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**Datasheet for the decision  
of 10 December 2013**

**Case Number:** T 0008/13 - 3.2.06

**Application Number:** 08425443.2

**Publication Number:** 2138625

**IPC:** D06F39/08, A47L15/42

**Language of the proceedings:** EN

**Title of invention:**

Apparatus for circulating flows of washing and rinsing liquids  
in a laundry washing machine

**Patent Proprietor:**

Candy S.p.A.

**Opponent:**

Martinez, Georges

**Headword:**

**Relevant legal provisions:**

EPC Art. 100(a), 56, 69, 111(1), 14(3)

EPC R. 3, 43, 103, 117, 124

RPBA Art. 13(1)

**Keyword:**

Grounds for opposition - extent of opposition novelty (no) -  
extent of opposition inventive step (yes)  
Late-filed document - admitted (yes)  
Inventive step - (yes)  
Representation - oral submissions by accompanying person  
(refused)  
Taking of evidence - expert opinion (refused)  
Reimbursement of opposition fee (no legal basis)  
Reimbursement of appeal fee - (no)  
Language in written proceedings - change of language of the  
proceedings (no)  
Sound recording during oral proceedings (refused)

**Decisions cited:**

G 0010/91, G 0007/95

**Catchword:**



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Case Number: T 0008/13 - 3.2.06

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.06**  
**of 10 December 2013**

**Appellant:** Martinez, Georges  
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**Respondent:** Candy S.p.A.  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted on 22 October 2012  
rejecting the opposition filed against European  
patent No. 2138625 pursuant to Article 101(2)  
EPC.

**Composition of the Board:**

**Chairman:** M. Harrison  
**Members:** T. Rosenblatt  
R. Menapace

## Summary of Facts and Submissions

- I. By its decision, dated 22 October 2012, the opposition division rejected the opposition against the European patent No. 2 138 625.

In the reasons for its decision the opposition division considered that the opposition was admissible because the opposition ground of lack of inventive step was sufficiently substantiated, that an objection of lack of novelty had been formally mentioned by the opponent but not been substantiated in detail and that the subject-matter of claim 1 of the patent in suit involved an inventive step in view of, *inter alia*, the following prior art:

D1: FR 2626588 corresponding to D2: EP-B-0 326 502,  
D3: FR 2706915 corresponding to D4: EP-B-0 707 670,  
D5: FR 2828503 corresponding to D6: EP-B-1 284 317, and  
US: US-A-2006/0000240.

The appellant (opponent) in the present appeal is also the inventor, applicant and patent proprietor designated on documents D1 to D6.

- II. With its letters dated 22 and 24 December 2012, received by the European Patent Office on 31 December 2012, the appellant filed an appeal against the decision of the opposition division. The appeal fee had been paid previously on 13 December 2012. The grounds of appeal were received by fax on 26 February 2013.
- III. The respondent (proprietor) submitted its observations to the grounds of appeal with letter dated 26 June 2013.

IV. The Board summoned the parties to oral proceedings. In its subsequent communication of 28 October 2013, the Board informed the parties of its preliminary opinion on the case. In reply to a request of the appellant in its notice of appeal that the Board should conduct the appeal proceedings in French, the Board indicated that in accordance with the provisions of the EPC, communications and the written decision of the Board would be issued in the language of the proceedings, but that translation would be provided during the oral proceedings according to both parties' requests. The Board also briefly commented on novelty of the subject-matter of claim 1 in view of D2 and D4 and noted the issues to be discussed in view of the objection on inventive step starting from D4 as the closest prior art.

V. The appellant replied to the respondent's submission by its letter dated 6 November 2013, crossing with the Board's communication, and filed document

US2 : US-B-6 167 733.

Besides requesting revocation of the patent the appellant also requested:

- that the Board used the "unlimited means" at its disposal according to Article 114(1) EPC to hear an independent university physicist and/or an expert on the issue of fluid mechanics involved in washing machines of D4, US2 and the patent in suit,
- that the appellant be given authorisation to make a sound recording of the oral proceedings,

- that written minutes of the discussions of the oral proceedings were issued before the reasons of the decision,
- that an interpreter be provided during the oral proceedings,
- that a third person, or an expert or in particular one Ms. M.-A. Labedan be allowed to make submissions on behalf of the appellant during the oral proceedings,
- that the Board exercise its power within the competence of the opposition division and not remit the case,
- that the appeal fee and/or the opposition fee be reimbursed.

VI. By the respective letters dated 18 November 2013 and 1 December 2013 the respondent and the appellant replied to the Board's communication.

VII. In a further communication dated 6 December 2013, the Board informed the appellant that its request for sound recording at the oral proceedings, submitted with the letter of 6 November 2013, would not be allowed, reference being made to the corresponding notice of the Vice President of DG3 of 16 July 2007. Also, the Board stated that the request for allowing another person who was not a professional representative to make submissions on behalf of the appellant (*ibid.*) would not be allowable in view of the conditions set by Article 134 EPC and having regard to the decision G 4/95 of the Enlarged Board of Appeal.

VIII. Oral proceedings were held before the Board on 10 December 2013, at the end of which the Board announced its decision.

- IX. The appellant requested that the decision under appeal be set aside and that the European patent No. 2 138 625 be revoked.

The appellant's requests of 6 November 2013 were each addressed by the Board during the oral proceedings, and the requests were not reiterated by the appellant at the end of the proceedings (these requests are dealt with below in the reasoning of this decision).

- X. The respondent requested that the appeal be dismissed.

- XI. Claim 1 of the patent in suit reads:

"Apparatus for circulating flows of washing and rinsing liquids in a laundry washing machine of the type comprising a tank (2), a drum (3) for the laundry to be washed arranged so as to be able to rotate inside the tank, a plurality of nozzles (4a) for releasing the liquids into the tank (2) and an opening (6) in the base of the tank (2) for the discharge of said liquids, said apparatus comprising a reservoir (1) arranged beneath the base of the tank (2) and designed to contain a substantial portion of the amount of liquid used during washing or rinsing operation, said reservoir being hydraulically connected to said nozzles (4a), to said opening (6) in the base of the tank (2) and to an outlet (15) outside the machine and being provided with a longitudinal axis (X-X) which extends between two opposing end walls (7, 8), a base wall (9), a top wall (10) and side walls (11, 12) extending parallel to said longitudinal axis (X-X), first pumping elements (13) for circulating liquids from the reservoir (1) to the tank (2) and vice-versa, second pumping elements (14) for discharging liquids from the reservoir (1) and from the machine, heating means (20)

arranged inside the reservoir (1) and elements (23, 24) for filtering liquids circulating in the reservoir (1), characterised in that at least said first (13) and said second (14) pumping elements are fixed directly onto one of the walls of said reservoir (1) and are connected to the interior of said reservoir (1) via respective openings (18, 19) formed in the walls of the reservoir."

XII. The arguments of the appellant, as far as they can be considered relevant to the present decision, may be summarised as follows.

- a) The examination did not satisfy the requirements set out by the Guidelines [for Examination in the EPO] in its version of June 2012, the Rules and Articles of the EPC and the spirit of the law of industrial property. The opposition division should have performed *ex officio* a more thorough analysis of the appellant's prior art, in particular D4. Article 114(1) EPC would have required that the division at least took the claims of D4 into consideration. As a consequence of this superficial examination the opposition division had wrongly considered the subject-matter of claim 1 to be novel over D4.
  
