

**FD1 Advanced IP Law and Practice
FINAL Mark Scheme 2021**

Part A

Question 1

You met a client in your local coffee shop yesterday morning to discuss a draft European (EP) application. The draft relates to using a known everyday item, in a new way, to improve the froth obtained from a coffee machine.

The following day you return to the coffee shop and see the copy of the application lying on the end of the counter near the milk and sugars – the owner of the coffee shop explains that as it is marked "Important" but not "Confidential", they had not thrown it away but left it out in the hope that the owner would return to collect it. They then mentioned they thought the idea was a good one and had been trying it yesterday on their machines to see if it worked as customers ordered drinks.

Explain the current situation to your client

5 Marks

Marking scheme

- 101** Discuss whether the disclosure in the document is enabling (e.g. does the draft document clearly describe how to put the invention into effect? The document is a draft – is it complete?)
- 102** Discuss whether the disclosure in the document is confidential– (discussion of marking it as important, discuss whether there is implied confidentiality – seems unlikely)
- 103** Customers coming into the coffee shop will have seen the invention working even if they didn't read the draft on the counter - **was it enabling?**
- 104** Europe provides a period of 6 months grace during which an application can be filed but there is no **evident abuse** (or "intention to cause harm")
- 105** Other countries may have a lower burden for such disclosures or provide a grace period (e.g. USA) and protection is still likely to be possible.

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Question 2

You have recently filed a UK design application for your UK client, Ms Alten (**A**), for registration of a distinctive new design for a walking frame for elderly and disabled people. Subsequently, Ms Alten made a prototype which she demonstrated to a UK manufacturer, Senior Ltd (**S**), who she had never dealt with before, to discuss large-scale production of the walking frame.

To Ms Alten's surprise, immediately following the demonstration Senior revealed dated drawings made by their development department some years previously and showing an almost identical design, differing only in immaterial details. Senior explained that, although they believed the walking frame would eventually be a popular product, they felt at that time the market was not ready for such a distinctive design and had not pursued it, with all details of the design remaining in-house as confidential information.

Ms Alten has subsequently received a letter from Senior advising that they own the rights in the design and do not need any licence from Ms Alten to make or sell walking frames made to their design. In addition, any registration by Ms Alten resulting from the application will be invalid and she cannot make or sell walking frames made to her design without infringing Senior's rights

Prepare notes for a meeting with your client regarding UK Unregistered and Registered rights only.

10 Marks

Marking scheme

UKUDR

- 201** Both A and S have original distinctive designs entitled to UKUDR (because there was no prior contact between them)
- 202** A has supplementary UKUDR (The Designs and International Trade Marks (Amendment etc) (EU Exit) Regulations 2019)
- 203** Your client cannot stop S from making and selling their design under UKUDR
- 204** S cannot stop your client from making and selling her own design under UKUDR
- 205** Because there would be no copying

UK Registered Design

- 206** A is rightful owner of her Registered Design (reason required - because she is the author/designer)
- 207** A's design is registrable because there has been no prior publication so the design is novel
- 208** and "distinctive" design implies individual character
- 209** S has no third party rights because no continuous serious and effective preparations
- 210** S will infringe, because the designs are **not materially different** (or would not produce a **different overall impression**), if it should make or sell walking frames (according to either design)

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Question 3

On behalf of your client Mr Kidd (**K**), you filed a patent application on 15 April 2017 without a priority claim. All formalities were completed on filing, a search report was received in October 2017 and you requested substantive examination in March 2019. You have received no further communications from the UKIPO since. However, upon a routine annual inspection of the patent register, you have just discovered that the first examination report was in fact issued on 30 October 2020 with comprehensive patentability objections and a two month term for responding. You check your files and there is no record of having received the examination report.

Explain to your client the steps you advise taking.

