

FC2 (Law) UK Patent Law
FINAL Mark Scheme 2016

[Mark scheme comment] Marks are awarded for candidates demonstrating their understanding of the legal concepts rather than for strict compliance with the legal language used in the mark scheme. Except where half marks are already indicated, half marks may be awarded throughout where the candidate has demonstrated understanding but has not given a sufficient answer to achieve a full mark.

Part A

Question 1

- a) What principles allow an English Court to apply European Directives and European Regulations directly on the request of an individual citizen?
4 marks
- b)
- i. State the requirements for successfully obtaining leave for judicial review.
2 marks
- ii. Who has the authority to grant permission for judicial review?
1 mark
- c) What principles are applied by an English court in deciding whether to grant a freezing order?
3 marks
- Total: 10 marks**

Answer

- a) Marks up to the maximum may be awarded for a reasonable discussion of the following:

Vertical effect is the ability of an individual to invoke a provision of European legislation against the state
0.5 marks

whereas Horizontal effect is the ability of an individual to invoke such a provision against another individual
0.5 marks

A Directive is addressed to a Member State but not individuals
0.5 marks

However where its provisions are unconditional and sufficiently clear and precise
0.5 marks

and the deadline for the Member State to transpose its provisions into national law have passed
0.5 marks

then the provision may have vertical effect but will not have horizontal effect
0.5 marks

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Regulations however have both vertical and horizontal direct effect as they directly apply in a Member State.

1 mark

- b) The application must be made promptly (and in any event within 3 months or other statutory time limit) of the date of the decision to be reviewed;

0.5 marks

the applicant must have sufficient standing or *locus standi* in that they must have been affected by the decision;

0.5 marks

the decision must be made by a public body

0.5 marks

in exercise of a public law rule not merely of tort or contract.

0.5 marks

The High Court has the sole authority to give leave

1 mark

- c) The applicant should have a good arguable case for a cause of action justiciable by the English court, there must be a real risk of the disposal or use of the assets, the applicant must give an undertaking in damages should the injunction not have been granted, there is a “balance of convenience” test including the applicant’s behaviour.

2 marks max (half marks may be awarded)

Such an order will not normally extend to preventing the defendant from carrying on in business with those assets or payment of living expenses and legal fees, rather it is to prevent removal of the assets from the jurisdiction; part marks may be awarded for a discussion that it is an equitable remedy.

1 marks max (half marks may be awarded)

Total: 10 marks

Question 2

- a) Briefly explain the part played by the “Balance of Convenience” test in the *American Cyanamid* principles.

3 marks

- b) In civil proceedings if a party wishes to admit evidence into trial, but does not call the witness at trial, can that party still admit the evidence and, if so, how? If the witness does in fact attend trial, what is the status of his witness statement?

2 marks

- c) What are the requirements to support an actionable claim for pure economic loss resulting from negligent misstatement?

5 marks

Total: 10 marks

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Answer

- a) In the granting of an interlocutory injunction the court must first assess whether the claimant has a prima facie case, and if so whether an award of damages after trial would be an adequate remedy

1 mark

If there remains doubt then the court must assess where the balance of convenience of the parties lie

1 mark

taking into account all the circumstances of the case and the presumption is that the court should maintain the status quo.

1 mark

- b) (CPR Rule 32.5); the evidence can still be admitted as hearsay evidence.

1 mark

Where a witness attends trial his evidence stands as evidence in chief (or other reasonable discussion of direct evidence).

1 mark

- c) Statement of fact not opinion

1 mark

unless it carries the implication that the person making the opinion has reasonable grounds for his opinion;

0.5 marks

there must be a special relationship such that

0.5 marks

the person making the statement knew or ought to have known that the person to whom the statement is being made would act upon the statement;

1 mark

actual reliance is placed upon the statement resulting in damage to the claimant;

1 mark

in the circumstances it is reasonable for the claimant to rely on the defendant.

