

Introduction

Overall, candidates appeared to have adapted well to the new examination format and made good use of the word-processed format to present clear and generally well laid out answers. Examiners did not notice any issues that might have affected the marks awarded. It appears that word processing encouraged more concise answers as the average length of answers was noticeably shorter than in previous years. Many candidates used cut and paste options to good advantage, but candidates need to be careful that pasted sections are properly related to the issue being addressed rather than merely repeating arguments from another section. Word processed answers made spelling or typographical errors easy to spot and accommodate. As this was the first time for the online exam format, examiners looked for any signs that this might have caused problems for candidates, but there were no clear cases of this.

As in previous years, most candidates laid out their answers appropriately. While there is no one way to do this, candidates who presented their arguments on novelty and inventive step before considering infringement tended to do less well than those who presented infringement first.

Some candidates included extra pages at the end of their Answer document that included materials they appeared to have used in developing their answer, such as logic tables. Unless the answer provides a clear indication to the examiner that these are to be considered and how the information is used, they do not contribute to the overall mark.

The marks available for each section of the paper were noted on the front page of the question paper. This provided an indication to the candidates how much of their answer should be devoted to each section and so assist in time allocation. This practice will continue but the distribution of marks between the sections may change from year to year depending on the subject matter of the paper.

The mark scheme applied this year was less prescriptive than in recent years to allow examiners to give credit for how a candidate had addressed a particular issue rather than whether or not they had addressed it in one particular way. Examiners were looking for consistency of arguments between sections and reasoning supported by evidence from the paper.

The 2020 paper was shorter than in previous years. There was a single embodiment to consider for infringement, one prior art document, and common general knowledge was explicitly presented. Overall, it appeared that more candidates gave answers to all parts of the paper than in previous years.

The objective for the 2020 paper was to advise a patentee (Pat Anchors) if an anchor (the Bettermore NG) that they had recently found from another company (Bettermore) falls within the scope of the patent (Document A), so that they could approach Bettermore to

take a licence under the patent, and if there are any validity issues that might affect the scope of the patent with regard to the Bettermore NG anchor.

The client's letter sets out brief details of their business and notes that they have licensed the patent in other countries to meet demand for their anchor.

The description of the Bettermore NG anchor was found in a pending patent application (Document B) after the Bettermore NG anchor had been identified at an exhibition. It is being manufactured in the UK so direct infringement of the patent may be an issue.

The technical field of the patent is anchors for boats, ships, oil rigs, etc. While the subject matter again falls in the mechanical domain, examiners with backgrounds in chemistry and biotechnology were involved in setting the paper to ensure that the technical subject matter would be accessible to all candidates. The field of technology in question is mature and stable.

The patent is a relatively short European (UK) patent with one independent claim and four dependent claims and describes two embodiments with four figures showing one embodiment with a hinge and one without. The hinged embodiment is the client's main product, and they make significant licence revenue from this product in other countries based on the European patent. The nature of the existing licences is not relevant to the task examined in this paper.

The single prior art document (Document C) is acknowledged in the patent and includes a description of well-known "traditional" anchors which can be considered as common general knowledge (CGK). The patent also refers specifically to the "traditional" form of anchors in the prior art document.

The challenge was therefore to provide a claim construction, with any necessary amendment to address validity issues, that reads onto the Bettermore NG anchor shown in Document C without excluding the client's main, hinged, product (Document A, Figs 1 – 3).

As in previous years, candidates need to support any conclusions with reasoning and apply this consistently throughout the answer to obtain good marks. A lack of reasoning and inconsistency in application are common features of poorly performing candidates.

Construction

Average mark 12/20

The patent has a single independent claim and four dependent claims. Several of the terms used in the claims are not explicitly defined in the patent. The challenge for candidates was to provide reasoned constructions for these terms.

There is more than one possible construction for some of the terms used in the claims. Provided that the construction adopted is reasonable, properly supported, and used

consistently throughout the answer, selecting one or other of these constructions should not be the deciding factor between passing or failing.

