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**Datasheet for the decision
of 9 March 2022**

Case Number: T 0963/19 - 3.4.02

Application Number: 05730272.1

Publication Number: 1872095

IPC: G01F1/84

Language of the proceedings: EN

Title of invention:

CORIOLIS FLOW METER AND METHOD FOR DETERMINING FLOW
CHARACTERISTICS

Applicant:

MICRO MOTION INCORPORATED

Headword:

Relevant legal provisions:

RPBA Art. 12(4)
RPBA 2020 Art. 13(2)

Keyword:

Admissibility main request (no) - request could and should have
been filed in first instance proceedings (yes)
Admissibility auxiliary request (no) - exceptional
circumstances (no)

Decisions cited:

Catchword:



Beschwerdekammern

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Chambres de recours

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Case Number: T 0963/19 - 3.4.02

D E C I S I O N
of Technical Board of Appeal 3.4.02
of 9 March 2022

Appellant:
(Applicant)

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Representative:

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Decision under appeal:

**Decision of the Examining Division of the
European Patent Office posted on 19 October 2018
refusing European patent application No.
05730272.1 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman R. Bekkering
Members: A. Hornung
B. Müller

Summary of Facts and Submissions

- I. The applicant appealed against the decision of the examining division refusing European patent application No. 05730272.1 on the basis of Article 97(2) EPC because the main and sole request then on file did not fulfil the requirements of Article 123(2) EPC and Article 84 EPC 1973.
- II. The appellant requested that the decision under appeal be set aside and a European patent be granted on the basis of the claims of the main request filed with the statement of grounds of appeal dated 20 February 2019 or of the claims of the auxiliary request filed with the letter dated 9 February 2022.
- III. Oral proceedings before the board were held on 9 March 2022. At the end of the oral proceedings, the applicant confirmed that it upheld its initially filed requests.
- IV. Claims of the requests

Independent claim 1 according to the main request reads as follows:

"A Coriolis flow meter (5) comprising:

one or more flow conduits (103);

at least two pickoff sensors (105, 105') affixed to the one or more flow conduits (103); and

a driver (104) configured to vibrate the one or more flow conduits (103); and meter electronics (20) coupled to the

at least two pickoff sensors (105, 105') and to the driver (104), the meter electronics (20) being arranged to:

vibrate the one or more flow conduits (103) of the flow meter with a first vibration frequency and in a first out-of-phase bending mode;

measure a first vibrational response of the one or more flow conduits (103) using the at least two pickoff sensors (105, 105'), with the first vibrational response being generated in response to the first vibration frequency;

vibrate the one or more flow conduits (103) with at least a second vibration frequency and in the first out-of-phase bending mode;

measure a second vibrational response using the at least two pickoff sensors (105, 105'), with the second vibrational response being generated in response to the second vibration frequency;

characterized in that the meter electronics is further arranged to:

determine a mass flow rate using a time delay or a phase difference determined using the first vibrational response or the second vibrational response,

determine a damping factor using a first phase and a first magnitude determined via the first vibrational response, a second phase and a second magnitude determined via the second vibrational response, the first vibration frequency, and the second vibration frequency, with the first vibration frequency and the second vibration frequency being at half power points of an amplitude response of the Coriolis flow meter (5); and

determine a viscosity of the flow medium using the damping factor".

Independent claim 1 according to the auxiliary request reads as follows:

"A Coriolis flow meter (5) comprising:

one or more flow conduits (103);

at least two pickoff sensors (105, 105') affixed to the one or more flow conduits (103); and

a driver (104) configured to vibrate the one or more flow conduits (103); and meter electronics (20) coupled to the at least two pickoff sensors (105, 105') and to the driver (104), the meter electronics (20) being arranged to:

vibrate the one or more flow conduits (103) of the flow meter with a first vibration frequency and in a first out-of-phase bending mode;

measure a first vibrational response of the one or more flow conduits (103), with the first vibrational response being generated in response to the first vibration frequency;

vibrate the one or more flow conduits (103) with at least a second vibration frequency and in the first out-of-phase bending mode;

measure a second vibrational response, with the second vibrational response being generated in response to the second vibration frequency;

characterized by determining a mass flow rate using the first vibrational response or the second vibrational response, and

determining a viscosity using the first vibrational response and the second vibrational response".

Reasons for the Decision

1. Main request - admittance

The main request is not admitted into the proceedings pursuant to Article 12(4) RPBA 2007.

