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**Datasheet for the decision  
of 4 November 2022**

**Case Number:** T 2152/19 - 3.2.03

**Application Number:** 06121125.6

**Publication Number:** 1906117

**IPC:** F25D17/06

**Language of the proceedings:** EN

**Title of invention:**

Production method of vertical freezers

**Patent Proprietor:**

Electrolux Home Products Corporation N.V.

**Opponent:**

Liebherr-Hausgeräte Ochsenhausen GmbH

**Headword:**

**Relevant legal provisions:**

EPC Art. 116(1), 100(c), 123(2), 123(3)  
RPBA 2020 Art. 12(8), 13(2)

**Keyword:**

Oral proceedings - withdrawal of request for oral proceedings  
- decision in written proceedings  
Amendments - features from schematic drawings - added subject-  
matter (yes) - inescapable trap (yes)  
Late-filed request - circumstances of appeal case justify  
admittance (no)

**Decisions cited:**

T 0169/83, T 0748/91, G 0001/93

**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 2152/19 - 3.2.03

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.03**  
**of 4 November 2022**

**Appellant:** Liebherr-Hausgeräte Ochsenhausen GmbH  
(Opponent) Memminger Str. 77-79  
88416 Ochsenhausen (DE)

**Representative:** Herrmann, Uwe  
Lorenz Seidler Gossel  
Rechtsanwälte Patentanwälte  
Partnerschaft mbB  
Widenmayerstraße 23  
80538 München (DE)

**Respondent:** Electrolux Home Products Corporation N.V.  
(Patent Proprietor) Raketstraat 40  
1130 Brussels (BE)

**Representative:** Electrolux Group Patents  
AB Electrolux  
Group Patents  
S:t Göransgatan 143  
105 45 Stockholm (SE)

**Decision under appeal:** **Decision of the Opposition Division of the European Patent Office posted on 27 May 2019 rejecting the opposition filed against European patent No. 1906117 pursuant to Article 101(2) EPC.**

**Composition of the Board:**

**Chairman**            G. Patton  
**Members:**            B. Goers  
                              D. Prietzel-Funk

## Summary of Facts and Submissions

- I. European patent No.1 906 117 relates to a freezing compartment of a vertical freezer having an upper wall provided with a cavity partially lodging an evaporation battery.
- II. With the impugned decision, the opposition division rejected the opposition which was based on the grounds of Article 100(a) and (c) EPC.
- III. With its communication under Article 15(1) RPBA 2020 dated 13 June 2022, the board informed the parties of its preliminary view of the case, *inter alia* that feature [1.8] of claim 1 of the main request constituted added subject-matter (see section VI below for the feature analysis). This objection seemed to apply to claim 1 of all of the requests on file.
- IV. With a letter dated 31 August 2022 the respondent announced it would not be attending the scheduled oral proceedings. It also filed new auxiliary requests 9a and 9b.
- V. The parties' requests were as follows.

The opponent ("appellant") requested that the decision under appeal be set aside and that the patent be revoked.

The patent proprietor ("respondent") requested that the appeal be dismissed and that the patent be maintained as granted (main request), or, alternatively, that the patent be maintained in amended form on the basis of

any one of the submitted auxiliary requests, in the following order:

- auxiliary request 4, filed by letter dated 15 January 2018
- auxiliary request 4a, 4b, 4c, 4d, 4e or 4f, filed by letter dated 4 August 2020
- auxiliary request 1, 2, 3, 5, 6, 7 or 8, filed by letter dated 15 January 2018
- conditionally all requests but auxiliary request 3 with a modified claim 3 ("replacement claim 3") and a correspondingly modified auxiliary request 3 (auxiliary request 3a), all filed by letter dated 4 August 2020
- auxiliary request 9a or 9b filed by letter dated 31 August 2022.