- b) The opposition division had not considered D4 in detail. This was evident since the division did not recognise any of the two pumps in D4, although the appellant had explicitly referred to several passages thereof in this respect in its submissions filed in the opposition proceedings. The pump 13 in combination with reservoir 41 and solenoid 42 had two functions, i.e. directing liquid into the recirculation circuit and



directing it to the drain, as also required by claim 1 of the opposed patent. It was thus functionally equivalent to the two pumps of claim 1 of the patent in suit. By virtue of Article 69 EPC and its protocol these equivalent pumps should have been recognised by the opposition division during the novelty examination. Moreover, claims 1 and 2, when considering the preamble of claims 5 and 9 of D4, clearly disclosed the physical presence of a first pump, and the characterising portions of claims 5 and 9 the physical presence of a second pump. According to the Guidelines F-IV 2.2, the proprietor of D4 was not required to define a pump in the preamble of its claims since they were not relevant to the objective of D4; nevertheless the pump in the preamble was tacitly understood to be there since any washing machine required such a pump for draining the liquids of the tank. Considering only one pump to be disclosed in D4 falsely relied merely on a visual inspection thereof, taking into account only the figures which showed a single embodiment. This resulted however in one equivalent embodiment to that of the two pumps of the preamble of the claims 5 and 9 of D4, which meant that all other equivalent embodiments falling under the scope of the claims by virtue of Article 69 EPC and its protocol were disregarded. The pumps of D4 were also not limited to a particular position, contrary to those of the patent in suit. The pumps of D4 could therefore be located anywhere along the hydraulic circuit, so that also the specific positions in the patent in suit would be encompassed by the scope of protection of the patent D4, as this was justified by the Guidelines F-IV 6.2 and 4.5.3. Also the positions of the

filtering element and of the heating element were not limited in the apparatus of D4. The reservoir according to claim 1 was provided in the apparatus of D4 by the reservoir 41 alone or in combination with the reservoir 5 and was suitable for holding and recirculating the liquids during the different steps of a washing cycle. The reservoir 41, or 41+5, had a double function of i) conveying the washing/rinsing liquid to one of two ports (drain or recirculation) and of ii) intermittently storing a substantial amount of it. Its volume was not limited by the claims and had thus to be considered, in line with the Guidelines F-IV 4.5.3, as variable. It was therefore suitable to contain a substantial amount of liquid according to claim 1 of the patent in suit. The reservoir's volume was anyway not limited to a defined minimum or maximum value and had to be ignored when considering novelty. It was furthermore contested that, contrary to the definition of the features in the preamble of claim 1 (see Rule 43(1) EPC), a heating element mounted inside the reservoir of the recirculating circuit belonged to the prior art; at least no document could be found which represented this prior art and the respondent had not indicated any either. According to what was stated in sections I.C.1.4 and I.C.1.5 of the Case Law (7th Edition) such element could thus not be taken into account when examining novelty and inventive step. Unless the respondent or the Board could prove its existence in the prior art, the feature "heating element inside the reservoir" therefore had to be ignored when considering the claim. The "openings" defined in the characterising portion of claim 1 were clearly also present in the reservoir 41 of D4, in Figure

8. The apparatus of D4 and the patent in suit had the same number of features, at least one reservoir for maintaining the liquids and the same number of pumps or equivalents thereto and the same functions, so that the patent in suit lacked novelty over D4. In summary: in view of the generalisations of D4 allowed by the Guidelines and Article 69 EPC, the apparatus of D4 needed no modification to correspond to that according to the patent in suit, since the apparatus according to the patent in suit was encompassed in D4.

- c) There was no new technical effect achieved by the features of the characterising portion of claim 1 of the patent in suit. In particular, compared to D4, there was no reduction in the consumption of water and energy during a washing cycle using a reduced amount of circulating liquid during both washing and rinsing. Also a reduction of the resistance to rotation of the drum due to a lower water level in the machine's tank was not a new effect. The description of D4 clearly explained the variability of the liquid levels in the ballast reservoir 5 during the different steps of a washing cycle. That the water and energy consumption would not be reduced by the apparatus of the patent in suit compared to that of D4 should be explained to the Board by an independent physicist or university professor who should carry out a comparison between these washing machines. The re-location of the heating element in D4, mounted for optimum heating of the washing liquids in the tank, and of the filtering element, did not contribute to any new technical effect, let alone to a reduction in the consumption of water and energy. The re-location of the heating element

would increase the volume of the reservoir in 41 but this would be prejudicial to reducing the volume of the hydraulic circuit downstream from the tank and therefore contrary to the effects sought. The re-location of the heating element also did not reduce the energy consumption, rather it would be detrimental to efficiency since heating of the liquids would occur far away from the actual active washing liquids around the laundry in the tank and would cool down on its way through the recirculation circuit. Similarly, replacing the pump-valve unit (13, 41, 42) by two pumps would only increase the space requirements downstream of the tank. The modifications of the apparatus of D4 would only result in predictable disadvantages and non-functional modifications and would consequently not involve inventive activity (cf. GL G-VII 10.1). The combination of the features according to claim 1 thus lacked a functional interrelationship and concerned a juxtaposition of features without any synergistic technical effect (GL G-VII 7).

- d) The patent also lacked novelty and inventive step in view of US2. This argument was not late filed and should be considered. The apparatus of US2 produced the same effects as the apparatus of the opposed patent. It was simple to understand and disclosed the same features as in claim 1, i.e. a reservoir, two circuits for the drain and recirculation of liquid. By virtue of Article 69 EPC it also disclosed two pumps which were the functional equivalents to the combination of pump and valves shown therein.

- e) The opposition division failed to establish the differences in terms of the features, their equivalents and the functions between US2 and the patent in suit; it did not apply Article 69 EPC in view of US2 and the sections of the Guidelines, *inter alia*, G-VI 6, D-V 4, G-VII 4, G-VII 5.2, G-VII 6, G-VII 10.1, G-VII 11. The modifications required to arrive at the subject-matter of claim 1 when starting from the apparatus of US2, for example re-locating the heating element from the tank of the washing machine in reservoir 351, would not lead to any space-saving, rather it would lead to a predictable disadvantage of increasing the manufacturing costs. Any advantage in view of water and energy consumption was not obtained by the modifications. The subject-matter of claim 1 of the impugned patent only concerned arbitrary selections without inventive activity.
- f) In regard to the appellant's further requests filed with letter of 6 November 2013, these were addressed individually at the start of the oral proceedings by the Chairman of the Board, first with regard to the procedural requests as concerned the oral proceedings and the way in which these would be run, followed then by the explanation that all remaining requests, apart from the request for reimbursement of the opposition and/or appeal fee, were understood by the Board as being related to the appellant's substantive submissions and would thus be considered together with any further arguments that the appellant chose to make as part of its case. The appellant made no specific comment as to most of the procedural requests apart from as dealt with specifically in this decision *infra*.

XIII. The arguments of the respondent, as far as relevant to the present decision, may be summarised as follows:

- a) The ground of lack of novelty had not been sufficiently substantiated in the notice of appeal and should therefore not be considered as comprised in the framework of the appeal. It should consequently be rejected as not admissible.
  
- b) The element 41 in D4 was not a reservoir designed or suitable to contain a substantial portion of the amount of liquid used during a washing or rinsing operation, rather it was disclosed as a two-way distributor, see page 4, lines 30-37 and Figure 8. Granted claim 1 specified heating means to be arranged inside the reservoir, thus implicitly disclosing that the amount of liquid contained in the reservoir should be such that it could be effectively used during the washing or rinsing states. In view of its purpose, the volume of element 41 in D4 was evidently negligible.

