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**Datasheet for the decision
of 18 January 2022**

Case Number: T 2125/18 - 3.2.06

Application Number: 11003983.1

Publication Number: 2360306

IPC: D06F37/22

Language of the proceedings: EN

Title of invention:
Drum type washing machine

Patent Proprietor:
Samsung Electronics Co., Ltd.

Opponent:
Bock, Wolfgang

Headword:

Relevant legal provisions:
EPC R. 100(2)
RPBA Art. 12(1), 12(1)(b), 12(1)(c), 12(2)
RPBA 2020 Art. 13(2), 25(3)

Keyword:
Amendment after summons - exceptional circumstances (no)

Decisions cited:

T 1194/12, T 0233/18, T 0222/18

Catchword:

Notification of the statement of grounds of appeal is not a
Rule 100(2) EPC communication (Reasons 1.4)
Article 13(2) RPBA - "in principle" (Reasons 2.1)



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 2125/18 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 18 January 2022

Appellant: Samsung Electronics Co., Ltd.
(Patent Proprietor) 129, Samsung-ro
Yeongtong-gu
Suwon-si, Gyeonggi-do, 443-742 (KR)

Representative: Gulde & Partner
Patent- und Rechtsanwaltskanzlei mbB
Wallstraße 58/59
10179 Berlin (DE)

Respondent: Bock, Wolfgang
(Opponent) Stuntzstraße 33
81677 München (DE)

Representative: Samson & Partner Patentanwälte mbB
Widenmayerstraße 6
80538 München (DE)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 15 June 2018
revoking European patent No. 2360306 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman M. Harrison
Members: P. Cipriano
A. Jimenez

Summary of Facts and Submissions

- I. An appeal was filed by the patent proprietor (appellant) against the decision of the opposition division revoking European patent No. 2 360 306. It requested that the decision under appeal be set aside and the patent be maintained according to a main request or, as an auxiliary measure, that the patent be maintained in amended form according to an auxiliary request 1.
- II. The respondent (opponent) requested that the appeal be dismissed.
- III. The Board issued a summons to oral proceedings on 3 February 2020 and a subsequent communication containing its provisional opinion, in which it indicated *inter alia* that the subject-matter of claim 1 of the main request and of auxiliary request 1 did not fulfil the requirements of Articles 76(1) and 123(2) EPC, including the fact that the first paragraph on page 8 of the divisional application as filed was not present in the parent application.
- IV. With its letters dated 25 June 2020 and 7 September 2020, the appellant filed a new main request and 6 additional auxiliary requests (request "main-A" as well as auxiliary requests 1, 1A, 2A, 3A and 3B) and renumbered and reordered its previous main request and auxiliary request 1 filed with the grounds of appeal as auxiliary requests 2 and 3 respectively.
- V. The Board issued a further communication dated 16 October 2020, in which it stated that it did not consider that there were exceptional circumstances

justified with cogent reasons (as stipulated in Article 13(2) RPBA 2020) and was thus minded not to take any of the requests filed with letters dated 25 June 2020 and 7 September 2020 into account.

- VI. With its letter dated 20 November 2020 the appellant reordered its requests into the following order:
- the main request and auxiliary request 1 being the main request and auxiliary request 1 respectively as filed with the grounds of appeal (corresponding to auxiliary request 2 and 3 in the previous order)
 - auxiliary requests 2, 3 and 4 corresponding to auxiliary requests 2A, 3A and 3B in the previous order.
- VII. Oral proceedings were held by video-conference before the Board on 18 January 2022.

The final requests of the parties were as follows:

The appellant (patent proprietor) requested that the decision under appeal be set aside and the patent be maintained in amended form on the basis of the main request, consisting of claim 1 labelled "main request" filed with the statement of grounds of appeal, claims 2 and 3 of the patent as granted and the amended description filed on 25 June 2020, or on the basis of auxiliary request 1 consisting of claim 1 labelled "auxiliary request 1" filed with the statement of grounds of appeal, claim 3 of the patent as granted as new claim 2 and the amended description filed on 25 June 2020, or on the basis of the claims of auxiliary requests 2-4, filed as auxiliary requests 2A, 3A and 3B with letter of 7 September 2020, together with the amended description filed on 25 June 2020.