8 Marks

Marking scheme

- 301** Deadline for responding to the exam report was 30 December 2020 **and** has been missed.
- 302** Deadline could have been extended retrospectively as of right until **28 February 2021 (or end of February)**, **but** this has also been missed.
- 303** Contact Examiner **as soon as possible** (or words to that effect) and request a discretionary extension explaining why the deadline was missed.
- 304** Check whether there was a **procedural irregularity by the Patent Office**/the examination report was properly sent. (If there was an error, then the deadline doesn't exist.)
- 305** Prepare and file a response **as soon as possible**, (including a request for a hearing if they intend to refuse the application)
- 306** Compliance deadline is **later of** 15 October 2021 and 30 October 2021, i.e. **30 October 2021**, which is imminent
- 307** (Should) request a 2 month extension of the compliance period - **Form and fee required**
- 308** If required to address comprehensive patentability objections, a further (2 month) extension of compliance period is possible at the Examiner's discretion

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Question 4

Your new UK based client asks for advice regarding its European patent application **EP1** filed on 1 April 2017 claiming priority from a UK patent application **GB1** filed on 1 April 2016. The GB1 has lapsed irrevocably. GB1 and EP1 both disclose and claim product "Block". An intention to grant communication (under Rule 71(3) EPC) was issued by the European Patent Office in October 2019. However, after paying the grant fee and filing German and French translated claims, your client decided that, at the time, it had no wish to proceed with validations. Your client is contacting you to say that circumstances have changed: its latest version of product Block is selling well in the UK and it now wishes to have UK patent protection.

Advise your client on the situation.

9 Marks

Marking scheme

- 401** Check whether the EP patent has granted (as grant fee paid and translated claims filed)
- 402** Check whether the 4th year European maintenance fee was due prior to grant date **and** was paid
- 403** If not paid, then is no longer possible to pay it because no due care
- 404** If mention of grant of the European patent in the European Patent Bulletin was on or before 1 April 2020, then grant would have happened before the 4th year renewal fee was due to EPO
- 405** UK validation not required due to London agreement
- 406** If EP1 has granted, first UK renewal fee due on **30 April 2021 (or end of April)**, but presumably not been paid
- 407** Grace period until **31 October 2021 (or end of month)** – **advise client to pay renewal fee with surcharge**
- 408** Anyone can pay the renewal fee (therefore, you don't have to appoint yourself as address for service)
- 409** Check allowed/granted claims of EP1 actually cover latest version of product Block

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Question 5

A new client, **Abacus (A)**, contacts you today:

'We are a small, new UK company, founded in June this year by **Nathalie (N)**, and will shortly begin manufacturing and selling camping stoves for the UK domestic market. Our new stoves incorporate a very efficient burner that requires less fuel – great for the environment and lighter to carry! Nathalie devised the general burner herself, and whilst it worked really well, she faced challenges and made modifications to achieve this in a compact, transportable unit suitable for a camping stove.

Nathalie filed a UK priority application "GB1" on 7 May 2020 with claims to the general burner and the modifications for a camping stove. On 7 May 2021 she filed a further UK application "GB2", claiming priority to GB1 and with the same content. GB1 has lapsed.

Unfortunately, the search report for GB2 cites a PCT application "PCT1" in the name of the large steel making conglomerate **Zeus (Z)**. No other prior art has been identified. PCT1 discloses the same general burner as ours. Fortunately, PCT1 makes no mention of compact units; rather it focuses on large scale embodiments related to blast furnaces.

We now realise the potential significance of our general burner design, and even the compact units could have a much wider range of uses than originally envisaged.

PCT1 published on 20 May 2021, disclosing and claiming the general burner design and blast furnace embodiments. PCT1 was filed on 17 December 2020 in the name of Zeus, claiming priority from an identical earlier US provisional patent application "US1", filed in the name of the sole inventor on 17 December 2019.

Explain the current situation to Abacus and propose options moving forward

10 Marks

Marking scheme

Right to work the invention

- 501** Check if Abacus already has rights to the invention **and** if not then transfer/license from Nathalie to the Company
- 502** If PCT1 results in granted patents, then Abacus does not have FTO/will infringe in granted territories (if PCT1 has valid/correct priority claim)

PCT1

- 503** PCT1 will only be entitled to priority if there has been an assignment from the sole inventor to Zeus at the time of filing PCT1. (Edwards Lifesciences vs Cook Biotech))
- 504** The effective date of PCT1 is currently unknown (could be Dec 19 or Dec 20)

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- 505** We cannot solve this - **discussion required** - e.g. because the existence of any assignment may not become public knowledge until such time as the applicant needs to rely on priority entitlement. (The burden is on Zeus to show that PCT1 is entitled to its priority claim – e.g. there was an assignment in place at the time of filing.)

