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**Datasheet for the decision
of 14 October 2021**

Case Number: T 1593/16 - 3.4.02

Application Number: 04798549.4

Publication Number: 1687589

IPC: G01B21/04

Language of the proceedings: EN

Title of invention:

METHOD OF ERROR COMPENSATION IN A COORDINATE MEASURING MACHINE
WITH AN ARTICULATING PROBE HEAD

Patent Proprietor:

Renishaw plc

Opponents:

Carl Zeiss Industrielle Messtechnik GmbH
Hexagon Technology Center GmbH

Relevant legal provisions:

EPC 1973 Art. 84, 100(c), 113(1)
EPC Art. 108, 123(2)
EPC R. 99(2), 103(1)(a)
RPBA 2020 Art. 11
RPBA Art. 12(4)

Keyword:

Admissibility of the appeal (yes)

Admission of requests submitted in reply to the statement of grounds of appeal (yes)

Amended subject-matter extending beyond the content of the application as filed (main request and fifth auxiliary request: yes)

Clarity of claims (second auxiliary request: no)

Substantial procedural violation and reimbursement of the appeal fee (yes)

Remittal (no)



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 1593/16 - 3.4.02

D E C I S I O N
of Technical Board of Appeal 3.4.02
of 14 October 2021

Appellant: Carl Zeiss Industrielle Messtechnik GmbH
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Appellant: Hexagon Technology Center GmbH
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Respondent: Renishaw plc
(Patent Proprietor) New Mills
Wotton-Under-Edge
Gloucestershire GL12 8JR (GB)

Representative: Dunn, Paul Edward
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 12 May 2016
rejecting the opposition filed against European
patent No. 1687589 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman R. Bekkering
Members: F. J. Narganes-Quijano
 B. Müller

Summary of Facts and Submissions

I. Opponent 1 and opponent 2 each lodged an appeal against the decision of the opposition division rejecting the oppositions against European patent No. 1687589.

The oppositions filed by opponent 1 and opponent 2 against the patent as a whole were based on the grounds for opposition of added subject-matter (Article 100(c) EPC 1973), insufficiency of disclosure (Article 100(b) EPC 1973), and lack of novelty and of inventive step (Article 100(a) EPC 1973).

II. During the appeal proceedings the parties referred *inter alia* to the following documents already considered during the first-instance proceedings:

E1: EP 1 391 684 A1
E3: DE 44 36 507 A1
E4: DE 37 40 070 A1
E5: US 5 138 563 A
E7: US 6 591 208 B2
E8: WO 02 04883 A1
E9: DE 100 07 062 A1
E10: US 6 568 242 B2
E11: DE 43 42 312 A1
E12: EP 0 684 447 A2.

III. In its decision the opposition division held *inter alia* that

- the subject-matter of independent claims 1 and 18 as granted did not extend beyond the content of the application as filed (Article 100(c) EPC 1973),

- the claimed invention was sufficiently disclosed (Article 100(b) EPC 1973), and

- the subject-matter of independent claims 1 and 18 as granted was new and involved an inventive step over the documents considered by opponent 1 and opponent 2, and in particular involved an inventive step over the combination of document E1 with either one of documents E3 and E8, and over the combination of document E8 with document E1 (Article 100(a) EPC 1973).

IV. In reply to the appeals of opponent 1 and opponent 2 the patent proprietor, by letter dated 3 February 2017, filed claims according to 1st to 19th auxiliary requests.

V. Oral proceedings before the board were held on 14 October 2021.

Opponent 1 requested that the case be remitted to the department of first instance in view of a substantial procedural violation or, in the alternative, that the decision under appeal be set aside and the patent be revoked; further, that the appeal fee be reimbursed in view of a substantial procedural violation.

Opponent 2 requested that the decision under appeal be set aside and the patent be revoked; further, that the appeal fee be reimbursed in view of a substantial procedural violation.

The patent proprietor requested that the appeal filed by opponent 2 be held to be inadmissible, and that the appeals filed by opponent 1 and opponent 2 be dismissed (main request); in the alternative, that the decision under appeal be set aside and the patent be maintained in amended form on the basis of the claims of the 2nd

or the 5th auxiliary request, all filed by letter dated 3 February 2017.