Some candidates construed terms too narrowly, essentially limiting the scope to what is shown in the drawings and importing limitations into the terms used that would not normally be there. Such answers were awarded fewer marks as they are too easily challenged by a broader construction that is in line with the practice adopted by the patent office and courts.

The client's letter and the patent both refer to CGK described in Document C (p. 11, ll. 5 – 19). It is appropriate to refer to this part of Document C when construing the claims.

Claim 1

The claims are directed to a "stockless" anchor. CGK shows this to be a term of art. It is important to provide meaning to the term: what a stock is (p. 11, ll. 10 – 11), what it does (p. 11, ll. 12 – 13), and what the effect of its presence or absence (p. 11, ll. 15 – 16). This becomes important when the term "stock" has to be considered with respect to the prior art in Document C, which uses the term differently, but which has structures that appear to function as a stock in the CGK. It is possible to derive meanings for "stockless" as being no stock anywhere at all on the anchor, or no stock at the head end of the anchor. Either of these was acceptable with appropriate reasoning.

The basic structure and definition of the shank can be found in the patent (p. 3, ll. 28 – 30, p. 4, ll. 9 – 10) and consistent with CGK.

The term "fluke arrangement" suggests more than a single fluke. The patent describes an arrangement with two blades (p. 4, ll. 3 – 10).

The transitional phrase "characterised in that" arising from EPO two-part claim practice makes no difference to the construction of the claim for infringement or validity and needed no comment.

Most candidates correctly noted that the term "including" was open wording equivalent to "comprising", allowing the claimed fluke arrangement to include more than the features presented in the claim.

The bill is the part of the fluke that first engages and is driven into the sea bed (p. 4, ll. 17 – 18, 22 – 23). The claim defines "a" bill. Unless there is clear evidence from the description or necessity in the language of the claim, this should be interpreted as "at least one". There is nothing explicit in the patent that supports meaning of "a" as being only one, so a proper construction allows more than one bill to be present. This is also consistent with the open wording "including".

Some candidates argued that there could only be a single bill because the anchor would not work in any other way, or that the two plate construction would only result in a single bill. There is nothing in the patent to support this conclusion. Furthermore, candidates who adopted this restricted meaning tended not to recognise that this limited meaning goes against conventional interpretation of "a" and provide fallback position should they

be wrong. They also did not consider that this provided a relatively easy design around for an infringer.

The relationship between the blades and the fluke arrangement is described in the patent (p. 3, ll. 31 – 35). Any construction must include the possibility that the pair of blades can be a single piece construction (p. 4, l. 7).

The relationship of the fluke arrangement with respect to the plane of symmetry is described in the patent (p. 4, ll. 11 – 13, 20 – 22, 27 – 30). Good answers noted that the hinged shank embodiment may not have the whole shank in the plane of symmetry at all times and so provides constructions that referent to the fixed part of the shank (p. 4, l. 12), or the line of action of the mooring chain in use (p. 4, l. 29).

Some candidates defined the blade in terms of an edge having a cutting action. This is not described in the patent. The patent does discuss the width (for resistance) and the curved shape (for self-righting action). The width is further defined in claim 1.

The patent does not explicitly mention the distance between the outermost edges but does describe the width across the blades (p. 4, l. 33). In the context of the fluke arrangement, the distance between the outermost edges is the distance from the outermost edge of one blade to the corresponding point on the outermost edge of the other blade.

The rear of the fluke arrangement is not explicitly mentioned in the patent. This could be defined as the opposite end to the bill, or opposite to the directions of pull, or other equivalent constructions.

The term “at or close to” is also not defined. A suitable construction should note that this term allows the widest point to be forward to the rearmost part of the fluke arrangement, but closer to the rearmost part than the front (e.g., in the rear half of the fluke arrangement).

Claim 2

This claim relates to the embodiments of Figs. 1 – 3. The term “part” could encompass both the two-part construction shown in the hinged embodiment, or a construction in which the whole shank was pivotably connected to the fluke arrangement. Good candidates noted that this claim did not cover the embodiment of Fig. 4.