Validity

- 506** PCT1 would only be citable under S2(3) if it enters **GB or EP (both required for mark)** (and if PCT1 is entitled to priority)
- 507** (i) if PCT1 is citeable, then only claims to compact unit would be novel (and inventive)
- 508** (ii) if PCT1 is not citeable, claims to general burner would be novel (and inventive)

Additional filings

- 509** Opportunity exists to pursue non-convention filings directed to the compact unit in additional states – **must be completed before publication of GB2 - 7 November 2021**
- 510** PCT1 would be full prior art for additional filings, but the fact that Nathalie ‘faced challenges and made modifications’ could support inventive step over PCT1

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Question 6

Last month you filed a patent application GB1 at the UKIPO in Japanese directed towards protective boots for dogs and cats. GB1 claims priority from a Japanese application, JP1, filed on 1 October 2020. All fees were paid on filing and the priority document was filed. Today, you receive notification from the UKIPO, dated 11th October, that a translation is required. On review of the case, you notice that all references to the sizes of the boots have been written in metres instead of centimetres in both JP1 and GB1 and it is clear that the sizes referred to would not provide suitable shoe sizes for the pets described.

Prepare notes for a meeting with your client

8 marks

Marking Scheme

- 601** The deadline for filing a translation of the application is **11 December 2021 OR 2 months from notification**; (one or the other required for mark)
- 602** Otherwise the comptroller may refuse the application;
- 603** The mistake in the unit of measurement is an **error that cannot be fixed by amendment** (because there is no basis);
- 604** Argue that it is immediately clear that there is an obvious error – **because** sizes referred to would not provide suitable shoe sizes for the pets described...
- 605** ...and that it is immediately evident that nothing else could have been intended in the original specification **because** e.g. centimetres requires only the unit of measurement to change; whereas any other unit of measurement will also require a change in the number as well as the unit
- 606** Also, centimetres match the sizes of animal paws, which should be supported with evidence (balance of probabilities)
- 607** File a new application that is correct, as soon as possible, whilst pursuing the current application with request for correction of the error (in order to preserve the earliest date in case of intervening prior art) (no need to pay fees on new application until fate of original filing is decided)
- 608** A discussion of the consequence if you cannot, or do not, make the correction (e.g. Client might obtain a patent that is completely unsuitable for the target animals/not commercially relevant; will need to continue with the new application (fees, costs etc)).

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Part B

Question 7

A new client comes to you for help.

“I work in the electronics industry and make mobile phone chargers. I have a patent application that I filed myself last year to protect my inventions. I filed a GB application (**GB1**) with claims to X and to Z. I have recently been talking to a Taiwanese company (**T**) who I have told I will soon have worldwide patent protection and they are interested to manufacture and sell both X and Z for me all over the world. Although X was my first idea I think Z is a lot better and may be really successful.

I have recently seen a published PCT application (**PCT1**) and I was initially really worried because the published PCT application exactly describes and claims X. I'm not as worried now though as I can see that the PCT1 application seems to be from an American company so I assume they can't stop me from getting my idea granted in the UK and other countries around the world as that wouldn't be fair and anyway my GB patent will protect my idea? I was going to write to the US company to see if they want to buy my chargers after they are manufactured by (T)”

You check and find the following:

- Your client's application was filed on 20th August 2020 with no claim to priority and all formalities were completed on filing. No other filings were made by your client.
- The PCT1 application was filed on 20th February 2020 with claims to X claiming priority from a US provisional application filed on 20th February 2019, which has identical content. There appears to be no complete US application from the provisional. PCT1 was published on 25th August 2020 and has not yet entered national/regional phase anywhere.
- A prior art search revealed no other relevant documents.

Prepare notes for a meeting.

