

**Internal distribution code:**

- (A) [ - ] Publication in OJ
- (B) [ - ] To Chairmen and Members
- (C) [ - ] To Chairmen
- (D) [ X ] No distribution

**Datasheet for the decision  
of 11 April 2024**

**Case Number:** T 0778/21 - 3.2.06

**Application Number:** 13199506.0

**Publication Number:** 2889424

**IPC:** D06F39/12

**Language of the proceedings:** EN

**Title of invention:**

Laundry appliance

**Patent Proprietor:**

Electrolux Appliances Aktiebolag

**Opponent:**

Whirlpool EMEA S.p.A.

**Headword:**

**Relevant legal provisions:**

EPC Art. 54, 111(1)

RPBA 2020 Art. 12(3), 12(4), 12(6), 13(2)

**Keyword:**

Late-filed evidence - admitted (no)

Remittal - required for hearing of witnesses and inspection of  
prior used machine - (yes)

**Decisions cited:**

T 0097/94, T 0474/04, T 0545/08, T 1363/14, T 2238/15,  
G 0003/97

**Catchword:**



**Beschwerdekammern**  
**Boards of Appeal**  
**Chambres de recours**

Boards of Appeal of the  
European Patent Office  
Richard-Reitzner-Allee 8  
85540 Haar  
GERMANY  
Tel. +49 (0)89 2399-0  
Fax +49 (0)89 2399-4465

Case Number: T 0778/21 - 3.2.06

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.06**  
**of 11 April 2024**

**Appellant:** Electrolux Appliances Aktiebolag  
(Patent Proprietor) St Göransgatan 143  
105 45 Stockholm (SE)

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

**Appellant:** Whirlpool EMEA S.p.A.  
(Opponent) Via Carlo Pisacane 1  
20016 Pero (MI) (IT)

**Representative:** Santonicola, Paolo  
PGA S.p.A.  
Via Mascheroni, 31  
20145 Milano (IT)

**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
26 March 2021 concerning maintenance of the  
European Patent No. 2889424 in amended form.**

**Composition of the Board:**

**Chairman** M. Dorfstätter  
**Members:** M. Hannam  
J. Hoppe

## Summary of Facts and Submissions

I. Appeals were initially filed by both the opponent and the patent proprietor against the interlocutory decision of the opposition division in which it found that European patent No. 2 889 424 in an amended form met the requirements of the EPC.

The opposition division concluded *inter alia* that the subject-matter of claim 1 of the patent as granted was not new in view of both document E2 and the prior use PU, the latter also being prejudicial to the novelty of the subject-matter of claim 1 of the then pending auxiliary request 6, while the subject-matter of claim 1 of auxiliary request 7 (identical to auxiliary request 7 in this appeal) was new and inventive in the light of prior use PU.

II. The opponent requested with its grounds of appeal and its reply that the decision under appeal be set aside and the European patent be revoked.

III. The patent proprietor requested with its grounds of appeal and its reply *inter alia* that the decision under appeal be set aside and the patent be maintained as granted (main request) or, as an auxiliary measure, that the patent be maintained in amended form based on one of the following requests in the given order:

- auxiliary request labelled "granted claims modified", filed on 28 July 2020;
- auxiliary request 7, filed in the oral proceedings before the opposition division on 24 February 2021 (i.e. to dismiss the opponent's appeal);
- auxiliary request 5, filed with letter of 11 October 2019;

- auxiliary request 8, filed in the oral proceedings before the opposition division on 24 February 2021; or
- new auxiliary request 9, filed with the proprietor's grounds of appeal.

The proprietor withdrew its appeal at the end of the oral proceedings before the Board.

IV. The following documents are referred to in the present decision:

E2	US2004/0168484
Elf,g,h	Technical drawings relating to prior use PU
PU1	Invoice dated 2 May 2012
PU2	Affidavit of Mr Erickson
PU3	Affidavit of Mr New
PU4a - PU4g	Photographs of prior use PU
PU5 - PU7	Technical drawings for prior use PU

V. The Board issued a summons to oral proceedings and a subsequent communication under Article 15(1) RPBA containing its provisional opinion, in which it indicated *inter alia* that the subject-matter of claim 1 of the main request appeared to lack novelty over E2 whilst the subject-matter of claim 1 of the request named 'granted claims modified' seemed not to meet the requirement of Article 123(2) EPC. With respect to auxiliary request 7 it indicated that the inventive step objection starting from E2 would likely not be admitted, the same fate meeting documents PU5 to PU7, that the opponent appeared to be citing different model numbers for prior use PU which did not correspond to that used before the opposition division and that the subject-matter of claim 1 seemed not to be clearly and unambiguously derivable from PU4a to PU4g.

VI. With later letters of 29 March 2024 and 9 April 2024 the opponent provided further submissions related to prior use PU and to several new instances of prior use.

VII. Oral proceedings were held before the Board on 11 April 2024. During the oral proceedings both parties withdrew several requests and the proprietor withdrew its appeal. At the close of the oral proceedings, the parties' requests were as follows:

The opponent requested

- that the decision under appeal be set aside and the European patent be revoked or, as an auxiliary measure, to remit the case to the opposition division for further prosecution.

The patent proprietor requested

- to dismiss the opponent's appeal, i.e. to maintain the patent in amended form based on auxiliary request 7, filed in the oral proceedings before the opposition division on 24 February 2021 or, as an auxiliary measure,

- to remit the case to the opposition division for further prosecution

or, as an auxiliary measure, to maintain the patent in amended form based on one of the following requests in the given order:

- auxiliary request 5, filed with letter of 11 October 2019;

- auxiliary request 8, filed in the oral proceedings before the opposition division on 24 February 2021; or

- new auxiliary request 9, filed with the proprietor's grounds of appeal.

