

**FD4 (P6) – Infringement and Validity
Mark Scheme 2015**

Assessment task

Your client sends you the letter and documents listed on the Instructions to Candidates sheet.

Your task is to prepare advice to your client on whether the attached granted patent may be enforced and defended.

Prepare notes on which you would base advice in which you:

- a) Provide an opinion on infringement and validity in the UK only.**
- b) Identify other patent related legal issues pertinent to the facts presented.**
- c) Outline possible actions that may be taken to strengthen your client's legal position.**
- d) Summarise the opinions formed in a-c above.**

Note the following:

- a) You should accept the facts given to you and base your answer on those facts.
- b) You should not make use of any other special knowledge that you may have of the subject matter concerned.

Total: 100 marks

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CONSTRUCTION

CLAIM 1

An insect trap	Explain nature and context of claim (e.g. apparatus)	0.5
comprising a housing having an opening through which insects can enter the housing	Comprising Housing (discussion of purpose of (a) housing and (b) opening re insect retention and longevity of passive sources)	0.5 0.5 0.5 0.5
the housing containing a passive source of insect attractant	Passive source insect attractant (effect at distance)	1 0.5
the volume between the opening and the source of insect attractant providing an insect fly path	Insect fly path (does insect need to fly) Inter relationship between housing and fly path	0.5 0.5
a screen located within the housing	Screen (purpose and position of screen)	0.5 0.5
and a source of electrical power to electrify the screen	Source of electrical power (ref line 5-7 page 4) (Mains is additive to dedicated power supply) Power to be generated by power source	0.5 0.5
Total		7 marks

1 mark in total will be awarded for accurate recitation of Claim dependencies

CLAIM 2

An insect trap according to Claim 1	Claimed trap has all the features of claim 1, plus the following.	
wherein the source of insect attractant is a body containing one or more insect pheromones.	Body (line 4 page 5) Containing...	0.5 0.5
Total		1 mark

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CLAIM 3

An insect trap according to Claim 2	An trap having all the features of claim 2 plus the following;	
wherein the screen, or a portion thereof, is angled with respect to the floor of the housing.	...or a portion... Angled – definition of (what is the purpose of angled?) With respect to the floor – (note lack of antecedence for ‘floor’ – sufficiency issue)	0.5 0.5 0.5 0.5
Total		2 marks

CLAIM 4

An insect path according to Claim 3	A <u>trap</u> having the following features, appended to claims 1,2,3 Construe as ‘trap’ (note error ‘path’ - sufficiency issue)	0.5
wherein the screen interrupts the insect fly path	Interrupts – discuss location and purpose of screen in relation to fly path, passive attractant, opening	0.5 0.5
Total		1.5 marks

CLAIM 5

An insect trap according to Claim 1	A trap having all the features of claim 1, and the following.	
further comprising a removable container located below the screen for receiving dead insects.	Removeable (from the housing?) Container – purpose of container Located below – rationale (gravity) and position	0.5 0.5 0.5
Total		1.5 marks

CLAIM 6

A screen for capturing insects in an insect trap	Independent Claim Suitable for use	0.5 0.5
the screen comprising a flat mesh secured to a frame,	Flat – purpose of ‘flat’ Mesh – what is a mesh?	0.5 0.5

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	Secured to a frame – purpose of frame (is frame part of screen)	0.5 0.5
the mesh being coated in an insect adhering material	Insect adhering material - purpose	0.5
and being electrically conductive	Electrically conductive screen, Electrically conductive adhering material, both?)	0.5 0.5
Total		4.5 marks

CONSTRUCTION TOTAL: 18.5 marks

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INFRINGEMENT – TRAP 1

CLAIM 1

	TRAP 1		TRAP 2	
An insect trap	Present	0.5	Present (line 26 page 11)	0.5
comprising a housing having an opening through which insects can enter the housing	Enclosure (Figure A 'enclosure' - line 26 page 10) and opening (Figure A 'insect entrance' - line 27 page 10)	0.5	Enclosure (Figure B 'enclosure' In 26 page 11) and opening (Figure B 'insect entrance' - line 27 page 11)	0.5
the housing containing a passive source of insect attractant	Pheromone (Figure A 'pheromone' - line 27 page 10)	0.5	Pheromone (Figure B 'pheromone' In 27 page 11)	0.5
the volume between the opening and the source of insect attractant providing an insect fly path	Present (line 15-20 page 11)	0.5	Present (line 28-32 page 12)	0.5
a screen located within the housing	Mesh M1-3 (In 30-31 page 10)	0.5	ball of metal wire (Figure C) and/or screens M21, 22, 23	0.5 0.5
and a source of electrical power to electrify the screen	sold with a PLUG (In 8-10 page 11) Feature NOT present because plug not a power source*	0.5 0.5	sold with a PLUG (In 8-10 page 11) Feature NOT present because plug not a power source*	0.5 0.5
Conclusion	NOT DIRECTLY INFRINGED if source of electrical power essential	0.5	NOT DIRECTLY INFRINGED if source of electrical power essential	0.5
	INFRINGED under S.60(2) if essential means test satisfied – presumably – they know of the patent – double territoriality – offer for sale in London 2016	1	INFRINGED under S.60(2) if essential means test satisfied – presumably – they know of the patent – double territoriality – offer for sale in London 2016	0.5
Total		5		5

