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**Datasheet for the decision
of 19 October 2022**

Case Number: T 1512/19 - 3.4.02

Application Number: 09789714.4

Publication Number: 2435800

IPC: G01F1/84

Language of the proceedings: EN

Title of invention:

A FLOW METER INCLUDING A BALANCE MEMBER

Applicant:

Micro Motion, Inc.

Headword:

Relevant legal provisions:

RPBA 2020 Art. 13(2), 13(1)

Keyword:

Amendment after summons - exceptional circumstances - main request (yes) - auxiliary request (no) - amendment overcomes issues raised - main request (no)

Decisions cited:

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 1512/19 - 3.4.02

D E C I S I O N
of Technical Board of Appeal 3.4.02
of 19 October 2022

Appellant: Micro Motion, Inc.
(Applicant) 7070 Winchester Circle
Boulder, CO 80301 (US)

Representative: Ellis, Christopher Paul
Ollila Law Limited
Unit 7 The Courtyard
Timothys Bridge Road
Stratford upon Avon CV37 9NP (GB)

Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 27 November
2018 refusing European patent application No.
09789714.4 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman R. Bekkering
Members: H. von Gronau
T. Karamanli

Summary of Facts and Submissions

I. The applicant's appeal is directed against the decision of the examining division to refuse European patent application No. 09789714.4. The examining division refused the application because the subject-matter of the then main request and then auxiliary request extended beyond the content of the application as originally filed, contrary to Article 123(2) EPC.

II. With the statement setting out the grounds of appeal, the appellant filed amended claims 1 to 12 of a main request replacing the main request on file and requested that the decision under appeal be set aside and that a patent be granted on the basis of the claims of the main request filed with the grounds of appeal. The previous auxiliary request was withdrawn.

As an auxiliary measure oral proceedings were requested.

III. In a communication pursuant to Article 15(1) RPBA 2020 annexed to the summons to oral proceedings dated 8 October 2021, the board indicated that, exercising its discretion under Article 12(4) RPBA 2007, it was of the provisional opinion that the main request should not be admitted into the appeal proceedings. The board provisionally concurred with the examining division division that the feature "longitudinal axis of the curved balance member" was not disclosed in the originally filed application. There was no literal basis for this feature and it could not be deduced from the figures, as the applicant suggested. In particular Figure 2 showed a curved flow tube and a curved balance member. It was not apparent from the figure how an axis

had to be placed relative to the flow tube or the balance member such that it could be considered to be the longitudinal axis of these elements. An axis was not curved but straight so that a longitudinal axis of the curved elements was not directly and unambiguously derivable for a curved unit.

IV. By letter dated 19 September 2022, the appellant filed claims according to a new main request and first to third auxiliary requests and requested that these requests be admitted into the proceedings and that a patent be granted on the basis of the claims of these requests.

V. Oral proceedings took place on 19 October 2022. During the oral proceedings the appellant withdrew the first and third auxiliary requests. The appellant confirmed its final requests as follows: The appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of the claims of the main request or, alternatively, of the second auxiliary request, both filed by letter dated 19 September 2022.

At the end of the oral proceedings the chairman announced the board's decision.

VI. Claim 1 of the main request as filed with letter dated 19 September 2022 reads as follows:

"A flow meter (200), comprising:
a curved flow tube (203);
a balance member (250) positioned such that a
longitudinal axis of the balance member (250) and
a longitudinal axis of the curved flow tube (203)
are aligned in a drive direction (Z) of the flow
meter;

a driver (104) configured to vibrate the flow meter in the drive direction (Z), the driver (104) including a first driver component (104a) coupled to the curved flow tube (203) and a second driver component (104b) coupled to the balance member (250) proximate the first driver component (104a);

and

at least a first pick-off sensor (105) including a first pick-off component (105a) coupled to the curved flow tube (203) and a second pick-off component (105b) coupled to the balance member (250) proximate the first pick-off component (105a)."

