Examiner's comments on candidates' performance in QE 2004 Paper C

On the whole this paper was not very well answered. A failing of many candidates was to make assertions concerning interpretation, infringement and validity without giving any supporting reasons. Unsupported assertions receive few marks. What the examiners want to know is what arguments support the assertions and, where appropriate, what arguments can be made against the assertion and which arguments are likely to prevail.

Most candidates did not properly understand the threats provisions of Section 77. Very few seemed to know that mere notification of the existence of the patent was not a threat. There was also some misunderstanding of the application and legal effect of the innocent infringement provisions of Section 69.

This paper, like the others making up the qualifying examination, is intended to indicate whether the candidate is fit to be a patent agent. Many candidates having analysed the patent for infringement and validity seemed not to recognise that they were being asked to advise a client who wanted to use his patent to restrain the competition. To that end what the client wants to know is can arguments be advanced for infringement by the competition and are those arguments likely to succeed in court. Similarly the client wants to know if arguments attacking the validity of the patent are likely to succeed or not. The client is unlikely to be interested in amendments proposed to the patent if they result in the patent not being infringed. Frequently the advice, or lack of advice, given to the client left the client without any indication as to what he could do or what the outcome of proceedings might be. Clients consult patent agents on these matters to be advised as to what the situation is, what the options are and what decisions the court is like to reach. No marks were given for suggestions by some candidates that the client should consult a lawyer

Some candidates proposed amending the patent-in-suit in such a way that it was no longer infringed and then went on to recommend to the client that proceedings for infringement could be brought against the competition. This kind of advice would be disastrous for the client and those candidates who suggested it could not be seen as fit to be patent agents.