VI. Claim wording as far as is relevant for the decision

(a) Claim 1 of the main request (patent as granted) reads as follows (with feature numbering added in "[ ]"):

"[1.1] *Freezing compartment of a vertical freezer provided with:*  
[1.2] *- an upper wall (4),*  
[1.3] *- an evaporating battery (2) contained in an outer envelope (Nx) mounted on a bottom side of said upper wall (4),*  
[1.4] *the front sides of said evaporating battery (2) and said outer envelope (Nx) being inclined upwards,*  
[1.5] *- said upper wall (4) of said freezing compartment being provided, towards the evaporating battery (2), with a cavity (6) having a front side inclined upwards,*

[1.6] *said cavity (6) partially lodging an upper portion of said evaporating battery (2),*

***characterised in that***

[1.7] *said cavity (6) is defined by a reduction of the thickness of said upper wall (4),*

***and in that***

[1.8] *said thickness of said upper wall (4) is substantially constant in front of and behind said cavity (6)."*

(b) Claim 1 of auxiliary requests 4 and 4a to 4e is based on claim 1 of the main request but has permutations of the following features [a] to [c] in addition:

[a] *"wherein only a small portion (9) of the upper wall (4) of the compartment (2) is sacrificed to create said cavity (6)"*

[b] *"wherein the reduction of the overall insulation ability of said upper wall (4) is low"*

[c] *"wherein the average thickness ( $S_m$ ) of said upper insulating wall (4), provided with said cavity (6), is only slightly reduced with respect to the thickness ( $S$ ) of the same insulating wall without said cavity".*

The permutations are as follows:

- Auxiliary request 4: Feature [a]
- Auxiliary request 4a: Features [a] and [b] and/or [c]
- Auxiliary request 4b: Features [a] and [b] or [c]
- Auxiliary request 4c: Features [a] and [b]
- Auxiliary request 4d: Feature [c]
- Auxiliary request 4e: Features [a] and [b] and [c]

(c) Claim 1 of auxiliary request 4f is based on claim 1 of auxiliary request 4a but has the following amendments (marked with bold type and strike-through):

**"Vertical freezer having a f**Freezing compartment, **wherein the freezing compartment is** ~~of a vertical freezer~~ provided with: ...".

(d) Claim 1 of auxiliary request 1 is based on claim 1 of the main request but has the following additional features:

*"... and in that said front side of said cavity (6) which is inclined upwards faces a first side of the evaporating battery (2), and in that the cavity (6) has another side inclined downwards and facing a second side of the evaporating battery (2)".*

(e) Claim 1 of auxiliary request 2 is based on claim 1 of the main request but has the following amendments in feature [1.8] (marked with bold type and strike-through):

*"[1.8] said thickness **(S)** of said upper wall (4) **without said cavity (6)** is ~~substantially~~ constant in front of and behind said cavity (6)".*

(f) Claim 1 of auxiliary request 3 is based on claim 1 of the main request but has the following additional features:

*"... and in that said cavity (6) has substantially the same width as said evaporating battery (2)".*



(g) Claim 1 of auxiliary request 3a is based on claim 1 of the main request but has the following amendment:

*"... and in that the width of said cavity (6) is only a portion of the whole compartment width and is the same as the width of the evaporating battery (2)."*

(h) Claim 1 of auxiliary request 5 is based on claim 1 of the main request but has the following amendments in feature [1.1] (marked with bold and strike-through):

***"Vertical freezer having a ~~f~~Freezing compartment, wherein the freezing compartment is ~~of a vertical freezer~~ provided with: ..."***

(i) Claim 1 of auxiliary request 6 is based on claim 1 of auxiliary request 5 but has the following amendment in feature [1.1] (marked with bold):

***"Vertical household freezer having a freezing compartment [0001] [0039], wherein the freezing compartment is provided with: ..."***

(j) Claim 1 of auxiliary request 7 is based on claim 1 of the main request but has the following additional features:

*"..., wherein said cavity (6) being open downwards and having geometry, size and position configured to lodge said upper portion of said evaporating battery (2)."*

(k) Claim 1 of auxiliary request 8 is based on claim 1 of the main request but has the following amendment in feature [1.3] (marked with bold):

"... - an evaporating battery (2) **and a fan (3)** contained in an outer envelope (Nx) mounted on a bottom side of said upper wall (4), ...".

