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ENTSCHEIDUNG / DECISION

vom / of / du 1 March 1985

Anmelder / Applicant / Demandeur : -

Patentinhaber / Proprietor of the patent / -

Titulaire du brevet :

Einsprechender / Opponent / Opposant : -

Stichwort / Headword / Référence : Interruption of proceedings

EPÜ / EPC / CBE Article 116(2) EPC
Rule 90(1)(c) EPC

Interruption of proceedings - incapacity of representative-oral proceedings before Receiving Section

Leitsatz / Headnote / Sommaire

- I. A case in which the Receiving Section has to decide whether the loss of a right has resulted from the EPC in accordance with Rule 69(2) EPC is not a case in which the Receiving Section "envisages refusing the European Patent Application" within the meaning of Article 116(2) EPC. Accordingly, the Receiving Section can refuse an applicant's request for oral proceedings in the case if it does not consider such proceedings expedient.
- II. The legal incapacity of a professional representative of an applicant for or proprietor of a European patent for the purposes of Rule 90(1)(c) EPC (interruption of proceedings) concerns his incapacity to carry out professional work on behalf of a client. Since there is a unified European profession of representatives before the EPO, there has to be a uniform standard of judging such legal incapacity in order to avoid differences in the application of Rule 90(1)(c) EPC depending on the nationality or domicile of the representative.

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- III. A reasonable basis for decisions on the matter by the EPO is the test: was the representative concerned in a fit mental state to do the work required of him at the material time or did he lack the capacity to make rational decisions and to take necessary actions?
- IV. Reliable medical opinion is necessary, as well as all available reliable information about the representative's conduct at the material time.
- V. If several representatives are appointed but only one is named in the Request for Grant, in accordance with the instructions on EPO Form 1001.1, the subsequent legal incapacity of that representative will result in interruption of proceedings in accordance with Rule 90(1) (c) EPC unless at least one of the other representatives is aware, or in the circumstances should have been aware, of the incapacity of the named representative.

REASONS FOR THE DECISION

1. The appeal complies with Articles 106 to 108 and Rule 64 EPC and is, therefore, admissible.
2. The Board has carefully considered the appellant's complaint that the request for an oral hearing before the Receiving Section was wrongly rejected.
3. Article 116(1) EPC provides inter alia that oral proceedings shall take place at the request of any party to the proceedings. Nevertheless, Article 116(2) EPC provides that oral proceedings shall take place before the Receiving Section at the request of the applicant only where the Receiving Section considers this to be expedient or where it envisages refusing the European patent application.
4. Taking the last point first, it is to be noted that the Receiving Section's powers to refuse a European patent application are limited but are expressly provided for under Article 91(3) EPC, in a case in which deficiencies in certain formal requirements are not corrected in accordance with Rule 41(1) EPC.

Accordingly, the Board does not accept the appellant's argument that a case in which the Receiving Section has to decide under Rule 69(2) EPC whether the loss of a right has resulted from the Convention is a case in which the Receiving Section "envisages refusing the European patent application" within the meaning of Article 116(2) EPC.

5. As to the question of expediency, the Receiving Section decided that no purpose would have been served by granting an oral hearing, as the applicant had had a full opportunity to argue its case and the facts and evidence were sufficiently clear for the Office to be in a position to make a decision. From the File of the case, it is clear that the relevant arguments had been fully presented except in one respect:

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the decision given relied upon on interpretation of Rule 90 EPC in the light of a comparison with Article 122 EPC. The appellant was never given an opportunity to make submissions on this matter, since it was not mentioned or implied in the Communication dated _____ or in any earlier communication. It was, however, a matter of subsidiary importance that could have been dealt with quite adequately in writing and, therefore, the Board is not satisfied that the Receiving Section exercised its discretion wrongly in refusing to hold oral proceedings merely because this point had not been raised.

The appellant has sought to persuade the Board that a full opportunity had not been given to argue its case because the Receiving Section had been told, in the letter dated _____, that further _____ evidence was being obtained. In fact, that letter stated that the appellant's representative expected to be in a position to submit the evidence during _____ and requested that the appellant be allowed at least until the end of that month to submit it. Although no time was set for the submission of this evidence, the Receiving Section did wait until _____ before issuing its decision, which seems to have been very fair to the appellant. There was no reason for the Receiving Section to wait any longer. Accordingly, in the opinion of the Board, no justifiable criticism can be made of the action of the Receiving Section in this respect.

The only other criticism made is that the European Patent Office ignored two requests for copies of relevant extracts from the preparatory documents for the Munich Diplomatic Conference, which the appellant considered it should study in order to prepare its case. There is no doubt that a party who requests such documents is entitled to have them if they are readily available, as they were in this case, subject to payment of the appropriate costs, and it is to be regretted that they were not sent.

However, the appellant could easily have repeated its requests, which had no necessary connection with the holding of oral proceedings, and, since the decision given did not rely upon any matter in the preparatory documents, it is not apparent to the Board that any injustice to the appellant resulted.

In all the circumstances of the case, therefore, the Legal Board of Appeal is satisfied that the Receiving Section properly exercised its discretion to refuse to hold oral proceedings.

6. The Board now comes to the substantive issues in the appeal, the first of which is the true effect of Rule 90(1) (c) EPC.

That Rule provides, inter alia, that proceedings before the European Patent Office shall be interrupted in the event of the "legal incapacity" of the representative of the applicant for or proprietor of a European patent. No definition of legal incapacity is given in the Rule or in the Convention, although Rule 90(1)(a)EPC also makes provision for interruption on the ground of the legal incapacity of the applicant or proprietor himself. The most that can possibly be deduced from Rule 90 EPC itself is that the incapacity should be such that the appointment of a new representative is necessary or at least expedient: cf. Rule 90(3) EPC.