VIII. Auxiliary request 7 is identical to auxiliary request 7 filed in the opposition proceedings and which was found

allowable by the opposition division. Claim 1 of auxiliary request 7 reads as follows (with feature annotation as used by the patent proprietor in its reply to the opponent's appeal):

- a) Laundry appliance, for example laundry washing machine, laundry dryer or laundry washer dryer, comprising
- b) a cabinet with at least two side walls, a front panel and a bracket element,
- c) wherein the front panel is fixed to the two side walls,
- d) wherein said bracket element substantially extends in between the two side walls and is fixed to said side walls in end portions, characterized in that
- e) each end portion of said bracket element and an upper or upper-most region of a corresponding side wall and a corresponding upper or uppermost region of the front panel are connected with each other,
- f) wherein said bracket element is formed as a separate part from said front panel,
- g) wherein a corresponding connecting part, extending from the rear side of the front panel is jointly fixed with a corresponding end portion of said bracket element to a corresponding side wall,
- h) wherein each end portion of said bracket element rests at least partially on and/or is mounted from above onto a corresponding resting surface of a corresponding side wall which resting surface faces upwardly, and
- i) wherein each resting surface is an upper surface of a connection bar formed at the inner side of the corresponding side wall at a depth downwards from the upper edge of the side wall.

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

The subject-matter of claim 1 lacked novelty over prior use PU relating to the washing machine with the serial number C21850524. In the course of the proceedings the opponent clarified that this serial number was solely related to the washing machine with model number WFW94HEXW2 (in the following referred to as "prior use PU").

The sale of the prior use PU washing machine as detailed on the invoice PU1 and the related affidavits of Mr New (PU3) and Mr Erickson (PU2) sufficed for proving that the machine was publicly available. Serial numbers were unique, so the indication of the serial number of the prior use machine allowed a definitive identification of the machine. The opposition division had correctly found that public availability of the machine was proven and that all claimed features were known from the photographs in PU4a to PU4g. Thus the inspection of the machine or the hearing of witnesses as requested by the proprietor was not necessary.

Technical drawings PU5 to PU7 should be admitted. These replaced the drawings previously on file but were versions dated prior to the relevant date of the patent with essentially identical technical content. Thus, they presented no change of the provided information. Documents filed during the written stage of the opposition procedure should be included in the appeal by default.

PU4a to PU4g implicitly disclosed features a) to e) of claim 1. There was no alternative technically reasonable way for the bracket element to be secured at



its end portions other than to be sandwiched between the front panel and the side wall and for the bolt visible in PU4b and PU4d to be opposite ends of the same bolt. PU4e also showed at the top right hand corner of the cabinet how the side wall was additionally secured to the bracket element, the side wall being visible through the bolt hole in the bracket element.

Regarding features h) and i), no direct contact was required between the bracket element and the resting surface and PU4b showed the bracket element sitting atop the bent under top edge of the side wall. The white surface of the side wall could be recognised through the bolt hole in the bracket element depicted in PU4e. The claimed connection bar needed not be a separate element from the side wall, col. 7, lines 24 to 28 of the patent itself indicating that this could be a connection flange of the side wall.

The new instances of prior use and further support of prior use PU as filed with its last letters should be admitted as they were a reaction to the unexpected preliminary opinion of the Board. The newly filed prior uses would simplify the proceedings as these were substantiated and proven beyond reasonable doubt. The errors in the opponent's grounds of appeal associated with the model number for the prior use PU were to be seen as clerical errors.

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

The opponent's new submissions filed after the communication according to Article 15(1) RPBA should not be admitted into the proceedings.

With respect to the alleged prior use PU, PU5 to PU7 should not be admitted into the proceedings as these documents were filed just a day before oral proceedings before the opposition division which did not allow the patent proprietor to critically analyse the documents.

There remained significant doubts as to the adequate substantiation and proof of the alleged prior use PU. In particular, the opponent had not established beyond reasonable doubt that the machine with serial number C21850524 had been made available to the public nor that photographs PU4a to PU4g related to the machine with this serial number. Hearing of the two affidavit writers, Mr New and Mr Erickson, as witnesses was therefore necessary to allow all these issues to be questioned directly.

Moreover, the provided photographs did not disclose the features of the claimed subject-matter. In particular, several elements were hidden from view such that there remained doubts as to the specific arrangement of these elements. In view of the doubts presented already in the opposition proceedings, an inspection of the machine with serial number C21850524 and the hearing of witnesses would have been necessary for verification.

The opposition division had infringed the proprietor's right to be heard by rejecting its requests for a machine inspection and hearing of the witnesses.

The inspection of the machine with serial number C21850524 and the hearing of Mr New and Mr Erickson as witnesses should therefore take place before the Board of appeal.

Regarding what was disclosed, prior use PU failed to directly and unambiguously disclose features c), d), e), h) and i) of claim 1. Regarding features c), d) and e) it was not clear whether the bolt head, securing the front panel visible in PU4b, was indeed part of the same bolt the thread of which was visible in PU4d. Even if it were the same bolt, this did not unambiguously secure the side wall of the machine, the bracket through which the bolt passed possibly being a frame element to which the side wall was fixed. PU4d and PU4e allowed such a frame element to be recognised as an inverted 'U' sectioned element to which the side wall was fixed. The 'line' indicated by the opponent in PU4b to allegedly indicate the bracket element being located behind the upstanding tab of the front panel was ambiguous from the photograph alone. The affidavit PU2 did also not unambiguously relate to the alleged prior used washing machine, as this made reference to 'such a washing machine' rather than specifically the prior used machine. The bracket element extending in between the two side walls was also not known since this required the bracket element to extend along its entire length only between the side walls.