Some candidates incorrectly interpreted the term “articulated” to mean the bend in the shank rather than the flexible (pivoting) joint. “Pivotable” further limits “articulated”. A detailed discussion of what a pivotable arrangement is, or where the pivot axis is, was not needed.

Claim 3

“On or close to” is not defined in the patent. Most candidates recognised that having the bill on or close to the centre line was to avoid twisting (p. 4, ll. 23 – 25). Few noted that

the term “close to” meant that it did not have to be strictly on the centre line but could be to one side or the other.

Claim 4

This claim relates to the embodiment of Fig. 4. “Fixed” is not defined so some meaning had to be placed on this term. Constructions noting that fixed means “no hinge” (p. 4, l. 34), or that the shank cannot move with respect to the fluke arrangement were accepted.

Most candidates noted the incompatibility of the dependency of claim 4 (fixed) on claim 2 (articulated/pivotable) and that this could be amended. Few then went on to say how they would handle this in construction of the claim as it stands. To get full marks, it was necessary to say that the dependency on claim 2 would be ignored.

Claim 5

The description includes a definition of the ridge (“extends upwardly”, p. 4, l. 1). The “extends from” wording implies that the two blades are joined together or continuous along the centre line (p. 4, ll. 3 – 10). Few candidates provided good constructions of this claim.

Infringement

Average Mark 11/20

To be awarded full marks, candidates needed to identify the feature in question in the infringement and explain why this corresponded to the construction of the term in the claim. Expressing the reasoning behind the conclusion is as important as the conclusion itself. Consistency of reasoning and conclusions on infringement compared to construction was necessary to get good marks.

When no literal infringement of a claim is found, it is appropriate to consider if *Actavis* might provide a basis to find infringement. It was not expected that *Actavis* reasoning would result in a finding of infringement where none would be present on the literal meaning of the claim, but candidates needed to at least indicate why *Actavis* would not be expected to change their answer. Marks were available for a short discussion of *Actavis* issues.

Clearly the client was trying to find reasons why infringement could be argued. If a candidate concluded that there was no infringement, we would expect the candidate to try to find a line of argument that would lead to a conclusion of infringement but indicate its weakness and identify any actions that might be taken to improve the position.

The infringement is described in Document B. The fact that this is a patent application carries no weight. While the appearance of the anchor in Document B is quite different to that of the patent, it was expected that candidates would find infringement of claims 1, 3,

and 4. Most did so. Candidates were expected to refer to the drawings to support their conclusions.

Claim 1

There is no stock, either at the head end or anywhere else on the anchor. Orientation of the anchor when setting is due to the shape of the fluke (p. 9, ll. 9 – 10).

The anchor has a shank 52 (limbs 52a, 52b). Limb 52b is connected to a fluke 53 so constitutes the crown end. Foremost extremity of limb 52a shows a hole that would be suitable for connection of the cable and so constitutes the head end.

The burial fluke 53 corresponds to the fluke arrangement. It is connected to the shank and curved tapering plates 56, 57 form the blades. Most candidates easily identified the tapering plates as the blades.

The point of the fluke 53 (p. 8, ll. 35 – 36; point of arrow 53 in Fig. 1)) corresponds to the bill.

The shank 52 lies in a plane of symmetry (p. 8, ll. 30 – 33). The tapering plates 56, 57 are symmetric on either side of a centre line (p. 8, l. 21; Fig. 2: line between connection point of limb 52b to fluke 53 and point at forward end).

The width across the blades is the width between the outermost tips of the plates 56, 57. The rear of the fluke arrangement is where the limb 52b joins. The widest point across the plates 56, 57 is closer to the rear of the fluke 53 than the front (Fig. 2). Identification of the outermost edges, the widest part, and how this is at or close to the rear were poor in many answers.

Claim infringed.

Claim 2

This claim was easily addressed and seemed to raise few problems. The shank 52 is a bar (p. 8, ll. 29 – 30) and nothing is shown that would provide any form of flexible connection between the shank and the fluke 53.

Claim not infringed.

Claim 3

The definition of the centre line in claim 1 places the bill on this line. Many candidates noted that Fig 2 shows the bill on the centre line. The shank 52 obscures the bill but its position can be inferred.