The respondent (opponent) requested that the appeal be dismissed.

VIII. The first paragraph on page 8 of the description as filed reads as follows:

"In FIG. 3 and 5 a cross section of the annular shaped body of the balancer (70F, 70R) comprises an inner wall and an outer wall facing the inner wall, which outer wall is disposed farther from the centre of the balancer (70F, 70R) than the inner wall, a first connecting wall and a second connecting wall formed between the inner wall and the outer wall to define said internal quadrilateral space, wherein the outer wall contacting the balls (74) contained therein during rotation of the spin tub (40) is formed as an undivided and unitary piece. A depth of the annular groove (43a) for accommodating the annular shaped body of the balancer (70F, 70R) is selected such that at least a centre of each of the balls (74) contained in the annular shaped body is disposed completely within the annular groove."

Claim 1 of the main request reads as follows (including the feature-by-feature analysis adopted by the appellant in its grounds of appeal):

"A drum type washing machine comprising:

- 1 a housing (10);
 - 2 a water reservoir (30) installed in the housing (10) to receive water therein;
 - 3 a spin tub (40) rotatable by receiving a rotational force from a driving motor (50) through a rotating shaft (53)
- characterized by
- 4 the spin tub (40) including an annular groove (43a)

4.1 formed at an outer peripheral end portion of a rear cover of the spin tub (40),
5 a shaft flange (60) provided with the rotating shaft (53) at the centre portion thereof and coupled to the spin tub (40),
5.1 the shaft flange (60) including a plurality of arm sections (62) extending radially outward; and
6 a rear balancer (70R) having one annular shaped housing (71, 72) rested in the annular groove (43a) and
6.1 including a plurality of balls (74) disposed and movable within an internal space of the annular shaped housing (71, 72) of the balancer (70R),
6.2 the annular shaped housing of the balancer having a cross section providing an internal quadrilateral space, wherein said annular shaped housing of the balancer (70R) comprises
6.3 a first balancer housing of essentially U-shape with an outer wall, an inner wall and a first connecting wall, and
6.4 a second balancer housing (72) forming a second connecting wall,
6.5 said housings are coupled to each other to form said internal quadrilateral space by said inner wall, first connecting wall, second connecting wall and outer wall;
7 wherein a depth of the annular groove (43a) for accommodating the annular shaped body of the balancer (70R) is selected such that each of the balls (74) contained in the annular shaped body is completely disposed within the annular groove, and
8 wherein the rear balancer (70R) is rested in the annular groove (43a) being supported by a rear surface of the rear cover and a front surface of the arm sections of the shaft flange."

Claim 1 of auxiliary request 1 builds on claim 1 of the main request, with the following feature appended at the end:

"9 and wherein the shape of the annular groove (43a) corresponds to the shape of the rear balancer (70R) such that the balancer rests in the groove."

The text of of auxiliary requests 2, 3 and 4 is appended at the end of the decision.

IX. The arguments of the appellant relevant to this decision may be summarised as follows:

Applicability of Article 13(2) RPBA 2020

Article 13(2) RPBA did not apply in the present appeal case. The communication issued on 31 October 2018 before the entry into force of the Revised Rules of the Procedure of the Boards of Appeal 2020 (RPBA 2020) was a communication under Rule 100(2) EPC.

There was no indication in Rule 100(2) EPC that the communication needed to contain substantive content. The examination of the appeal mentioned in Rule 100(2) EPC started already with the filing of the grounds of appeal. It was also not excluded that the grounds of appeal were observations as stipulated under Rule 100(2) EPC.

The summons for oral proceedings could have been issued earlier, before 1 January 2020.