As regards features h) and i), it was not unambiguous that the bracket element rested on, or was mounted from above onto, a resting surface of the side wall. A resting surface required physical contact. It was speculative that the hole on the horizontal part of the bracket element had an internal thread, so no contact between the bracket element and side wall was necessary. PU4e also showed a black bolted element obscuring the alleged resting surface of the side wall, so the presence of such a resting surface was highly speculative.

## **Reasons for the Decision**

### *Auxiliary request 7*

1. *Inventive step, starting from E2, admittance*
- 1.1 An inventive step objection starting from E2 against the subject-matter of claim 1 of auxiliary request 7 was not raised by the opponent before the opposition division, but for the first time in the opponent's reply to the proprietor's grounds of appeal. The new objection is thus an amendment according to Article 12(4) RPBA.
- 1.2 Article 12(6) RPBA, second sentence, indicates that the Board shall not admit objections which should have been submitted in the proceedings leading to the decision under appeal unless the circumstances of the appeal justify their admittance.
- 1.3 Auxiliary request 7 before the opposition division was identical to the present auxiliary request 7. The inventive step objection against the subject-matter of claim 1 starting from E2 thus could and should have been raised already before the opposition division. Filing an objection for the first time in appeal proceedings runs counter to the primary object of appeal proceedings which is to review the decision under appeal. It is neither apparent nor was it argued by the opponent that the circumstances of the appeal justified admittance of the new objection.
- 1.4 To the Board's intention not to admit the inventive step objection based on E2, the opponent offered no

counter-arguments.

- 1.5 In accordance with Article 12(4) and (6) RPBA, second sentence, the Board thus exercised its discretion not to admit the inventive step objection starting from E2 into the appeal proceedings.
2. *Admittance of new instances of prior use*
  - 2.1 With its letters of 29 March 2024 and 9 April 2024 the opponent submitted further instances of prior use (PU-Core08; PU-Sigma; PU-Futura) supported in particular by a new affidavit of Mr Iannicelli (N1), various screenshots from internet search results and further technical drawings.
  - 2.2 According to Article 13(2) RPBA, any amendment to a party's appeal case made after notification of a communication under Article 15(1) shall, in principle, not be taken into account unless there are exceptional circumstances.
  - 2.3 The opponent indicated that it 'was extremely surprised by the non-binding opinion of the Board of Appeal' both in respect of its public disclosure and of its technical features and that the filing of new instances of prior use were thus justified.

In this regard it is noted that, in *inter partes* opposition proceedings, the proprietor and opponent generally do have opposite views on many key issues relating to the opposed patent. The Board will generally base its preliminary opinion in favour of the more persuasive case presented by one of the parties such that the other party cannot reasonably claim to be surprised by the opposite view to its own which was

already on file and known to it. As the lack of substantiation and insufficient proof of prior use PU had already been addressed by the proprietor in the opposition proceedings, in its grounds of appeal and in the reply, the opponent was aware that its objection based on prior use PU might not be successful. Thus, if the opponent wished to rely on further instances of public prior use, it could and should have provided the respective submissions at an earlier stage of the proceedings.

- 2.4 The opponent further argued that the admittance of the affidavit of Mr Iannicelli (N1) and the hearing of them as a witness, were justified by these both dealing with further prior uses which were more relevant than prior use PU and that they would thus simplify the proceedings.

This argument is not accepted. At the final stage of the appeal proceedings, after having received the communication under Article 15(1) RPBA and less than two weeks before the oral proceedings, *prima facie* relevance alone cannot usually justify such late filing, in particular if the submissions relate to a public prior use initiated in the sphere of the opponent. A party, acting with all due care, needs to present such evidence at an early stage of the proceedings to serve procedural economy and to provide the other party and the Board sufficient time to assess the presented prior use.

The opponent's further argument that Mr Iannicelli was not available from June 2018 to April 2021 is also not a mitigating factor since they were apparently available throughout the opposition proceedings, as confirmed by the opponent in the oral proceedings.

Despite that, the absence of a single person would not be an adequate excuse for the late submission of a prior use that was initiated within the opponent's sphere.

- 2.5 In conclusion, the Board fails to see exceptional circumstances justifying the admittance of the opponent's change of appeal case. Consequently, the further instances of prior use presented in the submissions of 29 March 2024 and 9 April 2024 are not taken into account under Article 13(2) RPBA.

### 3. *Novelty*

#### 3.1 Prior use PU

The opponent based an objection under Article 54 EPC on prior use PU, related to a washing machine with the model number WFW94HEXW2 and serial number C21850524.

The Board concluded that the opponent has substantiated prior use PU and has also provided evidence confirming its public availability by way of the affidavits of Mr Erickson (PU2) and Mr New (PU3) and the photographs PU4a to PU4g.

#### 3.2 *Admittance of PU5 to PU7 and the new facts and evidence related thereto in the letters of 29 March 2024 and 9 April 2024*

- 3.2.1 In its grounds of appeal, the opponent relied *inter alia* on documents PU5 to PU7 to substantiate and prove the prior use PU.