*Other conclusions not awarded mark

Marks in total will be awarded for accurate recitation of all Claim dependencies	2
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CLAIM 2

An insect trap according to Claim 1				
wherein the source of insect attractant is a body containing one or more insect pheromones.	Present (Figure A 'pheromone' – In 26-28 page 10)	0.5	Present (In 28 page 11)	0.5
CONCLUSION	INFRINGEMENT CONCLUSION CONSISTENT	0.5	INFRINGEMENT CONCLUSION CONSISTENT	0.5
Total		1		1

CLAIM 3

An insect trap according to Claim 2				
wherein the screen, or a portion thereof, is angled with respect to the floor of the housing.	No (Figure A)	0.5	Present (Figure C) Part of ball is angled (must be consistent with 'screen' construction and interpretation)	0.5 0.5
CONCLUSION	INFRINGEMENT CONCLUSION CONSISTENT	0.5	INFRINGEMENT CONCLUSION CONSISTENT	0.5
Total		1		1.5

CLAIM 4

An insect path according to Claim 3				
wherein the screen interrupts the insect fly path	Present (see Figure A - e.g. Mesh M1)	0.5	Present? Does ball of metal wire 'interrupt' fly path?	0.5 0.5
CONCLUSION	INFRINGEMENT CONCLUSION CONSISTENT	0.5	INFRINGEMENT CONCLUSION CONSISTENT	0.5
Total		1		1.5

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CLAIM 5

An insect trap according to Claim 1				
further comprising a removable container located below the screen for receiving dead insects.	Are any one of flap F1-F3 a 'container' removable Is it 'below' screen	0.5 0.5 0.5	Not present	0.5
	INFRINGEMENT CONCLUSION CONSISTENT	0.5	INFRINGEMENT CONCLUSION CONSISTENT	0.5
Total		2		1

CLAIM 6

A screen for capturing insects in an insect trap	Yes (e.g. mesh M1)	0.5	Yes	0.5
the screen comprising a flat mesh secured to a frame,	No detail of a frame	0.5	Perhaps – see Figured D definition of 'secured', definition of 'frame'	0.5
the mesh being coated in an insect adhering material	No note of adhesive	0.5	No	0.5
and being electrically conductive	Yes (see line 7 page 11)	0.5	Yes (metal – line 1-2 page 12)	0.5
	NOT INFRINGED	0.5	NOT INFRINGED	0.5
Total		2.5		2.5

INFRINGEMENT TOTAL: 27 marks

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NOVELTY

Docs C and D fully available as prior art.

CLAIM 1

	C		D	
An insect trap	Yes – Figure 1, line 7-8 page 16	0.5	Yes - line 17-18 page 19	0.5
comprising a housing having an opening through which insects can enter the housing	Yes - Housing assembly 13, line 4-9 page 17	0.5	No - housing	0.5
the housing containing a passive source of insect attractant	Yes - Attractant means 21, line 23-27 page 16 - present (e.g. CO ₂ or food) Light 23 is not passive source	0.5 0.5	Yes - Source of attractant present – pheromone line 1-7 page 20	0.5
the volume between the opening and the source of insect attractant providing an insect fly path	Yes - Line 9-11 page 16 (Mosquito is a flying insect)	0.5	No - not enclosed (frame but no housing)	0.5
a screen located within the housing	Yes - Grid 39	0.5	No - There is a screen (line 32-35 page 19) – but no housing	0.5
and a source of electrical power to electrify the screen	No - connection means 27 (e.g. for coupling to source of electricity)	0.5	No	0.5
Conclusion	Novel		Novel	
Total		3.5 marks		3 marks

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Marks in total will be awarded for accurate recitation of all Claim dependencies	2
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CLAIM 2

An insect trap according to Claim 1	Not present		Not present	
wherein the source of insect attractant is a body containing one or more insect pheromones.	Not present	0.5	Present – lines 1-3 page 20	0.5
Conclusion	Novel			
Total		0.5 marks		0.5 mark

CLAIM 3

An insect trap according to Claim 2	Not present		Not present	
wherein the screen, or a portion thereof, is angled with respect to the floor of the housing.	Not present	0.5	No - angled (mesh in drawing 2, line 38 page 19) but no housing	0.5
Conclusion	Novel		Novel	
Total		0.5 marks		0.5 mark

