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D E C I S I O N
of 15 March 2005

Case Number: T 0074/00 - 3.4.2

Application Number: 89908146.7

Publication Number: 0393165

IPC: G02B 21/00

Language of the proceedings: EN

Title of invention:
Scanning confocal endoscope

Patentee:
OPTISCAN PTY LTD

Opponents:
01. Leica Microsystems Heidelberg GmbH
02. Okumura, Yaeko

Headword:
Scanning Confocal Endoscope/OPTISCAN

Relevant legal provisions:
EPC Art. 117, 125
EPC R. 60(2), 64(a), 65(2)

Keyword:
"Death of appellant - whether heir or heirs established by evidence (no)"

Decisions cited:
G 0004/88, G 0007/91, G 0008/91, G 0003/99, T 0563/89, T 0659/92, T 0353/95, T 0298/97

Catchword:
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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0074/00 - 3.4.2

D E C I S I O N
of the Technical Board of Appeal 3.4.2
of 15 March 2005

Appellant: (Opponent 02)
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Decision under appeal:
Interlocutory decision of the Opposition Division of the European Patent Office posted 8 December 1999 concerning maintenance of European patent No. 0393165 in amended form.

Composition of the Board:

Chairman: A. G. Klein
Members: C. Rennie-Smith
F. J. Narganes-Quijano

Summary of Facts and Submissions

I. The appeal is against the decision of the Opposition Division of 8 December 1999 to maintain European Patent No. 0 393 165 (based on European application No. 89908146.7) in amended form. The patent was opposed by two opponents, namely opponent O1 Leica Microsystems Heidelberg GmbH which opposed the patent on the grounds of lack of inventive step (Articles 100(a) and 56 EPC), and opponent O2 Yaeko Okumura who opposed the patent on the grounds of lack of novelty and inventive step, insufficient disclosure and added subject-matter (Articles 100(a), (b) and (c) and 54, 56 and 83 EPC). All the grounds relied on by opponent O2 other than lack of inventive step were withdrawn during oral proceedings on 17 September 1999 before the Opposition Division which held that the patentee's main request filed on 17 August 1999, consisting of the claims as granted with small amendments to claims 11 and 12, met the requirements of the EPC.

II. A letter received on 20 January 2000 from the representative of opponent O2 gave Notice of Appeal and requested that the first instance decision be set aside and the patent be revoked. The appeal fee was paid on the same date. The Notice of Appeal did not contain the name or address of an appellant. Neither the statement of Grounds of Appeal filed on 7 April 2000 nor a letter of 4 May 2000 correcting a typographical error in the Grounds of Appeal made any mention of the identity of the appellant. The respondent (patent proprietor) filed a Reply by fax on 13 October 2000 observing *inter alia* that the Notice of Appeal did not comply with Rule 64(a) EPC. A response dated 22 November 2000 on behalf of the

still-unidentified appellant again failed to supply a name or address. Further written submissions of the respondent dated 1 June 2001 again drew attention to this deficiency but yet another response of 13 September 2001 made no mention of the appellant's identity.

III. A first communication from the Board of 9 March 2004 required under Rule 65(2) EPC the disclosure of the name and address of the appellant within two months (i.e. by 19 May 2004). In reply, the appellant's representative filed three letters dated 19 April, 10 May and 17 June 2004 which contained the information summarised below.

(1) The letter of 19 April 2004 said the appeal had been filed in the name of Ms Yaeko Okumura of 6-1-1-1012 Ohshima, Koto-ku, Tokyo, Japan (that is, opponent O2).

(2) However, the letter of 10 May 2004 stated that Ms Yaeko Okumura had died and her eldest daughter Ms Keiko Negishi of 4-25 Kamikitazawa, Setagaya-ku, Tokyo was "her legal heir". The letter of 10 May 2004 also enclosed an English translation of certain Japanese legal provisions regarding succession.

(3) The letter of 17 June 2004 enclosed a document referred to as a "sworn statement" (which was not in fact sworn) of Ms Keiko Negishi made on 7 June 2004 saying she was the eldest daughter of Ms Yaeko Okumura and "a legal heir of her". In

this statement she gave her address as Number 102 Bonar Kashiwa, 3-31-20 Kyuden, Setagaya-ku, Tokyo.

