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**Datasheet for the decision
of 27 October 2016**

Case Number: T 1846/11 - 3.4.02

Application Number: 04012578.3

Publication Number: 1482304

IPC: G01N23/207

Language of the proceedings: EN

Title of invention:

Method of setting measuring range of reciprocal-space mapping

Applicant:

Rigaku Corporation

Headword:

Relevant legal provisions:

EPC Art. 134(8)

EPC R. 152(1), 152(2), 152(6), 152(11)

RPBA Art. 15(3)

Decision of the President of the EPO dated 12 July 2007 on the filing of authorisations, Article 1, 2

Keyword:

Decisions cited:

J 0005/02, J 0008/10, T 0267/08

Catchword:

No authorisation filed for legal practitioner, nor any subsequent approval by appellant submitted for steps taken by legal practitioner without such authorisation.



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Case Number: T 1846/11 - 3.4.02

D E C I S I O N
of Technical Board of Appeal 3.4.02
of 27 October 2016

Appellant: Rigaku Corporation
(Applicant) 3-9-12, Matsubara-cho
Akishima-shi,
Tokyo 196-8666 (JP)

Representative: Emde, Eric
Wagner & Geyer
Gewürzmühlstrasse 5
80538 München (DE)

Decision under appeal: Decision of the Examining Division of the
European Patent Office posted on 17 March 2011
refusing European patent application No.
04012578.3 pursuant to Article 97(2) EPC.

Composition of the Board:

Chairwoman T. Karamanli
Members: H. von Gronau
F. Maaswinkel

Summary of Facts and Submissions

- I. The present appeal lies from the decision of the examining division to refuse European patent application No. 04 012 578.3.
- II. The Request for grant of a European patent (EPO Form 1001 07.02) was filed on 27 May 2004. On page 1 of the form, Rigaku Corporation was named as applicant and "Eric C. Emde et al, WAGNER & GEYER" were indicated as the representatives, but no authorisation was enclosed and no reference was made to a registered general authorisation. The Request for grant was signed by Mr Wagner, a professional representative of WAGNER & GEYER.
- III. In the course of the proceedings before the examining division, Mr Klang of WAGNER & GEYER acted on behalf of the applicant for the first time when he filed a reply dated 19 November 2010 to the summons to oral proceedings.

Page 1 of the minutes of the oral proceedings of 17 March 2011 before the examining division (EPO Form 2009.1) includes the following statement:

"Present as/for the applicant/s:

Alexander Hubertus Klang

The identity of the person/s present and, where necessary, the authorisation to represent/authority to act were checked."

- IV. On 24 May 2011, notice of appeal against the refusal decision was filed by Mr Klang on behalf of the applicant (appellant). The appeal fee was paid on the

same day. The statement setting out the grounds of appeal dated 27 July 2011 was also filed by Mr Klang.

- V. First oral proceedings were held before the board on 22 January 2016.

At the beginning of the oral proceedings, the board informed Mr Klang, who was present on behalf of the appellant, that since he was a legal practitioner he had to file a signed authorisation or a reference to a general authorisation already on file according to the Decision of the President of the EPO on the filing of authorisations but that no authorisation was on file. Mr Klang was asked whether an authorisation had been filed in the present case or whether he could present an authorisation at these oral proceedings. He replied that he assumed that there was, as usual, an authorisation or a sub-authorisation in the file at the law firm and that he would immediately check this issue with his law firm.

After an interruption of the oral proceedings, in addition to Mr Klang, Mr Schmidbauer, a professional representative of WAGNER & GEYER, was present on behalf of the appellant. He informed the board that no authorisation could be presented at the moment but that the oral proceedings could be continued with him since he was a professional representative. The board pointed out that Mr Klang had acted in the first-instance proceedings and had filed the notice of appeal and the statement setting out the grounds of appeal. Hence, since Mr Klang had failed to file an authorisation or a reference to a general authorisation, the board would issue a communication inviting him to do so within a period to be specified. If, however, neither an individual authorisation nor a reference to a general

authorisation was filed within that period, the legal consequence would be that the procedural steps taken by Mr Klang would be deemed not to have been taken, in accordance with Rule 152(6) EPC. Consequently, as far as appeal proceedings were concerned, the notice of appeal would be deemed not to have been filed and an appeal would not exist.