Candidates needed to note that the claim would not be infringed when dependent on claim 1 but not when dependent on claim 2.

Claim 4

This claim appeared to present no problems. The basis for the conclusion that the shank is fixed to the fluke so that claim 2 is not infringed means that claim 4 would be infringed.

The fluke 53 is mounted on the shank 52 (p. 8, l. 32) and cannot move with respect to the shank 52 (Fig. 1).

If the construction addresses how to deal with the dependency on claim 2, no further comment is necessary here.

Claim infringed.

Claim 5

The fluke 53 is described as two plates 56, 57 but shown as a single piece construction. The plates 56, 57 are symmetrical either side of centre line (Fig. 2) so clearly extend from the centre line. There is no ridge described or apparent in drawing. The upward facing surface is “concave” (p. 8, ll. 33 – 34), suggesting no upwardly extending ridge.

Claim not infringed.

While most candidates came to clear conclusions concerning infringement, many lost marks for failing to provide proper reasoning and support.

Novelty

Average Mark 12/20

All prior art necessary to answer this paper was provided in a single document, Document C. Document C was published on 31.05.2000. This is before the filing date of the patent and so Document C is available as full prior art.

As well as a specific prior art disclosure (Figs. 3 and 4), Document C also provided two embodiments (Figs. 1 and 2) indicated as “traditional” or “commonly used”. Document C draws a clear distinction between stockless anchors and Admiralty/fisherman’s anchors allowing the conclusion that the Admiralty/fisherman’s anchor is not a stockless anchor. A full novelty analysis of the Admiralty/fisherman’s anchor was not needed; it was sufficient to note CGK did not consider it to be a stockless anchor and that it had a stock at the head end and so could not be “stockless”.

As the known stockless anchor (Fig. 2) is stockless by definition, it did need full analysis for a complete answer. Some candidates appeared to find difficulty in understanding Fig. 2 but had no problem in following Fig. 3 which was a similar view of another prior art embodiment.

Document C CGK/Fig. 2

Claim 1

There is no stock at the head end (p. 11, ll. 14 – 15; Fig. 2). There is no other structure that could be considered as a stock in form or function.

The shank 1' has a head end 6' and a crown end 2' (p. 11, ll. 15 – 18). Twin flukes 4' secured as a unit 3' (p. 11, ll. 16 – 17) at the crown end of the shank constitute the fluke arrangement.

A point is shown at the forward end of each fluke 4' (Fig. 2). This constitutes the bill.

The flukes 4' are symmetrical on either side of the shank 6' (Fig. 2).

The widest part of a fluke 4' appears closer to the front than the rear. There is no explicit description relating to this feature, so it is necessary to consider what is in the drawings (Fig. 2). Even if only the rear of the fluke 4' is considered rather than the rear of the unit 3', it appears that the widest part is closer to the front.

Candidates were expected to find claim 1 novel over the stockless anchor of Fig. 2 based on the reasoning above.

Claim 2

The unit 3' is pivoted (therefore articulated) at the crown end 2' of shank 1' (p. 11, l. 18). Claim novel by dependency if claim 1 novel, not novel if claim 1 not novel.

If the construction limited the shank was to a two-part construction, or required the shank to have a curved portion, claim 2 would be independently novel.

Claim 3

Fig 2 shows flukes 4' spaced apart. Document C discusses twisting problem encountered with the CGK embodiment (p. 11, ll. 20 – 22) so it can be assumed that they are not close to the centre line.

Claim 3 would be independently novel.

Claim 4

The unit 3' is pivoted at the crown end of the shank (p. 11, l. 18), therefore not fixed.

Claim 4 would be independently novel (consistent with claim 2).

Claim 5

The fluke 4' are separate from each other so cannot extend from the centre line. As there is no part of the flukes on the centre line, there can be no central ridge. No ridge is shown or described.

Claim 5 is independently novel.