Exceptional circumstances

The objection had been only brought forward for the first time with the preliminary opinion of the Board.

The representative of the appellant had changed and could not have dealt with the objection earlier.

- X. The arguments of the respondent relevant to this decision may be summarised as follows:

The main request and auxiliary requests 1 to 4 should not be taken into account.

Applicability of Article 13(2) RPBA 2020

The summons to oral proceedings were issued after the entry into force of the RPBA 2020 and thus according to Article 25(3) RPBA 2020, Article 13(2) RPBA 2020 was applicable to all requests.

The communication issued on 31 October 2018 was not a communication under Rule 100(2) EPC concerning examination of the appeal but a communication by the registrar (not the Board) addressed only to the respondent before examination of the appeal.

Exceptional circumstances

There were no exceptional circumstances justified with cogent reasons for filing the requests containing the revised description as an amendment to the appellant's appeal case. The problem with the description had already been discussed and acknowledged in the opposition proceedings and was part of the decision under appeal.

Reasons for the Decision

1. Applicability of Article 13(2) RPBA 2020
 - 1.1 With its letters dated 25 June 2020 and 7 September 2020 sent after the summons to oral proceedings dated 3 February 2020, the appellant filed a new main request and eight auxiliary requests. Auxiliary requests 2 and 3 contained the claims of the previous main request and auxiliary request 1 filed with the grounds of appeal respectively, but comprised a revised description.
 - 1.2 With its letter dated 20 November 2020 the appellant reordered its requests into the following order:
 - the main request and auxiliary request 1 being the main request and auxiliary request 1 respectively as filed with the grounds of appeal, i.e. without the revised description
 - auxiliary requests 2, 3 and 4 corresponding to auxiliary requests 2A, 3A and 3B in the previous order.
 - 1.3 At the beginning of the oral proceedings, the appellant amended the description of the main request and auxiliary request 1 to the revised description as filed on 25 June 2020.
 - 1.4 The appellant argued that Article 13(2) RPBA 2020 did not apply to the present case. Article 13(2) RPBA 2020 referred to
"[a]ny amendment to a party's appeal case made after the expiry of a period specified by the Board in a communication under Rule 100, paragraph 2, EPC or, where such a communication is not issued, after notification of a summons to oral proceedings...".

According to the appellant, since it was not excluded that the grounds of appeal could be seen as observations under Rule 100(2) EPC, the communication issued on 31 October 2018 was a communication under Rule 100(2) EPC. Rule 100(2) EPC did not require such communications to possess substantive content. Further, according to Article 25(3) RPBA 2020, since such a communication was issued prior to the date of entry into force of the RPBA 2020 (1 January 2020) Article 13(2) RPBA 2020 did not apply (see also T 1194/12 and T 233/18).

- 1.4.1 The Board does not accept these arguments. The communication issued on 31 October 2018 is a standardized communication without any personalized instructions, issued by the Registrar in *inter partes* proceedings accompanying a copy of the statement of the grounds of appeal of an appellant which is notified to the remaining parties in order to give them the chance of filing their written replies as foreseen in Article 12(1) (b) RPBA 2007.

As foreseen in Article 12(1) and (2) RPBA 2007, the statement of grounds of appeal and the replies constitute the basis of the appeal proceedings, being the parties' respective complete cases which are consequently used for the examination of the appeal. Whilst it is true that Rule 100(2) EPC does not explicitly require the communication to have substantive content, the Board finds that such a communication issued by the Registrar does not fall within the scope of the examination of the appeal, but serves a purely formal step in the procedure, namely the notification of the appellant's grounds of appeal to first obtain a written submission from the other

party/parties, on the basis of which the substantive examination can then take place (see also e.g. T 222/18, Reasons 7.6 to 7.8).