After a discussion on this issue, Mr Schmidbauer asked for a break to verify with his law firm whether a general authorisation existed. After an interruption of the oral proceedings, Mr Schmidbauer informed the board that he could not verify that a general authorisation existed.

At the end of the oral proceedings, the chairwoman informed Mr Schmidbauer and Mr Klang that proceedings would be continued in writing.

- VI. In a communication dated 5 February 2016, pursuant to Rule 152(2) EPC, the board invited Mr Klang to file an authorisation (original) or a reference to a general authorisation already on file within a period of two months of notification of the communication. He was warned that if the required authorisation (or reference to a general authorisation already on file) was not filed in due time, any procedural steps taken by him as representative in the present case would be deemed not to have been taken pursuant to Rule 152(6) EPC, i.e. the notice of appeal and the statement setting out the grounds of appeal would be deemed not to have been filed.

A copy of this communication was sent on the same day to Mr Emde in accordance with Rule 130(1) EPC.

VII. With a reply dated 15 April 2016, Mr Klang filed a duly signed general authorisation ("EPO 1004 12.07") dated 8 April 2016 (original and copy).

This general authorisation indicated the name of Mr Klang as one of the authorisees and included the following additional statement in the form of a stamp:

*"General authorisation (replacement):
WAGNER & GEYER Partnerschaft mbB was authorised at time
of October 1, 2010."*

Mr Klang submitted that the previous authorisation of 1 October 2010 had been given at the time when he took over responsibility for the present patent application. He argued that the previous authorisation had been misplaced and this could have occurred at or following the oral proceedings before the examining division held on "March 17, 2011", where, according to page 1 of the minutes, both the identity and the authorisation to act on behalf of the applicant were checked.

VIII. In a further communication dated 23 May 2016, the board informed Mr Klang that, according to the general authorisation dated 8 April 2016, he was duly authorised as from 8 April 2016, but the board could not accept that he had been authorised as from 1 October 2010 by a previous authorisation and gave detailed reasons for its preliminary view.

Mr Klang was also informed that, since he had filed an authorisation dated 8 April 2016 and submitted that the previous authorisation had been misplaced, the board would exceptionally accept that the appellant subsequently approved the procedural steps taken by Mr Klang as representative in the present case in the

period from 1 October 2010 to 8 April 2016. He was invited to file a corresponding subsequent approval from the appellant (original) within a period of two months of notification of the communication. He was also warned that, if the required subsequent approval were not filed in due time, any procedural steps taken in the present case by himself as representative in the period from 1 October 2010 to 8 April 2016 would be deemed not to have been taken (Rule 152(6) EPC *mutatis mutandis*), i.e. that in the present appeal case the notice of appeal and the statement setting out the grounds of appeal would be deemed not to have been filed.

A copy of this communication was sent on the same day to Mr Emde in accordance with Rule 130(1) EPC.

- IX. In a communication pursuant to Article 15(1) of the Rules of Procedure of the Boards of Appeal (RPBA, OJ EPO 2007, 536) annexed to the summons to oral proceedings dated 6 June 2016, the board referred to its communication dated 23 May 2016. The board informed the appellant that the first issue to be discussed was whether Mr Klang was authorised in the period from 1 October 2010 to 8 April 2016 and that, if the board concluded after the discussion that this was not the case, there would have to be a discussion of whether the notice of appeal and the statement of grounds of appeal had to be deemed not to have been filed. The board further indicated that, if the board concluded that Mr Klang was authorised in the relevant period, a discussion on the merits of the case would follow. It also expressed its preliminary opinion on the allowability of the appellant's requests on file.