1 mark

Total: 10 marks

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Question 3

- a) In the context of an assignment of a UK intellectual property right, briefly explain the difference between legal and equitable title. **2 marks**
- b) Distinguish between an invitation to treat and an offer in the formation of contracts under English law. **2 marks**
- c) With reference to the IPREG Code of Conduct give two examples of when a regulated person's duty of confidentiality to his client no longer applies. **2 marks**
- d) Briefly explain the meaning of:
- i) *Stare decisis*
 - ii) *Ratio decidendi*
 - iii) *Obiter dictum*
 - iv) *Res judicata*.

Answer

- a) Any reasonable discussion that demonstrate a candidates knowledge of the following: Legal title is the successful transfer of ownership upon which a proprietor may bring proceedings to enforce his title, whereas equitable title may arise where the formalities for transfer of the IP right in question are not met but there is clear agreement between the proprietor and another (often in the form of a contract) to transfer legal title.
Marks up to a maximum of 2 may be awarded
- b) Acceptance of an offer will result in a binding contract whereas an invitation to treat cannot be accepted and is merely an invitation for offers. The distinction rests on whether the offeror had the intention to be bound.
2 marks max (half marks may be awarded)
- c) Where the client consents; the disclosure is required by law; where the information is made public and ceases to be confidential
2 marks
- d) i) the legal point has already been decided by a superior court **1 mark**
 ii) the legal rationale of a court's decision on a matter of law **1 mark**
 iii) non-essential element of a court's opinion and therefore not legally binding **1 mark**
 iv) where a lawsuit that is identical or substantially identical has already been adjudicated by a competent court.
1 mark

Total: 10 marks

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Question 4

- a) Briefly contrast the jurisdiction of the following courts:
- i. County Court
 - ii. Intellectual Property Enterprise Court
 - iii. The 3 principal divisions of the High Court
 - iv. The different divisions of the Court of Appeal
 - v. Supreme Court

5 marks

- b)
- i. What is an “equitable remedy”?
 - ii. State one type of equitable remedy available in IP cases.
 - iii. Give at least one reason why a court might refuse to grant an equitable remedy to an otherwise successful party.

3 marks

- c) In contract law what is meant by “fundamental breach”, and what is the remedy?

2 marks

Total: 10 marks

Answer

- a) **0.5 x 2 marks** available for each section for any two of the points made:
- i) limited by statute (County Courts Act), civil cases with exclusive jurisdiction to Personal Injury cases whose value is £50,000 or less, other claims to value less than £100,000 and a small claims track of value less than £10,000, cannot grant search orders
 - ii) intellectual property disputes with a cap of damages at £500,000 with a small claims track to a below £10,000
 - iii) at first instance has inherent jurisdiction to hear cases, Chancery Division hearing financial, competition, IP, companies, trust claims, appeals from the IPO, Family Division matrimonial, child welfare including Court of Protection Queens Bench Division including PI, negligence and contract claims, defamation, possession of land, appeals from the magistrates court by way of case stated
 - iv) Criminal: appeals by leave from the Crown Court on matters of law only Civil: appeals by leave from the High Court and County Court and certain statutory rights of appeal from other tribunals
 - v) final court of appeal for all UK civil and criminal cases, by leave, on arguable points of law of general public importance, usually from the Court of Appeal.

5 marks max

- b) A remedy established by the court of equity as opposed to the common law courts operating on the conscience of the defendant with discretion on whether to grant them; (half mark may be awarded)

1 mark

injunction and account of profits; (Either will do for the mark)

1 mark

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delay in acting, if there is an adequate remedy in law (eg damages) then equity will not act. (Either will do for the mark)

1 mark

- c) A breach going to the heart of the contract enabling the injured party to consider the contract at an end;

1 mark

injured party may elect to rescind or confirm the contract and sue for damages accordingly.

1 mark

Total: 10 marks

Question 5

- a) Explain the nature of a Part 36 (CPR Part 36 (Offers to Settle)) offer, including the formal requirements and when it can be made.