- 1.4.2 Since Rule 100(2) EPC refers only to communications issued "[i]n the examination of the appeal", and not merely "in the appeal" the Board also concludes that this can only logically concern communications containing substantive content (i.e. involving content relevant to the examination of the appeal) and not just "any" communication in appeal, and certainly not a communication informing a party merely of a possibility to respond. The Board thus finds that the communication issued by the Registrar on 31 October 2018 to notify the appellant's grounds of appeal to the other party does not constitute a communication under Rule 100(2) EPC.
- 1.4.3 This also does not contradict the decisions T 1194/12 and T 0233/18 cited by the appellant, since in both cases the communications were explicitly communications under Rule 100(2) EPC containing substantive issues (see Summary of Facts and Submissions, IV and V, respectively).
- 1.5 The appellant further argued that the summons to oral proceedings could have been issued earlier.
 - 1.5.1 The Board does not accept this argument either. The Board fulfilled all the criteria stipulated in Article 15(1) RPBA 2020 as well as all the necessary requirements in Rule 115 EPC. No requirement exists as to when the summons is issued. If the Board did not issue the summons earlier this was because the circumstances prevailing at the time did not warrant issue of the communication earlier.

1.5.2 In addition, the Board notes that the RPBA 2020 including its transitional provisions were made public well before their date of entry into force in order not to take parties by surprise and to give them enough time to consider possible necessary procedural actions to be taken on their part so as to avoid any undesired consequences (such as in the case of Article 25(3) RPBA 2020).

1.6 Since neither a communication under Rule 100(2) EPC nor a summons to oral proceedings were issued prior to the date of entry into force of the RPBA 2020, Article 13(2) RPBA 2020 applies to all requests.

2. Exceptional circumstances

2.1 According to Article 13(2) RPBA 2020, "[a]ny amendment to a party's appeal case made ... after notification of 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".

First, the terminology "in principle" can only be understood to refer to the general principle which is to be observed at this late stage of the appeal procedure. This is because Article 13(2) RPBA 2020 is that part of the RPBA which is the most stringent - i.e. it defines the "third level of convergence". Thus, the wording "in principle" cannot be understood to mean that it can be applied simply where the Board finds it fitting, because this would reduce its application to the far broader discretionary powers granted to the Board under Article 13(1) RPBA 2020. Also, it is only logical when following the concept of the three levels

of convergence (as explained in e.g. the explanatory remarks to Articles 12(4), 13(1) and 13(2) RPBA 2020) that such a stringent approach must be followed after the less stringent ones, and as the proceedings progress. Indeed, this principle comes into effect only at a late stage of the appeal proceedings (here, after the summons was notified), when a party has made its complete appeal case and any amendments to that appeal case which may have been appropriate under Article 13(1) RPBA 2020. Thus, following the wording of Article 13(2) RPBA 2020, the principle has to be applied, such that, for the Board to take the amendment to the appeal case into account, exceptional circumstances must have arisen.

For applying the exception stated in Article 13(2) RPBA 2020, it is also the party amending its case which has to show that exceptional circumstances exist that would justify why deviation from the general principle should be allowed.

2.2 The appellant argued that no objection under Article 76(1) EPC had been made specifically regarding the first paragraph of page 8 of the description of the application as filed before the Board objected to it in item 1.7 of its preliminary opinion dated 25 June 2020. According to the appellant, it amended the description of its own volition before receiving the preliminary opinion of the Board but nevertheless the amendment also constituted a legitimate response to an objection made for the first time by the Board.

2.2.1 The Board does not find this argument persuasive. As can be seen in the decision under appeal (see page 9, first text paragraph), the opponent already argued that the first paragraph on page 8 of the divisional

application did not exist in the parent application as filed. From the last sentence in the first paragraph on page 10 of the contested decision, in which it is stated that the proprietor argued that the subject-matter of the first paragraph on page 8 of the description did not extend beyond the content of the parent application as filed, it is also clear that the proprietor understood (albeit the proprietor did not agree with the objection) that this paragraph was considered to contain subject-matter that did not fulfil the requirement of Article 76(1) EPC.