25 Marks

Marking scheme

Current situation

- 701** Effective date for X in PCT1 is 20 Feb 2019
- 702** (Earliest effective) date for X in GB1 is 20 August 2020 (as there is no priority claim)
- 703** (Earliest effective) date for Z in client's GB application is 20 August 2020 (as there is no priority claim)
- 704** PCT1 is citable as novelty only prior art against GB1 for X if PCT1 enters the national phase in **GB or EP (GB)**... (which it hasn't done yet)
- 705** GB national phase was due **20 September 2021, which has passed**
- 706** Can enter GB national phase late within 2 months, so still time - **20 November 2021**
- 707** Can enter EP regional phase 2 months **from notification of loss of rights**
- 708** If PCT1 does not enter national phase, then GB1 will be patentable for X in GB **because** no further prior art documents were cited
- 709** The US national phase entry was due **20 August 21** ...this has passed but late entry may be possible (check with US agent)
- 710** Z in GB1 is novel - no prior disclosure
- 711** X in PCT1 is not citeable against Z in UK for inventive step, so Z is patentable in UK
- 712** Client has no protection outside GB **because**... (it is a territorial, national only right.)

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Immediate Actions

- 713** Advise client against writing to US company **because** (reason required, e.g. it may put them on notice, they may enter national phase and cause an FTO issue for your client; wait and hope interest in their case is finished; risk of threats etc)
- 714** Set up a watch/monitor for patent publications by the US company (late national phase entry, other patent applications etc)

Protection for client

UK

- 715** Continue with GB1 to protect X and Z in UK
- 716** Can file a PCT claiming priority to GB1 **by 20 October 2021** with a request for restoration of the right to priority (late filing of priority claim is not correct because PCT was not filed within the 12 month priority period)
- 717** But will need to show failure was **Unintentional** in the UK AND **All Due Care** in the EP
- 718** Discussion of these standards **with reasoning** whichever way – (e.g. client believed they had worldwide protection – possibly difficult to show they intended to file a PCT? Can client's ignorance be considered unintentional? – seems unlikely)
- 719** PCT will not protect client's products being manufactured/sold in Taiwan as Taiwan is not a member of the PCT
- 720** Can a Taiwanese national case be filed? **Check with local agent**
- 721** File PCT and TW (with or without priority claim depending on conclusion from 718, but preferably with because there may still be a chance that the outcome will be favourable)
- 722** Manage your client's expectations as there is a risk you will get nothing from the new filings (sensible statement e.g. (depending on earlier conclusion) around uncertainty due to whether and where PCT1 has, or may yet, enter the national phase; which countries, if any, will accept the client's priority claim; PCT1 is full prior art and novelty destroying for X and relevant for inventive step for Z (if priority claim invalid), significant cost impact if priority claim fails).
- 723** Recent discussions with T are potential prior art. Check for CDA.
- 724** Consider countries with grace period if no CDA.
- 725** File applications **ASAP**

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Question 8

Ms Anderson (**A**), who runs **Xand (X)** -, comes to you to explain a current problem.

"Xand is a small UK engineering company that designs and manufactures car washes. Earlier this year, we designed and manufactured an improved type of portable car wash. This portable design can be moved between sites, such as garages and supermarket car parks.

I set up a UK company **YouClean (Y)** jointly with **Mr Bell (B)** to sell the portable car wash as a service in the UK. So, Xand would make the portable car wash and YouClean would take the portable car washes to sites as a rentable service for clients. In the end, we only made a single portable car wash, which was sold from Xand to YouClean, before Mr Bell and I fell out and I left the management of YouClean, leaving it entirely to Mr Bell. YouClean and Mr Bell are still providing the single car wash as a service. We did not make any profit on the single sale of the car wash because of all of the technical challenges that we had to overcome in making the first model.

Earlier this week, we received a letter from **ZingKlean (Z)**, addressed to Xand informing us of its granted GB patent, which was published before we started working on our new portable car wash, showing something very similar to our car wash. ZingKlean has said it wants to take Xand to court for infringement of its patent for both making and using the portable car wash. What do I do? I do not think the features in ZingKlean's patent claim are particularly clever. Everyone knew how to do what is claimed in the patent before the patent was filed.

In addition, I heard yesterday, from another person in my industry, that Mr Bell has filed a patent application to an additional improvement to the car wash that we may have made jointly, although I do not have full details about exactly what he has filed yet. I/we came up with several developments while working together that we never patented.