8 marks

- b) What is the basic aim of the award of damages for an infringement of an IP right? State a statutory rule which permits an English Court to award additional damages in IP cases (detailed section and paragraph numbers need not be given).

2 marks

Total: 10 marks

Answer

- a) An offer to settle made in accordance with CPR Rule 36 with the consequences as set out in that rule;

1 mark

can be made at any time including before the commencement of proceedings and is made when it is served on the party to whom the offer is being made;

1 mark (half marks maybe awarded)

it must contain certain information including the offer, the claim or part of the claim to which the offer is being made, state that it is a Part 36 offer, be in writing and specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs if the offer is accepted;

0.5 marks x3 for any of the points here

it cannot be withdrawn or changed unless the offeree has not previously served notice of acceptance and such withdrawal must be in writing;

1 mark (half marks maybe awarded)

maybe accepted at any time provided it has not been withdrawn;

1 mark

automatic costs consequences claimant will be entitled to costs of the proceedings up to the date on which the notice of acceptance was filed by the defendant and the proceedings will be stayed;

1 mark (half marks maybe awarded)

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if no acceptance then if claimant fails to obtain judgement more advantageous than a defendant's Part 36 offer then the defendant is entitled to its costs (indemnity basis) from when the relevant period contained in the offer expired plus interest (10%) unless the court considers it unjust to do so.

1.5 marks (half marks maybe awarded)

- b) Infringement is a tort and the normal rule is compensatory only to put the claimant back into the position had the tort not been committed and cannot be punitive;

1 mark

additional damages for flagrancy of the infringement are permitted are allowed by the Copyright Designs Patents Act 1988 section 97, Article 13 EU IP Enforcement Directive.

1 mark for either

Total: 10 marks

Part B

Question 6

After an inter partes opposition hearing in the trade marks registry, the Appointed Person gives the successful opponent a remedy under a new European Directive. Samantha, the Applicant, does not believe the Appointed Person has that power. Meanwhile the Opponent, Fred, has written to Samantha offering to drop the case in return for Samantha "becoming a good member of society". Samantha countersigns the letter and returns it to Fred. Assume this new Directive has been implemented in the UK.

- a) Explain how Samantha may appeal the decision of the Appointed Person, setting out the basis of any permissions required and what Samantha must show to succeed.

6 marks

- b) Explain on what basis such an appeal tribunal may seek the opinion of the Court of Justice of the European Union in such a case.

2 marks

- c) State the principles of formation of a contract and discuss any problems that arise with the purported letter agreement.

7 marks

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Answers

a) The only route to appeal is by way of judicial review.

1 mark

The application for judicial review must be made speedily and at least within 3 months of the date of the decision (the court may consider that an appeal whilst filed within the deadline has not been made speedily enough).

1.5 marks (half marks may be awarded)

The application is lodged at the High Court Administrative Division -permission is required from a single judge.

1 mark, (0.5 marks for each point)

Factors considered will be speed of the application lodged, that the decision must be one of public law as opposed to mere contract law (which it is as its about the decision of the Appointed Person) and that the applicant has sufficient standing (which Samantha has as the decision directly affects her). The review is then before 2 High Court judges.

0.5 x2 for any 2 of these points made

A review can overturn a decision on 3 grounds three issues of i) unreasonableness ii) ultra vires iii) procedural impropriety.

0.5 x2 for any 2 of these points made

For Samantha her case is that the decision is ultra vires as the Appointed Person has purported to make a decision that is outside his competence.

0.5 marks

b) Samantha can make a reference to the Court of Justice under Article 267 TFEU on the interpretation of Community law

1 mark

The ECJ has the power to interpret matters of Community law only - therefore the matter will return to the court seized of the matter to make a final decision based on the facts.

0.5 marks

In interpreting the Directive it is for the court to decide whether to make a reference to the ECJ or not.

0.5 marks

c) To form a contract you must have an intention to create legal relations, an offer capable of acceptance, unequivocal acceptance of all terms of the offer and consideration.

