

## **Introduction**

This report is intended to give an overview of candidates' performance in the 2025 FD4 examination. It should be considered in conjunction with the question paper and the published mark scheme.

Almost all answers included a meaningful attempt at all sections of the question paper. As always with FD4, time management is important; there was a lot to cover to produce a full answer, but as in recent years there was no clear indication that the paper caused unreasonable time pressure for candidates. Answers that failed to achieve a pass mark did so because the substance of the answers did not meet the necessary standard rather than because large portions of the paper were not properly considered or omitted.

The question paper this year related to insulation panels for insulating floors, walls or ceiling and the technology appeared to be understood by the vast majority of candidates.

Candidates who adopted a reasonable and justified construction and applied it consistently to their analysis of infringement and novelty generally scored well. Those who provided only a limited justification of their construction points or reverted to the claim language alone when analysing infringement and novelty did poorly.

The mark scheme indicates where marks could be awarded and provides guidance on points that should attract marks. It does not set out prescriptively the only points for which marks can be awarded (especially for later sections). It is not an exemplar answer. To be awarded high marks, points made in an answer needed to be (a) clear, (b) reasonable in view of the source material, and (c) fully justified.

Candidates who are not awarded marks for particular claim features in the construction section are nevertheless able to score well on the novelty and infringement sections by applying their adopted construction properly and consistently. Candidates are not penalised in later sections for not covering a relevant point in the construction section, nor are they penalised in later sections for having adopted an overly broad or narrow construction of a particular claim feature.

Candidates should take note of the number of marks available for each section of the question paper, as indicated at the bottom of the assessment task. This year, more marks were awarded for the Infringement section as candidates were expected to discuss the different infringing acts with respect to the different infringement parties. As a result, fewer marks were awarded for the Advice section. The point seems to have been overlooked by many candidates, and few candidates achieved the majority of the 7 marks at the end of the Infringement section.

Candidates are again reminded of Instruction 4 on the question paper front sheet: "Do not attempt to change the font style, font size, font colour, line spacing or any other pre-set formatting". Some candidates adjusted the font sizing and/or page orientation of their script, which led to formatting issues in the copies used for marking. Whilst best efforts were made to mark all scripts submitted, changing these formatting settings can lead to parts of answers being lost. It is, however, acknowledged that the font style and/or font

size can change when candidates copy and paste wording from the question paper into their answer scripts.

The pass rate for this year's examination was higher than the last couple of years, but in line with the pass rate from 2022.

The mean marks for all sections can be found below the feedback on individual questions.

## Task

### Construction

Most candidates appeared to appreciate the principles of construing patent claims according to UK law and sought to adopt a purposive construction of the claim features rather than a purely literal interpretation of the words of the claim.

Most candidates were able to identify passages of the patent that provided useful guidance for what the skilled person would have understood the patentee to be using each integer of the claims to mean. However, some candidates did no more than this when seeking to justify their conclusion. The best answers included well-reasoned explanations as to why the content of relevant description passages meant that certain interpretations would be adopted.

There were numerous features in the claims where it was possible to construe the claim feature one of two ways. For example, in Claim 1 is the core faced with metal foil on both sides? Page 5 L21-22 says one or both sides, Page 6 L18-20 says the entirety of both. In such situations, marks were awarded for a providing a reasoned argument rather than for the conclusion reached.

The number of marks available for each claim integer is provided in the mark scheme, but individual marks were not allocated to particular points of construction but rather for any relevant point covered in an answer.

As in previous years, a full mark was available for explaining fully the possible combinations of claims permitted by the indicated dependencies. Many candidates missed out on this by providing only a cursory discussion that did not unambiguously identify all possible claim combinations.

#### **Claim 1**

Claim 1 was generally well construed. The majority of candidates identified the definition of "rigid" and "conform" given in the description. Fewer candidates, however, construed what a panel was and what its purpose was. For example, candidates were expected to acknowledge that the panel was not limited to fitting in a wall, and could equally be used in ceilings or on floors.

Very few candidates discussed whether the side portions should always be deformable or just during installation. The compressibility of the side portions facilitates installation, so would it be acceptable for the side portions to set rigid once the panel was installed?

Few candidates discussed which “sides” of the central portion the side portions should be fitted to. Many candidates implied that it was obvious that the “each side” meant two opposing sides rather than any two or more sides of the central panel.

Most candidates recognised that metal foil includes aluminium, but few candidates linked the “polyisocyanurate core faced with a metal foil” back to the known conventional panels described in the background of the patent.