(1) Claim 1 of auxiliary requests 9a and 9b is based on claim 1 of the main request but has the following amendment in feature [1.7] (marked with bold), and feature [1.8] has been deleted:

... [1.7'] said **upper wall (4) has a thickness S and in that said** cavity (6) is defined by a reduction of the thickness **S** of said upper wall (4) ~~and in that~~  
~~[1.8] said thickness of said upper wall (4) is substantially constant in front of and behind said cavity (6)."~~

VII. The appellant's arguments, where relevant to the present decision, can be summarised as follows.

(a) Article 100 (c) EPC

The main request was not allowable since the subject-matter of claim 1 extended beyond the application as filed due to the introduction of feature [1.8]. The sole thickness disclosed in the application as filed related to an average thickness and there was no clear and unambiguous disclosure of any thickness outside the cavity. Since Figures 1, 5 and 6 are only schematic, relying on the thickness disclosed therein as a basis for the amendment was not allowable. That a constant thickness in front of and behind the cavity was an essential feature also had no basis in the application as filed. However, in accordance with decision T 169/83, cf. the headnote, such consistency with

respect to structure and function was the precondition for considering such features from schematic drawings to be disclosed. Moreover, there were inconsistencies between the figures and the description, such as that the average thickness  $S_m$  was shown in Figure 5 only as the minimum thickness of the cavity. Furthermore, the figures showed only a single cross-section and did not disclose the thickness at any other possible cross-section. Even though the cavity was formed from a precursor wall, this did not imply that the thickness was uniform.

(b) Admittance of auxiliary requests 9a and 9b

Auxiliary requests 9a and 9b should not be admitted into the proceedings since no reasons were apparent as to why they were submitted at that late stage. In addition, and contrary to the requirements of Article 13(2) RPBA 2020, no reasons were provided for the late submission of these requests. Furthermore the amendments made gave rise to further objections under Article 123(3) EPC.

VIII. The respondent's arguments, where relevant to the present decision, can be summarised as follows.

(a) Article 100 (c) EPC

The subject-matter of claim 1 of the main request did not extend beyond the disclosure of the application as filed. The description disclosed a given thickness  $S$  with a given magnitude. Figures 1, 5 and 6 were more than schematic and a dimensional analysis with respect to the thickness was possible, which was also confirmed by decision T 169/83, which stated that schematic figures generally could also provide a basis for

amending the claims. From Figures 1, 5 and 6 the skilled person would have unambiguously understood that this thickness was indeed constant, i.e. uniform, except in the area of the cavity. A cavity was a hollowed-out space, i.e. the cavity was formed by sacrificing a part of the precursor upper wall shown in Figure 1. Due to the insulation requirements of such a precursor wall, the wall outside the cavity has to have a uniform thickness.

(b) Admittance of auxiliary requests 9a and 9b

Auxiliary requests 9a and 9b should be admitted into the proceedings. Due to the rewording of granted features [1.7] to [1.7'], the deletion of granted feature [1.8] was not an issue under Article 123(3) EPC. By introducing a specific (uniform) thickness S into claim 1, the scope was not broadened with respect to claim 1 of the main request and thus no issue of extension of protection arose from this amendment.

## **Reasons for the Decision**

1. Since the respondent's requests on file are either not allowable or not admitted into the proceedings the appellant's request for the impugned decision to be reversed and for the patent to be revoked is successful. Thus, the appeal is allowable.

### *Decision in written proceedings*

2. In view of the respondent's explicit written statement following the board's preliminary opinion, in which it indicated that it would not be attending the oral proceedings, the scheduled oral proceedings were cancelled and the decision will now be handed down in written proceedings (Article 12(8) RPBA 2020).

As a matter of fact, in accordance with established case law (see Case Law of the Boards of Appeal, 10th edition, 2022, III.C.4.3.2) the respondent's statement that it would not be attending oral proceedings is interpreted as a withdrawal of its request for oral proceedings. When a party states that it will not be attending oral proceedings, it is unequivocally expressing its interest in an immediate decision on the file as it stands and implying that it does not wish to present its arguments orally in the previously requested oral proceedings.

The arguments of the respondent on file with respect to the objection of added-subject matter are not persuasive and the board maintains its preliminary view

as according its communication pursuant to Article 15(1) RPBA 2020. Furthermore, auxiliary requests 9a and 9b, which were filed after this communication, are not admitted into the proceedings, as explained in the following, for the reasons provided by the appellant in reaction to the filing of these requests.

Thus, holding oral proceedings is not considered to be expedient and therefore they have been cancelled (cf. Article 116(1) EPC).