7. Although there are differences in the national laws of Contracting States as to the concept of "legal incapacity" and as to its consequences, there seems to be broad agreement that a person of full age is legally incapacitated when he is suffering from such a disturbance of his mind that he is unable to form the necessary voluntary intention to carry out legal transactions which will be binding upon him, e.g. to make valid contracts. Such a disturbance of his mind may be recognised by national law even if it is temporary only (e.g. a disturbance caused by physical injury or by the influence of alcohol or other drugs) or occurs from time to time, as is the case with some mental illnesses in which the patient has lucid intervals.

Disturbance of the mind causing legal incapacity is always recognised by law if it is of long duration, a fortiori if it is permanent and irreversible.

8. The question has to be considered whether some uniform criteria may be applied by the European Patent Office without reference to any particular national law, for the purpose of deciding under Rule 90 EPC, the question of legal incapacity of the applicant for or proprietor of a European patent, on the one hand, or of his representative, on the other hand, or whether this must be decided in accordance with the rules of some national system of law with which the person concerned is connected by nationality or domicile. The Board has examined the preparatory documents relating to Rule 90 EPC but they contain no relevant indication as to the intention of the legislature.
9. The Board recognises that the capacity of the applicant or proprietor to carry out legal transactions relating to his application or patent must be determined according to a national system of law, since his interest in the application or patent is an interest in property (cf. Articles 74 and 2(2) EPC). For present purposes, it is not necessary to consider this matter further.
10. The question of the capacity of a representative is clearly different. The relevant aspect of his legal incapacity for the purposes of Rule 90(1)(c) EPC is that of his incapacity to carry out professional work on behalf of a client. Since there is a unified European profession of representatives before the European Patent Office, it is justified to consider that there should be a uniform standard of judging legal incapacity, in order to avoid differences in the application of Rule 90(1)(c) EPC depending on the nationality or domicile of the representative. The matter is, of course, completely separate from any question of a representative's legal incapacity to manage his own personal affairs, which, in accordance with the relevant national law will be governed by his nationality or domicile.

11. In these circumstances, the question of determining the legal incapacity of a representative for the purposes of Rule 90(1)(c) EPC is one for the European Patent Office, applying its own standards, developed in the light of experience and taking into consideration principles applied in the national laws of Contracting States. The simple test proposed by the appellant seems a reasonable basis for developing such standards: was the representative concerned in a fit mental state to do the work required of him at the material time or did he lack the capacity to make rational decisions and to take necessary actions?
12. In cases of this kind, there are inevitably problems of proof. In particular, it may be difficult to determine how disturbed the mind of a person was at any particular date if he was not then under medical care. In such cases, it is necessary to consider very carefully all available reliable information about his conduct at the time. It may be helpful, though it should not be regarded as conclusive, if a medical opinion given at a later date takes into account such information. In any case, reliable medical opinion is necessary.
13. In the present case, the medical evidence available to the Receiving Section was regarded by it as plainly inadequate.

it does not seem that all the relevant facts were known to the medical practitioners who gave the reports presented to the Receiving Section. The Legal Board of Appeal considers that, on the evidence before it, the Receiving Section was justified in rejecting the appellant's case.

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14. The latest medical evidence, by a second consultant psychiatrist, based on lengthy interviews with the representative concerned and on a consideration of the background facts about his professional work, stresses the seriousness of his mental condition and concludes that he was in fact suffering from such a serious depressive condition that his professional judgement was severely impaired. The second consultant psychiatrist says that he had access to much more information than was available to his colleagues and also that the representative showed a clear tendency to play down, or even cover up, the difficulties in which he found himself. It seems to the Legal Board of Appeal that the indisputable facts about the representative's work bear out the latest opinion and that on this evidence it can properly be said that, at least in the representative concerned was legally incapable of carrying out his professional duties. It is, therefore, justifiable to conclude that the proceedings in the present case were interrupted at the time when the normal period for paying the examination fee expired
15. One further point remains to be considered. The Receiving Section considered that Rule 90 EPC was, in any event, inapplicable, because the appellant had appointed representatives in addition to the representative named in the Request for Grant. The Legal Board of Appeal is of the opinion that if a number of representatives is appointed but only one of them is named in the Request for Grant, the subsequent legal incapacity of that representative will result in interruption of proceedings in accordance with Rule 90 EPC, unless at least one of the other representatives is aware or, in the circumstances, should have been aware of the incapacity of the named representative.

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In the present case, it is clear that only two of the other representatives appointed worked in the same office as the representative named and neither of them worked in his technical field, so they knew nothing about the details of his work. The other appointed representatives worked in two other offices both several hundred kilometres away. Furthermore, the representative named actively concealed his errors and omissions from his colleagues. In the exceptional circumstances of the case, therefore, it cannot fairly be said that any of the other representatives was or ought to have been aware of his incapacity.

If the approach adopted by the Receiving Section were correct, this would make it hazardous for an applicant or proprietor ever to appoint more than one representative at a time, which, as the appellant rightly argues, would cause a great deal of inconvenience and uncertainty.

15. In all the circumstances, the payment of the examination fee plus the surcharge for late payment, by the representative presently acting, must be regarded as payment in due time.

ORDER

For these reasons,

it is decided that:

1. The decision of the Receiving Section dated is set aside.
2. It is declared that the proceedings on European patent application n° were interrupted between at least and and that the application is not deemed to have been withdrawn on the ground of non-payment of the fee for examination.