Document C Figs. 3 and 4

Claim 1

The part for mounting the flukes 101 on the crown 102 is called a stock 103 (p. 11, l. 40). The term "stock" is also applied to the lateral extension 110 (p. 12, l. 22). Candidates were expected to comment on these features. Whether or not this embodiment is stockless will depend on the particular construction chosen. The stock 103 does not appear to

correspond to the CGK meaning of the term “stock”. The extensions 110 are described as being a stabilising bar (p. 12, l. 22) and providing means for positioning the flukes to engage and enter the ground (p. 12, l. 19). It would be reasonable to interpret the extensions 110 as constituting a stock.

If the construction defines stockless as no stock of any sort, the presence of the extensions 110 means that it is not a stockless anchor. If the construction defines stockless as being no stock at the head end, the anchor is stockless despite the presence of the extensions 110.

The shank 100 has a head end 112 and a crown end 102 (p. 11, l. 39 – p. 12, l. 1). A fluke arrangement comprising flukes 101 is connected via “stock” 103 at crown end 102 (p. 11, l. 40 – p. 12, l. 1).

The flukes 101 have a point 105 (p. 12, l. 5) for contact with the sea bed (p. 12, l. 15).

The twin fluke unit has a pair of flukes 101 (p. 11, l. 40). The shank defines a centre line (p. 12, l. 16). A symmetrical arrangement is not explicit but shown in the drawings (Fig. 4), the flukes 101 are symmetric about the shank 112 and therefore about the centre line.

The flukes 101 taper to a point 105 (p.12, l. 5). As the outer edges 108 diverge from the axis of the shank (p. 12, l. 10) and the point 105 is at the front of the flukes 101, they are wider at rear than front (Figs. 3 and 4). The widest point is more than half way to rear (Fig. 4).

If stockless, claim 1 is novel. If not stockless claim 1 is not novel. Either of these conclusions would be accepted if properly supported.

Claim 2

The fluke unit is pivoted at the crown 102 (p. 11, l. 40 – p. 12, l. 1). Claim 2 would be novel by dependency if claim 1 novel. Otherwise claim 2 is not novel.

If the construction limited the shank to a two-part construction, or required the shank to have a curved portion, claim 2 would be independently novel.

Claim 3

The space between the flukes needs to be large enough that the shank can sit between them (p. 12, ll. 16 – 17). This could be argued to show that the points 105 are not on or close to the centre line.

With this argument, claim 3 is independently novel.

Alternatively, the instruction to “keep the spacing between the points 105 of the flukes as small as possible so that contact with the seabed is close to the centre line of the shank” (p.12, ll. 12 – 16) could be argued to show that the points were functionally close to the centre line.

With this argument, claim 3 is not independently novel.

Claim 4

The fluke unit is pivoted at the crown 102 therefore not fixed.

Claim 4 would be independently novel (consistent with claim 2).

Claim 5

The space between the flukes needs to be large enough that the shank can sit between them (p. 12, ll. 16 – 17). Therefore the flukes cannot extend from the centre line. The absence of fluke structure on the central line means there cannot be a central ridge.

Claim 5 is independently novel.

Inventive Step

Average Mark 8.5/20

Some candidates found that claim 1 lacked novelty. In such cases, the candidate would be expected to identify a feature that could be disputed to lead to the conclusion that the claim is novel and present inventive step arguments accordingly.

Marks were available for stating the relevant date for assessing the state of the art or noting why the prior art can be used to assess inventive step; identifying the skilled person (designer and manufacturer of anchors for all types of vessels, client's letter mentions commercial shipping and larger vessels; "ships and other floating vessels" p. 3, ll. 4 - 5), and identifying the skilled person's common general knowledge (p. 11, ll. 5 – 19).

Most candidates had little difficulty in setting out the basis for the *Pozzoli* test. The single prior art document was published well before the filing date; the patent, infringement, and prior art all fell within a well-defined field, and the CGK was explicitly described in Document C.