At the end of the oral proceedings the Chairman announced the decision of the board.

VI. Claim 1 of the patent as granted (main request) reads as follows:

"A method of error compensation for measurements taken using a co-ordinate positioning apparatus (8) comprising an articulating probe head (10) having a surface detecting device (38), wherein the surface detecting device is rotated about at least one axis of the articulating probe head during measurement, the method comprising the following steps:

(a) determining the stiffness of the whole or part of the apparatus;

(b) determining the load or one or more factors which relate to the load applied by the motion of the articulating probe head about said at least one axis at any particular instant during measurement;

(c) determining the measurement error at the surface sensing device caused by the load, using the data from steps (a) and (b)."

Claim 1 of the 2nd auxiliary request differs from claim 1 of the main request in that paragraph "(b)" of claim 1 further reads:

", in which the motion is the surface detecting device being rotated about at least one axis of the articulating probe head".

Claim 1 of the 5th auxiliary request differs from claim 1 of the main request in that the phrase "wherein the

surface detecting device is rotated about at least one axis of the articulating probe head during measurement" in the first paragraph is replaced by the following phrase:

"wherein the surface detecting device is rotated about at least one of two axes of the articulating probe head during measurement, the two axes being perpendicular to each other",

and in that the phrase "about said at least one axis" in paragraph "(b)" of claim 1 is replaced by "about said two axes".

Reasons for the Decision

1. *Admissibility of the appeals filed by opponent 1 and opponent 2*

1.1 The appeal filed by opponent 1 is admissible

1.2 As regards the appeal filed by opponent 2, the patent proprietor submitted that the statement of grounds of appeal filed by opponent 2 essentially constituted a repetition of its submissions made during the first-instance proceedings, and in particular in its notice of opposition, and that for this reason the appeal filed by opponent 2 was inadmissible.

The board notes, however, that the statement of grounds of appeal filed by opponent 2 contains substantive submissions (see, in particular, the submissions on page 25, second paragraph, and on page 36, penultimate

paragraph, to page 37, third paragraph) that were not contained in its notice of opposition or in the subsequent letter dated 4 July 2014 and that, in addition, the mentioned substantive submissions constitute a reply to the reasons given by the opposition division in its decision on the issues of novelty and of inventive step of the subject-matter of claim 1 as granted. Therefore, at least for this reason the appeal filed by opponent 2 is sufficiently substantiated within the meaning of Article 108 and Rule 99(2) EPC. Consequently, and notwithstanding the fact that most of the submissions in the statement of grounds of appeal of opponent 2 constitute a repetition of submissions already filed during the first-instance proceedings, the appeal filed by opponent 2 is admissible. It is also noted in this respect that there is no support in the EPC for the notion of a partial admissibility of an appeal.

Therefore, the appeal filed by opponent 2 is also admissible.

2. *Allegations of a substantial procedural violation - Request for remittal*

2.1 Opponent 1 submitted that the fact that during the first-instance oral proceedings and subsequently in the decision under appeal the opposition division interpreted some of the features of independent claims 1 and 18 as granted (in particular, the expressions "load", "applied by" and "load applied by the motion") in a specific way without presenting evidence in support of the corresponding interpretation, constituted a procedural violation. In addition, opponent 1 requested the remittal of the case to the opposition division for further prosecution, and more

specifically a return to the first-instance proceedings, to hold oral proceedings again, and to instruct the opposition division to construe the features of claim 1 as granted in a specific way different from that followed by the opposition division in its decision.

The board, however, notes that the interpretation by the opposition division of the claimed features referred to by opponent 1 was extensively discussed by the parties and the opposition division during the first-instance oral proceedings (minutes of the oral proceedings, page 1, lines 4 to 32). In addition, the fact that the opposition division subsequently adopted in its decision an interpretation on the basis of the evidence and arguments submitted by the parties without presenting its own evidence in support of that interpretation does not constitute a procedural violation and, even assuming that the opposition division's construction of the claimed subject-matter was, in its context, incorrect, this would amount to an error of judgment, but not to a procedural violation.

