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Disciplinary
Board of Appeal

Chambre de recours statuan
en matière disciplinaire

Case Number: D 0001/06

D E C I S I O N
of the Disciplinary Board of Appeal
of 15 January 2007

Appellant: N.N.

Decision under appeal: Decision of the Examining Board for the
European Qualifying Examination dated
28 September 2005.

Composition of the Board:

Chairman: C. Holtz
Members: B. Günzel
C. Onn



Summary of Facts and Submissions

- I. By letter dated 4 October 2005 the appellant was informed of the decision of the Examination Board of 28 September 2005 that the appellant was not successful in the European Qualifying Examination ("EQE") held from 8 to 10 March 2005.
- II. The appellant's performance had been marked as follows:
A: -
B: -
C: 66
D: 42
- III. The appellant appealed the decision of the Examination Board in respect of the marking of his Paper D, by letter received on 9 November 2005. The appeal fee was paid on the same day. The statement setting out the grounds of appeal was received on 5 December 2005.
- IV. The Examination Board decided not to rectify its decision and remitted the appeal to the Disciplinary Board of Appeal.
- V. The appellant requested review of the examiner's assessment of Paper D Part II.
- VI. The appellant's submissions can be summarised as follows:

The Possible Solution stated that EP1 could not be used as an Article 54(3) EPC document against later filed PCT1 because it made no mention of the recycled scrap material of PCT1. EP1 disclosed a process for producing

a windmill wing having a core made of foamed plastic material. PCT1 disclosed a process for producing a windmill wing made of foamed recycled plastic. However, in view of the EPC case law, in particular decision T 205/83, the novelty of products produced by a modified process could be established only by them having different properties. This was however, not the case in Paper D Part II because the definition in EP1 that the plastic material was a foamed one did not make the said material physically or chemically different from the foamed recycled plastic disclosed in PCT1 and, according to the case law, the difference in colour mentioned in Paper D was not a distinguishing feature. The same held true for the mention in PCT1 that recycled plastic is very cheap material in comparison with virgin plastic. No other differences between virgin and recycled plastic having being mentioned in Paper DII the candidate was justified in believing that foamed virgin plastic and foamed recycled plastic were identical materials and not particular or specific embodiments of a generic term "foamed plastics".

Therefore, the Possible Solution on which the marking of Paper D Part II was based was in clear conflict with the preparation and knowledge required from the candidate in Article 12, particularly 12(a)(iv), REE, i.e. the knowledge of landmark decisions of the boards of appeals' case law, and violated Article 16 REE.

VII. By letter received on 11 January 2006 the appellant requested accelerated examination of the appeal considering that a favourable decision would avoid attending the next EQE on 8 March 2006.

VIII. By communication of 1 February 2006 the Board informed the appellant that after provisional consideration his appeal did not appear to be likely to be successful, that a communication setting out the Board's provisional opinion would be issued as soon as possible but there appeared however, to be no realistic possibility for the Board to hand down the decision before the date set for the sitting of Paper D.

By communication of 20 February 2006 the Board informed the appellant of its preliminary, non-binding opinion.

IX. A reply thereto was filed by letter received on 21 April 2006.

Reasons for the Decision

1. The grounds of appeal are directed against the presumed negative assessment by the examiners of the appellant's answer to the question as to whether PCT1 was anticipated by EP1 pursuant to Article 54(3) EPC, in the context of question 1 of Paper DII.

2. For the answers to question 1 a maximum overall number of 19 marks could be achieved. The appellant was awarded 2,5 and 2,0 marks by each of the examiners, respectively.

Although the issue addressed by the appellant is only one of several issues which were to be dealt with by the candidates in the context of question 1 of Paper DII, in view of the extremely low overall number of marks awarded by the examiners for the appellant's answers to question 1 it can be assumed that this low

result was - at least to a considerable extent - due to a negative assessment of the appellant's answer to the above question.