- X. In a letter dated 3 August 2016 and received on 29 August 2016, the appellant informed the board that it would not be attending the oral proceedings. No further submissions were made in this letter.

- XI. Second oral proceedings took place on 27 October 2016 in the absence of the duly summoned appellant. At the end of the oral proceedings, the chairwoman announced the decision of the board.

Reasons for the Decision

- 1. The duly summoned appellant did not attend the second oral proceedings. In accordance with Rule 71(2) EPC 1973, however, the proceedings continued without him. In accordance with Article 15(3) RPBA the board relied for its decision only on the appellant's written submissions. The board was in a position to decide at the conclusion of the oral proceedings, since the case was ready for decision (Article 15(5) and (6) RPBA), and the voluntary absence of the appellant was not a reason for delaying a decision (Article 15(3) RPBA).

- 2. Authorisation of Mr Klang
 - 2.1 Rule 152(1) EPC provides that the President of the EPO determines the cases in which a signed authorisation must be filed by representatives acting before the EPO.

 - 2.2 Mr Klang is a legal practitioner entitled to act as representative under Article 134(8) EPC. A legal practitioner must file the original version of a signed authorisation or a reference to a general authorisation already on file under Rule 152(1) EPC and Article 2, first sentence, of the Decision of the President of the European Patent Office dated 12 July 2007 on the filing

of authorisations (OJ EPO 2007, Special edition No. 3, 128; henceforth "Decision of the President").

2.3 At the first oral proceedings before the board, Mr Klang was informed that no authorisation was on file, and he was therefore asked whether an authorisation had been filed for him in the present case or whether he could present an authorisation at those oral proceedings. After the oral proceedings had been interrupted several times at the request of Mr Klang and/or the further professional representative who had joined him after the first break, Mr Klang and the further professional representative finally informed the board that they could not present an authorisation for Mr Klang, nor had they been able to verify with their law firm whether a general authorisation existed. Since Mr Klang failed to file the required signed authorisation or a reference to a general authorisation already on file, the board was obliged to invite him to do so within a period to be specified, pursuant to Rule 152(2), first sentence, EPC and Article 2, second sentence, of the Decision of the President. Therefore, the board did not announce a final decision at the first oral proceedings, but informed the party that proceedings would continue in writing.

2.4 In a reply to the board's invitation, Mr Klang filed a duly signed general authorisation from the appellant dated 8 April 2016 (original and copy) within the two-month period set by the board.

The board is satisfied that this general authorisation authorises Mr Klang to represent the appellant in proceedings before the EPO and thus in the present appeal proceedings as from 8 April 2016, since his name

is given in the authorisation as one of the authorisees. However, since the general authorisation is dated 8 April 2016, any procedural steps taken by Mr Klang as representative up to that date are not covered by that authorisation itself.

2.5 In the board's view, there are also no facts or indications on file which would lead to the conclusion that the appellant had validly authorised Mr Klang before the date of 8 April 2016.

2.5.1 It is true that the general authorisation includes the following additional statement in the form of a stamp:

*"General authorisation (replacement):
WAGNER&GEYER Partnerschaft mbB was authorised at time
of October 1, 2010."*

However, the board cannot accept Mr Klang's submission that he had been authorised by this previous general authorisation of 1 October 2010 when he took over responsibility for the present patent application.

Firstly, the previous authorisation of 1 October 2010 or a copy thereof is not on file. Therefore, it is not possible for the board to verify that Mr Klang had indeed been authorised by a signed authorisation as from 1 October 2010.

Secondly, the wording of the statement in the general authorisation dated 8 April 2016 clearly indicates that "WAGNER&GEYER Partnerschaft mbB" was authorised, i.e. an association of representatives according to Rule 152(11) EPC. Under Rule 152(11) EPC, the authorisation of an association of representatives is deemed to be an authorisation of any representative who can provide

evidence that he/she practises within that association. A legal practitioner, however, cannot be treated as a member of an association of representatives within the meaning of Rule 152(11) EPC and is therefore not covered by the legal fiction of that provision (see decision J 8/10, OJ EPO 2012, 470).