For these reasons, the submissions of opponent 1 in support of its allegation that the opposition division committed a substantial procedural violation are not found convincing by the board, and they do not justify the remittal of the case for further prosecution requested by opponent 1 (Article 11 RPBA 2020).

- 2.2 Opponent 2 submitted that the decision under appeal was not complete or not sufficiently reasoned in respect of alternative objections of lack of inventive step presented during the first-instance proceedings, and that the fact that during the oral proceedings the opposition division allowed opponent 1 and opponent 2

to respectively present, without any specific reason, only one objection of lack of inventive step, constituted a breach of the right to be heard and, therefore, a substantial procedural violation justifying the reimbursement of the appeal fee (Rule 103 EPC).

2.2.1 The board notes that during the first-instance proceedings

- opponent 1 and opponent 2 submitted in writing objections of lack of inventive step of the subject-matter of claim 1 as granted based on document E1 in combination with any of documents E3 and E7, on document E3 in combination with any of documents E4, E8, E10 and E11, on document E4 in combination with document E3, on document E5 in combination with any of documents E3 and E7, on document E7 in combination with the common general knowledge or with any of documents E4, E8, E10 and E11, on document E8 in combination with the common general knowledge or with document E9, on document E9 in combination with any of documents E4, E8, E10 and E11, on document E11 in combination with the common general knowledge or with document E12, and on document E12 in combination with the common general knowledge or with any of documents E4, E8, E10 and E11;

- during the first-instance oral proceedings and in the discussion of lack of inventive step of claim 1 as granted, the line of argument based on document E1 in combination with document E3 presented by opponent 1 and the line of argument based on document E1 in combination with document E8 presented by opponent 2 were discussed (minutes of the oral proceedings, page 5, line 25, to page 6, line 27), opponent 2 subsequently requested to present arguments based on document E8 in combination with document E1 (minutes, page 6, lines 28 and 29), the opposition division

stated that changing the order of the combination of documents E1 and E8 would not make a difference and that for this reason the new argument could not succeed and that the opponents had the opportunity to present enough arguments in both the written and the oral proceedings (minutes, page 6, lines 30 to 35), and none of these lines of argument of lack of inventive step were orally addressed; and

- in the decision under appeal the opposition division concluded that the subject-matter of claim 1 as granted involved an inventive step over a combination of document E1 with either one of documents E3 and E8 and also over a combination of document E8 with document E1 (reasons for the decision, points 17.1 to 17.3), and further stated that the remaining lines of argument of lack of inventive step of opponent 1 and opponent 2 were not convincing and summarily presented arguments in support of this opinion (reasons for the decision, point 17.4).

It follows that the opposition division concluded in its decision that the line of argument of inventive step based on document E8 as closest state of the art in combination with document E1 was not convincing, but that during the oral proceedings the opposition division denied opponent 2 the opportunity to present arguments in respect of this line of argument. In addition, the opposition division summarily rejected in its decision the remaining alternative lines of argument presented by opponent 1 and opponent 2, without having given the parties the opportunity to comment on them during the oral proceedings. The board is aware that during the oral proceedings opponent 1 stated that, in view of the opposition division's interpretation of claim 1 as granted, its arguments would not be successful (minutes of the oral

proceedings, page 6, lines 12 to 15), and also aware that it would have been unpractical in the particular circumstances of the case to have individually addressed in detail each of the numerous remaining lines of argument of lack of inventive step presented in writing during the proceedings; however, none of these circumstances justified denying opponent 1 and opponent 2 during the oral proceedings the opportunity to comment at least on those of the remaining lines of arguments that they would have considered as the most pertinent or promising, or at least to summarily comment on all them.

2.2.2 The board therefore concludes that the parties' right to be heard enshrined in Article 113(1) EPC 1973 was not complied with during the first-instance proceedings and that this amounts to a substantial procedural violation.

2.2.3 The board notes that this substantial procedural violation would justify a remittal of the case to the department of first instance under Articles 111(1) EPC and 11 RPBA 2020 for a re-examination of the issue of inventive step, but does not deem a remittal to be appropriate for reasons of procedural economy. Rather, the board considers it appropriate to exercise the powers of the opposition division.