(4) The letter of 17 June 2004 also stated that Ms Keiko Negishi had changed her name to Ms Keiko Okumura and that her address had changed. The evidence provided in this respect was a translation of her driving licence. As regards the change of name, the licence recorded this as having been reported on 15 December 2003. As regards the change of address, the translation of the driving licence showed that the address of Ms Okumura (formerly Negishi) when the licence was issued was 4-25-17-407 Kamikitazawa, Setagaya-ku, Tokyo; that she reported on 15 June 2001 a change from that address to 3-31-20-102 Kyuden, Setagaya-ku, Tokyo; and further reported another change of address on 15 December 2003 (the same date as the change of name) to 2-21-49 Oshidate-chou, Fuchuu-shi, Tokyo.

IV. A second communication of the Board dated 15 July 2004 made the following observations.

(1) As regards the appellant's letter of 19 April 2004, while it was strictly-speaking incorrect to state the appeal was filed in the name of Ms Yaeko Okumura, since the appeal as filed did not name an appellant, the Board accepted the statement as meaning the appellant should have been named as Ms Yaeko Okumura. She was opponent O2 and, in the absence of the other information supplied, that would have answered the Rule 65(2) EPC

communication and remedied the deficiency in the Notice of Appeal under Rule 64(a) EPC.

(2) As regards the letter of 10 May 2004, the Board observed that the description of Ms Keiko Negishi as "legal heir" of Ms Okumura suggested, but only tentatively, she might be the only heir; that the date of Ms Okumura's death had not been given, although it appeared probable that this had occurred after the appeal was filed; and that, while it had been said her husband was also dead, it was not said (though could be inferred) that he had pre-deceased her.

(3) Rule 60(2) EPC implies, and decision G 4/88 (OJ EPO 1989, 480 - see Reasons, paragraph 4) confirms, an opposition may be continued by "heirs or legal representatives" which can only mean, in the case of a sole heir, by that person or, in the case of two or more heirs, by both or all of them in concert unless one or more of them should choose to withdraw from the proceedings (cf. G 3/99 OJ EPO 2002, 347, Reasons, paragraphs 17 to 19). As to whom the heirs of opponent O2 might be, the English translation of Japanese legal provisions regarding succession enclosed with the letter of 10 May 2004 did not, contrary to the assertion in that letter, prove that Ms Negishi was an heir or the sole heir of Ms Okumura. If Ms Okumura's spouse had died after his wife, he would have become a successor to her according to this translation and in that event both he and their children would have become successors "in the same rank", although it is unclear whether

this means they would all have become heirs. As regards the statement that Ms Negishi was the heir, the translation simply said that children become successors: there was no mention of the eldest child becoming an heir or the sole heir. The translation also suggested some persons are entitled to "a legally secured portion" of an estate and it was unclear if this was related to the status of heir. Above all, this translation only referred to "successors" and not "heirs": even if the representative's use of the word "heir" meant the same as "successor" in the translation, the translation still suggested Ms Negishi could not be the only heir.

(4) As regards the letter of 17 June 2004, the Board observed that the "sworn statement" Ms Keiko Negishi made on 7 June 2004 merely repeated the representative's original assertion (see paragraph III(2) above) and did nothing to resolve the unclear position already created. The position was yet further complicated by the additional information in the letter of 17 June 2004 to the effect that Ms Keiko Negishi had changed her name to Ms Keiko Okumura and that her address had changed twice. No mention of these matters was made in her statement. As regards the translation of her driving licence which recorded the change of name as being reported on 15 December 2003, this was so long before Ms Negishi was first referred to in these proceedings that it must inevitably be asked why only the former name was given in the letter of 10 May 2004. As regards the changes of address, according to the translation

of the driving licence, Ms Keiko Okumura (formerly Negishi) reported these on 15 June 2001 and again on 15 December 2003 (the same date as the change of name) but, in her statement dated 7 June 2004, she used both her former name and a former address. This had to cast doubt on the evidential value of her statement.

