



Case Number: D 0006/16

D E C I S I O N
of the Disciplinary Board of Appeal
of 11 November 2016

Appellant: N.N.

Decision under appeal: Decision of the Examination Board for the pre-examination of the European Qualifying Examination dated 31 March 2016.

Composition of the Board:

Chairman: C.-P. Brandt
Members: G. Weiss
B. van Wezenbeek

Summary of Facts and Submissions

- I. The appeal contests the decision of the Examination Board for the pre-examination for the European qualifying examination 2016, as communicated to the appellant by registered letter with advice of delivery dated 31 March 2016, which was that she had failed the pre-examination. On her answer sheet she was awarded 65 points and marked FAIL, 70 points being needed for a PASS.

- II. By letter of 2 May 2016, received at the European Patent Office on the same day, the appellant filed notice of appeal against the decision and at the same time stated her grounds. The appeal fee was likewise transferred on 2 May 2016. By letter dated 10 May 2016 the appellant provided amendments to the notice of appeal.

- III. By letter of 15 June 2016 the Examination Secretariat submitted the appeal to the Disciplinary Board of Appeal, indicating that the Examination Board had decided not to allow the appeal. The following comments of the Examination Board regarding statement 18.4 were included: "In view of the fact that it is a general practice to select as the closest prior art in first line the document fulfilling the same function as the invention and in view of the fact that claim II.3 is a dependent claim of claim II.1 and II.2 for which D2 was regarded as the closest prior art, making it quite unusual - at the latest at the level of the pre-examination - to consider another document such as D3 as the closest prior art, even if it was admitted that that [sic] this document would constitute another but

less successful springboard, D2 was to be regarded as the closest prior art as indicated in the Examiner's report."

- IV. The appeal contests the marking of statements 12.1, 12.3, 13.3, 15.3, 17.1, 18.2 and 18.4 of the pre-examination.
- V. At the appellant's request, oral proceedings were scheduled for 26 August 2016 in a summons dated 29 July 2016. In an annex to the summons, the board informed the appellant of its provisional opinion on the appeal, indicating that it currently had little chance of success. The following point IX was added to the summons:

"IX. The summons to oral proceedings (in line with the auxiliary request) on 26 August 2016 is issued with less than the two months' notice provided for in Rule 115(1) EPC (Article 24(4) REE and Article 13(2) of the Regulation on discipline for professional representatives), to comply with the request for accelerated processing submitted by letter of 14 July 2016. If however no written agreement to the shorter notice period has been received at the latest **one week** after delivery of this summons (Rule 115(1) EPC), the oral proceedings will be cancelled and no new date fixed."

No written agreement was submitted after delivery of the summons with the shorter notice period, and consequently, as announced, the scheduled oral proceedings were cancelled and no new date was fixed.

VI. By letter of 29 August 2016 the appellant submitted comments on the summons.

VII. The arguments in support of the appeal may be summarised as follows:
Re 12.1, 12.3 and 13.3

The examiners of the Examination Committee based their evaluation on a technically incorrect premise that a straining section in all the three embodiments comprises perforations that are all of the same size. An objective reading of the third embodiment has led to the conclusion that a straining section of the third embodiment is different than the straining sections of the first and second embodiments, mainly because "a straining section" is used for it when first mentioned, implying that this is not "the straining section" that was already described in the first and second embodiments. Thus, "a straining section" does not seem to refer to the straining sections from the first and the second embodiments, the feature that the perforations are all of the same size cannot be directly and unambiguously derived from the description and the perforations in the third embodiment may have different sizes, which would result in the answer to statements 12.1, 12.3 and 13.3 being FALSE.

Re 15.3

The Examiner's report appears only to consider whether the mathematical relationship between the size of a perforation and the size of the opening is clear. Claim I.13 is not clear because it does not comprise an essential feature of the invention (se Guidelines F-IV, 4.5.1 and 4.5.2) - an opening located on the side wall

of the container is missing. Claim I.13, being dependent on claims I.1 and I.10, reads: "A system comprising a container and a lid for closing the container, wherein the lid has at least two perforations of the same size, wherein the lid further comprises an opening for pouring, wherein the size of the opening of the lid is larger than the size of one of the at least two perforations." Claim I.13 does not comprise a technical feature that would provide both a cooking position and a straining position. Since the essence of the present invention is a saucepan that provides for switching between a cooking position and a straining position by rotating the lid while keeping the lid on the container, it appears that the opening located on the side wall of the container is indeed an essential technical feature without which the invention would never work.