Claim 1 of the second auxiliary request as filed with letter dated 19 September 2022 differs from claim 1 of the main request in that in the definition of the balance member the expression "longitudinal axis" is replaced by the expression "centerline", and with respect to the driver the definition "to vibrate the flow meter" is replaced by "to vibrate the flow tube (203) and the balance member (250)".

Reasons for the Decision

1. The appeal is admissible.
2. Main request - admittance (Article 13(2) RPBA 2020)

In response to the board's communication under Article 15(1) RPBA 2020, the appellant filed the present main request.

2.1 The summons to oral proceedings was notified after the date on which the of the revised Rules of Procedure of the Boards of Appeal (RPBA 2020, see OJ EPO 2019, A63) entered into force, i.e. 1 January 2020 (Article 24(1) RPBA 2020). Thus, in accordance with Article 25(1) and (3) RPBA 2020, Article 13(2) RPBA 2020 applies to the question of whether to admit the present main request, which was filed by the appellant after notification of the summons to oral proceedings and is therefore an amendment within the meaning of Article 13(2) RPBA 2020. Where an amendment is made to a party's appeal case at this advanced stage of the proceedings, Article 13(2) RPBA 2020 stipulates that it will, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.

2.2 The appellant argued that the present main request was submitted in response to objections raised during oral proceedings at first-instance and/or in the board's communication annexed to the summons to oral proceedings. Hence the request could not have been filed earlier in first-instance proceedings. The request did not introduce any new technical features requiring further searches. The examining division considered the claims allowable during first-instance proceedings. This opinion was reconsidered only following third party observations. The claims of the present main request corresponded to the main request upon which the decision to reject the application was based (see letter dated 19 September 2022, section "ARTICLE 12(4) RPBA 2007" and section "MAIN REQUEST"). During the oral proceedings before the board, the appellant emphasised that the present main request was a reaction to objections raised by the board against

the former main request and that the examining division had already dealt with claim 1. No new technical features were introduced. The present main request had to be re-filed in the appeal proceedings because, as the board had indicated in its communication under Article 15(1) RPBA 2020, it intended not to admit the main request filed with the statement setting out the grounds of appeal into the appeal proceedings.

- 2.3 In the communication pursuant to Article 15(1) RPBA 2020, the board indicated that independent claim 1 of the then main request, filed for the first time with the statement of the grounds of appeal, had been amended by adding features from the description (in particular the curved balance member), which might not have been searched in the first-instance proceedings. The board considered inter alia this aspect to be a reason for not admitting the then main request under Article 12(4) RPBA 2007.

The board notes that this aspect was raised for the first time in its communication and accepts that this may be considered to constitute exceptional circumstances within the meaning of Article 13(2) RPBA. In exercising its discretion under Article 13(2) RPBA 2020, the board, however, may also apply the criteria as set out in Article 13(1) RPBA 2020 and analyse whether amended claim 1, prima facie, overcame the issues raised in its communication under Article 15(1) RPBA 2020, i.e. that the feature "longitudinal axis" with respect to the balance member and the curved flow tube did not seem to be disclosed in the application as filed.

- 2.4 In its letter dated 19 September 2022, the appellant argued that the drive direction (Z) was unambiguously

defined in the application, and the longitudinal axis was referenced relative to this axis. It was the view of the appellant that the term "longitudinal axis" was not a strict term that could only be applied to primitive shapes such as pure cylinders, for example. By way of a general example, an airplane had a fuselage and wings which overall shape deviated from a strict straight shape. However, it was well-understood that the airplane's longitudinal axis ran in the direction of motion, namely from nose to tail. The appellant was of the opinion that it was well understood in the art of flow meters that the longitudinal axis of a flow tube was the axis that travelled in the flow direction from entry to exit. The appellant also referred to another of its patent applications in which a longitudinal axis of a straight flow tube was disclosed and from which it was clear what a person skilled in the art would understand by the longitudinal axis in both curved and non-curved flow tubes, and that the term "longitudinal axis" was therefore generally known. The common general knowledge had to be taken into account in deciding what was clearly and unambiguously implied by the explicit disclosure of a document. When assessing the conformity of the amended claims with the requirements of Article 123(2) EPC, the focus was placed on what was really disclosed to the skilled person by the documents as filed as directed to a technical audience. In particular, the assessment needed to avoid disproportionately focusing on the structure of the claims as filed to the detriment of the subject-matter that the skilled person would directly and unambiguously derive from the application as a whole. Furthermore, the assessment of the requirements of Article 123(2) EPC was made from the standpoint of the skilled person on a technical and reasonable basis, avoiding artificial and semantic