(5) The Board concluded its communication by observing it had to be satisfied that Ms Yaeko Okumura had died after the appeal was filed in her name and that Ms Keiko Okumura (formerly Negishi) was her sole heir or, if she was not the sole heir, that all other heirs had chosen not to take part in the proceedings. If sufficient evidence of those matters could not be supplied, it would appear that either the appeal was inadmissible or that it had lapsed on the death of the original appellant. The appellant was directed to file such further evidence as might be considered appropriate (by way of possible example, a statement from a Japanese lawyer familiar with both the facts and the relevant law) within two months of the deemed date of receipt of the communication (that is, by 25 September 2004).

V. The appellant's representative replied to the Board's second communication by a letter of 13 September 2004 enclosing a copy of a statement made by Ms Hiroko Takeshita. This stated she was "one of the two daughters of Yaeko Okumura and the only one younger sister of Ms Keiko Okumura", that she was "the other legal heir of Yaeko Okumura besides [her] sister Keiko Okumura, and [she] has chosen not to take part in the

proceedings". The statement also confirmed her father died before her mother. As regards the Board's suggestion of further evidence from a Japanese lawyer, the representative offered to file copies of his correspondence with his instructing Japanese patent attorneys "upon request".

VI. In a third communication of 25 November 2004, accompanying the summons to oral proceedings, the Board commented on the letter of 13 September 2004 as follows.

(1) The statement of Ms Hiroko Takeshita indicated, but did not say so in terms, that Ms Yaeko Okumura was survived only by two daughters who were her only heirs and one of whom, Ms Takeshita, had chosen not to take part in these proceedings.

(2) As regards the appellant's representative's offer to file correspondence "upon request", it was for a party and not the Board to decide what evidence should be filed. The Board noted no further evidence had been filed by the time limit set in its previous communication.

(3) The letter described the statement of Ms Takeshita as a sworn statement but it was clear on its face that it was not sworn. The same was the case with the statement of Ms Keiko Okumura (formerly Negishi) filed with the earlier letter of 17 June 2004. In his letter of 13 September 2004, the appellant's representative had observed that the expression "sworn statement in writing" is used in Article 117 EPC. That was undoubtedly correct but it did not serve to make unsworn statements into

sworn statements. The Board added that this was only an observation of fact and not in itself determinative of the credibility of the evidence in the statements in question.

(4) Admissibility of the appeal and/or of the proposed successor to the appellant as a party was an issue which would have to be considered at the oral proceedings.

VII. Under cover of a letter dated 27 January 2005, the appellant's representative filed a further statement of Ms Hiroko Takeshita which was identical to that previously filed except that it was headed "Sworn Statement" and recited that the witness swore the facts deposed to.

VIII. The respondent filed written arguments in a letter dated 10 February 2005 which, in so far as they relate to the issues in this decision, were as follows.

(1) The date of death of Ms Yaeko Okumura had still not been established.

(2) The long delay in identifying the appellant cast doubt on whether she was alive when the appeal was filed.

(3) The statements of the two daughters of Ms Yaeko Okumura were inconsistent. Ms Keiko Okumura (formerly Negishi) stated she inherited all the rights of the appeal whereas her sister Ms Hiroko Takeshita stated the rights were inherited jointly but she chose to take no part in the proceedings.

(4) The statements filed were all in English. The deponents were Japanese but there was no evidence that they understood English or the context of their statements.

(5) In view of the uncertainties, an inference could be drawn from the absence of any independent evidence such as that of a Japanese lawyer as suggested by the Board.

IX. The appellant's representative's letter of 10 May 2004 referred to case T 365/03, an appeal pending before Board 3.2.2. From the file in that case, which is open to public inspection, the Board noted that the Notice of Appeal dated 24 March 2003 contained the statement: "The appeal is filed in the name of Keiko Negishi, who is residing at Number 102 Bonar Kashiwa, 3-31-20 Kyuden, Setagaya-ku, Tokyo, Japan. She is a legal heir (true child) of Yaeko Okumura, who was the opponent and died last year." From this it appeared opponent O2 died during 2002. This information was given to the parties attending the oral proceedings.

X. Oral proceedings before the Board took place on 15 March 2005. Opponent O1 (a party as of right in the appeal proceedings) did not attend as announced in a letter of 15 February 2005. The arguments of the other parties presented during the oral proceedings can be summarised as follows.