In addition, a skirt is another essential feature that is not defined in any of claims I.1, I.10 or I.13. The skirt is an essential feature of the invention, as it provides the cooking and straining positions depending on which of its parts (a solid part or the straining section) are in contact with the opening placed on the side wall of the container. The skirt is, however, mentioned only in claim I.2 for the first time. That said, neither claim I.10 nor claim I.13 is dependent on claim I.2, thus rendering claim I.13 unclear. Finally claim I.13 does not even have support in the description. None of the embodiments describe such a saucepan, as all of them have the mentioned opening for pouring on the side wall of the container. Therefore, this claim can be objected to under both Articles 83 and 84 EPC. The answer to statement 15.3 should

therefore be FALSE, contrary to the answer in the Examiner' report.

Re 17.1

Firstly, the answer in the Examiner's report that "maintain the lid close to the container" is not clear due to the word "close". "Close" is a relative term, thus rendering unclear what is meant by saying that the lid is maintained close to the container. Use of the word "close" is nowhere to be found in the description to describe the lid in relation to the container and, without any support in the description, "close to the container" could be interpreted as "1cm above the container", "beside the container", "touching the side wall of the container", etc.

Secondly, in contrast to what is stated in the Examiner's report, the technical effect is not explicitly disclosed in paragraphs [008] and [017] in the application. There is an essential difference between holding/keeping the lid on the container ([008], [017] respectively) and maintaining the lid close the container, as in statement 17.1. Having the lid placed on the container necessarily requires a direct contact between the two, whereas this is not the case when the lid is close to the container. Having the lid placed on the container is a prerequisite for the invention to work, whereas this is clearly not the case if the lid is placed close to the container. Thirdly, Rules 10(5) and 22(3) of the IPREE clearly provide that candidates must limit themselves to the facts given in the pre-examination paper. Therefore, the candidates could not be expected to make an assumption about the technical effect underlying statement 17.1, as this

effect is not given in the paper. This practice can also be confirmed by looking at all the pre-examinations from the previous years, see question 20.2 from the 2014 pre-examination and question 18 from the 2015 pre-examination.

Re 18.2

The answer in the Examiner's report is based on a technically incorrect premise, such that D2 was considered by the Examination Committee to be the closest prior art. Moreover, D3 may be argued to be the closest prior art, as D3 needs fewer structural changes to arrive at what is claimed in claim II.2. It may also be argued that both D2 and D3 can be considered to be the closest prior art and that this type of question is not appropriate in the pre-examination, where the answers should be given in a simple TRUE/FALSE format.

Compared to claim II.2, even though D2 does provide two positions - a straining and a cooking position, these two positions are not obtained by moving the lid around the vertical axis; instead, the two positions are obtained by "pivoting by an angle α from the container" [004]. Compared to claim II.2, D3 discloses indeed only a position for straining liquid by placing the annular straining portion of the lid in communication with the spout. Therefore, it can be argued that D2 and D3 have the same number of relevant technical features as claimed in claim II.2, which implies that both D2 and D3 can be considered to be the closest prior art. Secondly, when considering which of D2 and D3 needs a minimum of structural and functional modifications to arrive at what is claimed in claim

II.2, it can be argued that D3 is the most promising starting point.

Re 18.4

There appears to be a serious and obvious mistake in the Examiner's report because D2 does not disclose the container comprising an opening for pouring through which the liquid is being strained, based on which D2 was considered by the examiners of the Examination Committee to be the closest prior art. Moreover, D3 is the closest prior art, as D3 needs fewer structural changes to arrive at what is claimed in claim II.3, while at the same time it has the same number of relevant technical features in common with claimed matter of II.3 as D2. It can be easily deduced from the description of D2 and D3 that both are directed to a similar purpose and that they belong to the same or a closely related technical field.