*Ground of opposition under Article 100(c) EPC*

3. Main request - added subject-matter with respect to feature [1.8]
- 3.1 Feature [1.8] has no literal basis in the application as filed. It specifies that the thickness of the upper wall is substantially constant in front of and behind a cavity provided in the upper wall. The cavity is defined, according to feature [1.7], by a reduction of the thickness of said upper wall. The upper wall with its cavity extends in two directions, i.e. in the direction of the cross-section of Figures 5 and 6 and in the direction normal thereto.
- 3.2 The criterion for establishing that the subject-matter does not extend beyond the content of the application as filed is that the features in question are directly and unambiguously disclosed for a skilled person on the basis of their common general knowledge. Since the wording of feature [1.8] cannot be found verbatim in the application as filed, the feature firstly needs to be construed with respect to its limiting effect for the subject-matter of claim 1. The respondent's

understanding was that feature [1.8] required the thickness outside the area of the cavity to be substantially the same in every direction the upper wall extends. In view of this understanding, the following points were under dispute.

- Firstly, it was discussed whether the feature "constant" is to be understood as defining that the thicknesses in front of and behind the cavity are the same value or whether the term refers to constant thicknesses on both sides but possibly with different values.
- Secondly, it was discussed whether the wording "in front of" and "behind" (the cavity) refers to a specific orientation seen relative to the front and back side of the freezing compartment. While a "front side" is addressed in claim 1 in feature [1.4], it was discussed whether "in front of" actually refers to this front side.
- Thirdly, it was also discussed whether feature [1.8] is to be understood as having the same "constant" thickness over the whole extension of the wall in front of and behind the cavity or whether a small portion with the same thickness would also be encompassed by this feature.

However, contrary to the respondent's view, the general technical concept of the upper wall in front of and behind the cavity having a constant thickness is disclosed nowhere in the application as filed, whether explicitly or implicitly, as explained in the following paragraphs. This general concept is common to all of the above interpretations.

Therefore, the disputed points mentioned above with respect to the detailed interpretation of feature [1.8] can be left undecided. In addition, the significance of the term "substantially" in relation to "constant" is not relevant to the question of added subject-matter.

3.3 The respondent argued that in view of the thickness "S", as shown in Figure 1 and as referred to on page 9, lines 3 to 6 of the application as filed, the upper wall beside of the cavity formed therein was clearly and unambiguously disclosed as having a (substantially) uniform thickness. This is not persuasive. The definition of the thickness "S" and "S<sub>m</sub>" in the sole paragraph and figures in which these are disclosed (page 8, line 21, to page 9, line 6 and Figures 1 and 5) is not directed to a uniform thickness. On the contrary, the paragraph states that an **average thickness** of the wall "is reduced" from a dimension S to a dimension S<sub>m</sub>. Therefore, the thickness "S" does not relate to a "given magnitude" implying that the same thickness value can be found at any point of the upper wall beside the area of the cavity as argued by the respondent.

3.4 The feature is not disclosed in the figures of the application as filed either. In accordance with established case law (see Case Law of the Boards of Appeal, 10th edition, 2022, II.E.1.13), sizes or proportions can be derived from figures of the application as filed if, *inter alia*, one of the following criteria applies:

- the figures are technical drawings or photographs or it is indicated that the figures are a representation to scale (either explicitly or by means of respective dimensioning in the figure)



- the dimensions represented in the figures inherently have, in combination with the technical teaching in terms of structure and function disclosed in the application as a whole, a certain value or relation (this is in line with, for example, the conclusions in the decision cited by the parties, i.e. T 169/83, see the headnote, or T 748/91, see Reasons 2.1.1).

None of these criteria applies in the case at hand.

Contrary to the opinion of the respondent, Figures 1, 5 and 6 do not represent technical drawings but are instead considered to simply be schematic representations of a freezing compartment intended to demonstrate the essential features of the device which are the cavity and the orientation of the evaporating battery therein. As outlined before, the disclosure of the description provides no basis for a constant thickness outside the cavity, nor does it imply that this is essential. As far as dimensions are indicated in the figures, they only relate to average thicknesses. Therefore, it cannot be directly and unambiguously concluded from the schematic figures seen in conjunction with the description that "the thickness of the upper wall varies only due to the provision of the cavity" as argued by the respondent.

Furthermore, even if the skilled person considered Figures 5 and 6 to be true cross-sectional representations of an upper wall and its thickness in front of and behind the cavity, the appellant is correct in that in the absence of any teaching in this regard, Figures 5 and 6 do not allow any conclusions to be drawn about the thickness in further cross-sections

in width direction, let alone a cross-section normal to that direction.