The further question of whether the mentioned substantial procedural violation justifies the reimbursement of the appeal fees requested by opponent 1 and opponent 2 is addressed in point 6 below.

3. *Main request (patent as granted) - Article 100(c) EPC 1973*

3.1 Claim 1 as granted is directed to a method of error compensation for measurements taken using a coordinate positioning apparatus comprising an articulating probe head having a surface detecting device. According to the preamble of the claim "the surface detecting device is rotated about at least one axis of the articulating probe head during measurement", and feature "(b)" of claim 1 requires the determination of the load or one or more factors which relate to the load "applied by the motion of the articulating probe head about said at least one axis [...] during measurement".

However, as submitted by opponent 2, the claimed motion of the articulating probe head about the mentioned axis is not directly and unambiguously derivable from the disclosure of the application as filed. In particular, feature "(b)" of claim 1 of the application as filed corresponding to feature "(b)" of claim 1 as granted only refers to "the load applied by the articulating probe head", and the claim contains no reference to a motion of the articulating probe head about an axis or to the load applied by the mentioned motion.

In addition, according to the application as originally filed (page 9, lines 20 to 27) the articulating probe head (articulating scanning head 10 in Fig. 2) is mounted in a Z-column (column 12 in Fig. 1) and comprises a fixed part formed by a base or housing (housing 30 in Fig. 2) and a shaft (shaft 32 in Fig. 2) rotatable relative to the housing about an axis A1 (axis A1 in Fig. 2). The shaft is secured to a second housing (housing 34 in Fig. 2) which supports a second shaft (shaft 36 in Fig. 2) rotatable about a second axis A2 (axis A2 in Fig. 2) perpendicular to the axis A1 and coupled to a probe 38 (surface detecting device 38 in Fig. 2), so that the tip (tip 40) of the probe or

surface detecting device can be positioned angularly about the axes A1 and A2 (paragraph bridging pages 9 and 10). Therefore, the probe or surface detecting device can be rotated about at least one axis of the articulating probe head as claimed, but there is no disclosure of a motion of the articulating probe head itself about the axis about which the surface detecting device is rotated as required by claim 1 as granted.

3.2 The patent proprietor contested this view and submitted that the claimed load applied by the motion of the articulating probe head was disclosed in the description as filed, page 4, lines 22 and 23, page 11, lines 30 to 34, the paragraph bridging pages 14 and 15, and the paragraph bridging pages 16 and 17.

However, the passage on page 4, lines 22 and 23, only discloses that dynamic loads arise from the motion of the articulating head, and the passage on page 11, lines 30 to 34, the paragraph bridging pages 14 and 15, and the paragraph bridging pages 16 and 17 only refer to the load applied by the articulation of the head and by the articulating probe head, and none of the mentioned passages disclose a motion of the whole articulating probe head about the axis of rotation of the surface detecting device, let alone the load applied by such a motion.

The patent proprietor also submitted by reference to page 17, lines 15 to 17, and page 13, lines 14 to 21, of the description of the application as filed that the skilled person would understand that the original disclosure was about dealing with errors created by the load applied by the motion of the articulating probe head about at least one axis during measurement, and that "the motion of the articulating probe head"

mentioned in claim 1 as granted referred to the articulation motion about an axis, i.e. to the movement of the surface detecting device, and not to a motion of the whole articulating probe head about the axis. In addition, the skilled person would disregard as illogical and unrealistic an interpretation of claim 1 as granted as referring to loads applied by the motion of the whole articulating probe head about the axis about which the surface detecting device rotates and would therefore interpret the "motion" referred to in paragraph "(b)" as consisting of the rotation of the surface detecting device defined in the preamble of the claim, i.e. as referring to the articulation itself. Therefore, the skilled person would not be presented with new information when compared with the content of the application as filed.