Xand has recently developed an idea for how to make a new car wash that we believe is outside the claims of the ZingKlean patent and may even be better than ZingKlean's design. We will start manufacturing and selling this next week"

You review ZingKlean's patent assets and find a granted GB patent and a corresponding pending EP patent application. Both the GB patent and EP application have identical claims and descriptions. Both are live and renewal fees are up to date.

Prepare notes for a meeting with Ms A.

25 Marks

Marking scheme

Validity of company Z's patent (granted GB)

- 801** Find out from Ms A why everyone knew how to do what is claimed in the granted patent.
- 802** Carry out search for further evidence that could be prejudicial to patentability
- 803** If there is relevant prior art, for GB, could file for revocation, request patent office opinion on GB patent validity and infringement, etc (at least one sensible suggestion)

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- 804 For EP, file third party observations on EP application, consider opposition material (at least one sensible suggestion)
- 805 You will need to be successful in validity attack in **both territories** (needs to include both GB and EP).

Infringement

- 806 Review ZingKlean's patent claims for infringement by the original portable car wash
- 807 Set up watch on EP to monitor the prosecution..
- 808 ...appreciating that the scope of the claims of the EP application may change in light of new prior art for the original product and this could have a bearing on the validity of the granted GB patent.
- 809 If the original portable car wash falls within the scope of the claim, Xand has manufactured and sold (disposed of) a car wash according to the patent and would infringe (using or importing not relevant)
- 810 Xand is not **using** the car wash and so cannot be pursued for infringement of use.
- 811 No profit made on sale of portable car wash and so only financial risk to client would be (limited) **damages** (due to single sale only)
- 812 Injunction not relevant as no longer making
- 813 Innocent infringement? Did Xand know about the patent? Or a discussion of whether it could reasonably have been known? (may not be expected to as a small company)
- 814 In any case, the direct impact of a finding of infringement against client is minimal.
- 815 Company YouClean is also an infringer so we may be a contributory infringer via supply for use by YouClean
- 816 Check any contractual ties between Xand and YouClean that might imply joint tortfeasance
- 817 No unjustified threat because Xand is a manufacturer of the **original portable carwash**.

Ownership of patent application filed by Mr B:

- 818 Ask Ms A what **evidence OR details** she may have of what she developed together with Mr B, when she worked with him and that might be the subject of Mr B's application.
- 819 Consider the other inventions that were developed (by Mr B and Ms A, or Ms A alone whilst still at YouClean) **and** consider inventorship/ownership for possible future filings
- 820 Investigate relationship between A, B, X and Y and determine any contractual/employment ties **because** we need to establish who owns what
- 821 Can only request inspection of unpublished application if there has been a threat of infringement – there hasn't so have to wait until publication
- 822 Set up a watch/caveat for publication because we need to see what Mr B has claimed

New car wash

- 823 Check whether Xand's new car wash design actually infringes ZingKlean's patent claims?
- 824 File application for new car wash **quickly/ before next week because** of planned sale.
- 825 ZingKlean's EP can still be broadened (amendments or divisionals) which could cover the new car wash, if it doesn't already

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Question 9

Your client, BABS Ltd, manufactures novelty Easter items between December and March every year.

It devised a mould for producing novelty chocolate items in 2015, which improved durability in transit, resulting in less breakage.

Soon after, BABS set up a small-scale working prototype in its garage and developed a detailed business plan for expansion to large scale factory production including sourcing a site in GB for manufacture of the chocolate items with a view to selling in US and JP. However, due to a funding shortage, BABS put the plan to expand on hold. In 2015 it started to produce the items for Easter 2015 to sell at local craft fairs and continued to do this for a few months every year.

Continued efforts to secure funding resulted in the receipt of a large investment in December 2017 and BABS went into full scale production as planned.

BABS now contacts you today because it has just become aware of an on-line advertising video, produced by SAX Ltd - a company that makes novelty Christmas items. The video was set in SAX's UK factory and posted online in August 2020, which was promoting a new Christmas product – a luxury chocolate Faberge style egg, decorated in a Christmas theme that can be used as a bauble. The video inadvertently showed an egg mould in the background. Your client realised SAX was using moulds exactly the same as its moulds and wants to stop SAX using what your client believes is its proprietary technology. SAX's video stated it manufactures the items between June and November each year and then closes down its manufacturing sites once the Christmas period is over. Your client is worried that SAX will eventually break into the Easter market.

