

Question 2

a) The American Cyanamid 'Balance of Convenience' test is used to assess whether a claimant will be granted an interim injunction. The test for this is:

- i. There must be a serious issue to be tried: not simply vexatious or frivolous.
- ii. Damages must not be an adequate remedy for the claimant (e.g. due to reputational damage) but must be an adequate remedy for the defendant (if the interim injunction is falsely granted).
- iii. The court must consider the balance of convenience: weigh up the damage to the claimant if the interim injunction is not granted against the damage to the defendant if the injunction is granted.
- iv. Where the balance of convenience is finely balanced, the judge should favour maintaining the status quo at the point immediately before the issuing of proceedings.

The party may have the evidence admitted as hearsay evidence and must serve a hearsay evidence notice on the other party before the deadline for serving witness statements. If the witness does attend trial, his evidence given in the witness statement will be that of direct testimony (as if he were giving oral testimony).

To prove negligent misstatement, the defendant must have made a false statement that was reasonably relied upon by the claimant who suffered loss, provided that a special relationship exists between them (*Hedley Byrne v Heller*):

- i. The defendant must have or claim to have some special skill or knowledge, and make representation by virtue to the claimant; and
- ii. The statement must not have been made in a casual or offhand manner, or otherwise in circumstances where it was clear that it was not supposed to be taken seriously; and
- iii. There must have been no exclusion of liability for loss caused by the statement. Note that any statement would have to have been objectively reasonably otherwise forbidden by the Unfair Contracts Terms Act 1977 s2(2).

Note that pure economic loss is financial loss which is suffered not as a result of damage caused to or interference with the claimant's person or tangible property. Usually, no recover is available.

Question 3

a) The legal title is the actual ownership of the right whereas the equitable title is the beneficial ownership of the right. If the assignment of an IP right has taken place from a contractual point of view, the equitable title has transferred to the new owner. It is only after the completion of formalities (e.g. assignments must be in writing whereas a contract could be merely oral) that the legal title transfers too.

b) An offer is an expression of willingness to enter into a contract with the intention (actual or apparent) that it shall become binding upon the offerer as soon as it is accepted by the offeree. By contrast, an invitation to treat is an expression of willingness to receive offers and is incapable of acceptance and so cannot form the basis of a contract (unlike an accepted offer).

c) Duty of confidentiality to client no longer applies when disclosure is permitted by the client or permitted and required by law. (IPReg Code of Conduct Rule 8).

- May be permitted by client because info has entered public domain so is no longer confidential.
- May be required by law for disclosure and inspection during litigation if the info is confidential but not privileged.

d)

- i. Stare decisis ('to stand by that decided') is the doctrine of precedent and means that when a court reaches a decision on a set of facts, courts of a lesser authority will be bound to decide future cases of the same material facts in the same way.
- ii. Ratio decidendi ('the reason for deciding') is the part of a judgement which is binding a future court according to stare decisis. It may be defined as the principle of law upon which the decision is based as applied to the material facts.
- iii. Obiter dictum are 'by the way' comments in a judgement which do not form part of the ratio and so are not binding on future courts. These comments are often analogies and one not applied to the material facts.
- iv. Res judicata ('the matter is already judged') means that when a competent court has reached a decision on a case, the litigating parties may not re-litigate the same issue. This does not apply to appeals up the hierarchy of court.

MARKS AWARDED 10/10

Question 4

a)

- i. The county court is lowest civil court, which has first instance jurisdiction for the majority of civil cases (no criminal jurisdiction). It hears: personal injury under £50k, claims in contract and tort, certain claims according to Rent Act etc.
- ii. The IPEC only hears IP cases and is designed for SMEs and individuals to be able to litigate low-value, low-complexity cases in a cheaper and speedier environment than the main Chancery Division of the High Court. For example, damages are capped at £500k, and recoverable costs at £50k.
- iii. The High Court has criminal and civil jurisdiction. It has first instance civil cases (e.g. claims over £100k, personal injury over £50k) as well as civil appeals (from county) and criminal appeals (from magistrates). It has 3 divisions:
 - Family: hears matrimonial and related
 - Queen's Bench: hears contract, tort, admiralty and commercial.
 - Chancery: hears wills, tort, probate, mortgage, company, bankruptcy, IP.
- iv. The Court of Appeal only hears appellate cases:
 - Civil Division hears appeals from High Court and in exceptional cases from county court
 - Criminal Division hears cases from Crown Court and High Court).
- v. Supreme Court hears both civil and criminal appellate cases:
 - Criminal cases from Court of Appeal
 - Civil cases from Court of Appeal or via leapfrog from High Court.
(both after appeal on points of law of public importance only.)