2.5.2 As far as the statement on page 1 of the minutes of the oral proceedings held on 3 February 2011 before the examining division is concerned, from the wording of the relevant printed sentence ("The identity of the person/s present and, **where necessary**, the authorisation to represent/authority to act were checked." (emphasis added by the board)) it follows that the authorisation is not always checked. In the circumstances of the present case, where it is not indicated anywhere in Mr Klang's letters, in particular neither in the letterhead nor in the signature field, that he is a legal practitioner, it could well be that the examining division had the impression that he was a professional representative who has to present an authorisation only in specific circumstances and that therefore it did not check the authorisation. Moreover, according to the minutes, no authorisation was presented at the oral proceedings, since the minutes themselves do not mention that an authorisation was filed, nor is an authorisation annexed to the minutes.

2.6 In the specific circumstances of the present case, where a general authorisation dated 8 April 2016 is on file and the previous authorisation had allegedly been misplaced, the board would exceptionally have accepted that the appellant subsequently approve the procedural steps taken by Mr Klang as representative in the present case in the period from 1 October 2010 to 8 April 2016. However, although the board, applying

Rule 152(2) EPC *mutatis mutandis*, invited Mr Klang to file a corresponding subsequent approval from the appellant within a period of two months, he failed to do so.

3. For the above reasons, the board cannot accept that Mr Klang was authorised before 8 April 2016 by a previous authorisation. Nor has the appellant subsequently approved the procedural steps taken by Mr Klang as representative in the present case in the period from 1 October 2010 to 8 April 2016. In view of both these circumstances, the legal consequence is that the procedural steps taken by Mr Klang are deemed not to have been taken (cf. Rule 152(6) EPC; Rule 152(6) EPC applied *mutatis mutandis*). Consequently the notice of appeal is deemed not to have been filed and an appeal does not exist. In the absence of an appeal, there is no basis for payment of the appeal fee, which has therefore to be reimbursed.

4. The board is aware that this decision may appear formalistic and harsh to the appellant. Indeed, the consequences of the failure to file, for the period from 1 October 2010 to 8 April 2016, a signed authorisation, a reference to a general authorisation already on file or the appellant's subsequent approval for the steps taken by the legal practitioner without authorisation are in the present case fatal for the appeal.

However, the board emphasises that the filing of an authorisation as prescribed by Rule 152(1) EPC and the Decision of the President is of fundamental importance for establishing whether the EPO is dealing with the entitled representative. This is also clear from the fact that the absence of an obligation for professional

representatives to always file a signed authorisation by virtue of Article 1(1) of the Decision of the President similarly does not mean that they do not need to possess an individual or general authorisation verifying their entitlement to act for the party, which they must be able to produce if the EPO so requires (cf. Article 1(2) and (3) of the Decision of the President).

Moreover, a legal practitioner can be expected to be familiar with procedural matters in general, and the detailed and consistent jurisprudence of the boards of appeal in particular, as is expected of professional representatives according to the established jurisprudence (see for example J 5/02, point 3.2 of the Reasons; T 267/08, point 5.2.1 of the Reasons). Therefore, in the board's view, Mr Klang had to be aware that a legal practitioner entitled to act as representative under Article 134(8) EPC must always file an authorisation, at the latest when he is requested to file such authorisation in accordance with Rule 152(1) EPC and Article 2, first sentence, of the Decision of the President. Likewise, he should have been aware of the legal consequences under the EPC.

Order

For these reasons it is decided that:

1. The notice of appeal is deemed not to have been filed.
2. The appeal fee is to be reimbursed.

The Registrar:

The Chairwoman:



M. Kiehl

T. Karamanli

Decision electronically authenticated