1.1 The main request could and should have been submitted during first-instance proceedings for the following reasons:

1.1.1 According to the appealed decision, point 9, pages 2 to 4, claim 1 of the main and sole request then on file did not fulfil the requirements of Article 123(2) EPC and Article 84 EPC 1973.

1.1.2 As pointed out to the applicant during the oral proceedings before the board, according to the minutes of the oral proceedings held before the examining division, the objections of added subject-matter and of lack of clarity were both considered by the examining division and the applicant during the oral proceedings. Indeed, the second sentence, of the minutes reads: "[c]laim 1 was discussed with regard to Art. 123(2) and 84 EPC".

(i) Concerning the objections of added subject-matter

According to the minutes of the oral proceedings held before the examining division, objections under Article 123(2) EPC were raised by the examining division concerning the following amendments:

a1) the mass flow rate determination using the first or the second vibrational response,

a2) the damping factor determination and

b) the amendment in the description of the patent application on page 10, line 24.

These amendments are the same amendments as those referred to in the appealed decision, page 2.

The examining division raised the objections of added subject-matter concerning amendments a1), a2) and b) at the earliest practically possible point in time, namely during oral proceedings. Indeed, an amended claim 1 comprising the amendments a1), a2) and b) was filed by the applicant for the first time only one month before the oral proceedings. It was part of an amended set of claims.

(ii) Concerning the objections of lack of clarity

From the beginning of the examination proceedings, a clarity objection was raised by the examining division for the reason that it was not clear from the wording of claim 1 how the mass flow rate and the viscosity were determined. The applicant first responded with arguments without attempting to overcome the objection by amending claim 1. In the subsequent communication annexed to the summons to oral proceedings the clarity objection was reiterated and further explained. The applicant responded by submitting the above-mentioned amended set of claims

one month before the oral proceedings held before the examining division.

1.1.3 Despite the objections of added subject-matter and lack of clarity having been known to the applicant at the latest during those oral proceedings, the applicant did not attempt to overcome these objections by submitting amendments, which could have been in the form of auxiliary requests.

1.1.4 Instead thereof, an amended set of claims according to a new main request was filed for the first time with the statement of grounds of appeal. Independent claims 1 to 3 have been extensively reworded in order to overcome the objections raised by the examining division in the first-instance examination proceedings.

1.1.5 As a result of the applicant's approach, there could be no in-depth and concluding exchange of views neither on added subject-matter nor on clarity between the applicant and the examining division, thereby shifting the discussion on these issues without any apparent good reason to the appeal proceedings. Moving the unfinished debate on added subject-matter and clarity and, if these issues were overcome, the ensuing debate on novelty and inventive step, to the appeal proceedings would run counter to procedural efficiency as well as to the primary object of the appeal proceedings to review the decision under appeal in a judicial manner (see Article 12(2) RPBA 2020).

1.2 The main request could and should therefore have been submitted during first-instance proceedings. As a consequence, the board exercises its discretion under Article 12(4) RPBA 2007 in not admitting the main request into the appeal proceedings.

1.3 The applicant's counter-arguments

1.3.1 During oral proceedings before the board, the applicant recalled the history of the file. In response to the clarity objection raised by the examining division in its first communication, claim 1 was initially not amended because the applicant was convinced that claim 1 as originally filed was clear to the skilled person. As the examining division maintained its clarity objection in the summons to oral proceedings, the applicant filed an amended claim 1 directed at overcoming the clarity objection. During oral proceedings before the examining division, the requirements of Article 123(2) EPC were mainly discussed. In the view of the applicant, the amendment a1) concerning the mass flow rate was directly and unambiguously derivable from the application as filed. The applicant was surprised by the examining division raising this objection for the first time during the oral proceedings. The applicant submitted that it was reasonable and efficient to file an appeal with an amended claim 1 to overcome the objections raised by the examining division.

The board is not convinced by these arguments. The examining division raised the objection of added subject-matter for the first time during the oral proceedings for the evident reason that the amendments were filed only one month before the oral proceedings and that, therefore, this objection could practically not have been raised earlier. Since the applicant had the opportunity to file amendments during the oral proceedings before the examining division to overcome the objections under discussion of added subject-matter and lack of clarity, it should have done so instead of initiating the appeal proceedings to continue the discussion on these issues

with the board of appeal, whose primary task is to review the decision under appeal.

- 1.3.2 Furthermore, during oral proceedings before the board, the applicant referred to the overall length of the examination proceedings. The application was filed in 2005 and the first communication of the examining division was received only in 2014. The second and last communication, accompanied by a summons to oral proceedings, was received only in 2018. Due to the unreasonably long duration of the examination proceedings, the possibility of filing a divisional application at a reasonable cost was taken away from the applicant. With a divisional application, the applicant would have had the opportunity to restart examination and steer it in a more suitable direction for having a patent granted.