D4 did not disclose a reservoir comprising, inside it, heating and filtering elements, a second pump and the features of the characterising portion of claim 1. The pump of D4 was also not designed for circulating liquids from the tub to the reservoir, nor *vice versa* as required by granted claim 1. In D4, the liquid was fed by gravity from the tank 9 to the reservoir 5.

- c) The technical effect of the distinguishing features was a reduction in the liquids circulating in a liquid recirculation machine during washing and rinsing, thereby reducing its

energy consumption. In particular, the fixation of both pumps on the reservoir wall avoided the need for connecting conduits inbetween the reservoir and the pumps. The objective technical problem was thus a reduction in the liquids circulating in a liquid recirculation machine during its operation.

- d) D4 failed to solve this problem and taught away from the solution proposed in granted claim 1. The configuration of D4 in fact increased the total amount of liquid circulating in the machine during its operation. D2 failed to disclose a liquid recirculating machine and was hence not suitable to solve the above problem. Also the apparatus of document US, relating to the reduction of vibrations transmitted from the drainage pump to the washing machine's outer case, was not suitable for solving the objective technical problem.
- e) US2 was filed late in the appeal proceedings and should not be admitted into the proceedings. It was complex and required detailed consideration to understand its possible relevance. It did not disclose a second pump, which was however the basis of the factual framework of the present appeal. US2 also did not address the problem of saving water. It could consequently not be *prima facie* relevant.
- f) US2 did not disclose a reservoir, only a pump with a filter inside its housing. Using the apparatus of US2 in D4 would simply mean that the pump of D4 was provided with a filtering element. However there would be no reason for the skilled person to place a heating element and a filter in the reservoir.

## **Reasons for the Decision**

1. The appeal is admissible but cannot be allowed.
2. The legal and factual framework of the appeal
  - 2.1 The appellant repeatedly argued that the subject-matter of claim 1 lacked novelty (for example with respect to D4 or US2). The respondent however, in reply to the Board's comment on novelty in its communication in preparation for the oral proceedings, contested that novelty of claim 1 was comprised in the framework of the appeal since it was allegedly not sufficiently substantiated by the appellant in its notice of appeal.
  - 2.2 It is however not decisive in the present case whether or not the notice (or indeed the grounds) of appeal contains a sufficient substantiation for a novelty objection to be decided upon by the Board. Rather it is the legal and factual framework defined by the notice of opposition and any further grounds of opposition which might have been introduced by the opposition division during opposition proceedings which limits the power of examination of the Board of Appeal.

The guiding principles concerning the power of the opposition divisions and of the boards of appeal to examine the opposition grounds under Article 100 EPC were analysed by the Enlarged Board of Appeal in *inter alia* its decisions G 9/91, G 10/91, G 1/95 and G 7/95 (see OJ 1993, 408, OJ 1993, 420, OJ 1996, 618 and OJ 1996, 626, respectively).



In reply to the questions referred to the Enlarged Board in G 9/91 and G 10/91, the Enlarged Board stated in its opinion G 10/91, see Headnote:

"1. An Opposition Division or a Board of Appeal is not obliged to consider all the grounds for opposition referred to in Article 100 EPC [1973], going beyond the grounds covered by the statement under Rule 55(c) EPC [1973].

2. In principle, the Opposition Division shall examine only such grounds for opposition, which have been properly submitted and substantiated in accordance with Article 99(1) in conjunction with Rule 55(c) EPC [1973]. Exceptionally, the Opposition Division may in application of Article 114(1) EPC [1973] consider other grounds for opposition, which, *prima facie*, in whole or in part would seem to prejudice the maintenance of the European patent.

3. Fresh grounds for opposition may be considered in appeal proceedings only with the approval of the patentee."

Concerning the meaning of the term "fresh ground for opposition" coined by the Enlarged Board in G 10/91, the Enlarged Board gave an interpretation of this term in its decision G 7/95 (see Reasons, paragraph 5.4):

"..., the term "a fresh ground for opposition" which is used in paragraph 18 of G 10/91 must be interpreted as having been intended to refer to a new legal basis for objecting to the maintenance of the patent, which was not both raised and substantiated in the notice of opposition, and which was not introduced into the proceedings by the Opposition Division in accordance

with the principles set out in paragraph 16 of G 10/91."

In reply to the questions referred to it in G 1/95 and G 7/95, the Enlarged Board decided in G 7/95, see Headnote:

"In a case where a patent has been opposed under Article 100(a) EPC [1973] on the ground that the claims lack an inventive step in view of documents cited in the notice of opposition, the ground of lack of novelty based upon Articles 52(1), 54 EPC [1973] is a fresh ground for opposition and accordingly may not be introduced into the appeal proceedings without the agreement of the patentee. However, the allegation that the claims lack novelty in view of the closest prior art document may be considered in the context of deciding upon the ground of lack of inventive step."

Although the aforementioned opinion and decisions were issued under EPC 1973, no reason can be seen by the Board as to why the conclusions drawn therein would not also apply to the corresponding provisions of the EPC presently in force.

- 2.3 In the impugned decision, the opposition division considered the opposition to be admissible because the ground of opposition, lack of inventive step, was sufficiently substantiated as indicated in the decision under appeal, section "I Admissibility" of the "REASONED STATEMENT". In the following section "II Novelty and Inventive Step", under the sub-heading "Novelty", the opposition division first noted that it considered the subject-matter of independent claim 1 to be novel over all cited documents. The division then stated under the same sub-heading that whilst lack of

novelty had been formally mentioned by the opponent it had "not been substantiated in detail".

2.4 The Board concurs with the findings of the opposition division with respect to the substantiation of the respective grounds in the notice of opposition, namely that only the ground of lack of inventive step (Articles 100(a), 56 EPC) was sufficiently substantiated. The opposition division's mere statement with respect to the novelty of the subject-matter of claim 1 does not of itself imply that the opposition division considered lack of novelty as a sufficiently substantiated ground of opposition. In fact, just the opposite is the case. The opposition division also did not introduce the ground of lack of novelty into the opposition proceedings.

2.5 Consequently the unsubstantiated ground of lack of novelty is not a ground of opposition comprised in the legal and factual framework of the opposition and is therefore also not automatically part of the appeal proceedings. It can therefore only be considered as a fresh ground of opposition (see item 2.2 above). Since the Board has no power to examine a fresh ground of opposition on its own motion, unless the respondent-proprietor approves this (G 10/91, Headnote, item 3) - which did not happen in the present case - the objection of lack of novelty of the subject-matter of the claims has only been considered in the context of deciding upon the ground of lack of inventive step in view of the closest prior art (G 7/95, Headnote, 2nd sentence).

3. Admittance of US2 into the proceedings

3.1 US2 was referred to by the appellant for the first time with its letter of 6 November 2013, thus after the time limit for submitting the grounds of appeal.

The respondent objected to its admittance into the proceedings.

3.2 US2 is cited in paragraph [0003] of the description of the patent. It is not specifically referred to as representing the closest prior art to the subject-matter of claim 1 of the patent in suit and, without having been referred to in the notice or grounds of appeal (see Article 12(2) of the Rules of Procedure of the Boards of Appeal, RPBA), is therefore not considered to be automatically in the appeal proceedings. The reference to US2 in the appellant's letter of 6 November 2013 thus constitutes an amendment to the appellant's case (cf. Article 13 RPBA). US2 may only be admitted into the proceedings at the Board's discretion according to the criteria set out in Article 13(1) RPBA.