#### **Claim 2**

Claim 2 presented greater difficulty. Whilst most candidates identified the relevant passage of the description where polyurethane foam was described, few candidates discussed whether the form of the foam was important. Surprisingly few candidates acknowledged that the “comprise” wording allowed for other materials to be present in the side pockets in addition to the polyurethane foam.

#### **Claim 3**

Most candidates identified the error in the claim that “sides” meant the “side portions” but fewer candidates provided any explanation as to why they had reached this conclusion. To be awarded the full mark, candidate were expected to provide a brief reasoning (for example, this is the only technically sensible meaning within the context of the claims).

Whilst most candidates identified that the percentage of each material was by weight, very few candidates discussed whether other materials could be included in the side portions or whether the amounts of polyurethane foam and material wool were required to sum to 100%.

It was expected that candidates would construe this claim to mean that the sides included 40-50% polyurethane foam, with the remainder being mineral wool, but other reasoned conclusions were awarded marks.

#### **Claim 4**

Claim 4 was generally well construed. Candidates were expected to discuss whether the extension of the metal foil was an integral extension (i.e. the same piece of foil covering the central portion and the side panels) or whether a separate piece of foil could be used in addition to the foil facing the central portion. Either conclusion was accepted, with the mark awarded for the candidate’s reasoning.

#### **Claim 5**

Claim 5 appeared innocuous, but caused a lot of problems for candidates. Numerous candidates suggested that because the description states cutting the insulation with hand tools at thicknesses above 10cm becomes more difficult, that means it is impossible or there is no benefit from the panel being more than 10cm thick, despite the fact that the same paragraph states that it is preferable for the panel to be more than 10cm thick. Although specialist technical knowledge is not required in FD4, a technical benefit of a thicker panel, such as providing more insulation or better conforming to thicker wall cavities, can be easily derived.

Given the description teaches thicknesses of over 10cm are preferable (albeit difficult to cut), it is not plausible that a “correction” to directly invert the meaning of the claim would be accepted. Candidates tempted to argue in construction that up is down or left is right should consider whether they need to carefully re-read the specification again.

#### **Claim 6**

Claim 6 was poorly construed, with many candidates simply considering it a method claim with little to no additional features compared to Claim 1.

Very few candidates addressed the ambiguity in the dependency status of the claim; does the “panel of claims 1-5” mean the panel of any one of claims 1-5 or a panel with all of the features of claims 1-5? Whilst both conclusions were acceptable, very few candidates discussed this point.

Equally, very few candidates construed “installing” in the preamble and in particular what the panel is installed (in)to.

Candidates generally acknowledged the cutting step as being possible with a saw, but very candidates discussed which sections of the panel were being cut or what the “desired” length was.

Most candidates, however, identified that “conforming” can be done by pushing the panel into place, or using a tool to compress a side portion before allowing it to expand.

## **Infringement**

Seven of the marks were available for general considerations around infringing acts and not tied to any particular claim. Few candidates simply omitted any consideration of the parties and their activities. This was particularly important when analysing the claims, as many of the claim feature were only present in the “installed” form of the panel (i.e. after the foam was added) rather than in the “as-sold condition”. Whilst marks were awarded for mapping the features of the EdgeFlex product onto the claims, marks were available for acknowledging this distinction, and therefore in what form or state the EdgeFlex product needed to be in order to infringe a claim.

Those candidates who did consider the form of the panel when performing their infringement analysis scored well. They also generally considered indirect infringement and provided an adequate demonstration of the double territoriality requirement. Such candidates also noted the private/non-commercial defence for DIY users. Those candidates who did not consider the form of the panel generally did not score well and their oversight resulted in them failing to consider the more nuanced points like indirect infringement and private use.

The claim-by-claim analysis was generally handled well, although some candidates reverted to assessing infringement with reference to the claim wording rather than their construction. This was unlikely to be awarded marks.

Equally, candidates are reminded that in both the Infringement and Novelty sections, they are expected to provide a reasoned analysis of whether a feature is present or not. Providing a page and line reference is rarely sufficient.

Very few candidates considered the relevance of Actavis, but those who did demonstrated a knowledge of the relevant questions and applied them well to the facts in suit.

## **Novelty**

Although only one additional document was provided (Document C), candidates were expected to appreciate that there were multiple embodiments present in Document C; the two of note were “Bob the brickie’s” and “Fatima’s”. Candidates approached this in a variety of ways, with differing levels of success.

