested that the decision under appeal be set aside and that the patent be maintained as granted (main request), auxiliarily that the appeal of opponent 2 be dismissed (corresponding to auxiliary request 1 filed with the statement of grounds of appeal), or that the patent be maintained in amended form according to auxiliary request 2, 2a, 5, 3 and 4 (in that order), also filed with the grounds of appeal.

III. Opponent 2 requested that the decision under appeal be set aside and the patent be revoked, auxiliarily that the proprietor's appeal be dismissed.

IV. Opponent 1 withdrew its appeal and indicated that it would not attend the oral proceedings.

V. On 2 August 2021 the Board issued a summons to oral proceedings. It also issued a subsequent communication containing its provisional opinion, in which it indicated *inter alia* that Article 100(c) EPC prejudiced maintenance of the patent as granted and that claim 1

of each auxiliary request did not fulfil the requirement of Article 123(2) EPC.

- VI. With letter dated 24 August 2022, the proprietor submitted two additional auxiliary requests 2b and 2c, to be dealt with directly after auxiliary request 2.
- VII. Oral proceedings were held before the Board on 13 September 2022 as a videoconference and in absence of opponent 1, during which the proprietor withdrew its appeal and the main request.
- VIII. The final requests of the proprietor were that the appeal of opponent 2 be dismissed (indicated as 'auxiliary request 1'), auxiliarily that the patent be maintained in amended form according to any of auxiliary requests 2c and 2b filed with letter of 24 August 2022, and auxiliary requests 2a, 2, 3, 4 and 5 filed with the statement of grounds of appeal, in that order.
- IX. Claim 1 of the request indicated as 'auxiliary request 1' (i.e. the highest ranking request at the end of the oral proceedings) reads as follows:

"Laundry washing machine comprising a dispenser (6) for dispensing detergent products or similar, wherein the dispenser (6) comprises a drawer (7) housed in a front wall (4) of the machine (1) and comprising a first section (10) adapted to be manually loaded with at least a first powdered or liquid product sufficient for one wash, so as to allow using said laundry washing machine as a conventional manually loaded dispenser machine, wherein said drawer (7) comprises an outer handle (8),

wherein said drawer (7) comprises a distinct second section (11) adapted for housing at least a second product sufficient for a given number of washes, so as to allow using said laundry washing machine also in an automatic dispensing mode, wherein said second section (11) houses a container (12) for housing said second product, and wherein said container (12) is refillable and formed integrally with said second section (11)."

- X. Claim 1 of auxiliary request 2c reads as follows (with the differences to auxiliary request 1 indicated in bold):

"Laundry washing machine comprising a dispenser (6) for dispensing detergent products or similar, wherein the dispenser (6) comprises a drawer (7) housed in a front wall (4) of the machine (1) and comprising a first section (10) adapted to be manually loaded with at least a first powdered or liquid **detergent** product sufficient for one wash, so as to allow using said laundry washing machine as a conventional manually loaded dispenser machine, wherein said drawer (7) comprises an outer handle (8) **which is flush with a front wall (4) of the laundry washing machine when the drawer (7) is in the closed position,** wherein said drawer (7) comprises a distinct second section (11) adapted for housing at least a second **detergent** product sufficient for a given number of washes, so as to allow using said laundry washing machine also in an automatic dispensing mode, wherein said second section (11) houses a container (12) for housing said second **detergent** product, and wherein said container (12) is refillable and formed integrally with said second section (11)."

XI. Claim 1 of auxiliary request 2b reads as follows (with the additions to auxiliary request 1 indicated in bold, deletions are struck through):

"Laundry washing machine comprising a dispenser (6) for dispensing detergent products or similar, wherein the dispenser (6) comprises a drawer (7) housed in a front wall (4) of the machine (1) and comprising a first section (10) adapted to be manually loaded with at least a first powdered or liquid **detergent** product sufficient for one wash, so as to allow using said laundry washing machine as a conventional manually loaded dispenser machine, wherein said drawer (7) comprises an outer handle (8) **which is flush with a front wall (4) of the laundry washing machine when the drawer (7) is in the closed position,** wherein said drawer (7) comprises a distinct second section (11) adapted for housing at least a second **detergent** product sufficient for a given number of washes, so as to allow using said laundry washing machine also in an automatic dispensing mode, wherein said second section (11) ~~houses~~**comprises** a container (12) for housing said second **detergent** product, and wherein said container (12) is refillable and formed integrally with said second section (11)."