Compared to claim II.3, a relevant technical feature that D2 does not disclose is "the container comprising an opening for pouring, the liquid being strained through said opening for pouring". The saucepan in D2 does have an opening for pouring ("an upper opening 8" [001]), but this opening is not used for straining liquid. Thus, the skirt (perforations of the skirt) is used to strain liquid contents and not the opening of the container. Therefore, the liquid is not strained "through said opening for pouring" in D2. On the other hand, D3 clearly discloses a container having a spout 7, through which the liquid content can be strained out of the container. Compared to claim II.3, D3 discloses only a position for straining liquid by placing the annular straining portion of the lid in communication

with the spout 8 [002]. Therefore, it can be argued that D2 and D3 have the same number of relevant technical features as claimed in claim II.3, which implies that both D2 and D3 can be considered to be the closest prior art. Secondly, in considering which of D2 and D3 needs a minimum of structural and functional modifications to arrive to what is claimed in claim II.3, it can be argued that D2 is not the most promising starting point and that the skilled person would thus have to make non-trivial modifications to arrive at what is claimed in II.3.

It can then be concluded that D3 is the closest prior art and, consequently, the answer to statement 18.4 is FALSE. This is contrary to the TRUE answer in the Examiner's report, which considers D2 to be the closest prior art.

VIII. The appellant requested the following:

- reversal of the contested decision, with the mark PASS being awarded for the pre-examination for the European qualifying examination 2016;
- reimbursement of the appeal fee;
- extension of the deadline for applying for the pre-examination for the European qualifying examination 2017 if the result of the appeal is not known by 2 June 2016.

Reasons for the Decision

1. The appeal is admissible.

2. In accordance with Article 24(1) REE and the established jurisprudence of the Disciplinary Board of Appeal (following D 1/92, OJ EPO 1993, 357), decisions of the Examination Board may in principle only be reviewed for the purposes of establishing that they do not infringe the REE, the provisions relating to its application, or higher-ranking law. It is not the function of the board to reconsider the entire examination procedure on the merits. Only if the appellant can show that the contested decision is based on serious and obvious mistakes can the board take this into account. The alleged mistake must be so obvious that it can be established without reopening the entire marking procedure. This is for instance the case if an examiner is found to have based his evaluation and hence the contested decision on a technically or legally incorrect premise (D 13/02 of 11 November 2002); what matters in that respect is the meaning that common sense would ascribe to the actual wording of the question.

3. The appellant's submissions regarding the alleged mistakes would require an in-depth review of the content of the examination material. In order to establish whether the alleged mistakes actually occurred, the board in fact would have to review if not all, then at least a substantial part of the examination paper and the corresponding part of Examiner's Report. The board would have to perform a detailed, partly technical analysis of the facts

presented, e.g. of the description and the drawings of the client's European patent application, of the statements as such or of the claims and the state of the art mentioned in the statements. Therefore, the subject of the review requested in the present appeal appears to be the "correct" interpretation of the contested statements for the assessment in the examination paper, and equally the examination of the corresponding solutions in the Examiner's report as to their correctness. Thus, an examination of the lines of argument put forward by the appellant would result in an exercise which obviously could not be carried out without a value judgment. In the board's view, the assessment of claim features on the one hand and their comparison with technical details of the disclosed invention and the prior art documents on the other hand would be such a value judgment, which inevitably would have to be based on at least a significant portion of the facts presented in the examination paper.