With its letters of 29 March 2024 and 9 April 2024 and during the oral proceedings the opponent provided

further submissions with respect to documents PU5 to PU7.

The proprietor requested that these submissions not be admitted.

3.2.2 According to Article 12(4) RPBA, any part of a party's appeal case which is not directed to requests, facts, objections, arguments and evidence on which the decision under appeal was based is to be regarded as an amendment, unless the party demonstrates that this part was admissibly raised in the proceedings leading to the decision under appeal. Any such amendment may be admitted only at the discretion of the Board.

3.2.3 With its grounds of appeal, the opponent stated that technical drawings PU5 to PU7 showed parts of prior use PU. In its further submissions, the opponent confirmed that the filing of PU5 to PU7 during the opposition proceedings was intended to replace respective previous versions of the same technical drawings that had already been on file as E1f, E1g, E1h in the opposition proceedings.

In its decision, the opposition division did not refer to PU5 to PU7 such that the decision is not based upon these documents. Therefore, it is necessary to consider whether PU5 to PU7 were admissibly raised before the opposition division (Article 12(4) RPBA).

3.2.4 PU5 to PU7 were filed by the opponent during the opposition proceedings with letter of 23 February 2021, after expiry of the time-limit according to Rule 116(1) EPC and only one day before the scheduled oral proceedings before the opposition division. As a justification for this late filing, the opponent had



indicated in the opposition proceedings that only in preparation for oral proceedings had it noticed that the revision dates of the technical drawings then on file (Elf-h) were after the relevant date of the patent, but that the technical content of PU5 to PU7 was essentially identical to that of the drawings on file such that no difficulty in understanding the drawings would be experienced by the proprietor.

3.2.5 The Board concluded that PU5 to PU7 were not admissibly raised in the opposition proceedings. In this respect it is noted that the proprietor had indeed indicated already with its letter of 11 October 2019 that the revision date of the technical drawings Elf, Elg and Elh resulted in these not being prior art under Article 54(2) EPC, yet the opponent made no effort to remedy this objection for well over 16 months, ultimately filing the replacement drawings PU5 to PU7 just one day before the scheduled oral proceedings.

3.2.6 The filing of PU5 to PU7 just one day prior to oral proceedings is not seen to represent admissibly raised evidence. Such late filing does not provide the other party and the opposition division sufficient time to assimilate the new evidence submitted and evaluate this appropriately. Despite the opponent alleging that PU5 to PU7 presented no relevant change of content to the technical drawings previously on file, lacking reasonable time to analyse the new drawings prohibited the proprietor from checking the opponent's allegation in this regard and unfairly prevented it from adequately preparing the case. Additionally, no reason was provided by the opponent as to why PU5 to PU7 could not have been filed sooner, the objection to the technical drawings previously on file having been received over 16 months earlier. Moreover, it was the

first time that the related drawings previously on file as Elf, Elg, Elh, were related to the washing machine with the model number WFW94HEXW2 as before they had been relied on only with respect to the washing machine with the model number WFW97HEXWD.

3.2.7 The opponent's argument that documents filed during the written stage of the opposition proceedings should be included in the appeal by default is not accepted in such generality. Rather, in application of Article 12(4) RPBA, it is only those parts of a party's submissions which were admissibly raised and maintained which are not to be regarded as an amendment. PU5 to PU7 failed to meet this requirement (see points 3.2.5 and 3.2.6 above).

3.2.8 As PU5 to PU7 were not admissibly raised before the opposition division, they have to be seen as an amendment to the opponent's case presented before the opposition division. The admittance of PU5 to PU7 is thus at the discretion of the Board under Article 12(4) RPBA, such discretion being exercised in view of *inter alia* complexity and the need for procedural economy.

3.2.9 The opponent's further attempts to substantiate the link between PU5 to PU7 and the prior use PU in its letters of 29 March 2024 and 9 April 2024 and in the oral proceedings before the Board lacked any justification of exceptional circumstances (see Article 13(2) RPBA). Even on direct questioning by the Board at oral proceedings, the opponent failed to identify any exceptional circumstances justifying why these arguments should be taken into account. The Board therefore exercised its discretion under Article 13(2) RPBA not to take these late filed arguments for

admitting PU5 to PU7 into account.

3.2.10 As an amendment to the opponent's case, and lacking any (admitted) substantiation as to the link between PU5 to PU7 and prior use PU, it would be procedurally inefficient to admit PU5 to PU7 into the appeal proceedings. Consequently the Board exercised its discretion under Article 12(4) RPBA not to admit PU5 to PU7 into the appeal proceedings.

3.3 *Admittance of additional new submissions of 29 March 2024 and 9 April 2024 related to prior use PU*

3.3.1 In its letters of 29 March 2024 and 9 April 2024, the opponent provided additional submissions, including new facts and evidence to substantiate and prove prior use PU.

3.3.2 The admittance of these new submissions, filed after notification of the Board's communication under Article 15(1) RPBA, is to be regarded as an amendment of the opponent's appeal case and lies within the discretion of the Board according to Article 13(2) RPBA.

3.3.3 In its preliminary opinion, the Board questioned whether the prior use PU was substantiated in view of the confusion of two model numbers associated with the specific washing machine with serial number C21850524.

In reaction to this objection, the opponent explained in its submissions of 29 March 2024 and 9 April 2024 that the incorrect association of model number WFW97HEXW2 with serial number C21850524 was a clerical mistake.