(1) The appellant submitted that, taking all the evidence into account, it appeared there were two daughters of Yaeko Okumura and her husband who had

died before her. As to who is her heir for the purposes of these proceedings, one daughter has said she has chosen not to take part so, on the balance of probability, the other daughter Keiko Okumura (formerly Negishi) is now the appellant. There is no evidence that either sister is seeking to circumvent the legal requirements - see Singer/Stauder, "European Patent Convention", Article 117, paragraph 16, "If a party's entitlement to file an opposition is to be withheld, this must be on the basis of clear and convincing evidence that the law has indeed been circumvented." In answer to a question from the Board as to the date of death of Yaeko Okumura, the appellant's representative said the best information he could supply was a statement in a letter from his instructing Japanese patent attorneys that they had no knowledge that she had died before the filing date of the appeal. An authority to act in EPO proceedings does not end with the death of a party.

(2) The respondent repeated the arguments in its letter of 10 February 2005, said it was surprised no document such as a death certificate could be produced to establish the date of death, and questioned whether, if Ms Keiko Okumura (formerly Negishi) was the appellant, the appellant's representative was authorised by her.

(3) The parties agreed with the Board that, if the question of the identity of the appellant could not be resolved, the appeal proceedings would then be at an end. No other matters were discussed at

the oral proceedings before the Board considered and decided that issue.

XI. The appellant requested that the decision under appeal be set aside and the patent be revoked. The respondent requested that the appeal be dismissed.

Reasons for the Decision

1. This appeal raises a number of questions concerning what happens when an opponent who is a natural person dies. Rule 90(1)(a) EPC provides that proceedings before the EPO shall be interrupted in the event of the death or legal incapacity of a patent proprietor or applicant but makes no mention of the death of an opponent. Other provisions provide for the recording in the Register of European Patents of transfers of ownership of or rights over European patents and patent applications (see for example Rules 20 and 92(1) EPC) but not of changes in the identity of opponents. There is a body of jurisprudence concerning the transfer of oppositions together with business assets (see "Case Law of the Boards of Appeal of the European Patent Office", 4th edition, 2001, pages 459 to 460 and 507 to 508). However, there is no case-law of which the Board is aware (and certainly none was cited by the parties during these proceedings) directly relating to the demise of natural persons, whether as regards the transfer of oppositions to heirs or successors or as regards the position where no heir or successor exists or can be ascertained. Since patent and opposition rights are essentially commercial in nature, it is probably the case that most parties are legal persons

but the position as regards natural persons must, as this present case illustrates, be considered occasionally. The Board will consider the various questions of law involved before turning to the facts of the present case.

2. The only legislative provision referring to the death of an opponent is Rule 60 EPC, entitled "Continuation of the opposition proceedings by the European Patent Office of its own motion". This provides in sub-Rule (2):

"In the event of the death or legal incapacity of an opponent, the opposition proceedings may be continued by the European Patent Office of its own motion, even without the participation of the heirs or legal representatives. The same shall apply when the opposition is withdrawn."

It is established case-law that the effect of withdrawal of an opposition during appeal proceedings is not necessarily the same as during opposition proceedings (see G 7/91 OJ EPO 1993, 356 and G 8/91 OJ EPO 1993, 346). However, the value of Rule 60(2) EPC for the present case lies not so much in the question whether or not proceedings shall continue in the event of an opponent's death as in the fact that in this provision the EPC recognises that, in that event, the late opponent's heirs may participate in any further opposition proceedings.

3. This is confirmed by the Enlarged Board of Appeal in Decision G 4/88 (OJ EPO 1989, 480, Reasons, paragraph 4):

"The transmission of the opposition to the opponent's heirs is acknowledged implicitly in Rule 60(2) EPC which stipulates that the opposition proceedings may be continued even without the participation of the deceased opponent's heirs."

The Enlarged Board's conclusion in G 4/88, that an opposition is transferable together with business assets, applies to transfers between both legal and/or natural persons. However, it is quite clear, both from the question under consideration and from paragraphs 4 and 5 of the Enlarged Board's Reasons, that this conclusion was limited to cases in which oppositions were instituted in the interests of a business and has no application to the transfer of an opposition from a deceased natural opponent to his or her heirs, since such transfers were already tacitly acknowledged by Rule 60 EPC as being possible. It follows that an opposition may pass from a deceased opponent to his or her heirs without any requirement that it be accompanied by any particular assets of the deceased.