3.3 In regard to these criteria (i.e. Article 13(1) RPBA), the Board does not consider the filing of US2 so late in the proceedings, by itself, to be a sufficient reason for not admitting it. The Board also cannot share the respondent's view that the document, which was evidently already at the disposal of the respondent during the proceedings up to grant of the patent, raises complex issues. Its content is neither difficult to understand nor does it increase the complexity of the case in regard of the issue of inventive step.

US2 is in fact the only piece of prior art on file disclosing an apparatus for a washing machine incorporating a filter inside its case and a pump

mounted on one of its walls for directing the water from the inlet to either the recirculation circuit or to the drain. US2 is therefore also *prima facie* highly relevant for the consideration of inventive step.

The Board consequently exercised its discretion to admit US2 into the proceedings.

4. Closest prior art

The appellant originally based its objection of lack of inventive step of the subject-matter of claim 1 primarily using D4 as the closest prior art. The opposition division nevertheless considered D1 as representing the closest prior art. In contrast to D4, D1 however does not disclose, for example, a recirculation circuit for washing or rinsing liquids between the tank, in which the drum for the laundry to be washed is arranged, and a reservoir separate and arranged underneath the tank, as defined in claim 1. Compared to D1, D4 thus has more structural features in common with the subject-matter of claim 1 of the patent in suit. Also, D4 addresses similar problems to those of the patent in suit, i.e. reducing energy and water consumption (see D4, e.g. page 2, lines 25-44).

In its letter of 6 November 2013, the appellant stated that US2 represented the closest prior art, and proceeded to present an attack which the Board can only understand to comprise a mixture of arguments involving issues of both novelty and inventive step based on this document. In the following letter of 1 December 2013 and during the oral proceedings, the appellant continued however to argue principally on lack of novelty and lack of inventive step taking D4 as the closest prior art.

The Board therefore will first deal with the objection of lack of inventive step based on D4 as the closest prior art having regard to the subject-matter of claim 1 of the patent in suit, and will then proceed *infra* with reasoning starting from US2 as the closest prior art.

5. Distinguishing features of claim 1 in view of D4

5.1 When considering whether the subject-matter of a claim involves an inventive step (Article 56 EPC), as a first step the state of the art is considered, and a comparison is made of the subject-matter of the claim in question against the disclosure in the document belonging to the state of the art that is used as the starting point for consideration of inventive step. The difference(s) compared to the state of the art represented by the closest prior art starting point are thereby established. Here, this comparison is made with regard to D4. In this comparison, the same criteria are applied as when assessing the disclosure in a prior art document as apply to the consideration of novelty. According to the practice of the EPO, this comparison involves an examination as to which features defined in combination in the claim are directly and unambiguously derivable from such document, taking into account also all features implicit to the skilled person in the art, but notably excluding equivalent features, even if these are well known equivalents (see for example the Case Law of the Boards of Appeal, 7th Edition, I.C.3, I.C.3.2 and I.C.4).

5.2 D4 discloses a washing machine of the type comprising a tank (9), a drum (10) for the laundry to be washed arranged so as to be able to rotate inside the tank, a

plurality of nozzles (exit of conduits 6 and 31, Figures 2, 2bis) for releasing the liquids into the tank (9) and an opening (entry of duct 11) in the base of the tank (9) for the discharge of said liquids. The tank is installed in a surrounding reservoir (5, 5') serving two purposes. In addition to its purpose as a ballast element (as disclosed in the appellant's own earlier patent D2), the reservoir is also used to store the almost clear liquid from the last rinsing step for recycling it in the next washing and rinsing cycles of the machine. For this purpose, a hydraulic circuit is provided in the machine. It comprises downstream from said opening in the tank's base, in series, a conduit (11), a pump (13), a further conduit (39), a two-way valve unit (41, 42), all of which are arranged beneath the base of the tank, and another conduit (21) connected via a filter (19) to an inlet to the top of the reservoir (5). The reservoir (5) is in turn hydraulically connected via conduit (6) to the tank, thereby completing the recycling circuit. From the two-way valve unit (41, 42), which is controlled by solenoid 42, a second outlet conducts used water to the drain. This hydraulic circuit can be considered to constitute "an apparatus for circulating flows of washing and rinsing liquids in a laundry washing machine" of the general type defined in claim 1.

5.3 The claimed apparatus of the patent in suit, which includes the above-mentioned hydraulic circuit as in D4 as part of its subject matter, further comprises a reservoir arranged beneath the base of the tank. The appellant considered that the valve unit, in particular its component (41) constituted such a reservoir. The valve unit (41, 42) disclosed in D4, named "*système bi passage*", is depicted in Figures 2, 2bis, 8, 9 and 18-37. The respondent disputed that the volume of the

element 41 was sufficiently large "to contain a substantial portion of the amount of liquid used during washing or rinsing operation", as required by claim 1. The Board however agrees with the appellant, that the claim leaves unrestricted how much of the amount of liquid used during a normal washing/rinsing operation constitutes a "substantial portion" thereof. According to paragraph [0020] of the patent in suit, which anyway is merely descriptive rather than necessarily limiting for the claim, the volume of the reservoir must not exceed 600 ml. A minimum volume to be understood by the terminology "substantial portion" is however not mentioned in the patent. The description of the patent also does not give any indication how the minimum volume should be selected in view of the reservoir's function in the washing and rinsing cycles or in view of savings in water and energy consumption. According to the further features defined in claim 1, the reservoir must have arranged therein a heating means, filtering elements and two pumping elements on its walls. Since the claim does not exclude that the washing machine, with which the claimed apparatus is to be used, may comprise further heating means in its tank or other filtering elements elsewhere in some portion of the circuit, the presence of these means inside the reservoir also does not impose any clear limitation for a minimum reservoir volume. In the absence of any clear dimensional limitation implied in claim 1 by the feature "to contain a substantial portion of the amount of liquid used during washing or rinsing operation", this feature cannot serve to distinguish the claimed reservoir from that constituted by the valve unit (41, 42) in D4 in terms of a volume of water to be held inside.



Moreover, according to Figure 8 of D4, the valve unit, i.e. the "reservoir" as understood in this embodiment - besides its hydraulic connections to the base of the tank, to the outlet and to the nozzles (see above) - also has a box shape consisting of two opposing end walls, base, top and side walls, extending parallel to a longitudinal axis of the reservoir, as defined in the preamble of claim 1 of the opposed patent.

The apparatus of D4 also comprises a first pumping element (*pompe* 13) for circulating liquids from the reservoir to the tank and vice versa.

5.4 However, the following features of claim 1 of the opposed patent are not directly and unambiguously derivable from D4:

- a second pumping element;
- heating means arranged inside the reservoir;
- elements for filtering liquids circulating in the reservoir.

D4 does also not disclose the features in the characterising portion of claim 1 of the opposed patent, not least since there is - as stated above - no second pumping element, to which the characterising features relate. The Board also concludes that the first pumping element (*pompe* 13) in Figure 8 of D4 is not fixed directly onto one of the walls (as defined in claim 1), because it is only connected to the reservoir 41 by means of the tubing 39.