The patent proprietor, neither in its statement of grounds of appeal nor in its reply, explicitly mentioned the apparent confusion of the two model numbers (WFW97HEXW2/ WFW94HEXW2) which appeared in the opponent's statement of grounds of appeal and reply. This objection was therefore indeed raised for the first time in the preliminary opinion of the Board.

In view of this, exceptional circumstances are found to justify admitting the opponent's explanations regarding the confusion of model numbers into the proceedings under Article 13(2) RPBA. Consequently the Board accepted the opponent's clarification that the intended model number of the prior use PU washing machine was WFW94HEXW2.

3.3.4 With respect to the further submissions in the letters of 29 March 2024 and 9 April 2024, i.e. the submissions other than the explanations with regard to the confusion of model numbers, exceptional circumstances are not discernable for the same reasons as set out above under point 2.5. Consequently, the Board exercised its discretion under Article 13(2) RPBA not to take these additional submissions related to prior use PU into account.

### 3.4 *General principles for assessing an alleged prior use*

If it has to be determined whether an objection based on a prior use is persuasive, in general, the following assessment needs to be made:

3.4.1 Step 1: It needs to be evaluated whether the prior use has been substantiated, i.e. whether the opponent has - presented a chain of facts and arguments that describe the subject of the prior use;

- indicated when the prior use occurred;
- indicated how the subject of the prior use was made available to the public; and
- indicated what was disclosed by the subject of the prior use.

As to how detailed the substantiation needs to be depends on the specific circumstances of the case and the arguments presented by the proprietor.

3.4.2 Step 2: If the facts and arguments of the opponent presented in the first step are found to substantiate the prior use, a second step must establish whether evidence has been offered by the opponent, as the party bearing the burden of proof, in order to prove the alleged facts in dispute.

3.4.3 Step 3: An evaluation of the evidence provided by the opponent must be made as to whether the facts that were set out to substantiate the prior use are confirmed. This includes the assessment of the entire evidence offered by the opponent. Depending on the outcome of the assessment, the next (fourth) step can vary:

3.4.4 Step 4:

a) First variant

If the opponent's evidence on file, for example documents and affidavits, do not confirm the alleged facts, or if doubts remain as regards their credibility, and the opponent, as the party bearing the burden of proof, requests an inspection or hearing of such affidavit writers as witnesses, such hearing and/or inspection should be granted (T 1363/14, reasons 2.2.4).

b) Second variant

If the opponent's evidence on file, does not confirm the alleged facts, or if doubts remain as regards their credibility and if the opponent does not request an inspection or hearing of witnesses, despite the deciding body not being convinced by the evidence on file, it is not necessary to initiate an inspection or to hear the witnesses even if this was requested by the patent proprietor. The reason for this is that the patent proprietor is not the party having the burden of proof. Thus, its request for an inspection is to be regarded as counter evidence. Such counter evidence and also the hearing of the authors of the affidavits as witnesses upon request of the patent proprietor only becomes relevant if the evidence provided by the party bearing the burden of proof (i.e. the opponent) confirms the facts set out by the opponent for substantiation of the prior use with a sufficient degree of certainty. Thus, if the evidence offered by the opponent is insufficient to convince the deciding body, no further assessment or taking of counter evidence is required as it would be irrelevant for the outcome of the decision. Rather, in such cases, it can be concluded that the alleged prior use was not proven and is thus not prior art under Article 54(2) EPC.

c) Third variant

If, as a further variant, the opponent's evidence on file confirms the facts provided to substantiate the prior use with a sufficient degree of certainty (i.e. as such do not give cause to doubt their credibility) and the proprietor has contested the findings and offered counter evidence and/or requested to hear the authors of the affidavits as witnesses, it cannot be concluded at this stage that all the facts of the prior

use have been proven. Rather, such a conclusion can only be drawn after taking and evaluating the entire available evidence offered by the parties, including (counter) evidence by the patent proprietor. Thus, if the opponent's evidence confirms the prior use, the (counter) evidence offered by the patent proprietor becomes relevant and needs to be considered. If assertions made in an affidavit or in any other witness declaration remain contested, a request from a party to hear the (available) witness must be granted before these assertions can be made the basis of a decision against the contesting party (Case Law of the Boards of Appeal, 10th edition, G.3.3.1). To conclude in such a case that the opponent proved its allegations without considering the counter evidence goes against the prohibition of prejudging the weight of evidence and violates the proprietor's right to be heard. It contradicts Articles 113(1) and 117(1) EPC which embody a basic procedural right generally recognised in the EPC contracting states, i.e. the right to give evidence in appropriate form and the right to have that evidence heard (G 2/21, OJ 2023, 85, reasons 41). This right applies not only to the party bearing the burden of proof but also to the other party with respect to counter evidence. Thus, to decide whether a fact can be regarded as proven, all the relevant evidence needs to be taken into consideration (G 2/21, OJ 2023, 85, reasons 42; T 474/04, reasons 6-10). The principle of unfettered consideration and evaluation of the evidence does not apply until after an offer of evidence has been taken up and cannot be used to justify not taking offered evidence into account (G 2/21, point 44 of the reasons). Thus, if the evidence offered as proof of contested facts is potentially relevant, the body hearing the case must, as a rule, order that it be taken into account (G 2/21, point 42 of the Reasons;

see T 474/04, reasons 8, 10) otherwise the party's right to be heard would be violated. Only after taking the entire evidence into account can the deciding body, in a next step, consider whether or not the prior use is proven with a sufficient degree of certainty.

In what follows these principles will be applied to the present case.