4. However, in accordance with the consistent jurisprudence of the Disciplinary Board of Appeal, value judgments are not, in principle, subject to judicial review (see Case Law of the Boards of Appeal, 8th Edition 2016, Chapter V.2.6.3). The board considers that this settled jurisprudence of the Disciplinary Boards of Appeal is also applicable to appeals concerning the pre-examination. This is so even though the marking of the papers, the latter being understood as the according of the marks on the basis of the answers, is hardly ever in dispute, given the simple marking scheme of a multiple choice test where the answers are merely "True" or "False", so that their evaluation is straightforward and objective. However,

the review requested in the present case is clearly not directed to the marking itself, but to the content of the pre-examination as presented to the candidates. As explained above, deciding on the issues raised by the appellant (the application as filed and interpretation of the terms therein, analysis of claims and their scope in relation to novelty, extended subject-matter and choice of closest prior art) would result in an exercise which appears to be well beyond the powers of the board, as this would in fact be tantamount to reviewing the substantive content of the examination material.

Re 12-1, 12-3, 13-3:

Statement 12.1: "A saucepan as shown in FIG. 3 falls within the scope of claim I.4."

Statement 12.3: "A saucepan as shown in FIG. 3 falls within the scope of claim 1.8."

Statement 13.3: "A saucepan as shown in FIG. 3 falls within the scope of claim I.13."

Claim I.1: "A system comprising a container and a lid for closing the container, wherein the lid has at least two perforations of the same size."

Claim I.2: "A system according to claim I.1, wherein the lid comprises a skirt, said perforations being arranged in the skirt."

Claim I.3: "A system according to claim I.1 or I.2, comprising securing means for securing the lid to the container."

Claim I.4: "A system according to claim I.3, wherein the securing means are of the bayonet type, wherein the lid has L-shaped slots interlocking with pegs located

on the inner surface of the side wall of the container."

Claim I.5: "A system according to claim I.1 or I.2, wherein the securing means comprise protruding elements on the lid adapted for being engaged with corresponding elements on the container."

Claim I.6: "A system according to any of the preceding claims, wherein the container comprises an opening for pouring."

Claim I.8: "A system according to claim I. 6, wherein the opening is circular."

Claim I.10: "A system according to claim I.1, wherein the lid further comprises an opening for pouring."

Claim I.13: "A system according to claim I.10, wherein the size of the opening of the lid is larger than the size of one of the at least two perforations."

5. According to the Examiner's report the answers to statements 12.1 and 12.3 were "True" because the embodiment of the saucepan shown in Fig. 3 has a securing means of the bayonet type ([015]) and the embodiment shown in Fig. 3 also has an upper opening 70 which is circular and through which the contents can be poured, see [017]. Concerning statement 13.3, the answer is also "True" because the saucepan as shown in Fig. 3 has the opening 55 in the lid being larger than the size of one of the at least two perforations and being a pouring opening ([014]).

6. In her written submission the appellant essentially maintained that the indefinite article before "straining section 45" ("a straining section") in paragraph [014] describing the third embodiment had misled her into concluding "that 'a straining section'

[did] not seem to refer to the straining sections from the first and the second embodiments and that the straining section in the third embodiment [might] have perforations of different size". As indicated in the summons, the board is still unable to identify an obvious mistake "that would result in the exam paper having to be deemed inconsistently or incomprehensibly formulated". The description of the first embodiment first states, in paragraph [005], second sentence, that "the skirt 40 also comprises a straining section 45". The next sentences describe "the straining section 45". The description of the second embodiment refers to "the straining section 45", while the description of the third embodiment says that "the skirt 40 of the lid 15 comprises a straining section 45". The board fails to see any reason for confusion. The presence of the number 45 after the words "straining section" means that the reasonable reader has no cause to think that the "straining section" can be any other than the straining section of the first and second embodiments. In fact, the sentence in paragraph [014] together with the other paragraphs can only be understood as having the implied qualification "... as defined in the first and second embodiments". According to Article 1(1) in conjunction with Article 1(7) REE, the purpose of the pre-examination is to establish whether a candidate is qualified to practise as a professional representative before the EPO. On that basis it seems doubtful that it can be assumed that it should have been the candidate's task to identify a difference between the embodiments purely from the use of the indefinite article in paragraph [014] before the words "straining section". If that had been the case, it would have been clear and unmistakable from the text of the description that the

straining section was differently designed. Even Figure 3 on its own provides no evidence of that. The appellant's arguments as to the terms "openings 55" and "skirt 40" in the different embodiments and shapes are neither conclusive nor convincing, as these words and the associated numbers are to be read solely in conjunction with the description and the corresponding figures, and are perfectly comprehensible. Consequently, the board's conclusion has to be that the Examination Board's assessment of statements 12.1, 12.3 and 13.3 as "True" is not obviously mistaken.