4. As with transfers of business assets, such transfers to heirs can only be governed by the applicable national laws (cf. G 4/88, *supra*, Reasons, paragraph 6, second sentence) - there is no "EPC law of succession". Accordingly a deceased opponent's heir or heirs can only be ascertained by reference to the particular national laws of succession applicable to the estate of the deceased opponent and it follows that the person or persons seeking to establish that they have the right to succeed to an opposition must produce satisfactory evidence that he, she or they have done so under the

relevant national law. As is the generally accepted procedure in most European countries (cf. Article 125 EPC) and beyond, laws of other jurisdictions than the one before which proceedings are pending must be proved as a matter of evidence, for example by filing as documents adequate copies (in translation if necessary) of such laws and/or as appropriate by filing as expert evidence the opinions of a suitably qualified lawyer in the relevant jurisdiction. This is no more than the equivalent of what is required in the case of a business assets transfer, namely that sufficient evidence of the transfer must be produced (cf. T 659/92 OJ EPO 1995, 519, Reasons, paragraph 3.3; T 298/97 OJ EPO 2002, 83, Reasons, paragraph 7.2).

5. Although Rule 60 EPC refers only to oppositions, the Board sees no reason why an opponent's heirs cannot succeed to the right to appeal against a decision in opposition proceedings or to an appeal commenced by an opponent before he or she dies. The case-law recognises both such possibilities in the case of business assets transfers (cf. T 563/89 of 3 September 1991 and T 659/92 *supra*) and it would be illogical not to allow the same possibilities as between natural persons and their heirs.

6. If more than one heir of the deceased opponent is established, the question which then arises is, must all the heirs become party to the opposition proceedings? In the Board's view, this question has a two part answer. First, the relevant national law may be decisive. Thus if, for example, the evidence shows that under the relevant national law a deceased opponent has left different assets to different persons,

such that only one or more specified persons out of a larger number are identifiable as inheriting the opposition, then logically only that person or those persons can be the heir or heirs for the purpose of the opposition.

7. Second, whether or not the opposition can be seen to have devolved in such a manner to a specific person or persons, if two or more persons are identifiable as heirs inheriting the opposition then, as with other multiple opponents, all the persons constituting the opponent must at all times be ascertainable and act through a common representative, and the EPO must be informed if any of them cease for any reason to be a member of the multiple opponent (see G 3/99 OJ EPO, 2002, 347, Reasons, paragraph 19 and order, paragraph 3). This is a natural corollary of the principle that the patentee and, as the case may be, the Opposition Division or the Board of Appeal must know who is opposing a patent.

8. The final question of law which arises is, what happens if either no heir or heirs can be ascertained or, if ascertained, none are willing to conduct the proceedings further? As regards opposition proceedings, the position is governed by Rule 60 EPC (see paragraph 2 above). As regards appeal proceedings, the answer must depend on the relative dates of the death of the opponent and the filing of the Notice of Appeal. If an opponent who is a natural person entitled to appeal against a first instance decision dies before a Notice of Appeal is filed and no heir or heirs are subsequently established, then there is no-one who can be named in the Notice of Appeal (see Rule 64(a) EPC)

and the appeal is inadmissible. If however the original opponent is still alive when the Notice of Appeal is filed but dies thereafter and no heir or heirs are established, then the appeal comes to an end and, if that opponent was the only appellant, the appeal proceedings as a whole come to an end since the only appellant has ceased to exist. In this latter case, the result is the same as if a legal person which is the sole appellant ceases to exist (cf. T 353/95 of 25 July 2000).

9. Turning to the facts of the present case, it appears to be established beyond doubt that opponent O2, Ms Yaeko Okumura, has died. Her representative has so informed the Board; Board 3.2.2 has been given the same information in case T 365/03; and both her daughters have confirmed this in their statements - expressly in the case of Ms Keiko Okumura (formerly Negishi) who used the words "when my mother passed away" and implicitly in the case of Ms Hiroko Takeshita who said "My sister, Ms Keiko Okumura and I are the only heirs of Yaeko Okumura." The opponent having died, the Board must then decide whether it has been demonstrated by evidence that an heir or heirs has succeeded to, as the case may be, the right of the opponent to appeal or to the appeal itself. It is also beyond doubt that the relevant national law of succession is that of Japan. Not only were or are all the relevant persons resident in Japan, but opponent O2's representative filed an extract from a translation of the Japanese law of succession.