The opposition division also stated, in the paragraph before last on page 10 of the decision, that it was of the opinion that the subject-matter in the paragraph on page 8 was not "objectively and unambiguously derivable" from the parent application and in the following sentence (through the use of the conjunctive adverb "also") that the paragraph was not disclosed in the parent application. The Board thus finds that the decision indeed concludes that the paragraph on page 8 constitutes a deficiency and does not fulfil the requirement of Article 76(1) EPC.

Also on page 3, first paragraph of the reply to the grounds of appeal (in the respondent's summary of the decision reasoning) it is stated that "[t]he Opposition Division rejected the Appellant's such arguments and decided on violation of Article 76(1) EPC because the paragraph was added when filing the divisional application O1 and not contained in the earlier application E1".

This objection was thus not made for the first time by the Board in its preliminary opinion but was part of the decision and the respondent's appeal case.

- 2.2.2 Since it was already established by the opposition division that the first paragraph on page 8 contained subject-matter that contravened Article 76(1) EPC, the Board cannot recognize any exceptional circumstances justified with cogent reasons for the amendment to the appellant's case after notification of the summons to oral proceedings.
- 2.2.3 The Board also notes that in this case the amendment made to the description is not equatable with an adaptation of the description to a set of allowable claims but can only be seen as a response to an objection relating specifically to the text of the description independent of any possible amendment of the claims, not least since the text of the paragraph does not match the wording of the claims and also contains further subject-matter (for example, regarding the inner and outer wall of the annular shaped body) manifestly without correspondence in claim features.
- 2.3 The appellant also argued that the proprietor had changed the law firm representing it during the proceedings, which had led to the objection regarding the description being recognized at a late stage.

The Board does not find this argument persuasive either. A change of representative cannot be recognized as an exceptional circumstance for amendments to the party's appeal case being filed at this late stage of proceedings. To accept such an argument would leave the door open for a change of representative to be purposively made in order to enable the admittance of e.g. new requests after the complete case had been made as laid down in Article 12(3) RPBA 2020. This would not provide a basis for a fair procedure.

- 2.4 The Board thus finds that no exceptional circumstances justified by cogent reasons have been presented which justify the filing of an amended description only after the notification of the summons to oral proceedings.
- 2.5 The same amended description is present in all the auxiliary requests, which were also filed after the summons to oral proceedings was notified. The Board cannot recognize any specific exceptional circumstances for filing the amended description only after the notification of the summons to oral proceedings for any of the auxiliary requests either. The appellant also did not argue that there were any.
3. Accordingly, the Board exercised its discretion under Article 13(2) RPBA 2020 not to take the main request and the auxiliary requests 1 to 4 into account.
4. In the absence of any request in the proceedings on the basis of which the patent can be maintained, the impugned decision cannot be set aside and the appeal must be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



D. Grundner

M. Harrison

Decision electronically authenticated

Claim 1 of auxiliary request 2

1. A drum type washing machine comprising:

a housing (10);

a water reservoir (30) installed in the housing (10) to receive water therein;

a spin tub (40) rotatable by receiving a rotational force from a driving motor (50) through a rotating shaft (53),

characterized by

the spin tub (40) including an annular groove (43a) formed at an outer peripheral end portion of a rear cover of the spin tub (40),

a shaft flange (60) provided with the rotating shaft (53) at the centre portion thereof and coupled to the spin tub (40), the shaft flange (60) including a plurality of arm sections (62) extending radially outward; and

a rear balancer (70R) having one annular shaped housing (71, 72) rested in the annular groove (43a) and including a plurality of balls (74) disposed and movable within an internal space of the annular shaped housing (71, 72) of the balancer (70R), the annular shaped housing of the balancer having a cross section providing an internal quadrilateral space,

wherein said annular shaped housing of the balancer (70R) comprises a first balancer housing of essentially U-shape and a second balancer housing (72), said housings are coupled to each other to form said internal quadrilateral space;

wherein a depth of the annular groove (43a) for accommodating the annular shaped body of the balancer (70R) is selected such that each of the balls (74) contained in the annular shaped body is completely disposed within the annular groove, and

wherein the rear balancer (70R) is rested in the annular groove (43a) being supported by a rear surface of the rear cover and a front surface of the arm sections of the shaft flange.