3. According to the established jurisprudence of the Disciplinary Board of Appeal (following D 1/92, OJ EPO 1993, 357) it is not within the competence of the Board to reconsider the evaluation of a candidate's performance on its merits. Only serious and obvious mistakes, on which the contested decision is based and which can be established without reopening the entire marking procedure, can be considered (see D 23/97 of 16 March 1998, point 5. of the reasons). Only if the text of the paper was misleading or confusing (D 13/02 of 11 November 2002, point 4. of the reasons) or if there was a mistake in the so-called Possible Solution on which the assessment of the candidate's answer was based (D 6/04 of 30 August 2004, point 1. of the reasons) could such a mistake be seen as a violation of the REE or higher ranking law or principles.
4. The appellant's submission that he was correct in proposing the solution he actually proposed in his answer can thus only be considered by the Board by understanding it in the sense that the text of Paper DII was misleading and the answer given as the correct answer in the Possible Solution was legally incorrect. Neither of these has, however, been demonstrated by the appellant. On the contrary, the appellant's submissions are based on several incorrect assumptions.
5. According to page 1, in the middle, of Paper D "EP1 describes a process for manufacturing a windmill wing having a core made of foamed plastic material fully

encapsulated by a smooth, hard shell. In this way a lighter and less expensive wing is obtainable as compared to prior art wings. The claims are directed to both the process and to the wing". According to page 4 of the paper "PCT1 describes a process for manufacturing a windmill wing from foamed, recycled plastics. The foamed core is fully encapsulated by a smooth hard shell,....In PCT1 the essence of the invention is seen in the use of recycled plastic, which is a very cheap material in comparison with virgin plastic. Recycled plastic is easily distinguishable from virgin plastic in that it is multi-coloured. The claims of PCT1 are directed to the process and to the resulting wing."

The Possible Solution for Paper D, Part II, indicates (Compendium 2005, page 80) in its answer to question 1 that "EP1, though filed earlier, cannot successfully be used as an Article 54(3) EPC document because it does not mention recycled scrap material".

Thus, novelty for PCT1 is acknowledged in the Possible solution according to the principle that the general does not anticipate the specific, the general term "foamed plastic material" encompassing virgin and recycled foamed plastic, as is set out in Paper DII and was as such acknowledged by the appellant.

6. First, it is to be noted that the text of Paper DII does not state that EP1 discloses the use of virgin plastic for the foamed core of the windmill wing. DII just says that EP1 describes a manufacturing process for a windmill wing said windmill wing having a core of foamed plastic. No more details are given in EP1

according to the text of Paper D as regards the nature of the foamed plastic.

Second, the text of Paper DII does not state that foamed virgin plastic and foamed recycled plastic "only" differ in their colour. It solely states that recycled plastic can be easily distinguished from virgin plastic in that it is multi-coloured which information is relevant in the context of the issue of prior use (see the Possible Solution for question 1).

Third, according to the text of Paper D, what is described in Paper D is not a process for foaming the core but a process for manufacturing a windmill wing using a foamed core as one of the - starting - elements of the windmill wing to be produced. No information is given in EP1 according to the text of Paper D, nor in the remaining text of Paper D, about the processes for foaming plastic or virgin plastic or recycled plastic. The foamed cores, how ever produced, are just described as one of the elements of which the windmill wings are/have to be composed.

7. There is therefore nothing in the text of Paper D leading the candidate to conclude that apart from their difference in colour foamed virgin plastic and foamed recycled plastic were identical material and the whole argumentation of the appellant as to the case law with regard to the novelty of products defined by their process of manufacture and as to which properties of a chemical product are or may be suitable to distinguish it from a known product is beside the point in the present context.

Moreover, the text of DII clearly indicates that foamed plastic does exist both as foamed virgin plastic and foamed recycled plastic. Logically, it derives therefrom that the term "foamed plastic" is one covering two specific embodiments and is, thus, a more general term as compared with foamed virgin plastic or foamed recycled plastic individually. That conclusion does not require any technical assessment and it is even irrelevant therefor, whether or not virgin and recycled plastic differ in their properties. Even if they did not so differ, in the absence of virgin plastic being disclosed in EP1 the general term foamed plastic used in EP1 would not anticipate the specific foamed recycled plastic disclosed in PCT1, as has therefore correctly been stated in the Possible Solution.

8. In this context it is also of importance that Paper DII is a legal Paper. According to Article 13(3)(d) REE the task of candidates in this paper is the legal assessment of a specific situation. Paper D is identical for all candidates irrespective of their technical background. According to I. 3. of the Instructions to candidates for preparing their answers candidates should accept the facts as given in the paper and limit themselves to these facts. They are not to use any special knowledge they may have of the field of the invention.

Thus, the appellant's criticism of Paper DII and its Possible Solution is unjustified. No violation of the REE or any higher ranking law or principle can be established.

Accordingly, the appeal has to be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

P. Martorana

C. Holtz