The *Pozzoli* test is as follows:

- *Identify the inventive concept of the claim in question or if that cannot readily be done, construe it;*
- *Identify what, if any, differences exist between the matter cited as forming part of the "state of the art" and the inventive concept of the claim or the claim as construed;*
- *Viewed without any knowledge of the alleged invention as claimed, do those differences constitute steps which would have been obvious to the person skilled in the art or do they require any degree of invention?*

No marks were awarded for merely reciting these steps, candidates needed to show that they had applied all steps of the *Pozzoli* test to each claim.

Irrespective of the actual inventive step arguments presented by a candidate for a given claim, it is important that they are consistent with the inventive step arguments for other

claims and with the position on construction and novelty. This year, marks were available to reflect such consistency of argumentation.

Candidates seemed to struggle to identify an inventive concept and to relate the obviousness argument to the identified concept. It was not sufficient to simply copy the claim language, or paraphrase it slightly. Candidates needed to demonstrate that they had properly considered the inventive concept, for example by thinking about what the claimed features add to the invention and what additional functions or benefit they achieve.

Candidates who went on to apply the EPO problem and solution approach and used the difference between the state of the art and the claim to define the inventive concept were not using the *Pozzoli* test set out above.

Claim 1

The patent presents the concept of a stockless anchor in which the flukes self-bury and progressively increase drag as anchor buries (p. 3, l. 6; p. 4, ll. 30 – 33). While other concepts are presented in the description, this appears to be the key concept consistent with claim 1.

Document C (p. 11, l. 23 onwards; Figs. 3 and 4) is preferred as the state of the art over the CGK (Fig. 2) as the embodiment and the invention are both aimed at addressing problems with the CGK design.

The difference is either absence of a stock completely or absence of a stock at head end depending on construction. Document C proposes use of stock (extensions 110) to position fluke to engage and enter ground (p. 12, ll. 19 – 26).

The presence or absence of the stock has no impact on the inventive concept (self-burying and progressive increase in drag). Document C suggests that the stock is optional (“the anchor can be provided with a stock at the after end” p. 11, l. 34), and notes the advantage of no stock at the head end (p. 12, ll. 25 – 26).

The omission of a stock would be obvious and claim 1 is not inventive.

Claim 2

The inventive concept is that the orientation of the flukes when setting can be improved (p. 4, ll. 19 – 23) by allowing the flukes to align differently to the shank.

Document C is again the state of the art for the same reasons as claim 1.

Document C discloses providing a pivot mounting for the flukes (p. 11, l. 32; p. 11, l. 40 – p. 12, l. 1) so the difference is the same as for claim 1.

While Document C proposes use of a stock/lateral extensions to position fluke to engage and enter ground (p. 12, ll. 19 – 26) and articulation of the shank appears to be for different reasons (fold flat for storage; p. 12, ll. 17 – 118), there is no purpose or effect recited in claim that allows different consideration of the pivoting articulation.

As is noted in claim 1, deletion of the lateral extensions would be obvious and claim 2 is not inventive.

If the construction of claim 2 required only a two-part shank, a non-obvious difference could be argued, especially as Document C aims to store the anchor flat. Similarly, a construction that requires a bent part in the shank might also be inventive as unobvious for similar reasons.

Claim 3

The inventive concept is to reduce twisting forces when setting (p. 4, l. 24).

Document C is again the state of the art for the same reasons as claims 1 and 2.

The difference is that the flukes are spaced apart to allow shank to sit between them (p. 12 ll. 16 – 18) such that neither point 105 is not on or close to the center line.

Document C indicates keeping spacing between the points 105 to a minimum is preferable to reduce twisting when setting (p. 12, ll. 12 – 14). Therefore, even if the feature is not present in the claim, the skilled person is still told that it is desirable and what its effect will be. The argument that it would not be obvious because reducing the space might mean that the anchor cannot fold flat is a different problem unrelated to the twisting or setting of the anchor. It is arguable that this does not make the feature unobvious.

On this basis, claim 3 is not inventive. This should apply for both dependencies.

Depending on how the concept is presented, the need to maintain the gap in the prior art structure may alternatively be argued to preclude an obvious adaptation of the type claimed. Some candidates did argue this and obtained marks accordingly.

Claim 4

The inventive concept is that the anchor with a fixed shank is structurally simpler and stronger (p. 4, ll. 39 – 40).