The board, however, is not persuaded by these arguments either. The passage on page 17, lines 15 to 17 refers in connection with Fig. 7 to "some motion of the articulating probe head [creating] both a torque and linear force on the quill" of the coordinate positioning apparatus, and in the passage on page 13, lines 14 to 21, reference is made to Fig. 3 and to the different errors in the position of the stylus tip, i.e. of the tip of the surface detecting device, but none of these passages refer to a load applied by the motion of the articulating probe head about the axis about which the surface detecting device is rotated in Fig. 3 and 7. The board also notes that, as submitted by opponent 2, a difference is to be made between, on the one hand, a torque generated by the rotation of the surface detecting device around an axis and applied, or transmitted, to the Z-column by the articulating probe head and causing rotation of the Z-column (paragraph bridging pages 12 and 13) and, on the other hand, the

load applied by a motion of the articulating probe head about the axis as defined in claim 1 and for which no basis can be found in the application as filed.

In addition, claim 1 as granted refers to the rotation of the surface detecting device about an axis and to "the load applied by the motion of the articulating probe head about" said axis and, as submitted by opponent 2, the corresponding features require a motion of the whole articulating probe head about the mentioned axis. There is no reason why the skilled person would disregard this arrangement as being unrealistic or not technically meaningful and would subsequently consider a different interpretation of the claimed method.

Similar comments apply to the reasons given by the opposition division in the decision under appeal for rejecting the objection under consideration and according to which it was readily apparent from the application as filed that a well-known articulating probe head was considered which comprised within itself several axes of rotation and which was commonly addressed as an articulating probe head rotating about at least one axis. In the opinion of the board the claimed subject-matter at least encompasses embodiments involving loads applied by the motion of the whole articulating probe head about the axis about which the surface detecting device rotates during measurement and, as already mentioned above, there is no basis in the application as filed in support of these embodiments.

3.3 In view of the above, the board concludes that the subject-matter of claim 1 as granted extends beyond the content of the application as filed (Article 100(c) EPC

1973). For this reason, the ground for opposition under Article 100(c) EPC 1973 prejudices the maintenance of the patent as granted and, consequently, the patent proprietor's main request is not allowable.

4. *Second auxiliary request*

4.1 Admission

4.1.1 The claims of the second auxiliary request were filed for the first time during the proceedings by the patent proprietor in reply to the statements of grounds of appeal of opponent 1 and opponent 2.

Opponent 2 submitted that the amendment introduced into claim 1 according to the second auxiliary request was in reply to the objection under Article 100(c) EPC 1973 addressed in point 3 above, that this objection was already raised in its notice of opposition and discussed during the first-instance proceedings, that the amended claims could, and should, have been filed during the first-instance proceedings, and that for this reason the second auxiliary request should not be admitted into the appeal proceedings. Opponent 1 concurred with opponent 2's submissions in this respect.

4.1.2 The board notes that during the first-instance proceedings opponent 1 and opponent 2 raised numerous objections under Articles 100(a), 100(b) and 100(c) EPC 1973 in respect of claim 1 as granted, and in particular numerous objections of added subject-matter under Article 100(c) EPC 1973 that were linked to each other and involved different features of claim 1 and complex submissions as regards the interpretation of these features. In addition, the preliminary opinion

expressed by the opposition division in the communication annexed to the summons to oral proceedings was favourable to the patent proprietor. The board considers that, in these circumstances, it could not reasonably have been expected from the part of the patent proprietor to have already filed during the first-instance proceedings auxiliary requests in reply to each of the mentioned objections and combinations thereof, and more particularly an auxiliary request in reply to the specific objection addressed in point 3 above, as this approach would have resulted in an excessively high and procedurally impractical number of auxiliary requests.

In view of these considerations, the board, under Article 12(4) RPBA 2007 (which applies in the present case according to Article 25(2) RPBA 2020), decided to take the second auxiliary request into account.

4.2 Article 84 EPC 1973

- 4.2.1 Claim 1 of the second auxiliary request has been amended so that it requires, on the one hand, the determination of the "load applied by the motion of the articulating probe head about" the axis about which the surface detecting device is rotated and, on the other hand, that the mentioned motion "is the surface detecting device being rotated about at least one axis of the articulating probe head".

As submitted by opponent 1 and opponent 2, claim 1 contains two definitions of the same motion, and these two definitions are different and not technically equivalent. As a consequence, it is not clear whether claim 1 requires the determination of the "load applied by the motion of the articulating probe head about" the

axis about which the surface detecting device is rotated, or of the load applied by the motion corresponding to "the surface detecting device being rotated about at least one axis of the articulating probe head", or of both.