XII. Claim 1 of auxiliary request 2a reads as follows (with the additions to auxiliary request 1 indicated in bold, deletions are struck through):

"Laundry washing machine comprising a dispenser (6) for dispensing detergent products or similar,

wherein the dispenser (6) comprises a drawer (7) housed in a front wall (4) of the machine (1) and comprising a first section (10) adapted to be manually loaded with at least a first powdered or liquid product sufficient for one wash, so as to allow using said laundry washing machine as a conventional manually loaded dispenser machine, wherein said drawer (7) comprises an outer handle (8), wherein said drawer (7) comprises a distinct second section (11) adapted for housing at least a second product sufficient for a given number of washes, so as to allow using said laundry washing machine also in an automatic dispensing mode, wherein said second section (11) houses a container (12) for housing said second product, ~~and~~ wherein said container (12) is refillable and formed integrally with said second section (11), **and wherein the second section (11) is divided into a number of compartments (13), each for housing a respective container (12) for a relative second product, said container (12) being integral with respective compartment (13).**"

XIII. Claim 1 of auxiliary request 2 reads as follows (with the additions to auxiliary request 1 indicated in bold, deletions are struck through):

"Laundry washing machine comprising a dispenser (6) for dispensing detergent products or similar, wherein the dispenser (6) comprises a drawer (7) housed in a front wall (4) of the machine (1) and comprising a first section (10) adapted to be manually loaded with at least a first powdered or liquid **detergent** ~~product~~ sufficient for one wash, so as to allow using said laundry washing machine as a conventional manually loaded dispenser machine,

wherein said drawer (7) comprises an outer handle (8), wherein said drawer (7) comprises a distinct second section (11) adapted for housing at least a second **detergent** ~~product~~ sufficient for a given number of washes, so as to allow using said laundry washing machine also in an automatic dispensing mode, wherein said second section (11) houses a container (12) for housing said second **detergent** ~~product~~, and wherein said container (12) is refillable and formed integrally with said second section (11)."

XIV. Claim 1 of auxiliary request 3 reads as follows (with the additions to auxiliary request 1 indicated in bold, deletions are struck through):

"Laundry washing machine comprising a dispenser (6) for dispensing detergent products or similar, wherein the dispenser (6) comprises a drawer (7) housed in a front wall (4) of the machine (1) and comprising a first section (10) adapted to be manually loaded with at least a first powdered or liquid product sufficient for one wash, so as to allow using said laundry washing machine as a conventional manually loaded dispenser machine, wherein said drawer (7) comprises an outer handle (8), wherein said drawer (7) comprises a distinct second section (11) adapted for housing at least a second product sufficient for a given number of washes, so as to allow using said laundry washing machine also in an automatic dispensing mode, wherein said second section (11) houses a container (12) for housing said second product, ~~and~~ wherein said container (12) is refillable and formed integrally with said second section (11), **and wherein the drawer (7) is movable between a closed position, a first extracted position, in which only the**

first section (10) projects from the front wall (4), and a second extracted position, in which both the first and second section (11) project from the front wall (4)."

- XV. Claim 1 of auxiliary request 4 reads as follows (with the additions to auxiliary request 1 indicated in bold, deletions are struck through):

"Laundry washing machine comprising a dispenser (6) for dispensing detergent products or similar, wherein the dispenser (6) comprises a drawer (7) housed in a front wall (4) of the machine (1) and comprising a first section (10) adapted to be manually loaded with at least a first powdered or liquid product sufficient for one wash, so as to allow using said laundry washing machine as a conventional manually loaded dispenser machine, wherein said drawer (7) comprises an outer handle (8), wherein said drawer (7) comprises a distinct second section (11) adapted for housing at least a second product sufficient for a given number of washes, so as to allow using said laundry washing machine also in an automatic dispensing mode, wherein said second section (11) houses a container (12) for housing said second product, ~~and wherein said container (12) is refillable~~ and formed integrally with said second section (11), **wherein the drawer (7) is movable between a closed position, a first extracted position, in which only the first section (10) projects from the front wall (4), and a second extracted position, in which both the first and second section (11) project from the front wall (4),**

and wherein the laundry washing machine comprises a stop device (20) for arresting the drawer (7) in the first extracted position when opening the drawer (7)."

XVI. Claim 1 of auxiliary request 5 reads as follows (with the additions to auxiliary request 1 indicated in bold, deletions are struck through):

"Laundry washing machine comprising a dispenser (6) for dispensing detergent products or similar, wherein the dispenser (6) comprises a drawer (7) housed in a front wall (4) of the machine (1) and comprising a first section (10) adapted to be manually loaded with at least a first powdered or liquid product sufficient for one wash, so as to allow using said laundry washing machine as a conventional manually loaded dispenser machine, wherein said drawer (7) comprises an outer handle (8), wherein said drawer (7) comprises a distinct second section (11) adapted for housing at least a second product sufficient for a given number of washes, so as to allow using said laundry washing machine also in an automatic dispensing mode, wherein said second section (11) houses a container (12) for housing said second product **being a detergent,** ~~and~~ wherein said container (12) is refillable and formed integrally with said second section (11), **wherein the first section (10) is divided into a number of compartments (10a, 10b) each for housing a respective first product being a powdered or liquid detergent, and** wherein the second section (11) is located behind the first section (10) in an opening direction of the drawer (7) substantially perpendicular to the front wall (4)."