CLAIM 4

An insect path according to Claim 3	Not present		Not present	
wherein the screen interrupts the insect fly path	Present - (lines 30-33, page 16) / not present depending on 'interrupts'	0.5	Present (mesh?) / not present depending on 'interrupts'	0.5
Conclusion	Novel		Novel	
Total		0.5 marks		0.5 marks

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CLAIM 5

An insect trap according to Claim 1	Not present		Not present	
further comprising a removable container located below the screen for receiving dead insects.	Yes (Line 28 – 31 page 17) - Removable, clasp members 61 - Container, lower member 45 - Below according to construction?	0.5 0.5 0.5	Not present	0.5
Conclusion	Novel		Novel	
Total		1.5 mark		0.5 mark

CLAIM 6

A screen for capturing insects in an insect trap	Present? - depends on 'capture'	0.5	Present - mesh	0.5
the screen comprising a flat mesh secured to a frame,	Present - flat mesh (grid 39 / Not present - open mesh screen 19) Secured?	0.5 0.5	Depending on 'flat' feature present/not present Secured (around entirety of periphery?)	0.5 0.5
the mesh being coated in an insect adhering material	No - adhesive is alternative 'trapping medium'	0.5	Adhesive (In 32 page19)	0.5
and being electrically conductive	Present (line 32, page 16)	0.5	Made from aluminium in one alternative (line 33 page 19)	0.5
Conclusion	Claim Novel		Novel/Not Novel	
Total		2.5 marks		2.5 marks

NOVELTY TOTAL: 18.5 marks

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INVENTIVE STEP

Pozzoli/Windsurfer approach:

PSA is manufacturer/designer of fly traps

CGK of PSA? Line 9 to 29 of page 3; 'passive'/'active' traps; Document D?

Claim 1

The document relates to provision of 'distant' or 'remote' location of fly traps.

There is least one difference between Claim 1 and Doc C, passive attractants and source of power.

- 'Chemicals' are foreshadowed in Doc C (see line 24, page 16)
- 'Other electrical sources' for 'remote areas' is mentioned (line 22 page 16)

There appears to be no particular reason why both alterations could not be made, and a rationale for doing so.

Claim 2

Inventive concept is use of pheromones (line 37-40 page 3) – this is disclosed in doc D

Doc D is an early publication – is it CGK?

In doc D trap (adhesive) and lure (pheromone) are combined.

In doc C lure (light) and trap (grid) are separate.

Would it be obvious to extract pheromone from D to replace lure in C?

Claim 3

Angled to prevent build up in one place. (line 10-12 page 4)

Would you use construction of D in C, i.e. undulatory mesh? Encourages spread of pheromone – perhaps.

Claim 4

Screen prevents insect access to attractant

Concept known from doc C (line 12-14 page 16)

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Claim 5

Removable container to allow corpses to be gathered/disposed of
Concept known from Doc C (line 32-33 page 17)

Claim 6

Depending on 'flat' and 'secured' no incentive to modify Doc C
Purpose of 'flat' is to enable it to be slid into trap
Purpose of secured about the periphery is presumably to prevent electrocution.

Claim	1	2	3	4	5	6
marks	5	5	2	2	2	3

Proper identification of CGK, PSA; Windsurfer/Pozzoli - 2 marks

INVENTIVE STEP TOTAL: 21 marks

AMENDMENT

Reasonable amendments to Claim 1:

- Add Claim 2 - depending on I.S. conclusion
- Baffles (see line 5-9 page 6) - may capture trap 2.
- Removable screen (line 12 page 4) may capture trap 2 but may not be novel/inventive over Doc C

Are amendments to Claim 6 necessary?

AMENDMENT TOTAL: 4 marks

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SUFFICIENCY

No real issues:

- change dependencies
- correct errors (e.g. antecedence)

SUFFICIENCY TOTAL: 1 mark

ADVICE

- Document A is granted and in force - no renewal payment due yet
- S60(2) – essential means needs explaining / knowledge requirement
- Request purports to be re S.71 – have they provided sufficient details? If we don't respond they can go to court / inherent juris
- Nothing to stop filing Inf. Action / interim relief?
- Double patenting
- Contemporaneous amendment (S.75)
- Both S.27(6) and S.75(5) limit discretion to object to amendments re patentee's conduct (note letter states aware of Doc C and it is referred to in spec)
- But S.62(3)(b) / S.63(2) may limit damages (if no knowledge), if not framed with reasonable skill/not started in good faith
- Research exception (so 60(5)(b)) does not apply
- Relevant commercial advice / prosecution strategies

[NO MARKS AWARDED FOR REPEATING INFORMATION DISCUSSED EARLIER / SUCH AS WHICH CLAIMS ARE NOVEL / INFRINGED]

ADVICE TOTAL: 10 marks

GRAND TOTAL: (C 18.5 marks; Inf 27marks; Nov 18.5 marks; IS 21 marks; Am 4 marks; Suff 1 mark; Adv 10 marks) 100 marks