0.5 marks x4 for each point made

Samantha has shown unequivocal acceptance of the terms of the offer.

1 mark

Consideration is not mentioned but should be something of value, sufficient but not adequate.

1 mark

If this is not mentioned in the letter then it is possible to find consideration in the settling of the dispute.

1 mark

The problem is in whether there is an offer capable of acceptance as "being a nice person" is not sufficiently certain to amount to a contractual term

1 mark

or alternatively shows no intention to create legal relations.

1 mark

OR

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Reasonable analysis of the problem such as “becoming a good member of society” is incapable of being a mutual promise and therefore there is a lack of consideration

2 marks

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Question 7

Robert sends a letter to Felicity alleging patent infringement on a device covered by claims 1, 2 and 3. The letter doesn't mention settlement. Robert commences proceedings against Felicity the day after he posts the letter. David his patent attorney advised Robert that this is an acceptable way of approaching litigation.

- a) Explain what the Civil Procedure Rules requires Robert to put in his letter to Felicity and what sanctions may be applied against Robert.

4 marks

A week later Robert and Felicity have a "without prejudice" meeting. Robert accepts that the case under claim 2 is very weak. As for claim 3 he tells Felicity that protection was obtained knowingly using false data supplied to the UK IPO but he is still going to pursue the case in Court. A full written record of the meeting is kept by Felicity. David agrees to continue with the case including claim 3 even though he knows that the claim is invalid.

Felicity wants to put her notes of the meeting to the Court as part of her Defence.

- b) Explain what the term "without prejudice" means including its limitations. Can Felicity include her meeting notes as part of her defence?

4 marks

After the meeting Felicity sends to Robert a first letter headed "without prejudice save as to costs" setting out a reasonable settlement proposal on claim 1, and a second letter regarding claim 2 with the words "this letter is intended to have the consequences set out in CPR Rule Part 36".

- c) Explain what effect the term "without prejudice save as to costs" has for Felicity.

2 marks

- d) Explain the significance of and, briefly, the consequence for Robert of the statement "this letter is intended to have the consequences set out in CPR Rule Part 36" in the letter.

2 marks

- e) How has David breached the IPReg Rules of Conduct in the above scenario?

3 marks

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Answer

a) Under CPR the Pre-Action Protocol and the Code of Practice for pre-action conduct in IP cases; Robert must send to Felicity full details of the claim including details of the claim(s) alleged to be infringed, how Felicity is alleged to infringe the claim(s) as well as details of the remedies sought giving 14 days to respond and suggest possible alternative dispute resolution to attempt resolution of the matter without recourse to proceedings.

1 mark x 2 for any two points made

A court may i) penalise the party at fault in costs either by reducing the award if they are the winning party or increasing the award against them if they lose, ii) costs awarded on an indemnity basis iii) suspension of proceedings until there correct steps have been taken iv) increase an award by 10%.

0.5 marks x4

b) Means that the court will not consider the contents of such correspondence or discussions including any admissions made when considering the merits of the case at trial;

1 mark

it is a public policy based on encouraging parties in a dispute to attempt settlement discussions

1 mark

so i) there must be a dispute whether proceedings commenced or not ii) the correspondence or meeting must be genuine attempts at settlement.

0.5 marks x2

As it is a public policy not a rule, it cannot be used to hide a fraudulently obtained settlement or other improper act so Felicity can arguably use her notes in respect of claim 3 in her defence. Also candidates may be awarded half a mark if they say that these are not genuine settlement negotiations.

0.5 marks x2

c) Means that when the judge is considering the costs in the case, having decided the liability in the case already without use of the letter,

1 mark

he has discretion whether to take into account the reasonableness of the Felicity's attempt to settle in determining whether to affect his decision on the award of costs to Robert should she lose the case (or indeed vice versa).

1 mark

d) Means that the letter is an attempt to settle the dispute in accordance with CPR Rule 36

1 mark

and the attendant cost consequences set out in the Rule provided the letter accords with the formal requirements set out in the Rule putting Robert under pressure to accept a reasonable offer when he knows his case on claim 2 is weak.