5.5 The Board notes that D2 (or D1), to which the appellant frequently referred as being the initial patent, and from which D4 (or D3) evolved and from which the basic ideas and features were inherited, does not disclose

any additional information relevant to the above distinguishing features which could alter the conclusion reached by the Board. The machine known from D2 does not comprise a hydraulic recirculation circuit from the tank (3), in which the drum is installed, to the outer reservoir (17) which here serves as a ballast element ("*reservoir de lestage*"). So, even if D2 and D4 were considered in some way together as a single prior art disclosure, which they are not, the above recited features of claim 1 of the opposed patent would still not be disclosed in these documents.

5.6 The appellant contested that the above features constituted differences between the subject-matter of claim 1 and D4 and/or that they would establish any new technical effects, concluding that the subject-matter of claim 1 would therefore not be novel over D4. The Board however cannot agree with the appellant's arguments, for the reasons given below:

5.6.1 Disclosure versus scope of protection of D4

The appellant's arguments appear to be at least partially based on the appellant's understanding that the scope of protection conferred by its own patents should encompass the subject-matter of the claims of the present patent in suit and therefore, as a result of embodiments which might be "encompassed" by the claims of e.g. D4 but not explicitly defined therein, anticipated such subject-matter or at least part of it. In support of this viewpoint, the appellant relied *inter alia* on Article 69 EPC and its protocol of interpretation and on the Guidelines for examination, sections F-IV 2.2, 4.5.3, 6.2 and 4.13 (version of 2012).

The Board however does not accept these arguments.

The scope of protection conferred by the claim(s) of a patent according to Article 69 EPC and its protocol of interpretation, is to be distinguished from the disclosure in a patent. When it comes to the assessment of novelty and inventive step of the subject-matter of an opposed patent claim, the possible scope of protection of a prior art patent is irrelevant. Rather, the technical content which is disclosed in the prior art document, or, in other words, the technical content (i.e. the disclosure) which is directly and unambiguously derivable from it, has to be assessed, taking into account the entire document including claims, description and drawings, excluding any equivalent (combination of) feature(s) which is not directly and unambiguously disclosed, independent of whether or not such undisclosed equivalent feature(s) might be encompassed by the claims of a prior patent.

As regards the passages of the Guidelines referred to by the appellant, the Board limits itself to pointing out that they cannot be applied in the way the appellant has argued and that, anyway, they have no binding effect on the Boards of Appeal (cf. e.g. Case Law of the Boards of Appeal, 7th Edition, III.S.1).

The claims of the appellant's own prior art patent D4 indeed do not define any specific limitation with respect to, for example, the localisation of the pump 13 and the valve unit 41/42, of the filter 19, of the heating element, or of the volume of certain of the hydraulic circuit's components, or whether more than one pump might be present. However the claims do not - merely as a result of leaving all this as undefined - provide a direct and unambiguous disclosure of these

features. Claims 1, 5 and 9 do not disclose two pumps. Claim 1 does not mention any pump. Claim 5, dependent on claims 2 to 4, and claim 9, depending on any of claims 2 and 5, both define "a drain pump (13)" and additional features (*inter alia* a valve "bi passage") in relation thereto. There is nothing in these claims, each taken individually or in combination with claim 1 or 2, which can be seen as a direct and unambiguous disclosure of two pumps. Even if it were assumed that the washing machine of D4 according to claims 1 and 2 and thereby also that according to the preambles of claims 5 and 9, inherently had at least a ("first") pump for conveying the water from the tank to the drain, as argued by the appellant, this does not unambiguously mean that the pump 13 defined in the characterising portions of claims 5 and 9 would be a different ("second") one in addition to the ("first") inherent pump. On the contrary, the pumps specified in the characterising portions of claims 5 and 9 define literally a drain pump and in addition a valve unit "bi passage" (two-way) for conveying the fluids in either of two possible conduits. There is simply no explicit or implicit information to a skilled person which would have led to a meaning other than what is literally stated there, i.e. the provision, in the washing machine of claims 1 and 2, of one drain pump with a two-way valve. The description and the Figures of D4 also add to this understanding as they disclose only a single pump. They further only disclose specific positions and arrangements for the heating element and the filtering element. There is no indication given in the description from which it is directly and unambiguously derivable that the respective features should be arranged in the way defined in claim 1 of the opposed patent. For example, there is no disclosure that the filter 19 could be arranged also in the valve

unit 41/42, or that two pumps could be used instead of one.

#### 5.6.2 Equivalent combination of features

The Board concurs with the appellant that the combination of pump 13 and valve unit 41/42 disclosed in D4, which together convey washing/rinsing liquids coming from the tank to either the drain or back via the reservoir(s) 5 (and/or 5') in the washing/rinsing circuit, would be functionally equivalent to the provision of two pumps as defined in claim 1 of the patent in suit. However, as mentioned above, a (combination of) feature(s) being equivalent to those shown in a prior art document is, without any specific mention of such equivalent feature(s), not considered as being disclosed in such prior art document. In this sense, the approach on novelty applied by the EPO comes certainly closer to what the appellant called an approach "*prime abord*" (letter dated 1 December 2013, page 3) than to the appellant's own approach on novelty based on the scope of protection. Equivalent features or equivalent combinations of features to the claimed features which are not directly and unambiguously derivable from the prior art document, although they are possibly even well-known to the skilled person and perhaps even within the scope of protection of a prior art patent, are taken into account when deciding on the obviousness of such features in view of the objective technical problem to be solved.

In the present case, again, D4 does not contain any indication that, for example, in another embodiment the combination of features having reference numerals 13, 41 and 42 should be replaced by a combination of "first and second pumping elements" or that the positions of

other features should be such as defined by claim 1 of the opposed patent.

#### 5.6.3 The absence of new technical effects

Contrary to the appellant's submission on this matter, a new technical effect is generally not required in order to establish novelty of the subject-matter of a claim and thus which features of the claim are not disclosed in the closest prior art for the consideration of inventive step. The technical effects achieved by individual features or combinations thereof are taken into account when formulating the objective technical problem to be solved for the consideration of inventive step when using the problem/solution approach.

Therefore, the argument that the washing machine of D4 would perform the same or arguably even better in terms of (a reduction of) water and energy consumption during a normal washing/rinsing cycle than a machine according to the patent in suit is not relevant when assessing whether or not the features of claim 1 are known from D4.

#### 5.6.4 Features of the claim's preamble unknown from the prior art according to the appellant

Features defined in the preamble of a claim which are not known to the appellant as belonging to the prior art cannot simply be ignored during the examination of novelty and inventive step, as was argued by the appellant (cf. top of page 22 of the letter dated 6 November 2013; pages 3 and 4 of the letter dated 1 December 2013). To the contrary, the appellant's argument that in the present case the feature "heating

means arranged inside the reservoir" in the preamble of claim 1 was not known to the appellant from any cited prior art, because the appellant could not find a document showing such feature, establishes only that the subject-matter of claim 1 is not disclosed in the prior art cited by the appellant.