### 3.5 *Evaluation of the Opponent's submissions as regards prior use PU*

In the case on file, after having heard the parties' arguments in the oral proceedings, the Board changed its preliminary opinion as set out in the communication under Article 15(1) RPBA and found that the opponent substantiated prior use PU (step 1) and provided evidence (step 2) confirming this prior use (step 3). Thus, the proprietor's request for an inspection of the washing machine and for hearing the authors of the affidavits as witnesses needs to be granted (step 4, third variant). This is reasoned as follows (see points 3.6 to 3.8.3).

### 3.6 *Public availability of PU*

3.6.1 It is firstly noted that the prior use PU occurred within the knowledge and control of the opponent as it relates to a washing machine produced and sold by Whirlpool. The prior used machine WFW94HEXW2 with serial number C21850524 was a specific machine. Photographs (see PU4a - PU4g) were provided to prove the technical features of the machine. Even if the machine type was publicly available for sale, the alleged instance of prior use concerned the one specific machine to which the proprietor had no access.



In such cases, it is established case law that the required standard of proof is 'beyond reasonable doubt' (see e.g. T 97/94, Reasons 5.1) or that the deciding body has to be convinced with a sufficient degree of certainty (T 1138/20, reasons 1.2.1; T 545/08, reasons 11).

- 3.6.2 The opponent's substantiation of prior use PU is based on the sale of a washing machine with model number WFW94HEXW2 and serial number C21850524, which was sold by the opponent to ABT Television & Appl FDC on 5 February 2012, i.e. before the date of filing of the patent in suit. These events are confirmed by the invoice PU1 and the affidavits of Mr Erickson (PU2) and Mr New (PU3). At least the dates provided in PU1 and the related declarations of Mr New in PU3 demonstrate that the machine with serial number C21850524 was made available for the public in 2012 when it was sold to ABT Television & Appl FDC. In their affidavit, Mr Erickson explained how they were requested by the opponent to find a washing machine having the specific structural features of claim 1 of the patent in suit and found such a machine on the opponent's so-called "Alpha" platform. They further stated that it had been possible to find the product with the model number WFW94HEXW2 and serial number C21850524 and to buy it back from the customer. Mr New continued to explain how it had been possible to find the invoice for the washing machine with the model number WFW94HEXW2 and serial number C21850524 in the business transaction reporting system used by the opponent and provided a screenshot of the information found in that system concerning the sale of this machine.
- 3.6.3 The proprietor argued that the model number WFW94HEXW2 included an additional '2' at the end in photograph

PU4g, which was absent from the references to the washing machine on the invoice PU1. This caused doubt as to whether the washing machine allegedly shown in the photographs PU4a to PU4g was made available to the public. PU3 also detailed a SAP system internal to Whirlpool which did not allow any external verification of the data in the system.

In this respect the Board notes that Mr Erickson explained in PU2 that commercial models ended with a letter (WFW94HEXW), i.e. without a number, while the engineering models comprised an additional number at the end (WFW94HEXW2) even though they referred to the same type of machine. This statement is confirmed by the table shown in PU3 which, according to Mr New, the author of the affidavit, shows a screenshot of the "SAP BW" system.

Thus, based on the submissions and evidence on file at this stage of the proceedings, the opponent has substantiated that the subject of the prior use PU, a machine with the model number WFW94HEXW2 and serial number C21850524, was made available to the public and has provided evidence confirming the related facts.

It should however be noted that a final conclusion on whether all relevant aspects of the prior use, including public availability, are proven beyond reasonable doubt, can only be drawn after considering the evidence requested to be considered, by the proprietor, i.e. after inspecting the prior use PU washing machine with model number WFW94HEXW2 and serial number C21850524 and hearing Mr New and Mr Erickson as witnesses.

- 3.7 *Disclosure of the features of claim 1 in prior use PU*
- 3.7.1 As the drawings PU5 to PU7 and the further submissions in the letters of 29 March 2024 and 9 April 2024 were not admitted into the appeal proceedings (see points 3.2 and 3.3 above) and since the opponent with its grounds of appeal and its reply did not request an inspection of the machine with the model number WFW94HEXW2 and serial number C21850524 or to hear Mr Erickson as a witness, the Board has to assess whether the opponent's remaining submissions, in particular affidavit PU2 and photographs PU4a to PU4g, are sufficient to confirm that the prior use PU (machine with model number WFW94HEXW2 and serial number C21850524) discloses all the features set out in claim 1 of auxiliary request 7.
- 3.7.2 In their affidavit Mr Erickson stated that they took pictures of "such a washing machine that was returned from the field". Despite the proprietor's objections in this regard, the Board understands this to mean that Mr Erickson took photographs PU4a to PU4g of the specific machine with model number WFW94HEXW2 and serial number C21850524 and thus confirmed the opponent's allegation that the photographs PU4a to Pu4g indeed relate to prior use PU.
- 3.7.3 There was no dispute between the parties that the prior use disclosed features a), b) and f) of claim 1. The opponent however saw all further features of claim 1 to also be disclosed by the prior use. The Board concurs with the opinion of the opponent and firstly sees features a) to f) of claim 1 disclosed as follows.
- 3.7.4 Feature a) Laundry appliance, for example laundry washing machine, laundry dryer or laundry washer dryer.

PU4f shows a washing machine, as also confirmed in the sentence bridging pages 1 and 2 of PU2.