1 mark

e) Conduct Rule 4 Competence i) Guidance 4.3 on observing rules of court, David must warn Robert of the need to send pre-action correspondence and the risk of an adverse costs order of not doing so

2 mark (1 mark for each point)

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ii) Conduct Rule 14 Guidance 14.1(a) submitting contentions that are not supported by the evidence or the instructions of the client on claim 3 when he knows the claim is invalid.

1 mark for either point

Total: 15 marks

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Question 8

Adelita makes a sales call at Nicholas' office telling him about her technology. She claims it will increase Nicholas' production capacity by 100% although Nicholas is sceptical. After the meeting Nicholas shows Adelita around his factory and the way the factory works. On the way out Adelita assures Nicholas that twenty other factories are using the new process. Nicholas is impressed that so many factories have installed the process.

Adelita and Nicholas sign a 12 month contract to use the new process and for Adelita to supply Nicholas with the necessary tooling. There is no mention in the signed document of the 100% increase or the twenty factories using the process. The contract commenced in December but the new process only increases production by 30%.

- a) Discuss whether Adelita's claim that Nicholas' capacity will increase by 100% becomes part of the contract and, briefly, justify your answer.

3 marks

Nicholas is unsure how many factories actually use Adelita's new process. Terrence, Nicholas' patent attorney, advises Nicholas to allege Adelita has made a fraudulent misrepresentation anyway saying they will gather the information later.

- b)
- i. With reference to the scenario distinguish between fraudulent misrepresentation and negligent misrepresentation.
 - ii. What remedies would be available to Nicholas for each?
 - iii. State the standard of proof required to show each of them.
 - iv. Could Adelita have excluded liability for each and, if so, how.

5 marks

1 mark

- c) With reference to the IPREG Code of Conduct discuss Terrence's advice to Nicholas.

1 mark

In any case the necessary tooling arrived only 6 months after the contract commenced and Nicholas wants to claim breach of contract.

- d) Distinguish between the remedies for fundamental breach of contract and breach of warranty. Absent any guarantee of delivery time in the contract, could supply of the tooling after 6 months be considered a fundamental breach?

3 marks

- e) i) What is the basic rule for assessing damages in a contract case?
ii) When considering the level of loss that can be compensated for, what duty does Nicholas have?

2 marks

Total: 15 marks

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Answers

a) A contract is formed by acceptance of an offer. A person can only be bound by the terms of the offer if there is an intention to create legal relations. If there is no intention to create legal relations then the statement is mere puff or invitation to treat.

1.5 marks (half marks possible)

Any reasonable discussion/conclusion covering the following: The statement is made prior to the parties reviewing the actual factory and cannot seriously have been meant to be a part of the contract and therefore it does not form a term of the contract. Half a mark may be awarded if the candidate has based their discussion on failure of the 100% figure becoming a written term of the contract.

1.5 marks (half marks possible)

b) i) A representation made in either case is a statement that is made prior to concluding a contract where the statement is made in such circumstances that a person is induced into entering the contract and it is reasonable that reliance should be placed upon it and it therefore becomes a term of the contract.

1 mark (half marks may be awarded)

Fraudulent: where the maker of the statement knows or is reckless as to the untruth of the statement;

1 mark (half marks may be awarded)

Negligent: where the person making the statement is negligent in making a statement that turns out to be untrue.

1 mark (half marks may be awarded)

ii) Both result in the injured party being able to rescind the contract and sue for damages.

1 mark (half marks may be awarded)

iii) Fraudulent: beyond reasonable doubt, Negligent: balance of probabilities.

0.5 marks x2

iv) Negligent misrepresentation can be excluded by contract term but fraudulent cannot be.

1 mark

c) Conduct Rule 14, Guidance 14.1(c); an allegation of fraud cannot be made in civil proceedings unless there is prima facie credible evidence to justify such an allegation.