The patent proprietor submitted that the amendment only clarified the meaning of "the motion of the articulating probe head" referred to in claim 1 as granted, and that the amended claim was clear. In the opinion of the board, however, the "motion" referred to in claim 1 is, as noted above, ambiguous in the context of the claim, and this ambiguity renders the claim unclear.

4.2.2 Having regard to the above, the board concludes that claim 1 of the second auxiliary request is not clear (Article 84 EPC 1973) and that, therefore, the second auxiliary request is not allowable.

5. *Fifth auxiliary request*

5.1 Admission

The claims of the fifth auxiliary request were also filed for the first time during the appeal proceedings in reply to the statements of grounds of appeal of opponent 1 and opponent 2.

Opponent 2 objected to the admission of this request into the proceedings for reasons analogous to those submitted in respect of the admissibility of the second auxiliary request and mentioned in point 4.1.1 above, second paragraph.

However, the board, under Article 12(4) RPBA 2007, decided to take the fifth auxiliary request into account in the proceedings for reasons analogous to those already given in point 4.1.2 in respect of the second auxiliary request.

5.2 Article 123(2) EPC

Claim 1 of the fifth auxiliary request differs from claim 1 as granted in that the claim, instead of only requiring that the surface detecting device is rotated "about at least one axis" of the articulating probe head and the motion of the articulating probe head is "about said at least one axis", requires that the surface detecting device is rotated "about at least one of two axes" of the articulating probe head, "the two axes being perpendicular to each other", and in that the motion of the articulating probe head is "about said two axes".

Opponent 2 submitted that the amendments to claim 1 did not overcome the objection under Article 100(c) EPC 1973 addressed in point 3 above, and that for this reason claim 1 of the fifth auxiliary request contravened the requirements of Article 123(2) EPC.

The patent proprietor argued that, as already submitted in respect of the objection addressed in point 3 above, the skilled person would not construe claim 1 as granted as requiring a motion of the whole articulating probe head, but only the motion of a part of the head with respect to a stationary part of the head as it was usually the case in an articulating probe head and as also supported by the description of the patent specification, and that claim 1 had been amended to exclude such an interpretation as otherwise it would

unrealistically require that the whole articulating probe head was moved about two perpendicular axes.

The board, however, is not persuaded by the patent proprietor's arguments because, first, a motion of the whole articulating probe head about two orthogonal axes would not be considered by the skilled person as a technically unrealistic possibility in a coordinate positioning apparatus as that considered in the method defined in claim 1 and, second, the fact that the articulating probe head moves about two axes does not overcome the objection of added subject-matter addressed in point 3 above in respect of the feature relating to the articulating probe head moving about the axis about which the surface detecting device is rotated.

- 5.2.1 Having regard to the above, the board concludes that the subject-matter of claim 1 of the fifth auxiliary request extends beyond the content of the application as filed (Article 123(2) EPC) and that, therefore, the fifth auxiliary request is not allowable.

6. *Request for reimbursement of the appeal fee*

As already concluded in point 2.2.2 above, the parties' right to be heard under Article 113(1) EPC 1973 was not complied with during the first-instance oral proceedings, amounting to a substantial procedural violation. In addition, it cannot be excluded that, in the event that opponent 1 and opponent 2, during the first-instance oral proceedings, had had the opportunity to make the further submissions referred to in point 2.2.1 above, the opposition division would have come to the conclusion that the subject-matter of claim 1 of the patent as granted did not involve an

inventive step, and in that case there would have been no need for opponent 1 and opponent 2 to file an appeal - at least not in respect of the patent as granted. In view of these considerations, and since the appeals of opponent 1 and opponent 2 are found to be allowable, the reimbursement of the appeal fees of opponent 1 and opponent 2 is, in the board's opinion, equitable in the circumstances of the case (Rule 103(1)(a) EPC).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.
3. The appeal fees of opponent 1 and opponent 2 are to be reimbursed.

The Registrar:

The Chairman:



L. Gabor

R. Bekkering

Decision electronically authenticated