XVII. The proprietor's arguments relevant to the decision can be summarised as follows:

Claim 1 of 'auxiliary request 1' (i.e. the highest ranking request at the end of the oral proceedings) fulfilled the requirement of Article 123(2) EPC. The handle was presented in the application in several passages, without mentioning that it was flush with the front wall.

The feature "flush" was not presented in the application as filed as being essential. Nor was the feature "flush" functionally or structurally linked to the feature "handle". In view of the whole disclosure of the application as filed, it was thus justified to claim the outer handle in its generic form.

Furthermore, the limitation to an outer handle had been included to delimit the subject-matter of claim 1 over post-published prior art to restore novelty. The introduction of this feature should thus be considered under the aspect of an undisclosed disclaimer. It should be allowable if the conditions for an undisclosed disclaimer developed by the case law of the Boards of Appeal were fulfilled, which was the case here.

Auxiliary requests 2b and 2c should be considered in the appeal proceedings. There were exceptional circumstances in the meaning of Article 13(2) RPBA, as the case law on intermediate generalisations and the Rules of Procedure before the Boards of Appeal had changed during the time the opposition and the appeal were pending. The Board's preliminary opinion in its

communication thus came as a surprise for the proprietor.

XVIII. The opponents' arguments relevant to the decision can be summarised as follows:

Claim 1 did not fulfil the requirement of Article 123(2) EPC. There was only a disclosure of a flush handle such that claiming a handle in its generic form introduced subject-matter that was not derivable from the application as filed.

Whenever reference was made to the handle in the application, this was done in relation to the preferred embodiment as also shown in the figures. Even though the attribute "flush" was not repeated, the text passages still referred to the flush handle as initially introduced.

There was a structural link between the features "handle" and the handle being "flush", the latter referring to the very structure of the handle.

The introduction of the feature "handle" should not be considered under the conditions of an undisclosed disclaimer.

Auxiliary requests 2b and 2c should not be considered in the appeal proceedings. There were no exceptional circumstances in the meaning of Article 13(2) RPBA.

Reasons for the Decision

1. *Auxiliary request 1 (i.e. the highest ranking request at the end of the oral proceedings) - Article 123(2) EPC*

Claim 1 does not fulfil the requirement of Article 123(2) EPC. The general definition that "said drawer comprises an outer handle" introduces subject-matter that is not derivable from the application as filed. There is no basis in the application for a handle other than the one shown and described as an embodiment and being flush with the front wall when the drawer is in the closed position.

- 1.1 Although the allowability of the introduction of the feature that said drawer comprises an outer handle was discussed in view of the main request (claim 1 as granted), and thus with respect to Article 100(c) EPC, the arguments put forward by the parties apply *mutatis mutandis* to the same feature present in claim 1 of auxiliary request 1 with respect to Article 123(2) EPC.
- 1.2 The feature is based on the wording on page 3, lines 19 to 20 of the description as filed. Here, an "outer handle 8" is described "which is flush with front wall 4 when drawer 7 is in the closed position". The proprietor referred to several other passages of the application as filed (page 5, lines 23 to 26, page 6, lines 2 to 7) in which a handle was mentioned without a reference to it being flush.

This does however not justify generalising the disclosure of the flush handle to a handle of a generic type. It is undisputed that the passage on page 3,

lines 18 to 20, refers to the handle 8 as shown in Figures 1-3. This is also explicitly mentioned in line 18. At the other locations referred to by the proprietor, reference is made to "the handle 8", and thus not to a handle in any given generality. The passages on pages 5 and 6 therefore clearly refer to the very same handle as the one introduced in line 19 of page 3 and shown in Figures 1-3, i.e. "the" handle enumerated by the reference numeral "8". This handle 8 is not only depicted as having a shape, the intention of which is to make it flush with the front wall when the drawer is in its closed position, but this characteristic is even explicitly mentioned in said passage on page 3. There is therefore no other disclosure of a handle in the application as filed than one being flush with the front wall.