1 mark

d) Fundamental breach is a breach that goes to the heart of the contract and makes the contract unable to continue such that the injured party may rescind the contract and claim damages.

1 mark (half marks may be awarded)

Breach of warranty is a breach that allows the contract to continue so that the injured party may not consider the contract at an end but may nonetheless sue for damages.

1 mark (half marks may be awarded)

Any reasoned discussion including whether it could be considered a fundamental breach as the tooling is required to use Adelita's system.

1 mark (half marks may be awarded)

e) i) To put the injured party back into the position as if the contract had been fulfilled.

1 mark

ii) Nicholas has a duty to mitigate his loss.

1 mark

Total: 15 marks

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Question 9

Joe has designed a new kind of radio. He needs investment for a patent application and to manufacture the radio and to employ people to sell the radio. He is currently a sole trader. Greg is interested in investing, but is concerned about getting security for his money.

- a) Distinguish between a sole trader and a limited company, and, referring to the above scenario, set out the advantages and disadvantages.

3 marks

- b) Distinguish between fixed and floating charges and, considering Joe's tooling and his expected patent, discuss which is most appropriate for which type of asset.

6 marks

Aidan, Joe's patent attorney, used to work for Greg. Joe asks Aidan to review the draft loan agreement that Greg provides.

- c) With reference to the IPREG Code of Conduct discuss one issue that Aidan needs to consider.

2 marks

Joe is considering registering a company, Abed Limited. He knows a successful sole trader making tape recorders that trades as Abbett. Joe will likely trade under a different name, but wants Abed Limited as his company name.

- d) Advise Joe how Abbett might use the Company Names Tribunal to object to his choice of company name.

4 marks

Total: 15 marks

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Answers

- a) A limited company has individual and separate legal identity
0.5 marks
governed by its Articles of Association, is created by a process of incorporation set out in its Memorandum of Incorporation, owned by its shareholders who have limited liability, managed by its Directors.
0.5 marks x2 for any two points made
A sole trader is an individual acting in business acting for themselves in their own legal identity.
0.5 marks
Reference must be made to the scenario with a reasonable discussion impacting on the following: A sole trader is liable for all the debts of the business but a limited a company is solely liable for the debts of the company's business (beyond the shareholders liability) unless a Director can be found personally liable usually for reasons of misconduct in fulfilling the Directorship.
1 mark for any reasonable point made
- b) A fixed charge is a charge or mortgage secured on particular specified property
0.5 marks
which usually restricts the owners ability to deal with that property.
0.5 marks
A floating charge is an equitable charge available only to companies or LLPs that
0.5 marks
does not attached to specific assets but rather over classes of assets, such as stock,
0.5 marks
usually of such nature as will be dealt with frequently in the course of business by the owner
0.5 marks
making it impractical for the owner to seek permission of the debenture holder each time the asset is bought or sold.
0.5 marks
The floating charge only crystalizes or attaches to the property when the debenture specifies (including eg non-payment) and catches only property held at that moment, at which point it becomes a fixed charge
1.5 marks
A fixed charge would be appropriate for Joe's patent rights and a floating charge over Joe's tooling.
1.5 marks
- c) Rule 7, Guidance 7.1 Conflicts; Aidan may act for Joe on the agreement provided he gets Greg's consent however if Aidan has obtained any relevant knowledge about Greg or his business then Aidan must decline to act even if Greg gives his consent.
1 mark (half marks may be awarded)
"Relevant knowledge" includes knowledge of the client or his affairs that is not widely disseminated to the public and that is or is likely to become relevant to the matter,
1 mark

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Alternatively, Rule 5 Integrity Guidance 5.3(a) independence, danger of Aidan not acting for Joe in a fully independent way.

2 marks (1 for each point)

Alternatively, Conduct Rule 4 Competence – discussion of whether Aidan is capable of advising on such a loan agreement.