3.5 In addition, the thickness definitions disclosed in the application as filed comprise further ambiguities. As also noted by the appellant, the "average thickness"  $S_m$  is indicated in Figure 5 at the point of the smallest thickness. A thickness "S" (referred to in the paragraph with "fig. 4") is not indicated in Figure 5 at all. That the application as filed has a clear and unambiguous disclosure with respect to a constant thickness is not persuasive also for this reason.

3.6 Finally, the claim wording "provided with a cavity" "defined by a reduction of the thickness of said upper wall" (features [1.5] and [1.7]) is not limited to a product-by-process definition with a step of forming a cavity in a precursor and this view is also consistent with the disclosure on page 8, lines 4, to page 9, line 2 of the application as filed. However, even if the term "sacrificed" disclosed therein were to be interpreted such that it relates to a product-by-process step of removing a part from a precursor to form the cavity, it still does not allow any conclusions to be drawn about the thickness of the precursor upper wall over the area thereof, even if, technically, a constant uniform thickness might be considered a relatively straight-forward choice. The argument in the decision under appeal, in section 2.1.4, last paragraph, "that the reduction of the overall insulating ability when creating the cavity cannot be compromised" is not convincing, since also the cavity as such reduces the insulation effect.

3.7 To conclude, the main request is not allowable since due to the introduction of feature [1.8] the subject-

matter of the claim extends beyond the content of the application as filed (Article 123(2) EPC).

4. Irrespective of questions relating to the admittance of late filed auxiliary requests 4a to 4e, feature [1.8] is also present in auxiliary requests 4, 4a, 4b, 4c, 4d, 4e, 4f, 1, 2, 3, 5, 6, 7 and 8 and the corresponding requests relying on replacement claim 3. The amendments to claim 1 made in these requests do not affect the added subject-matter discussion of feature [1.8], a fact which was undisputed. Therefore, none of the requests is allowable for the same reasons as those set out with respect to the main request (Article 123(2) EPC).

*Admittance of auxiliary requests 9a and 9b under Article 13(2) RPBA 2020*

5. Auxiliary requests 9a and 9b were submitted for the first time by the respondent in response to the communication under Article 15(1) RPBA 2020 in order to address the objections to feature [1.8] under the ground of opposition under Article 100(c) EPC. They represent an amendment of the respondent's appeal case within the meaning of Article 13(2) RPBA 2020 and the admittance of these requests is subject to the presence of exceptional circumstances, which have to be justified with cogent reasons.
  - 5.1 The respondent did not provide any such reasons or arguments in support of such circumstances and the board is of the opinion that there are no such circumstances present in the case at hand.

The objection to feature [1.8] based on the ground of opposition under Article 100(c) EPC has already been raised in the notice of opposition and was re-submitted in the statement setting out the grounds of appeal. None of the claim requests submitted by the respondent with its reply to the appeal include an amendment in reaction to this objection. The mere fact that the board pointed in their preliminary opinion to possible consequences under Article 123(3) EPC when addressing the Article 123(2) EPC objection does not constitute exceptional circumstances within the meaning of Article 13(2) RPBA 2020. This consequence inherently follows from Article 123(2) EPC and the fact that the added subject-matter objection was raised against a feature restricting the subject-matter of claim 1 as granted.

For these reasons alone, auxiliary requests 9a and 9b are not taken into account.

- 5.2 However, even if auxiliary requests 9a and 9b were to be assessed under the criterion of the suitability of the amendment to resolve the issues raised without giving rise to new objections, the board would not come to a different conclusion (when applying Article 13(2) RPBA 2020, a board may also rely on the criteria set out in Article 13(1) RPBA 2020, cf. EPO OJ 2020, Supplementary Publication 2, page 60).

As a matter of fact, claim requests 9a and 9b are *prima facie* not suitable for overcoming the added subject-matter objection linked to feature [1.8] without giving rise to new objections. As already explained (see section 3. above), the term "thickness S" as defined in the application as filed does not represent a thickness of given uniform magnitude, i.e. a substantially constant thickness, and, hence, the amendments

according to feature [1.7'] are not considered to further restrict the scope such that a deletion of feature [1.8] does not constitute an extension of protection. Thus, feature [1.8] cannot be deleted from the claim without violating the requirements of Article 123(3) EPC, a situation commonly described in the case law as an "**inescapable trap**" (see G 1/93, EPO OJ 1994, 541, Reasons 13).

## 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:



C. Spira

G. Patton

Decision electronically authenticated