- 1.3 As to the proprietor's argument that the feature "flush" was not presented in the application as filed as being essential, the Board finds that this is not the relevant standard for assessing whether an amendment fulfils the requirement of Article 123(2) EPC. In its decision G2/10, and summarising long standing case law of the Boards of Appeal, the Enlarged Board of Appeal found that the test to be applied is whether the skilled person would, using common general knowledge, regard the claimed subject-matter as explicitly or implicitly, but directly and unambiguously, disclosed in the application as filed (Reasons 4.5.4). This is commonly referred to as the "gold standard". The proprietor has not provided any reasons as to why the Board should deviate from this test such that any other test can only assist in answering this question, but not substitute it. In this sense, the so-called "essentiality test" according to T331/87 was found to be potentially in contradiction

with the "gold standard" (see T1852/13, Reasons 2.2.3) and the Board also does not see a reason to use it.

1.4 With regard to the proprietor's argument that the feature "flush" was not functionally or structurally linked to the feature "handle", the case law developed around the concept of two features being linked to each other is not applicable. In the present case, the question as to whether the feature "handle" and the attribute "flush" are functionally or structurally linked does not arise since the handle being flush concerns the handle itself. As also argued by the opponent, "flush with the outer wall" refers to the very structure of the handle. The handle presented in the application and it being flush with front wall 4 are not regarded as separate features that could potentially be linked. Being flush with the outer wall is a technical characteristic of the handle and its inherent structure.

1.5 As to the proprietor's argument that the feature of an outer handle should be treated under the concept of an undisclosed disclaimer, this is also not accepted.

Firstly, there is no disclaimer in claim 1, as there is no negative feature. Secondly, the contested feature covers all kinds of handles, instead of excluding a particular one as would be the case if a certain prior art handle had been disclaimed. Not recognising the existence of a disclaimer, the Board sees no reason to apply any of the test criteria developed under the concept of disclaimers.

1.6 Auxiliary request 1 is thus not allowable.

2. *Auxiliary requests 2a, 2, 3, 4, 5 - Article 123(2) EPC*

2.1 The proprietor did not present any specific arguments regarding Article 123(2) EPC for auxiliary requests 2a, 2, 3, 4, 5. As the feature regarding the outer handle in claim 1 of each of auxiliary requests 2a, 2, 3, 4 and 5 is identical to that in auxiliary request 1 and the Board finds that the further amendments made to claim 1 of these requests also do not overcome the objection discussed above for auxiliary request 1, claim 1 of each of these requests does not fulfil the requirement of Article 123(2) EPC either.

2.2 None of auxiliary requests 2a, 2, 3, 4 and 5 is thus allowable.

3. *Auxiliary requests 2b, 2c - admittance*

Auxiliary requests 2b and 2c are not taken into account by the Board (Article 13(2) RPBA 2020).

3.1 Under Article 13(2) of the Rules of Procedure of the Boards of Appeal 2020 (RPBA 2020), "[a]ny amendment to a party's appeal case made after ... notification to a summons to oral proceedings shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned" (emphasis added by the Board). Article 13(2) RPBA 2020 is applicable (see Article 25(1), (3) RPBA 2020) as the Board's summons was issued in 2021.

3.2 There are no exceptional circumstances that would justify their admittance. The proprietor's argument, that the case law on intermediate generalisations and the Rules of Procedure before the Boards of Appeal had

changed during the time the opposition and the appeal were pending, and that this constituted exceptional circumstances, is not accepted.

As explained above (see Reasons 1.3), in G2/10 the "gold standard" is found to be the only test to be applied in the assessment of whether the requirement of Article 123(2) EPC is fulfilled. G2/10 was decided on 30 August 2011 and published in the Official Journal 2012, 376, i.e. long before the opposition underlying the present case was filed in 2016.

Whether the "essentiality test" was declared to be in contradiction to the "gold standard" at some point in time, or whether decisions with a different conclusion were handed down by opposition divisions, is of no relevance for the present assessment of the Board.

The Board's preliminary opinion in its communication could thus not come as a surprise for the proprietor.

- 3.3 The new Rules of Procedure before the Boards of Appeal (RPBA 2020) came into force on 1 January 2020. Their changes do not, in themselves, constitute exceptional circumstances either. According to the transitional regulations (see Article 25(1) RPBA 2020), Article 13(1) and (2) RPBA 2020 are applicable to all appeals pending on that date.

The first reaction from the proprietor was however its submission dated 24 August 2022 in response to the Board's communication issued after the notification of the summons to oral proceedings. As the proprietor waited until after this notification, the stringent provisions of new Article 13(2) RPBA 2020 fully apply.

3.4 As auxiliary requests 2b and 2c represent an amendment of the proprietor's case after the Board had issued its communication in preparation of the oral proceedings, and as there are no exceptional circumstances in the present case, these requests are not taken into account.

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:



D. Grundner

P. Cipriano

Decision electronically authenticated