2 marks (1 for each point)

- d) Provides a remedy for i) a person aggrieved by opportunistic registration of company name for a similar name

0.5 marks x2

ii) in which that person has goodwill or a reputation;

0.5 marks

opportunistic means a) suspicion that name has been registered to extract money b) or preventing registration of variation of a name c) name of newly merged company;

0.5 marks x3

person making application i) does not have to own a company name registration ii) will have to demonstrate goodwill or reputation at time that new company name was adopted.

0.5 marks x2

Total: 15 marks

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Question 10

Jason, a patent attorney, acts for Books Ltd. Books has a UK patent. Claim 1 relates to online searching for book titles, claim 2 to search engines that cross reference books. Books is suing Boxes Ltd for patent infringement over their in-store search engine which can search and cross-reference books.

Jason is using an expert, Dorothy, who knows about search engines but not book referencing. Jason helps Dorothy prepare expert evidence about search engines. After filing the statement, Jason realises he has not filed any expert evidence relating to book referencing. The judge refuses permission to file further expert evidence.

At trial, claim 1 is found to be obvious and claim 2 is defeated because there is no expert evidence of how it can be inventive when used for book searching. Proper expert evidence would likely have shown claim 2 to be patentable. With reference to this scenario:

a) With reference to Jason's mistake set out the elements for actionable negligence.
6 marks

b) Briefly state the basic rule for assessing damages in a tort case.
1 mark

During trial Dorothy gives oral evidence. During lunch Jason talks with Dorothy. Dorothy tells Jason she has discovered search engines that search for books, but which is not favourable to Books' case. Dorothy asks Jason whether she should discuss it in her evidence.

c) With reference to the IPREG Code of Conduct discuss any conduct issue arising from their conversation.
1 mark

d) Must Dorothy disclose the new facts she has discovered? Briefly explain answer.
1 mark

Outside court Boxes tells a press reporter how useless Books' search engine is, even though it has been shown to work.

e) Referring to the press interview, set out the requirements for malicious falsehood.
6 marks

Total: 15 marks

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Answers

- a) i) duty of care owed by Jason to Books
 (relationship of sufficient proximity to impose such a duty) **1 mark (half marks may be awarded)**
0.5 marks
- ii) breach of duty failure to file evidence referring to book referencing
 (objective standard of care required of a person in exercising that duty) **1 mark (half marks may be awarded)**
0.5 marks
- iii) reasonable foreseeability, whether it was reasonably foreseeable the failure to file evidence would result in damage claimed for
 (reasonable man test) **1 mark (half marks may be awarded)**
0.5 marks
- iv) causation of damage, was there a sufficient proximity between the failure to file evidence and the losing the case or the candidate questioning whether the judge's decision not to allow further evidence to be filed make the damage too remote
 (both would damage have occurred "but for" test and remoteness of the type of damage) **1 mark (half marks may be awarded)**
0.5 marks (for either point)
- b) To put Books back into the position had Jason successfully filed the evidence/the tort (negligence) had not been committed.
1 mark (half marks may be awarded)
- c) Conduct Rule 14, Guidance 14.2; must not communicate with a witness whilst the witness is still giving evidence.
1 mark
- d) Yes, CPR rule 35.3 states that the expert has an overriding duty to the court before the party instructing them or paying them.
1 mark
- e) A false statement of fact and not of opinion, Boxes "opinion" statement could still be taken as a statement of fact, false if system does work even in part;
1 mark (half marks may be awarded)
 published in writing or any permanent form, the interview is published in permanent form with in writing or broadcast;
1 mark (half marks may be awarded)
 calculated to cause injury to claimant's economic or commercial interests as distinct from reputation, Boxes is attempting to damage Books market;
1 mark (half marks may be awarded)
 the statement is made with malice, Boxes knows it is giving a false statement;
1 mark (half marks may be awarded)

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(an intention to cause loss or an improper motive by defendant including recklessness, but defendant's honest belief negates malice – actionable misrepn and beyond mere advertising puff);

0.5 marks x2

damage is caused to Books but no requirement for special damage.

0.5 marks x2

Total: 15 marks