Re 15-3:

Statement 15.3:

"The subject-matter of claim 1.13 is clear."

Claim I.1: "A system comprising a container and a lid for closing the container, wherein the lid has at least two perforations of the same size."

Claim I.10: "A system according to claim I.1, wherein the lid further comprises an opening for pouring."

Claim I.13: "A system according to claim I.10, wherein the size of the opening of the lid is larger than the size of one of the at least two perforations."

7. According to the Examiner's report the answer to this statement is "True", because the mathematical relationship between the two sizes (the size of a perforation and the size of the opening) is clear (Guidelines, F-IV, 4.14). It was noted that both the perforations and the opening are features of the claimed entity.
8. The board does not share the appellant's view that a careful analysis of claim I.13 and its dependent claims

shows that features essential for carrying out the invention (Guidelines F-IV, 4.5) are missing, resulting directly in a lack of clarity in claim I.13. As regards the specific argument that neither claim I.13 nor any of the dependent claims defined the opening of the lid and that it was therefore unclear whether the lid had a circular opening (35) or a spout (30), the board can only counter that the circular opening or the spout is located on the container whereas the claimed opening of the lid is located on the skirt of the lid. Consequently, as already indicated in the summons, the board is unable to deem this a serious error or an obvious mistake. This conclusion was not been objected to or commented on by the appellant.

9. The board similarly cannot accept the argument that the absence of other essential features (e.g. "a skirt is another essential feature that is not defined in any of the claims I.1, I.10 or I.13") makes the claim unclear. According to Rule 22(3) IPREE candidates are to accept the facts given in the examination paper and limit themselves to those facts. That means that claims I.1, I.10 and I.13, forming the subject-matter and basis of statement 15.3, are to be taken as they are. Therefore, the wording of claim I.13 "...wherein the size of the opening of the lid is larger than the size of one of the at least two perforations" had to be assessed and examined as to whether it complies with the requirement of clarity pursuant to Article 84 EPC, as requested in statement 15.3. Since primarily the wording of the claims has to be considered when examining clarity, the arguments that "claim I.13 does not comprise a technical feature that would provide both a cooking position and a straining position" and that "in

addition, a skirt is another essential feature that is not defined in any of claims I.1, I.10 or I.13" have to be left out of consideration when answering this statement. The arguments brought forward in the statement of grounds of appeal appear to relate to sufficiency to disclosure (Article 83 EPC) rather than to clarity (Article 84 EPC). Under these circumstances, the board is unable to deem the answer "True" given for question 15.3 in the Examiner's report a serious error or obviously mistaken.

10. It is considered that a pan according to the invention is well defined by claims I.1, I.10 and I.13, as several embodiments could be envisaged that do not need further essential features. From the wording of the question and the claims it is clear that the pivotal element for which clarity should be considered is the relationship between the size of the opening of the lid and the size of the perforation. In this respect too, claims and questions in the EQE should be read with a mind willing to understand. As any lawyer can confirm, the meaning of a word or a sentence is never 100% clear; it can always be questioned. However, it is the purpose of the EQE and of the pre-examination to test whether a candidate is fit to practise, which means that candidates also need to take account of the inherent ambiguity of words and the context of the facts presented. If a question makes perfect sense and it is clear what answer is expected, a candidate cannot, as the appellant has done, rely on exceptions to the rule or deliberately or artificially interpret the question in such a way as to show that a different answer would be applicable in some specific instances.

Re 17-1:

Statement 17.1:

"A technical effect of the lid being movable around a vertical axis into the two positions defined in claim II.2 is to maintain the lid close to the container while moving the lid from the cooking position to the straining position."

Claim II.1: "A saucepan comprising a container and a lid, wherein the lid is provided with at least one perforation for straining liquid, the saucepan further comprising at least a holding means for holding the lid to the container when straining liquid."