You look into the situation and find the following:

- Client BABS's GB published patent, **GB1**, filed in October 2016, now lapsed.
- Client BABS's EP patent **EP1**, filed in February 2017. EP1 validly claims priority from GB1. EP1 granted 2 March 2021 and in force in a number of countries including UK
 - EP1 describes and claims the mould.
 - On review of the file history, it appears that EP1 was deemed withdrawn in February 2020 and was successfully re-established September 2020.
- A published PCT application, **PCT1**, filed by a company called **MINE** in January 2017 validly claiming priority from a US provisional application, **US1**, filed January 2016.
 - PCT1 describes and claims the mould and a process for producing eggs using the mould.
 - No prior art is cited

Your client further informs you that it contacted SAX and drew attention to its granted patent.

Prepare notes for the meeting with your client ignoring design matters

25 marks

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Mark scheme

EP1

- 901** EP1 is enforceable in UK against SAX's mould **because** it has been granted
- 902** EP1 is vulnerable to opposition until **2 December 2021**
- 903** Client's disclosure of their patent to SAX may have alerted them to file an opposition
- 904** No threats if only drawing attention to the patent

PCT1

- 905** PCT1 is earlier than the priority date of EP1 and would have published after the priority date of EP1 and is, therefore, potentially novelty only prior art against EP1 (if enters EP regional phase)
- 906** PCT1 should have entered the national phase after **31 months** for EP or **30 months** for US & JP from priority date, (i.e. July/August 2018) **which have passed**
- 907** Check whether the national phase was entered in EP/GB, JP and US, and **FTO** in these jurisdictions.

Client's (BABS) activities wrt PCT1

- 908** PCT1 is not enforceable against client until grant of any relevant national/regional phase entry (EP(GB), US or JP)
- 909** Prior user rights should be considered because client started activity in garage in 2015, i.e. **before PCT1 priority date**
- 910** **Is it continuous?** Discussion around seasonal nature – so long as you do it every year it doesn't matter if there are breaks in activity
- 911** **What was being done continuously?** Discussion about the scale of the garage operation compared with the large scale factory operation – is this continuing "what the client was doing before"? ("continue" suggests that significant expansion or divergence from the original act is not allowed)
- 912** **Serious and effective preparations for expansion?**
Discussion required - (Funding was applied for in Dec 2015 so before PCT1 priority date - clear intentions? sourcing of manufacturing sites ...etc)
- 913** However, there was a 2 year wait for funding – does this impact on serious and effective preparations? Discussion required ("continuous efforts to secure funding...")
- 914** There is a risk that BAB's prior user rights may be limited to local craft fair levels

SAX's activities wrt EP1

- 915** Reestablishment of EP1 will result in the potential for third party rights to accrue between the loss of rights and **publication** of the mention of re-establishment
- 916** Discussion as to whether SAX's advertising video is evidence of serious and effective preparations undertaken within this period.
- 917** Discussion about when SAX's other preparative activities and mould production took place (and whether there was bad faith)
- 918** Discussion about whether BABS can enforce EP1 because of the discussed timespan regarding SAX's activities
- 919** If necessary, we could consider licensing /extending SAX's activities within the Christmas market.
- 920** The prior user rights won't extend to Easter market.

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Validity considerations

- 921** Discussion on whether the mould in the garage was visible to the public; if so, was it an enabling disclosure.
- 922** This (and any other disclosures) may be invalidating for claims to the mould in both EP1 **and** PCT1
- 923** The eggs have been publicly disclosed by selling at craft fairs. Discuss whether the public disclosure could be relevant for patentability of the mould invention in EP1 (e.g. mould lines, impressions, etc)
- 924** Eggs made by the client, using the same process as claimed in PCT1 are novelty destroying for the direct product of the process of PCT1...
- 925** ...therefore, MINE cannot obtain valid patents resulting from PCT1 that could be used to prevent BABS from selling the eggs.