Feature b) comprising a cabinet (PU4a best shows this with the front control panel and the cabinet top panel removed) with at least two side walls (PU4d shows an internal view of the left hand - when viewed from the front - side wall taken from above the machine with the top panel removed, looking from the rear of the machine towards the front panel).

Feature c) wherein the front panel is fixed to the two side walls (PU4a, PU4b and PU4d best depict this, with the bolt, the head of which is visible on the upstanding tab of the front panel, passing through the metallic-coloured bracket element and securing the side wall via the flange of the side wall depicted in PU4d. The bolt thread is visible protruding from the flange in PU4d.

Feature d) The bracket element substantially extends in between the two side walls and is fixed to said side walls in end portions. PU4a depicts the metallic bracket element extending fully between the two side walls and each end portion of said bracket element (PU4b and PU4c depict the left and right end portions of the bracket element), the bracket element being connected to the side walls by way of the bolt passing from the upstanding tab of the front panel through the bracket element and into the flange of the side wall visible in PU4d.

Feature e) each end portion of said bracket element and an upper or upper-most region of a corresponding side wall and a corresponding upper or uppermost region of the front panel are connected with each other. The

bolt connecting the front panel to the bracket element and the side wall passes from the upstanding tab of the front panel (an 'uppermost region of the front panel', see PU4a) through the end portion of the bracket element (see PU4ba) and into an upper region of the flange on the side wall (see PU4d).

Feature f) wherein said bracket element is formed as a separate part from said front panel. PU4a shows the metallic bracket element clearly as a separate part from the front panel in which the door opening is located.

3.7.5 The proprietor's primary objections to this analysis were that the photographs PU4a to PU4g did not unambiguously show feature e) since in the prior use PU:

- the front panel, bracket element and side wall were not connected together since the bracket element did not necessarily extend continuously behind the upstanding tab of the front panel; and
- the bolt head engaged with the upstanding tab of the front panel in PU4b did not necessarily belong to the threaded bar protruding from the flange of the side wall in PU4d.

As to the bracket element extending continuously behind the upstanding tab of the front panel, this is seen to implicitly be the case i.e. no alternative interpretation of the bracket element's extent is technically reasonable. As the opponent also argued, the metallic bracket element is visible through the square hole in the upstanding tab of the front panel in PU4b and, in the same photograph, the metallic bracket element can be seen between the left hand vertical edge of the upstanding tab and the side wall. These both

corroborate the interpretation of the bracket element extending behind the entirety of the upstanding tab so that at least these two features are connected by the bolt. In addition, the proximity of the bolt hole, in which the connecting bolt is inserted, to the edge of the bracket element (visible at the left hand vertical edge of the upstanding tab of the front panel in PU4b) implies that the bolt must necessarily pass through a hole in the bracket element. No alternative technically reasonable arrangement for the bracket element can be imagined, nor did the proprietor suggest any such alternative arrangement.

As to the bolt head engaged with the upstanding tab of the front panel not necessarily belonging to the threaded bar protruding from the flange of the side wall, this is not accepted. Viewing PU4b in conjunction with PU4d, the precise location of the bolt passing from the bolt head on the upstanding tab of the front panel can be ascertained *inter alia* relative to the bent-over tab of the bracket element (visible above the upstanding tab of the front panel in PU4b) which protrudes through the square hole in the flange of the side wall (visible in PU4d). In combination with the relative positioning of the bolt head and thread with respect to the detergent drawer opening in the bracket element visible in both PU4b and PU4d, it is seen to be unambiguous that the bolt head in PU4b belongs to the very same bolt as the thread protruding from the flange of the side wall in PU4d.

- 3.7.6 The proprietor further argued that the photographs PU4a to PU4g did not exclude the possibility of the washing machine cabinet being structured around a frame, such that the 'flange of the side wall' visible in PU4d was actually the frame element and not the side wall. This

is not accepted.

Considering the views of the cabinet in PU4b, PU4d and PU4e in combination, the possibility of this being based around a frame to which the side panels are attached is excluded. The left hand most edge of the cabinet in PU4b depicts the side wall of the cabinet in a view from the front of the machine and depicts how the side wall is folded over at both the front and top edges to locate directly below the L-shaped metallic bracket element. The rear view of the folded over front edge of the side wall (see PU4d) depicts how this forms the flange on the side wall from which the bolt joining the front panel and bracket element protrudes. The proprietor's contention that the inverted 'U' sectioned portion at the top of the side wall in PU4d could be a frame section to which the side wall is attached is not accepted. Such an interpretation would require fixings for the side wall which are visible in none of the photographs and further would not explain the folded over edges of the side wall depicted in PU4b since these would then have to be understood as a portion of the frame structure. Consequently, the only technically reasonable interpretation of the photographs excludes the possibility that a frame structure is utilised in prior use PU, rather the front panel, the bracket element and the respective side wall must implicitly be connected with each other.

- 3.7.7 The proprietor's further contention that the expression 'in between' required the entirety of the bracket element to extend between the side walls is not accepted. The Board understands the expression 'in between' more broadly than the proprietor, requiring solely that at least a portion of the bracket element is located in between the side walls. This corresponds to established case law that a claim should be

interpreted as broadly as technically reasonable. The claimed recitation of the bracket element extending 'in between the two side walls' thus fails to define that it must lie between the two side walls over its complete extent.

3.7.8 Feature e) of claim 1 is therefore directly and unambiguously disclosed in prior use PU.

3.7.9 As for the further features of claim 1, namely features g), h) and i), these are also disclosed by the photographs PU4a to PU4g as follows:

Feature g) The 'connecting part extending from the rear side of the front panel' is anticipated by the upstanding tabs of the front panel (see PU4a, PU4b and PU4c), these being jointly fixed with end portions of the bracket element to the corresponding side wall, as found with respect to feature e) above.

