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**Datasheet for the decision
of 5 December 2023**

Case Number: T 0310/20 - 3.2.06

Application Number: 14182930.9

Publication Number: 2990517

IPC: D06F58/02, D06F58/20

Language of the proceedings: EN

Title of invention:

Laundry dryer including a heat pump system

Patent Proprietor:

Electrolux Appliances Aktiebolag

Opponent:

BSH Hausgeräte GmbH

Headword:

Relevant legal provisions:

EPC Art. 54(2), 100(a)

RPBA 2020 Art. 13(2)

Keyword:

Amendment after summons - exceptional circumstances (no)

Novelty - public prior use - prior art (no)

Decisions cited:

Catchword:



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Case Number: T 0310/20 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 5 December 2023

Appellant: Electrolux Appliances Aktiebolag
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Representative: Electrolux Group Patents
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Appellant: BSH Hausgeräte GmbH
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
4 December 2019 concerning maintenance of the
European Patent No. 2990517 in amended form.**

Composition of the Board:

Chairman M. Harrison
Members: M. Hannam
W. Ungler

Summary of Facts and Submissions

- I. An appeal was filed both by the appellant (opponent) and by the appellant (patent proprietor) respectively against the interlocutory decision of the opposition division in which it found that European patent No. 2 990 517 in an amended form met the requirements of the EPC. The opposition division found an alleged public prior use to be both proven and prejudicial to novelty of the subject-matter of claim 1 of the patent as granted.
- II. The opponent requested that the decision under appeal be set aside and the patent be revoked, auxiliarily that the case be remitted to the opposition division for further prosecution.
- III. The patent proprietor requested that the decision under appeal be set aside and the patent be maintained as granted (main request) or, in the alternative, that it be maintained according to one of the auxiliary requests 1, 1bis, 2 to 4, 4bis, 5 to 8 (auxiliary request 4bis filed with letter dated 8 October 2020, all other auxiliary requests filed with the statement of grounds of appeal). It also requested that the appeal fee be reimbursed due to the opposition division having committed a substantial procedural violation.
- IV. The following document is relevant to the present decision:
- D3 Sales invoice ("Verkauf - Rechnung") dated 19 August 2014, for a Samsung DV70F5E0HGW/EG Heat Pump dryer

V. The Board issued a summons to oral proceedings and a subsequent communication containing its provisional opinion, in which it indicated *inter alia* that, based on D3 alone, the sold tumble dryer identified therein, could not be regarded as forming prior art under Article 54(2) EPC. It also stated that it was unlikely that the appeal fee would be reimbursed.

VI. With its submission of 9 November 2023 the opponent filed a set of documents as new evidence

D20.4.4 Sales invoice ("Rechnung") dated 5 December 2013, for a Samsung DV-70 F5E0HGW dryer, with certain blacked-out details.

D20.5 Online offer for sale (kleinanzeigen.de) of the above dryer including photographs dated 2 November 2023

D20.3.1 Copy of email exchange with seller of the dryer on the kleinanzeigen.de website

all relating to the sale of an alleged identical dryer to that of the sales invoice D3.

VII. Oral proceedings were held before the Board on 5 December 2023, during which the patent proprietor filed a copy of the opponent's letter of 9 November 2023 which had been submitted directly to it by the opponent's representative and which was different to that submitted to the EPO. Additionally, the opponent withdrew its request for remittal of the case to the opposition division while the patent proprietor withdrew its request for reimbursement of the appeal fee.

VIII. At the close of the oral proceedings, the parties' requests were as follows:

The patent proprietor requested that the decision under appeal be set aside and the patent be maintained as granted.

The opponent requested that the decision under appeal be set aside and the patent be revoked.

IX. The wording of claim 1 of the main request (patent as granted) is unimportant for the present decision.

X. The opponent's arguments relevant to the present decision may be summarised as follows:

D3 included both an invoice and a delivery date for the dryer of the prior use of 19 August 2014. This proved that, with the sale, the dryer was immediately handed over for delivery. This also reflected general experience when ordering from an online retailer rather than the manufacturer. Even if final delivery did not occur on the precise date given on the invoice, the dryer was at least available to the public on that date on account of it being in the hands of the retailer.

The set of documents D20 proved that an identical dryer with the same model number to that of the prior use D3 was publicly available already before the filing date of the opposed patent. Having the same model number proved that the dryer of D20 would be identical to that of the publicly prior used dryer according to D3. It had not been possible to file this evidence sooner since the online offer for sale of the dryer had only been activated on 2 November 2023. Previous searches for dryers with this model number being offered for sale had been without result.