While the board acknowledges the problem of the applicant wanting to restart the examination and redirect it into a different direction, the board is of the opinion that it would go too far to continue the unfinished examination of the patent application during the appeal proceedings. This should have been done during the first-instance proceedings.

- 1.3.3 In its letter dated 9 February 2022, point 2.1, the applicant argued that "the discussion apparently exclusively focused on inadmissible amendment. Given this course of the oral proceedings, it cannot be expected from the Applicant to foresee that the Examining Division maintained the previously raised clarity objection".

In view of the minutes of the oral proceedings stating that "[c]laim 1 was discussed with regard to Art. 123(2) and 84 EPC", the board is of the opinion that the examining division at least invited the applicant to bring

forward any argument in favour of clarity of claim 1. Any way, since the examining division did not state that claim 1 met the requirement of Article 84 EPC, it had to be assumed that the clarity objection on file was still valid. Therefore, it was up to the applicant to submit any arguments in favour of clarity of claim 1 and to amend claim 1 if necessary, instead of filing such amendments only with the statement of grounds of appeal.

2. Auxiliary request - admittance

The auxiliary request is not admitted into the proceedings pursuant to Article 13(2) RPBA 2020.

2.1 The auxiliary request was filed only with the applicant's letter of response to the summons to oral proceedings before the board of appeal. Present claim 1 has been modified with respect to claim 1 of the main request filed with the statement of grounds of appeal by substantially going back to claim 1 as originally filed. According to the applicant, these amendments of claim 1 were intended to overcome the objections under Article 123(2) EPC and Article 84 EPC 1973 raised in the first-instance examination proceedings and raised again in the board's communication annexed to the summons.

2.2 According to Article 13(2) RPBA 2020, "[a]ny 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". The board is unable to see any such exceptional circumstances justifying filing the new auxiliary request only in response to the board's communication annexed to the summons to oral proceedings. Indeed, objections under Article 84 EPC 2007 against claim

1 then on file were raised by the examining division before, and upheld during, the oral proceedings. Objections under Article 123(2) EPC were raised by the examining division against the amendments filed shortly before the oral proceedings. In the board's communication annexed to the summons to oral proceedings, these objections under Article 84 EPC 1973 and Article 123(2) EPC, known from the first-instance proceedings, were essentially reiterated. Therefore, the auxiliary request could and should have been filed during the first-instance examination proceedings.

- 2.3 During oral proceedings before the board, the applicant submitted essentially the same arguments as for the main request (see point 1.3 above), namely that the way how the patent application was handled by the examining division constituted exceptional circumstances justifying admitting the auxiliary request into the appeal proceedings. According to the applicant, since filing a divisional application at a reasonable cost had been prevented by the examining division by taking too much time for examining the patent application (see point 1.3.2 above), the board should admit present claim 1 which was very close to claim 1 as originally filed.

The board cannot agree to the applicant's arguments. In the board's view it follows from the term "[a]ny amendment to a party's **appeal** case" in Article 13(2) RPBA (emphasis added) that the exceptional circumstances mentioned therein must relate to the appeal proceedings and may not have their root cause in the first-instance proceedings. This conclusion is confirmed by the explanatory remarks to Article 13(2) RPBA, which, in pertinent part, read: "[p]roposed new paragraph 2 implements the third level of the convergent approach applicable in appeal

proceedings." (See OJ EPO 2020, Supplementary publication 2, page 60).

In addition, the reasons given in point 1.3 above apply *mutatis mutandis*. Moreover, restarting examination of the patent application essentially from scratch only at the appeal proceedings would run counter to the primary object of the appeal proceedings to review the decision under appeal in a judicial manner (see Article 12(2) RPBA 2020).

- 2.4 In its letter dated 9 February 2022, point 2.2, the applicant argued that "filing amendments in order to overcome the objection raised in the communication of the Board of Appeal is considered a reasonable reaction".

The board cannot agree with this view since the objections raised in the board's communication were already known to the applicant since the first-instance examination proceedings. Therefore, amended claims according to the present auxiliary request could and should have been filed at the latest during the oral proceedings before the examining division.

3. In view of the above, none of the appellant's requests is admitted into the appeal proceedings and, therefore, there is no basis for setting aside the contested decision. Consequently, the appeal must be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



A. Voyé

R. Bekkering

Decision electronically authenticated