Claim 1 of auxiliary request 3

1. A drum type washing machine comprising:

a housing (10);

a water reservoir (30) installed in the housing (10) to receive water therein;

a spin tub (40) rotatable by receiving a rotational force from a driving motor (50) through a rotating shaft (53),

characterized by

the spin tub (40) including an annular groove (43a) formed at an outer peripheral end portion of a rear cover of the spin tub (40),

a shaft flange (60) provided with the rotating shaft (53) at the centre portion thereof and coupled to the spin tub (40), the shaft flange (60) including a plurality of arm sections (62) extending radially outward; and

a rear balancer (70R) having one annular shaped housing (71, 72) rested in the annular groove (43a) and including a plurality of balls (74) disposed and movable within an internal space of the annular shaped housing (71, 72) of the balancer (70R), the annular shaped housing of the balancer having a cross section providing an internal quadrilateral space,

wherein said annular shaped housing of the balancer (70R) comprises a first balancer housing of essentially U-shape and a second balancer housing (72), said housings are coupled to each other to form said internal quadrilateral space;

wherein a depth of the annular groove (43a) for accommodating the annular shaped body of the balancer (70R) is selected such that each of the balls (74) contained in the annular shaped body is completely disposed within the annular groove,

wherein the rear balancer (70R) is rested in the annular groove (43a) being supported by a rear surface of the rear cover and a front surface of the arm sections of the shaft flange, and

wherein the shape of the annular groove (43a) corresponds to the shape of the rear balancer (70R) such that the balancer rests in the groove.

Claim 1 of auxiliary request 4

1. A drum type washing machine comprising:

a housing (10) having a box shape forming an external appearance of the drum type washing machine;

a water reservoir (30) installed in the housing (10) to receive water therein;

a spin tub (40) rotatable by receiving a rotational force from a driving motor (50) through a rotating shaft (53),

characterized by

the spin tub (40) including an annular groove (43a) formed at an outer peripheral end portion of a rear cover of the spin tub (40),

a shaft flange (60) provided with the rotating shaft (53) at the centre portion thereof and coupled to the spin tub (40), the shaft flange (60) including a plurality of arm sections (62) extending radially outward; and

a rear balancer (70R) having one annular shaped housing (71, 72) rested in the annular groove (43a) and including a plurality of balls (74) disposed and movable within an internal space of the annular shaped housing (71, 72) of the balancer (70R), the annular shaped housing of the balancer having a cross section providing an internal quadrilateral space,

wherein said annular shaped housing of the balancer (70R) comprises a first balancer housing of essentially U-shape being positioned at the side of the shaft flange (60) with an outer wall, an inner wall and a first connecting wall and a second balancer housing (72) forming a second connecting wall, said housings are coupled to each other to form said internal quadrilateral space by said inner wall, first connecting wall, second connecting wall, and outer wall;

wherein a depth of the annular groove (43a) for accommodating the annular shaped body of the balancer (70R) is selected such that the rear balancer (70R) and each of the balls (74) contained in the rear balancer (70R) is completely disposed within the annular groove,

wherein the rear balancer (70R) is rested in the annular groove (43a) being supported by a rear surface of the rear cover and a front surface of the arm sections of the shaft flange, and

wherein the shape of the annular groove (43a) corresponds to the shape of the rear balancer (70R) such that the balancer rests in the groove,

wherein a part of the rear end portion of the spin tub body (41) protrudes toward the rear side of the rear cover (43), so that an end portion of the arm sections (62) is fixed to the protruding part of the rear end portion of the spin tub body (41).