Feature h) Each end portion of the bracket element (see bent-over horizontal portion of the metallic bracket element at the top left of the cabinet in PU4b) rests at least partially on and/or is mounted from above onto a corresponding resting surface of a corresponding side wall (see top left of the cabinet PU4b where the top of the side wall can be seen to be folded over through about 90° in order to lie underneath the horizontal portion of the bracket element; also visible in PU4e in a view from above the cabinet) which resting surface faces upwardly.

Feature i) Each resting surface is an upper surface of a connection bar formed at the inner side of the corresponding side wall at a depth downwards from the upper edge of the side wall (the above referenced top



of the side wall folded over through about 90° may be seen as a 'connection bar' in the sense that the expression is used in the patent, col. 7, lines 24 to 28 disclosing that the connection bar can be a 'connection flange').

- 3.7.10 The proprietor's argument that the photographs failed to unambiguously show a resting surface of the side wall is not accepted. In addition to the above indications of the prior use PU having a resting surface as claimed, PU4e shows a hole in the horizontal surface of the metallic bracket element through which a white reflection of the resting surface of the side wall is visible. In conjunction with the visible folded over portion at the top of the side wall in PU4b and PU4e which can be seen to disappear underneath the horizontal surface of the metallic bracket element, this is found to unambiguously disclose a resting surface of the side wall.

The proprietor further argued that a 'resting surface' implicitly required physical contact between the surface and the supported element. The Board can agree with this. Indeed, this is how the interaction between the folded over horizontal portion at the top of the side wall and the horizontal portion of the bracket element is interpreted by the Board, not least in view of PU4e showing a thread in the holes of the horizontal portions allowing these two portions to be secured together.

The proprietor's further argument that the black bolted element visible on the top surface of the wall in PU4e obscured the alleged resting surface of the side wall, is not found to prohibit the horizontal surface of the side wall acting as a resting surface. As explained

above, the resting surface of the side wall is seen to be anticipated by the top of the side wall folded over through about 90° at the position in which it provides the support for the horizontal portion of the bracket element. The black bolted element referred to by the proprietor does not change this anticipation of the claimed resting surface.

- 3.7.11 In conclusion, therefore, the Board finds the photographs PU4a) to PU4g) to disclose features g), h) and i) of claim 1 of auxiliary request 7. Consequently, based on the evidence on file at this stage, all features of claim 1 are seen to be known from the prior use PU.
- 3.7.12 Summarising, therefore, in steps 1 to 3 the submitted facts and arguments are found to be sufficient to substantiate prior use PU and these facts are confirmed by the evidence provided by the opponent. Therefore, the patent proprietor's request for taking (counter) evidence (Step 4, third variant - see point 3.4.4 above) needs to be considered.
- 3.8 *Proprietor's request to consider (counter) evidence*
- 3.8.1 The proprietor's request to inspect the machine and hear Mr New and Mr Erickson as witnesses needs to be granted (Article 113(1) and 117(1) EPC).
- 3.8.2 The patent proprietor contested public availability of the washing machine with the model number WFW94HEXW2 and serial number C21850524 with specific arguments. It argued that the circumstances of taking the photographs and how the machine was bought back were not clear and based its allegation on the specific wording of the affidavits PU2 and PU3. It also contested the

explanations provided in Mr Erickson's affidavit with respect to the identification of the serial number. Moreover, the patent proprietor contested the connection between prior use PU and photographs 4a to 4g.

- 3.8.3 The patent proprietor thus provided a clear line of argument to contest the opponent's submissions and evidence.

The opponent stated that it was possible to make the washing machine with model number WFW94HEXW2 and serial number C21850524 available for inspection and also indicated the availability of Mr New and Mr Erickson to be heard as witnesses.

In view of this, taking of evidence (inspection of the machine of prior use PU and hearing of Mr New and Mr Erickson as witnesses) as requested by the patent proprietor, is necessary in order to ultimately decide whether prior use PU was indeed publicly available, whether photographs PU4a to PU4g are indeed related to prior use PU, i.e. to a washing machine with model number WFW94HEXW2 and serial number C21850524 and whether the inspected washing machine indeed discloses the subject-matter of claim 1 of auxiliary request 7.

The body hearing the case must therefore order that the requested evidence be taken into account in order to avoid violation of the proprietor's right to be heard. Only after that can the entire evidence be evaluated to conclude whether or not prior use PU has been proven beyond reasonable doubt.

4. *Remittal according to Article 111(1) EPC*

4.1 In view of the need to hear Mr New and Mr Erickson as witnesses and to inspect the prior use PU washing machine, remittal of the case to the opposition division in accordance with the proprietor's and opponent's auxiliary request is appropriate.

4.2 It is noted that the opposition division's decision with respect to the substantiation and proof of prior use PU was in relation to auxiliary request 6 pending before it. In view of the general principles as set out above, the (counter) evidence requested by the proprietor was relevant to that decision and should have been taken into account in order to guarantee the proprietor's right to be heard (see Articles 113(1) and 117(1) EPC) being met.

4.3 The Board avails itself of its power under Article 111(1) EPC to remit the case back to the opposition division for further prosecution.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division for further prosecution.

The Registrar:

The Chairman:



D. Grundner

M. Dorfstätter

Decision electronically authenticated