The passages of sections I.C.1.4 and I.C.1.5 cited by the appellant from the Case Law of the Boards of Appeal (7th edition 2013) concern entirely different issues. The summary of case law quoted in these paragraphs relates to the question of what actually belongs to the state of the art referred to in Article 54(2) EPC. Indeed, the determination of what actually belongs to the state of the art - i.e. determining which evidence, which patent document, which scientific article, which product allegedly shown on a trade fair, or whether a combination of features indicated by the applicant/ proprietor in its own patent as background art, to give only some examples, was made available to the public before the priority date of the patent application or patent to be examined for novelty and inventive step - constitutes a first step in the examination of novelty and inventive step. Once this state of the art has been determined, the actual examination of novelty and inventive step can be carried out in a second step based on that state of the art previously determined in the first step. The paragraphs cited by the appellant here refer to the first step. Section I.C.1.4 (Case Law of the Boards of Appeal, 7th Edition) reports on case law relating to company internal knowledge and/or to subject-matter or embodiments indicated (in the application or patent to be examined) as known to the applicant/proprietor and whether such knowledge, subject-matter or embodiments could be used themselves as a starting point for a novelty or inventive step

objection. As stated there, such in-house knowledge cannot be used. It is wrong to understand this to mean that in-house knowledge (at the date of filing the application) defined in a claim should not be considered part of the claimed subject-matter which must be taken into account for assessing novelty and inventive step. This paragraph of the Case Law book relates instead to what disclosure can be considered to be part of the prior art which may be used to attack either novelty or inventive step when assessing substantive patentability.

That the feature "heating element arranged inside the reservoir" might be wrongly recited in the preamble of the claim in view of the state of the art known to the appellant, is not relevant when deciding on substantive patent requirements and the matter of maintenance of the patent. A lack of conformity with the requirements of Rule 43 EPC is not a ground for opposition (these grounds are given by the exclusive list in Article 100 EPC) prejudicing the maintenance of the patent.

6. The problem to be solved

6.1 Technical effects achieved

The Board finds the arguments made by the respondent-proprietor in regard to the alleged water/energy savings unconvincing. Although indeed the mounting of the pumps directly to the reservoir wall would omit the conduits previously used therebetween, this does not mean that the overall length of the hydraulic circuit is necessarily reduced. Whether or not the hydraulic circuit could be shortened by a direct mounting of the pump(s) on the reservoir wall would depend on the structure and location of the other parts connected in



the hydraulic circuit and on the space available for laying the remaining conduits inside the washing machine along a shorter path, nothing of which is defined in the claim. The respondent's arguments that the installation of a heating element inside the reservoir lead to saving of water and reduced energy consumption are also not convincing. The claim neither precisely defines under which conditions water to be recirculated to the washing machine's tank should be heated nor does the claim limit the washing machine with which the claimed apparatus should be used in view of the requirements for heating the liquids. It is left entirely open whether such washing machine should be equipped with further heating elements and, if so, how they might be dimensioned in relation to the heating element in the reservoir. Similarly, the respondent's argument concerning the choice of the position of the filter inside the reservoir for the purpose of water and energy savings is not persuasive. The disadvantages of prior art washing machines mentioned in paragraph [0005] of the specification of the contested patent, linked to the resistance to rotation encountered by the drum due to the liquid in the tub, also do not appear to be overcome by the claimed combination of features, as also argued by the appellant. In this regard, the claim does not define any feature which specifies a variation of the amount of washing/rinsing liquids contained in the reservoir (of claim 1) during the different phases of the washing cycle. Even the description does not disclose whether the liquid level in the reservoir 1 varies. If the reservoir were continually filled at the same level throughout the washing cycle, as argued by the appellant, the level in the drum as well as the total amount of liquid contained in the entire hydraulic circuit, would always be the same. The same applies to the resistance to

rotation.

The technical effects referred to by the respondent and mentioned in the patent specification have not been shown to be achieved by the distinguishing features identified in paragraph 5.4 above. The technical problems indicated in the contested patent in this context, namely the reduction of water and energy consumption (see paragraph [0008] of the patent) are thus not considered to be solved by the claimed combination of features when starting e.g. from D4.

The technical problem thus needs to be reformulated. In the formulation of the objective technical problem, all of the distinguishing features compared to the closest prior art starting point, whether these features are defined in the preamble or in the characterising portion of the claim, must be taken into account.

## 6.2 Objective technical problem to be solved

Although the appellant repeatedly pointed to the provisions of the Guidelines G-VII 5.2 in regard to the formulation of the objective technical problem, the appellant itself never actually formulated such a problem.

Starting from D4 as the closest prior art, the objective technical problem to be solved by the distinguishing features can only be seen as the provision of an alternative arrangement of the components of such apparatus for recirculating washing or rinsing liquids in a washing machine.

## 7. Obviousness

The subject-matter of claim 1 represented by the combination of features in claim 1 of the contested patent is not rendered obvious by the prior art cited by the appellant.

- 7.1 The fact that the appellant repeatedly argued that a heating element inside a reservoir of an apparatus for recirculating washing/rinsing liquids in a washing machine was not known in the prior art, and stated that it had also been unable to find a corresponding document disclosing this feature, and requesting that this feature should therefore not be taken into account during the examination of novelty and inventive step (cf. above), already provides the first reason to conclude that the appellant did not convincingly demonstrate that the subject-matter of claim 1 lacked an inventive step. But beyond this merely formalistic conclusion, the Board finds upon consideration of the submitted prior art and the appellant's arguments in this regard, that lack of an inventive step has not been convincingly shown.
  
- 7.2 D4 on its own and D4 in combination with common general knowledge of the skilled person
  - 7.2.1 D4 taken on its own does not contain any indication which would have led the skilled person to modify the arrangement of the features disclosed therein to arrive at the combination of features according to claim 1. As noted already above, simply by the breadth of the scope of protection conferred by its claims, a particular hint or motivation to modify the washing machine of D4 in the way defined by claim 1 of the contested patent is not given to the skilled person. Also the references to the general applicability of the invention of D4 in the description (e.g. page 2, line 39, "*Il ne resulte*

*pas de limitation quelconque à l'application de la présente invention,...*", translated by the Board as: "no limitation exists as to the application of the present invention,..." would not be understood by the skilled person as an indication which would lead obviously to the combination of features defined in claim 1 of the patent in suit.

Even if the Board were to concur with the appellant (despite the lack of substantiation by the appellant in this regard) that, based on common general knowledge, the skilled person would have considered replacing the combination of pump 13 and valve unit 41/42 with a functionally equivalent embodiment comprising a reservoir unit with two separate pumps mounted on one of its walls for conveying the liquids to the respective outlets (see however 7.5 below), and assuming, still to the advantage of the appellant, that the skilled person would also have considered integrating the filter element 19 into this unit, the Board is unable to find any motivation in D4 or based on the common general knowledge of a skilled person, to further include a heating element into this unit as defined in the claim. This is not least due to the particular configuration of the washing machine disclosed in D4. The provision of a heating element in a reservoir formed as part of the recirculation circuit (13, 41, 42, 21), or in a reservoir of a functionally equivalent two-pump unit, would be highly inefficient in view of the size of the ballast reservoirs and the comparatively great, albeit variable amount of water stored therein during the different steps of the washing cycle (see e.g. Figures 17 to 37).

Concerning this issue, the appellant argued that re-locating the heating element would have no effect on

the objective of the patent in suit stipulated in paragraph [0008] (reduction of energy and water consumption), with reference to the passage bridging pages 4 and 5 of its letter dated 1 December 2013. The Board concurs with the appellant insofar as the re-location of the heating element seems neither to affect the amount of liquid to be circulated during the washing/rinsing cycles (at least this was not shown by the respondent to be the case) nor does it necessarily lead to space savings. However, the Board disagrees with the appellant that the re-location would not effect the performance of the machine in terms of energy. In fact, as the appellant himself recognises (*ibid.*, page 5, 3rd paragraph), and as would also the notional skilled person, a re-location would in fact negatively effect the energy consumption of the machine of D4, since heating would be provided at a location too far away from the water in contact with the laundry during the washing/rinsing process. Hence, starting from D4 as the closest prior art, the skilled person would have no reason objectively to either move the heating element from the inside of the tub or to install an additional heating element into the reservoir of the recirculation circuit, so that such a re-location or such provision of an additional heating element is not obvious to the skilled person.