Some candidates treated Document C as a single embodiment, whilst others acknowledged there were multiple embodiments before discussing the disclosure of “Doc C” in the Novelty and Inventiveness sections. These candidates scored poorly for the Novelty section.

Some candidates only performed a detailed analysis of Fatima’s embodiment in Document C, then did a detailed analysis of the conventional PIR panel from the background of the patent. Marks were awarded for analysis of the latter, but not all of the marks allocated to Bob the brickie’s embodiment were achievable since the discussion of the expanding foam was not well handled.

The claim-by-claim analysis was generally handled well, although candidates are again reminded that providing a page and line reference is rarely sufficient. Whilst this might be the mark scheme layout, it should not be used as a template (exemplar answer) for how to tackle the Novelty and Infringement sections.

## **Inventive Step**

As in previous examinations, a proportion of the marks were available for the set-up steps of the Windsurfing/Pozzoli approach which do not require analysis of the claims, such as identifying the person skilled in the art and their common general knowledge.

For each claim, a mark was available for identifying the inventive concept of the claim. This is not only an essential part of the Windsurfing/Pozzoli approach, but can also be done regardless of conclusion with regards to novelty for the claim. Marks were then awarded for identifying the differences (or lack therefore) between the state of the art and alleged invention, allowing candidates to be awarded marks even if they had found the claim to lack novelty. Too often candidates faced with this scenario did not perform any inventiveness assessment, stating that the claim lacks novelty and therefore is obvious. Whilst this is correct, within the context of the FD4 assessment, candidates are

still expected to demonstrate their understanding of the assessment of inventive step as applied by the UK courts.

In general, the Inventive Step section was well attempted. Most candidates made a reasonable attempt at assessing inventive step using the Windsurfing/Pozzoli approach, although many candidates slipped into an EPO-style problem-and-solution analysis resulting in a hybrid approach.

As previously stated, numerous candidates indicated that simply because the background states that cutting the insulation with hand tools at thicknesses above 10cm becomes more difficult, Claim 5 has no inventive concept or advantage over the prior art. Such an approach was not awarded marks.

## **Sufficiency**

2 marks were available for the Sufficiency section this year. The first mark was awarded for spotting the potential sufficiency issue with the working range of polyurethane in the side portions. The second mark was awarded for a reasoned discussion as to whether this was an issue of sufficiency or part of routine experimentation to find a working range. As always, the conclusion reached was not important: the mark was awarded for the reasoning and justification.

Most candidates spotted the potential sufficiency issue relating to the amount of polyurethane needed to produce a working embodiment, but very few provided any argument or justification around whether this required amendment or could be achieved through routine experimentation.

## **Amendment**

2 marks were available for the amendment section. The first mark was available for any proposed amendment which would improve the sufficiency, novelty and/or inventiveness position of the patent.

Some candidates did not propose amendments to the patent because, in the scenario of the paper, their client was not the patent proprietor. Nonetheless, it is always vital to consider how the patent proprietor could improve their position regardless of which party you represent in the scenario of the paper.

The second mark was available for a proposed amendment that would capture infringement.

Few candidates spotted the potential amendment to specify that the depth of the side panels does not increase when conforming; such an amendment would appear to be novel, inventive and capture infringement.

## Examiner's Report 2025

### FD4 – Infringement and Validity

### Advice

In general, candidates scored relatively poorly in the Advice section. Often candidates wrote generic advice, without apply the facts of the question to the situation. Like the preceding sections, marks are awarded for providing reasoned and justified advice using the facts of the situation.

Most candidates identified that renewal fees were not yet due and that the email from ScrewStore is a threat of bringing proceedings that is not actionable since Build-It UK is a manufacturer.

Fewer candidates discussed whether a preliminary injunction is likely to be granted, and the discussion of this point often lacked substance and justification.

Marks were also available for any other relevant advice provided even if they were not in the mark scheme

### Mean Marks by Section

| FD4             | Construction | Infringe-ment | Novelty | Inventive Step | Sufficiency | Amendment | Advice | Total |
|-----------------|--------------|---------------|---------|----------------|-------------|-----------|--------|-------|
| Marks available | 23           | 25            | 20      | 21             | 2           | 2         | 7      | 100   |
| Mean mark       | 13.0         | 12.8          | 11.0    | 9.9            | 0.6         | 0.6       | 2.6    | 50.6  |