constructions (see letter dated 19 September 2022, section "ARTICLE 123(2) EPC" on pages 3 to 5). During the oral proceedings before the board, the appellant stressed that the term "longitudinal axis" was well understood by the person skilled in the art to be the axis between the points where the flow enters the flow tube and where it leaves the flow tube. Similar considerations applied for the balance member. Although the expression "longitudinal axis" was not used literally in the original application it was a well understood term in the technical field that the skilled person would of course deduce from the application.

- 2.5 As admitted by the appellant, there is no literal basis in the application as filed for the feature "longitudinal axis" with respect to the balance member and the curved flow tube and it cannot be deduced from the figures, as the applicant suggests. In particular, Figure 2 shows a curved flow tube and a curved balance member. It is not apparent from the figure how an axis has to be placed relative to the flow tube or the balance member such that it can be considered to be the longitudinal axis of these elements. An axis is not curved but straight so that a longitudinal axis of the curved elements is not directly and unambiguously derivable for a curved unit. A longitudinal axis for a curved tube is also not generally known. The appellant's other patent application referred to in its letter dated 19 September 2022 cannot be regarded as proof of common general knowledge. The board is therefore of the opinion that prima facie claim 1 still extends beyond the content of the application as originally filed, contrary to the requirements of Article 123(2) EPC.

2.6 For this reason, the board exercised its discretion under Article 13(2) RPBA 2020, taking into account the criteria as set out in Article 13(1) RPBA 2020, and decided not to admit the main request into the appeal proceedings.

3. Second auxiliary request - admittance (Article 13(2) RPBA 2020)

The second auxiliary request was filed by the appellant after notification of the summons to oral proceedings and is therefore an amendment within the meaning of Article 13(2) RPBA 2020.

3.1 In claim 1 of the second auxiliary request, *inter alia*, the term "longitudinal axis" is replaced by the term "centerline".

3.2 The appellant argued that instead of referring to a "longitudinal axis" of the balance member and the flow tube, a "centerline" was defined. Support for this amendment could be found in Figures 2 to 4 and the associated description where the centerlines 340 and 341 were clearly identified relative to the coordinates system X, Y, and Z. The appellant pointed to the fact that previously filed claims in first-instance proceedings defining the position of the flow tube and balance member with reference to their centerlines had been deemed to comply with Article 123(2) EPC (see letter dated 19 September 2022, section "AMENDMENTS" on pages 9 and 10). During the oral proceedings before the board, the appellant added that the term "longitudinal axis" was clearly disclosed in the original application documents. Filing the second auxiliary request was a direct reaction to the board's surprising view that the term "longitudinal axis" was not originally disclosed.

Due to these exceptional circumstances, the second auxiliary request should be admitted into the appeal proceedings.

- 3.3 The board cannot recognise exceptional circumstances within the meaning of Article 13(2) RPBA 2020 justifying the admittance of the second auxiliary request. In its preliminary opinion in its communication under Article 15(1) RPBA 2020, the board did not raise for the first time the objection under Article 123(2) EPC that the feature "longitudinal axis" was not disclosed in the application as filed, but merely confirmed the examining division's opinion. Therefore, this objection could not be new or surprising for the appellant. Thus, the circumstances, which according to the appellant led to the filing of the second auxiliary request, are not exceptional within the meaning of Article 13(2) RPBA 2020.
- 3.4 The Board therefore exercised its discretion under Article 13(2) RPBA 2020 and decided not to take the second auxiliary request into account in the appeal proceedings.
4. As none of the appellant's requests were allowed by the board, the appeal has to be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



H. Jenney

R. Bekkering

Decision electronically authenticated