The differences between the version of the letter of 9 November 2023 filed at the EPO and that sent to the proprietor were not deliberate. This was an unintentional mistake.

XI. The patent proprietor's arguments relevant to the present decision may be summarised as follows:

D3 was an invoice for the sale of the prior used dryer and as such could not prove the date of delivery of the dryer. No conclusion could be reached as to when the dryer was actually delivered. The offer for sale of the dryer by the online retailer 'redcoon.de' did not make the dryer available to the public.

The late filed set of evidence D20 should not be admitted since the objection of lack of proof regarding public availability of the D3 prior use had been filed already with the proprietor's reply to the notice of opposition and had been repeated when filing the grounds of appeal. No exceptional circumstances justifying this evidence being taken into account, as required by Article 13(2) RPBA 2020, had been provided by the opponent. The late filing of this evidence also allowed insufficient time for the proprietor to investigate the accuracy of the evidence. The opponent's submission also failed to substantiate whether the sale according to D20 was a new instance of prior use or whether it related to an identical unit of the same model as that specified in D3. The version of the opponent's letter dated 9 November 2023 failed to argue that the D20 and D3 machines were identical in their build.

Reasons for the Decision

1. *Admittance of the opponent's submission of 9 November 2023*
- 1.1 According to Article 13(2) RPBA 2020, any amendment to a party's appeal case made after notification of a summons to oral proceedings shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.
- 1.2 The opponent's submission of 9 November 2023, providing details of a further dryer (D20) of essentially the same model number as that of the D3 prior use, was made after notification of the summons to oral proceedings such that the requirements of Article 13(2) RPBA 2020 apply.
- 1.3 The Board fails to see exceptional circumstances which would justify the opponent's submission including D20 being taken into account.
 - 1.3.1 As also argued by the proprietor, the argument that the prior use of the dryer identified in D3 was not made publicly available before the filing date of the opposed patent has been on file since the beginning of the opposition procedure. Even though the opposition division found the dryer identified in D3 to be prior art under Article 54(2) EPC, this was not only contested again during the oral proceedings before the opposition division but was contested afresh by the proprietor in its grounds of appeal. The opponent has thus had some three years after the proprietor's grounds of appeal were filed before the summons was issued to provide further evidence supporting its

contention that the alleged prior use dryer identified in D3 was indeed prior art under Article 54(2) EPC, but addressed this not only after notification of the summons to oral proceedings but moreover only after receiving the Board's communication under Article 15(1) RPBA 2020 including its preliminary opinion on the matter. Nor can the opponent have expected the Board to have immediately seen no problem in the evidence D3, given the fact that the invoice D3 was issued only 10 days before the filing date of the patent. In summary, no exceptional circumstances can be seen in the sequence of events which might justify such a late submission being taken into account.

- 1.3.2 The opponent's argument that the evidence in the D20 set of documents could not have been filed sooner is not a justification for it to be taken into account at such a late stage of the proceedings. Whilst the specific evidence provided in D20 could seemingly not have been filed before the notification of the summons to oral proceedings, as the online offer for sale of the dryer according to D20 was only published on 2 November 2023 (evidence in this regard being submitted in the form of the online offer for sale in D20.5 and the email exchange with the seller recorded in D20.3.1), the opponent failed to provide any evidence that it had sought unsuccessfully to find such evidence at an earlier point in time. The opponent also failed to submit any alternative evidence of public availability such as, for example, a statement from the manufacturer of the prior use dryer, Samsung, that the dryer had been offered for sale from a particular date onwards. The opponent's argument that it had indeed tried, without success, to obtain details of the date when the dryer of D3 was first put on the market by the manufacturer, and that it had looked for further models

of the same type on the internet in order to purchase one, are all unsubstantiated. The Board thus fails to see exceptional circumstances which would justify D20 being taken into account.

