Bubendorf, 2 December 2016

Well, I’ll go to the foot of our stairs…

This is what a Liverpudlian acquaintance used to say as an expression of complete surprise. I think this is justified in this case:

<https://www.gov.uk/government/news/uk-signals-green-light-to-unified-patent-court-agreement>

Most of us, myself included, had written off the EUP/UPC as being finished – I thought that ratification of the agreement would be close to the bottom of the UK Government’s to-do list in the aftermath of Brexit. And, after all, why participate in an agreement of a body that you’d just decided to leave? But, surprise, surprise, it suddenly looks as if 2017 is on again. Question is, what will be the position of an EU court in a country that is no longer an EU member (remember that London will host the very important chemistry/pharma Central Division court)? And will the UK start off as part of the EUP and then as of final Brexit suddenly be no longer covered, or will some fudge be found somehow to keep the UK within the system? Certainly, without the UK, the EU’s second biggest economy, the EUP would be considerably devalued, and in the case of Givaudan not worth considering. (Admittedly it wasn’t worth considering even with the UK in the EU). Interesting times ahead.

The business of poisonous priorities, the concept that a patent application could be invalidated by its own priority document, has vexed EPO practitioners ever since the idea was first mooted in Malcolm Lawrence’s EPI article in 2010. Well, some EPO practitioners; some took an over-cautious approach, while others (myself included) strongly suspected that it was a case of much ado about nothing. Some Boards of Appeal nodded vaguely approvingly, while never actually deciding on the question, while others nodded in the opposite direction, so it ended up before the Enlarged Board of Appeal. The decision G1/15 has not yet appeared, but the Enlarged Board’s ruling has:

*Under the EPC, entitlement to partial priority may not be refused for a claim encompassing alternative subject-matter by virtue of one or more generic expressions or otherwise (generic "OR"-claim) provided that said alternative subject-matter has been disclosed for the first time, directly, or at least implicitly, unambiguously and in an enabling manner in the priority document. No other substantive conditions or limitations apply in this respect.*

A generic "OR"-claim is one that covers multiple alternatives without spelling them out. If such a claim can have partial priority to an earlier application that disclosed one of those alternatives, then the implication is that the publication of the earlier (priority) application cannot deprive the later application of novelty under Article 54(3) EPC. This would appear to counter the extreme reading of G2/98, which started the whole thing in the first place:

*… these two priorities may also be claimed for a claim directed to C, if the feature C, either in the form of a generic term or formula, or otherwise, encompasses feature A as well as feature B. The use of a generic term or formula in a claim for which multiple priorities are claimed in accordance with Article 88(2), second sentence, EPC is perfectly acceptable under Articles 87(1) and 88(3) EPC, provided that it gives rise to the claiming of a limited number of clearly defined alternative subject-matters*

The full decision will need to be seen, of course, but perhaps life can now return to normal.

I’ve just got involved with a new sort of patent attorney firm:

<http://www.k2ip.com/>

I found about it via an old Australian contact, Jeff Sweetman, now in England. I’ve never actually met him, but we initially got in contact through the old *Hi-Fi Choice* Forum (a common interest). He had been working for a UK firm, but then found this one. It is an offshoot of Keltie, a firm founded by Kiwi David Keltie, who sadly passed away at the beginning of this year, and it is headquartered in rather nice offices at 1 London Bridge, appropriately for me just upstream from HMS *Belfast*. Instead of the usual patent attorney structure, it employs independent consultants and backs them up with Keltie’s services. It certainly seems impressively organised and run. I spent a morning there, desperately trying to get my head around its IT system (not easy for someone whose computer facility extends to turning the thing on and off unaided). Anyway, it’ll be something different – and it’ll provide the perfect excuse for the occasional visit to London.

Trouble at t’mill continues. Benny the Batt, the EPO’s autocratic Kaiser, is apparently continuing his crusade against the SUEPO (the staff union of the EPO) on the one hand and the all-too-independent Boards of Appeal on the other. Some SUEPO officials have been sacked or downgraded. And he proposed moving the Boards out of the main Isar building facing the Deutsches Museum to unsuitable premises in a suburb of Munich, whose only distinguishing feature is that it houses Germany’s largest mental hospital (is there a connection there somewhere?). At one point, he proposed moving them to Vienna. What next? And what is the Administrative Council doing about it apart from rolling over on command (when it’s supposed to be doing the commanding)? All very bizarre.

Speaking of things European and unsuitable premises, there has been much fuss over UK premises for the EQE. The 2016 EQEs were held in Ashton Gate Stadium, Bristol, where conditions were so bad that extra marks were given to candidates who ~~survived~~ did the EQE there (reportedly the temperature never rose above 13° and candidates were wearing coats, gloves and hats – the noise levels were also reportedly horrendous). For 2017, it was announced that the EQE would be held at the premises of Walsall Football Club, with a note that places would be limited (only half of the candidates could be accommodated), and them wot got in too late would have to go to Munich (which is the destination of last resort – been there, done that). Then, when the deadline for choosing a venue was past, it was announced that there was sufficient room for everyone in Walsall after all. From whence came this extra space? Were they going to sit on the football pitch itself? It turned out that the Walsall venue has 17 conference rooms, more than adequate space. So why wasn’t this a consideration in the first place? Was someone skimping in the best British fashion?

I finish the year on a personal sad note, the passing of my old boss, mentor and friend Don Berryman. Don was the first Australian patent attorney who came entirely from industrial practice, something regarded with horror by much of the then profession (entirely private, apart from ICI Australia’s Doug Freckleton, who at least had had the decency to start in private practice). But Don was a determined character. Working in the technical field in BALM Paints (now Dulux Australia) in Clayton, Victoria, and having made the decision in mid-life and -career to change direction completely, he went to ICI in the UK to be trained by some of the best, Donald Vincent at Paints Division and John Baxter at Millbank. He passed the exams and, having overcome the doubts of the Institute, was registered and became a Fellow, eventually rising to take the top ICI Australia patent position on Doug’s retirement. We kept up regular contact after he retired and I came here, until his cancer and its treatment rendered him unable to respond, but daughter Ann would read my e-mails to him, and he apparently enjoyed that.

I first met Don in February 1970, I a £10 assisted passage migrant fresh off a plane that took me from a British winter into an Australian summer, he seeking to start a patents section at BALM and needing help. Why exactly he thought that this green (in every respect) newcomer with the bizarre accent would be of any use at all is not known, but typically (and this was indeed typically Don), he gave me a chance, and persevered with me through all my early bumblings (and believe me, there were many). He even let me have a go in the labs where I proved to everyone’s satisfaction (my own included) that I didn’t have the makings of a lab chemist. He was ultimately instrumental in my getting the senior ICI Australia patent job at the Ascot Vale labs.

Don was not without his quirks, but then none of us lacks quirks and we can only hope that, at the end of our days, the good that we have done outweighs the bad/stupid things that we have done. This was undoubtedly true of Don; the overwhelming memory remains of a friendly, kind and generous man who was willing to give complete newcomers a chance in the profession and to help them along the way. He was the same with support staff – the survivors of the Dulux group, Joan (from the Mallee), Michelle (from Mauritius) and Liba (from Czechoslovakia), remember the Dulux period as the happiest working experience of their lives. Dulux was also special to Don; in recognition of the fact, at the funeral, Ann placed a small can of Dulux paint on the coffin. I shall miss him.

And so, I wish you and yours a merry Christmas and a happy, prosperous and healthy 2017.