The state of the art is again Document C.

The difference is that the flukes are fixed with respect to the shank. In Document C, the flukes can pivot (see claim 2 above). There is nothing in Document C that led the skilled person to consider a fixed relationship. The CGK stockless anchors are also articulated. Neither Document C nor the CGK note simplicity and strength as an issue. Taken together with the desirability to fold flat for storage, there is nothing to suggest providing a fixed fluke arrangement.

On this basis, claim 4 is inventive for any valid dependency.

An alternative position is one that is consistent with claim 3 and that the difference would be obviously understood to be simpler and stronger. This is a common activity for designers of mechanical devices.

Claim 5

There is no concept identified in the patent, so it may be appropriate to argue that this is merely one specific embodiment of the invention that is effective for self-burying.

The state of the art is again Document C.

The difference is the shape of the fluke arrangement: the blades extending from the centre line and the presence of the ridge.

As with claims 3 and 4, Document C looks to allow the shank to fit between the flukes. This would not be possible with the claimed construction. There is also nothing in Document C to suggest any form of ridge in the fluke structure.

On this basis, claim 5 is inventive for all dependencies.

These are only some of the possible inventive step arguments. Credit was given for alternative positions if well supported and consistent. Where different dependencies lead to different conclusions, it was expected that these would be presented clearly.

Sufficiency

Average Mark 0.5/1

There were no sufficiency issues in the patent. There is nothing in the paper that suggests certain embodiments will not work, or that the skilled person would have any difficulty in constructing the claimed device.

Candidates should remember that sufficiency is part of the consideration of validity alongside novelty and inventive step. Consequently, sufficiency should be considered before amendment and proposed amendments should be framed in the light of a full validity assessment to resolve all validity issues relating to novelty, inventive step, and sufficiency.

Amendment

Average Mark 1/4

Credit was given for any amendment that provided a novel and inventive claim that was infringed and could find appropriate basis in the patent.

Amendments that excluded the embodiment of Figs. 1 – 3 were given fewer marks as this would open up the client to competition for its main product and potentially jeopardise its licence revenue stream.

An amendment to claim 1 to state that the blades extend from the centre line provides a claim that is arguably inventive and covers all existing embodiments and the

infringement. Basis can be found either on p. 5, l. 20 – 25, or from claim 5 with an argument that the ridge feature is separable.

If claim 3 was found to be novel and inventive, this would also provide a possible amendment.

To get full marks, the amendment and its basis needed to be clearly stated and a brief summary of why it is novel and inventive.

Advice

Average Mark 2.5/10

This year, the scenario did not anticipate litigation. Therefore, general advice on how infringement actions might proceed received few marks. Candidates should tailor their advice to what the client has asked. In this case, it is what to do with the aim of licensing the patent. Therefore, discussion of injunctions was inappropriate.

In addition to any actual amendment necessary to address validity, candidates should advise the client how best to go about amending. This advice should include:

- When to amend (before contacting Bettermore)
- Why amendment to claim 4 might not be undesirable (excludes main embodiment)
- Where to amend:
 - UK IPO – post-grant amendment under s. 27, need to state reasons, has no effect on licenced patents in other countries but might highlight weakness in patent.
 - EPO – available because the patent is an EP(UK) central limitation, relatively quick, only needs clarity and basis to be discussed, effective for licenced patents as well.

When putting Bettermore on notice of the patent, consideration needs to be given to what should be done to avoid the suggestion of unjustified threats: consider waiting until amendment completed and validity clear.

An opinion under s. 74A might be a useful negotiating tool but it gives Bettermore a chance to challenge in public. Whether this should be before or after amendment should be considered.

Given that the Bettermore product is used on oil rigs, some comment on how use on ships and other vessels may affect the position on infringement would be useful.

Few candidates appeared to give much thought to advice beyond the routine subjects presented every year.

Examiner's Report 2020
FD4 – Infringement and Validity

Discussion of Bettermore's patent was not needed and no marks were awarded for this. The patent was well outside of the EPO opposition period so no advice on this was required.