- 7.2.2 The Board would like to point out that the choice of the placement of the heating element in the reservoir of the recirculation circuit is not arbitrary, since its arrangement in the reservoir, containing in combination also the filtering element and the pumps, leads to a compact unit, which might be for example exchanged as one unit if the need should arise. The placement of the heating element also does not lead to a non-functional modification, since the heating

element would still be able to heat the recirculating washing liquids to a certain extent, although in D4 it would appear to be of relatively low overall efficiency. That, in the context of the washing machine of D4, the low energy efficiency possibly resulting from the location of the heating element might constitute a predictable disadvantage does, in the Board's view, not mean that this feature is to be considered as obvious in the context of claim 1 in the present case. No evidence has been provided that the skilled person would have considered, without the use of hindsight, i.e. without already knowing the subject-matter of the patent in suit, placing a heating element in D4 in the valve unit 41.

### 7.3 D4 in combination with US2

US2 is the only document submitted by the appellant which shows a washing machine with an apparatus for recirculating flows of washing and rinsing liquids arranged beneath the base of the tank of a laundry washing machine (see Figures 2 to 5). The apparatus comprises a case (351) which can be considered to constitute a reservoir within the meaning of claim 1 of the patent in suit. It is provided with an inlet (362) receiving water from the tank and two outlets (366, 367), one connected to a recirculation circuit (367, back to the tank) and the other (366) to the drain. A single pump (358, 352) is mounted to one of its side walls. A filter element (340) is arranged inside its case. The pump may be operated in two directions to convey washing or rinsing water received from the tank through one of the outlets either to the recirculation circuit or to the drain. Even if one would assume, again to the advantage of the appellant, that the skilled person would have recognised US2 as proposing

an appropriate alternative arrangement which could be employed in a washing machine according to D4 and, still further in the appellant's favour, that the pump and valves implemented in the apparatus of US2 could be replaced by a functionally equivalent two-pump unit (see however 7.5 below), there is nevertheless still no indication in US2 that would have led the skilled person to add a heating element in this apparatus when installing it on the machine of D4.

7.4 It follows that, starting from D4 as closest prior art and in view of the objective technical problem to be solved (see 6.2 above), neither D4 itself, nor common general knowledge, nor US2, contain any indication which would have motivated the skilled person to mount a heating element inside the reservoir contained in the recirculation circuit. Consequently at least for this reason the subject-matter of claim 1 is not obvious in view of the prior art submitted by the appellant and the arguments made in support of its objections.

7.5 The Board notes that, although it may appear from the above that the invention is considered to involve an inventive step only on the basis of the non-obvious mounting of the heating element inside the reservoir, other features defined in the claim of the contested patent which are not directly and unambiguously disclosed in the prior art cited by the appellant also do not constitute obvious solutions to the objective technical problem. For example, the Board considers that, contrary to the assumptions made above in favour of the appellant, there is nothing in the file to indicate that the provision of two pumps on a side wall of a reservoir would have been obvious to the skilled person. None of the documents even shows a two-pump arrangement as defined in claim 1. Moreover, the two

arrangements known from the prior art with one pump but different valves (D4, two-path valve activated by a solenoid; US2 two valves activated by the operation of the pump) show that the skilled person was not necessarily guided to the use of two pumps to replace the pump-valve arrangement of D4 when looking for an alternative arrangement. A solution to the problem of an alternative arrangement employing two pumps in the way defined in claim 1 of the patent in suit, when considering the prior art cited by the appellant, would only be reached based on hindsight, i.e. by already knowing the solution proposed in the patent in suit.

7.6 The appellant's references to the Guidelines G-VII 7, G-VII 10.1, G-VII 11 with respect to this particular feature also did not convince the Board. Clearly the combination of features defined by claim 1 leads to an alternative arrangement or module which might facilitate the exchange of this module during maintenance or repair of the washing machine (although arguably increasing the costs for the exchange part incurred by the consumer, this might indeed be more economical in several respects for the manufacturer or service provider). Moreover, even if each of the elements functioned in its normal way without producing any combined technical effect with the other features, this does not necessarily mean that the combination of the features in claim 1 would lack an inventive step. In the case of a mere juxtaposition of features, it would still be necessary to show that each of the individual features would have been obvious to the skilled person in view of the objective technical problem. Simply arguing that the claimed effects are not achieved by some feature, as the appellant did, is not enough. The appellant failed to provide persuasive arguments why the skilled person would, and not only



"could", have provided, e.g. two pumps instead of the documented pump-valve arrangements. The Board moreover does not consider that, apart from some increase in manufacturing costs, the provision of two pumps instead of a pump-valve arrangement according to D4 or US2, results in a predictable technical disadvantage. Such an arrangement could be less prone to failure compared to the valves, which by the washing chemicals and dirt transported by the washing and rinsing liquids might become jammed. A technical disadvantage of two pumps is therefore at least not clearly inevitable.

Additionally, the two pumps would not constitute a non-functional modification, nor does this arrangement constitute an arbitrary modification. Finally, the fact that the respondent did not submit any evidence in view of the reduction of water and energy consumption is not relevant in the present case, since the Board did not acknowledge the technical effects described in the patent in suit as being achieved and consequently formulated a less ambitious objective technical problem independent of energy and water efficiency.

7.7 In view of the substantive reasoning given by the Board in the preceding paragraphs, which, taken on its own, already leads to the conclusion that claim 1 is considered to involve an inventive step, it is not necessary for the Board to consider in more detail the arguments of the appellant in view of the alleged obviousness of the other distinguishing features not discussed so far.

7.8 The Board's conclusion in respect of inventive step is also not altered if the problem-solution approach were conducted using US2 as the closest prior art starting point. The differences between the subject-matter of claim 1 of the patent in suit and US2 are a heating

element inside the reservoir (which can be regarded as the casing 351) and a second pump mounted directly on the side wall of the reservoir. One of the objectives to be achieved in US2 is the increase in washing efficiency and saving washing liquids required for articles to be washed (see col. 2, lines 29 to 34). US2 and the patent in suit therefore have very similar objectives. Concerning the problems mentioned in paragraph [0005] of the patent (reducing the resistance to rotation), the Board is not convinced that these are solved when starting from US2, by the combination of the features of claim 1 (see above). The objective technical problem could therefore again only be understood by the Board to be that of providing an alternative arrangement for an apparatus for recirculating washing/rinsing liquids in a washing machine. In accordance with the findings already made in section 7.2.1 above, the skilled person does not receive any teaching from US2 itself, nor indeed from any other of the prior art documents on file, which would have led him to mount a heating element inside the reservoir of US2. Similarly and in analogy to section 7.3 above, the Board finds no evidence that the skilled person would employ two pumps as defined according to claim 1 instead of the single pump used in US2, unless inventive skill were used. That the apparatus according to claim 1 of the patent in suit might not provide any *per se* new technical effect compared to the apparatus of US2 does not mean that the alternative solution to the problems related to the water and energy efficiency of a washing machine are automatically obvious to the skilled person; two inventions may for example provide the same technical effects but may achieve them in different non-obvious ways.