- 1.3.3 At oral proceedings it also became apparent that the version of the letter of 9 November 2023 filed at the EPO and that sent directly by the opponent to the proprietor had not insignificant differences. Ignoring the very limited time which was anyway available between receipt of this submission and the scheduled oral proceedings, ultimately the proprietor only became aware of the opponent's contention that the dryers according to D20 and D3 were "identical in their build" at the oral proceedings before the Board, this having been absent in the letter received by it directly from the opponent. The Board sees the contention that the dryers according to D20 and D3 were of identical build to be of potentially significant relevance as this was intended to show that the D20 evidence proved that the prior use dryer according to D3 had been publicly available before the filing date of the opposed patent. In this regard it is noted that the photographs included in the D20.5 online offer of sale are unable, by themselves, to allow a conclusion to be reached that D3 and D20 unambiguously relate to identical dryers. Therefore, absent the contention in the letter received by the proprietor that the dryers according to D20 and D3 were identical in their build, the proprietor logically interpreted the D20 evidence as relating to a new instance of prior use and thus had no motivation to further investigate whether the opponent's allegation of the D20 and D3 dryers being identical was correct or not. This understanding is confirmed by the first paragraph of the letter of 9 November 2023 which states (translated from the original in German), the documents

are evidence that a Samsung brand tumble dryer with an identical type designation to the appliance shown in D3 was already available to the public long before the filing date of the contested patent ("Bei den Unterlagen handelt es sich um Nachweise, die belegen, daß ein Wäschetrockner der Marke Samsung, der eine identische Typbezeichnung, wie das in D3 dargestellte Gerät aufweist, bereits lange vor dem Anmeldedatum des angefochtenen Patents der Öffentlichkeit zugänglich war"). Thus, the opponent alleged an identical type designation of the dryer rather than that the dryers were identical in their build, the proprietor also arguing that an identical type designation did not necessarily imply an identical dryer build.

- 1.3.4 Regarding the opponent's argument that the copy of the letter of 9 November 2023 sent directly to the opponent was not the official notification and that the correct version had indeed been forwarded by the EPO at a later date, this does not mitigate the significance of the error between the two versions of the submission. The Board sees the recipient of a submission sent directly to it by the opposite party due to imminent oral proceedings as reasonably expecting this to be identical to that filed officially with the EPO. There could thus be no reasonable expectation of the proprietor comparing the submission received directly from the opponent with that officially forwarded from the EPO, rather it should be able to rely on the accuracy of the directly received submission - both of which were addressed to the EPO and without further detailed inspection seemingly having the same content.
- 1.3.5 In view of all points 1.3.1 to 1.3.4, the Board fails to see exceptional circumstances justifying consideration of the opponent's submission of

9 November 2023 regarding details of a dryer with essentially the same model number as the dryer identified in D3. This submission is thus not taken into account (Article 13(2) RPBA 2020).

2. *Dryer identified in D3 as being prior art*

2.1 In point 2.2 of the Board's communication under Article 15(1) RPBA 2020, the preliminary opinion was given that the dryer identified in D3 appeared not to be prior art under Article 54(2) EPC.

2.2 Regarding the date of public availability, the "invoice" for the sale of the subject laundry dryer (D3) is dated 19 August 2014, i.e. 10 days prior to the filing date of the opposed patent. Even though D3 mentions "19.08.2014" as both the order date ("Auftragsdatum") and the delivery/invoice date ("Liefer-/ Rechnungsdatum") it seems very unlikely that such a large item that has to be delivered by means of a courier (cf. D3 "DHL Zwei-Mann-Service") would be delivered on the same day, i.e. the day of the order. The Board therefore concludes that 19 August 2014 cannot be the day of delivery to the customer. In the absence of any further evidence of delivery to the customer, which would be necessary to establish the true date of delivery, the Board finds the alleged prior use not to have been made available to the public prior to the filing date of the opposed patent.

2.3 Regarding the opponent's argument that the dryer according to D3 was publicly available already while being in possession of the online supplier 'redcoon.de', this is not accepted. No evidence has been supplied that the online supplier physically had the subject dryer in its own possession when offering

it for sale. It was equally reasonable for the supplier to offer the dryer for sale without it physically being in its possession, delivery being made directly from the manufacturer (Samsung) to the buyer on completion of the sale over the online platform. It is further not accepted that the delivery service itself can be considered part of the public, since the delivery personnel would have no rightful access to the item being entrusted to their delivery service.

- 2.4 At oral proceedings before the Board, the opponent stated that it had no further arguments regarding this and referred to its written submissions.
- 2.5 The Board thus finds the prior use according to D3 not to be prior art under Article 54(2) EPC.
3. Absent any further objections to claim 1 as granted, the Board finds the ground for opposition under Article 100(a) EPC not to prejudice maintenance of the patent as granted.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is maintained as granted.

The Registrar:

The Chairman:



D. Grundner

M. Harrison

Decision electronically authenticated