10. The case presented by opponent O2's representative was that the only heir is Ms Keiko Okumura (formerly

Negishi) and that her mother, Ms Yaeko Okumura, died after the appeal was filed in, as was ultimately disclosed, her name. Thus to prove that case to the Board's satisfaction, the representative had to show by sufficient evidence that Ms Yaeko Okumura died after 20 January 2000, that under the law of Japan Ms Keiko Okumura (formerly Negishi) was her only heir or, if she was not the only heir, any other heir had chosen not to take part in the proceedings. The Board made this clear in its second communication of 15 July 2004 and suggested the best evidence which could be provided was evidence of the relevant Japanese law as applied to the facts of the present case. The Board will now consider these two issues of fact.

11. As to the date of opponent O2's death, there are two items of evidence - the statement in a letter from the representative's instructing Japanese patent attorneys that they had no knowledge that she had died before the filing date of the appeal; and the information, appearing from the Notice of Appeal dated 24 March 2003 in case T 365/03, that she died during 2002. While the Board shares the respondent's surprise that no more precise information has been provided, these two items of evidence are at least consistent. The first item, the statement that opponent O2 was "not known to be dead", is a quite extraordinary manner of presenting information intended to show that person was alive, and all the more extraordinary when one considers the information comes from that person's own attorneys with whom she presumably dealt directly. In the absence of any other information, the Board would treat such vague and second-hand evidence as highly unreliable. However, the second item of evidence, while very general as to

the date of death, does at least provide a year of death and in doing so can be said to establish that, at least on the balance of probability, opponent O2 was still alive when the appeal in the present case was filed.

12. As to the issue of opponent O2's heir or heirs, the Board agrees with the respondent that the statements of the two daughters of Ms Yaeko Okumura are inconsistent: Ms Keiko Okumura (formerly Negishi) stated she inherited all the rights of the appeal whereas her sister Ms Hiroko Takeshita stated the rights were inherited jointly but she chose to take no part in the proceedings. That is a clear inconsistency of fact which, on the available evidence, cannot be resolved. To suggest, as the appellant's representative did, that on the balance of probability the evidence shows that Ms Keiko Okumura (formerly Negishi) is the only heir is to dignify the evidence with a clarity it simply does not possess. The Board can agree with that representative that there is no evidence that either sister was seeking to circumvent legal requirements; that would suggest a deliberate intention to be misleading, which has not been alleged at all. Far from there being any attempt to circumvent legal requirements, the necessary legal requirement - namely that there must be sufficient evidence of an heir or heirs - has quite simply not been fulfilled.

13. Even if the statements of the two children of opponent O2 were not inconsistent in the crucial respect of the identity of the heirs, there would remain two further problems of evidence. The first problem is that there is no satisfactory evidence to

the effect that the alleged heir has succeeded to the deceased's opposition as a matter of Japanese law. This was not shown by the translation of certain provisions of Japanese law filed with the appellant's representative's letter of 10 May 2004 for the reasons given in the Board's communication of 15 July 2004 (see paragraph IV(3) above). As already mentioned, the Board thereafter suggested such evidence be given by way of an opinion from a Japanese lawyer but that suggestion was not pursued. The offer by the appellant's representative to file copies of his correspondence with his instructing Japanese attorneys was no substitute for several reasons - the Board had no means of knowing what if anything such correspondence might show; whatever it might show, it would only be correspondence and not evidence *per se*; and it was futile to suggest that the Board should decide whether or not the correspondence should be filed - a party wishing to prove a case must decide themselves what evidence to provide in support. The second problem is that such evidence as was supplied suffered not just from inconsistency but also, for the reasons in the Board's second communication of 15 July 2004 (see paragraph IV(4) above), from a significant lack of credibility on the part of Ms Keiko Okumura (formerly Negishi).

14. The Board thus finds as facts that the original opponent O2, Ms Yaeko Okumura, died after the appeal was filed and that no heir or heirs have on the evidence been established. There is accordingly no-one who can continue the appeal which therefore must lapse. Since no other party appealed, the appeal proceedings are at an end.

Order

For these reasons it is decided that:

The appeal proceedings are terminated.

The Registrar: The Chairman:

M. Dainese A. Klein