7.9 The appellant had also briefly referred to the document "US", without however specifically addressing its relevance in regard of the relevant issues. This document relates to the reduction of vibrations transmitted from a drainage pump to the machine's casing. It does not appear to disclose a recirculation circuit. The Board of its own motion was also unable to find anything in this document which could have changed the conclusion reached on inventive step in view of the prior art and arguments already considered.

7.10 Consequently, the subject-matter of claim 1 is considered to involve an inventive step in regard to the prior art referred to by the appellant and the arguments made in support of its attacks in this regard.

8. Further requests of the appellant

8.1 Request to hear an independent expert of a university

The questions on which the Board had to decide did not require any further technical expertise to be gathered from outside the Office, in particular in view of the fluid mechanics involved in washing machines or components of their circuits in D4, US2 and the patent in suit.

In particular the appellant's conditional request for an "intervention" of a university professor on the question of the consequences in terms of energy of a re-location of the heating element in D4 required no further technical considerations. Notwithstanding the fact that the Board finally reached a different conclusion on the alleged obviousness of the claimed subject-matter than the appellant, clearly the Board

and the appellant had anyway drawn the same conclusions on the technical effects that a re-location of the heating element would have.

The presence of two technically qualified members on the Board in addition to the legal member, and the specific division of technical subject-matter between the various Boards of Appeal, is already provided such that the parties' arguments, in as far as these are clearly formulated, may be fully understood from both a technical and legal standpoint. Also, all the Board members are not only in an impartial position but are also experienced in judging what knowledge is attributable to the notional skilled person, as opposed to an opinion provided by a technical expert which may be based on that person's subjective analysis.

Although the Chairman stated at the start of the oral proceedings that the appellant could make submissions on its requests, which were not procedural requests, during the oral proceedings when hearing the substantive submissions of the parties, the appellant did not provide any further argument as to why hearing of an independent technical expert would have been required in order to decide on this case.

There are thus no good reasons why the Board should have exercised its discretionary power under Rule 117 EPC as requested by the appellant.

8.2 Request for conducting the proceedings in French and request for an interpreter

In the communication dated 28 October 2013, the Board pointed to the provisions of the EPC concerning the language of proceedings (Article 14(3), Rule 3) and

noted that in accordance with these provisions communication(s) as well as the decision would be issued in English. Translation from French to English in the oral proceedings had been provided according to the appellant's request and the appellant was informed in advance that these would indeed be provided.

The appellant did not come back to this issue, neither in writing nor during the oral proceedings.

8.3 Request for allowing submissions by a person not being a professional representative

In reply to the Board's preliminary view expressed in its communication dated 6 December 2013, the appellant argued that Ms. Labedan, attending the oral proceedings together with the appellant, had closely followed the whole case from the beginning and should therefore have been allowed to present the case. Moreover, the appellant suffered from asthma and could therefore only plead the case with difficulty. Also, the appellant stated that it was at a disadvantage in view of the respondent being represented by two professional representatives.

The Board was not persuaded by these arguments and refused the appellant's request, as already preliminarily mentioned in its communication. Ms. Labedan is neither a representative according to Article 134 EPC nor was she presented as a technical expert to be heard on a technical question. The personal involvement with the case or her relationship to the appellant also does not qualify Ms. Labedan to have made submissions as an accompanying person in accordance with the conditions set out in G 4/95. In regard to the appellant's medical condition, the

appellant was informed by the Board that it was prepared to interrupt the proceedings from time to time should this be required, and that he should request a break or interruption of the oral proceedings if needed, which, apart from brief moments during the proceedings, was however not required and no such request was made.

Whilst the appellant stated that it perceived the procedural situation as unfair in view of the representation afforded by the respondent, the Board is nevertheless bound by the relevant provisions of the EPC in this respect. The possibility of representation by a professional representative was of course always open to the appellant, as it is to all parties, and it is the choice of any party as to which use they make of this possibility, albeit financial implications are unavoidable. It should for completeness be added that Ms. Labedan was in the event not prevented by the Chairman from assisting the appellant in finding various notes and passages in his submissions and allowing the extra time necessary for this, as this was considered appropriate in the circumstances and was not objected to by the respondent.

8.4 Request for sound recording of the oral proceedings

In the same communication of 6 December 2013, the Board stated that sound recordings were not allowed and reference was made to the corresponding notice of the Vice-President of DG 3 of the EPO dated 16 July 2007. The appellant did not contest this matter further.

8.5 Request for written minutes of the oral proceedings debate

Rule 124 EPC sets out the provisions governing the minutes of oral proceedings. The appellant was informed at the start of the oral proceedings that the minutes would be drafted and transmitted in accordance with these provisions and that it was within power of the Board to decide upon the content of the minutes. The appellant did not provide any counter-argument to this.

8.6 Request for a decision by the Board

In accordance with Article 111(1) EPC, the Board decided on the appeal. It did not remit the case to the first instance, and consequently met the appellant's request.

8.7 Request for reimbursement of the opposition and/or appeal fees

A legal basis for the reimbursement of the opposition fee does not exist in the EPC, so that this request is refused.

In its communication dated 28 October 2013 the Board had already given its preliminary opinion on the appellant's request for the reimbursement of the appeal fee in view of the conditions set out in Rule 103 EPC. As the appeal was ultimately unsuccessful and was thus not allowed, the first of the two conditions set out in paragraph (a) of the Rule has thus not been fulfilled. Consequently, the Board could not grant the reimbursement of the appeal fee.

Whether or not the opposition division correctly exercised its competence in respect of the many cited passages of the Guidelines to which the appellant referred (see for example the appellant's letter of

6 November 2013, starting from page 7) and which had allegedly been ignored by both the examining and opposition divisions, is therefore irrelevant when deciding upon this request. It is however noted regarding this issue that the Board could anyway not detect any procedural violation by the opposition division; rather it appears to the Board that the complaints of the appellant arise to a great extent from its singular interpretation of the Guidelines, the Case Law and the Convention itself (see also paragraphs 5.6.1 or 5.6.4 above). In particular it should be noted that the opposition procedure is not conceived to be a second examination procedure.

9. Final remarks

Although the appellant argued that the scope of protection of his own patents should prevent others from developing concepts within those patents, the considerations surrounding this are not matters affecting the conclusions of the Board on the appeal before it. It may however be added, since this was part of the appellant's arguments, that there is no specific provision in the EPC which prevents others during the term defined in Article 63 EPC from continuing to develop the appellant's protected inventions nor from filing patent applications relating to modifications and further developments thereof, and possibly even obtaining patent protection themselves on such subject-matter which might possibly be encompassed by the appellant's patents. Which rights can be derived from a granted European patent and which acts ultimately constitute an infringement of a granted patent are not stipulated by provisions of the EPC, rather these are governed by national law (see Articles 64(1) and (3) EPC). The acts of filing patent applications and



obtaining patents generally do not constitute in themselves an infringement of an earlier patent which has not expired at the moment of filing and granting the later application(s). Nor do such later applications generally limit the protection conferred by the appellant's earlier patents.

That the later patents of potential competitors may make further developments more difficult for the appellant in its own field of activity may be correct but is simply an inherent feature of the patent system. This is also not an argument which the Board can consider when judging on the appeal case before it.

## **Order**

### **For these reasons it is decided that:**

The appeal is dismissed.

The Registrar:

The Chairman:



I. Aperribay

M. Harrison

Decision electronically authenticated