Claim II.2: "A saucepan according to claim II.1, wherein the lid is movable around a vertical axis into at least two positions, one position for straining liquid through said at least one perforation and one position where the liquid cannot be strained through the at least one perforation."

11. According to the Examiner's report the answer is "True", because this technical effect is explicitly disclosed in the application [008] and [009].

12. In her submission the appellant explained at length that that in her view the lid in the application was always disclosed as being "on" the container, never "close to" the container, so that the answer to the statement should have been "False". As already indicated in the summons, the board agrees with the appellant to the extent that, contrary to what the Examiner's report says, the technical effect is not explicitly disclosed in the application. Yet, equally, there is no basis in the application documents for expressions such as "fixed connection" or "permanent"

or "direct contact" between lid and container. The appellant's view that "close to" is an unclear term may be correct if the term is viewed in isolation and not in relation to a specific situation. However, statement 17.1 containing the term "close to" relates here to the patent application in question. The object of the application, and in particular the purpose of the underlying invention, was to allow liquid to be strained after cooking without the need to remove the lid, which instead can stay on the container in the straining position. On that basis, according to a properly objective interpretation, the term "close to" should have been construed in accordance with the aim of not having to remove the lid, such that in the present context the term acquires a sufficiently clear meaning, even if - as the appellant rightly argues - the term "close to" is not disclosed literally and explicitly in the application. The substance of the disclosure of a patent specification or application is not limited to explicit or literal statements, but also includes implicitly disclosed information which a reader skilled in the art would necessarily infer from the overall context.

13. In the light of the appellant's arguments, the board wishes to stress that in accordance with statement 17.1 what matters is the feature "while moving the lid from the cooking position to the straining position", and not whether the lid is "in the straining position" on the container. The board already pointed out in the summons that, for example, in the embodiment with a bayonet joint as the securing means it does not seem to be ruled out that the lid, while being rotated, briefly has no "fixed or permanent connection" to the container

and thus is not "on" but in fact literally "close to" the container. Be that as it may, the sense of the term "close to", which is in any case conveyed by the subject-matter of the invention, implies that statement 17.1 - in the light of the meaning of the actual wording of the question, subject to the restrictions as regards the use of the word "explicitly" specified in the Examiner's report - can by no means be deemed misleading or unclear. Candidates can arrive at this understanding of the term "close to" by merely reading and evaluating the underlying application documents, without having to use any specialist knowledge of their own within the meaning of Rule 22(3), third sentence, IPREE.

14. While the appellant, citing the 2014 and 2015 pre-examinations, argues that the statements made there about a technical effect appear literally in the description of the invention, this does not justify her conclusion that there is a general rule that in future pre-examinations, too, a technical effect can be assumed only if the formulation of a statement literally matches the corresponding passage in the description. She does not argue that there is a legal basis for a single examination to have such a binding effect, and none is apparent. On the contrary: every examination must be considered and evaluated on its own, with its own different technical and legal context. The conclusion is that, in view of the meaning of the actual wording of the question, the Examination Board's assessment of statement 17.1 as "True" does not in any event constitute an obvious mistake, even in the light of the present appeal.

Re 18-2 and 18-4:

Statements 18.2 and 18.4:

Statement 18.2: "... D2 is the closest prior art with regard to claim II.2."

Statement 18.4: "... D2 is the closest prior art with regard to claim II.3."

Claim II.1: "A saucepan comprising a container and a lid, wherein the lid is provided with at least one perforation for straining liquid, the saucepan further comprising at least a holding means for holding the lid to the container when straining liquid."

Claim II.2: "A saucepan according to claim II.1, wherein the lid is movable around a vertical axis into at least two positions, one position for straining liquid through said at least one perforation and one position where the liquid cannot be strained through the at least one perforation."

Claim II.3: "A saucepan according to claim II.2, the lid comprising a cylindrical skirt, said at least one perforation being arranged in said skirt, the container comprising an opening for pouring, the liquid being strained through said opening for pouring."

15. According to the Examiner's report, statement 18.2 is "True", because D2 is the closest prior art since it discloses a saucepan with a lid being positionable in two positions, one of them allowing straining. Statement 18.4 is also "True", because claim II.3 encompasses all the features of claims II.1 and II.2. In addition to a lid being positionable in two positions, one of them allowing straining, D2 discloses that the lid comprises a cylindrical skirt, at least one perforation arranged in the skirt, and

that the container comprises an opening for pouring (upper opening 8), the liquid being strained through said opening for pouring ([004] of D2). It was noted that D3 is not the closest prior art, since it always strains in each rotational position, i.e. there are no two different positions of the lid. After further review, even in the light of the submission presented in the letter of 29 August 2016, the board still sees no reason to change its assessment of the appeal in that respect from its provisional opinion in the summons, where it took the following view:

"Re 18.2 and 18.4:

As regards the argument that, in comparison with D2, D3 requires the fewest changes to arrive at the claimed invention and is therefore to be regarded as the closest prior art, in technical terms this may well be a defensible view. Conversely, though, in keeping with consistent board of appeal rulings, the line taken in the model solution - that D2 is the closest prior art because the lid disclosed there is positionable in two positions, one of them allowing straining - can at any rate not be deemed a serious error or obviously mistaken. The grounds of appeal devote five pages to statements 18.2 and 18.4, and that alone is an argument against any such "obviousness". Furthermore, identification of the "correct" closest prior art would entail a technical review based on the application documents and at least documents D2 and D3, and under Article 24(1) REE that does not fall within the competence of the Disciplinary Board of Appeal." Hence the board's finding, in the light of the appeal, has to be that the Examination Board's assessment of statements 18.2 and 18.4 as "True" does not constitute an obvious mistake.

16. In this context the board would once more like to stress that it is pointless to refer back to previous years' pre-examination papers in support of the appeal, because their scenarios and questions are different, and in any case they have no legally binding effect.

17. Moreover, the board takes the following stance on the Examination Board's comments on statement 18.4 (see point III above) which were contained in the Examination Secretariat's letter of 15 June 2016. Under Article 24(3) REE (second sentence), if - as in the present case - the appeal is not allowed, the Examination Board must remit it to the Disciplinary Board of Appeal and, as with a remittal under Article 109 EPC, must do so without including comments or grounds. If, however, the Examination Board saw reason to comment, it is difficult to understand why it referred only to statement 18.4 and did not also comment on the other statements contested in the appeal. What is also completely unclear is the purpose of the assertion - between dashes - that it would be quite unusual "at the latest at the level of the pre-examination" to select a different document (D3 instead of D2). If that was intended to mean that in the multiple-choice pre-examination there have to be different requirements as to the expected legal and technical scope of the examination, this could have been taken into account in the decision on whether to allow the appeal. As things stand, however, the cited parenthetical insertion raises questions and doubts that cannot be assessed by the Disciplinary Board or the appellant.

18. As the appeal fails, there is no legal basis for reimbursement of the appeal fee under Article 24(4), third sentence REE, as requested by the appellant. The appellant, in consultation with the Examination Secretariat, continues to be authorised to enrol for the 2017 EQE pre-examination outside the normal time limits.

Remark

19. The Disciplinary Board takes the present appeal as an opportunity to address some general remarks to the Examination Board. The substance of this appeal makes it clear that in a multiple-choice examination such as the EQE pre-examination it is essential to ensure that the questions to be answered and the statements to be evaluated are formulated clearly and unambiguously. In particular, this means avoiding terms and formulations which at the outset induce candidates to adopt an interpretation which ultimately to some extent leads them away from the answer and technical and/or legal assessment actually sought by the test setters and causes them to arrive at conclusions which are not in keeping with the object and purpose of the pre-examination. Given that pre-examination candidates cannot give any reasons for a "True" or "False" answer, and that no acceptable alternative solution to a question can be considered, it is crucial to formulate statements in such a way that clearly only one "True" or "False" answer is possible and "correct" in the circumstances. The Examination Board is requested to give due consideration to these remarks in setting future examination papers.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

P. Martorana

C.-P. Brandt