b)

- i. An equitable remedy is a remedy which is discretionary, rather than being available as of right.
- ii. Injunction.
- iii. Equitable remedies are governed by the doctrines of equity, such as 'he who comes to equity comes with clean hands' if a party has acted poorly/there is some fault, the court will not grant an equitable remedy.

c) A fundamental breach is a breach of a 'condition': such a breach goes to the very root of the contract and so is repudiatory in nature. The remedy is damages (as with all contractual breaches) but also the right to decide whether or not to rescind the contract.

MARKS AWARDED 10/10

Question 5

a) A Part 3b offer is an offer to settle made according to Part 3b of the CPR. It must be genuinely aimed at settlement and is made 'without prejudice save as to costs': meaning that the communication will not be seen by the trial judge, and so any admissions of liability will not affect the judgement or the remedies awarded. This allows a full and frank discussion between the parties. However, the communication is seen by the costs judge, and if refused by the receiving party, binds the costs judge to award costs in a particular way. The offer can be made by either claimant or defendant.

The nature of a Part 3b offer is that if it is refused, the receiving party must obtain a more advantageous judgement at trial otherwise they will be heavily penalised by the costs judge. Such a mechanism is in line with the overriding objectives, as it puts pressure on a party to accept such an offer, thereby avoiding trial.

A Part 3b offer may be made at any time (before, during, after proceedings) and may concern all or part of a pecuniary or non-pecuniary claim. It may also relate to another issue which is not part of the claim.

The formal requirements for a Part 3b offer:

- i. In writing.
- ii. State that it is a Part 3b offer.
- iii. State which part of the claim it concerns.
- iv. State whether it takes into account any counterclaim.
- v. Set a relevant period of 21 days or more within which the defendant will be liable for the claimant's costs if it is accepted.
- vi. Must contain sufficient information for the receiving party to be able to consider it comprehensively.

b) Compensate claimant for damage suffered/loss suffered.

MARKS AWARDED 6/10

Question 7

a) Not answered

b) 'Without prejudice' is a term which means that offers and discussions aimed at settlement of a dispute are protected from disclosure to both the trial and costs judge. Therefore there can be a full and frank discussion between the parties without fear that admissions of liability will affect the judgement and any remedies.

This type of protection arises automatically provided that the correspondence is genuinely aimed at settlement. This is irrespective of whether correspondence is headed with 'without prejudice'.

Felicity may not disclose the meeting note without Robert's permission to waive the privilege. The notes are actually made 'without prejudice'. However, it seems that Robert may not have actually been aiming for settlement in which case the note may be included and disclosed without his consent.

c) 'Without prejudice save as to cost' correspondence provided, it is genuinely aimed at settlement (as is the case here) is privileged with respect to the trial judge, so any admission of liability will not affect the judgement. However, it will be disclosed to the costs judge: this puts pressure on the recipient to accept the offer otherwise they may be penalised by the costs judge.

d) This offer is a Part 3b offer which means that if he accepts it then Felicity will be liable for his reasonably incurred costs up until the date of him serving the acceptance. He will, of course, also receive whatever is promised in the offer. If Robert refuses the offer, he must obtain a judgement at trial which is more advantageous than the terms of the offer, or he will be liable for Felicity's costs from the end of the 'relevant' periods as well as interest on these costs.

MARKS AWARDED 7.5/15

Question 8

a) No.

- The offer of the contract in this scenario is the provision of the written document containing the express terms which are accepted by Nicholas.
- Additionally, the information that she initially claimed might be regarded as mere puff or boast.
- At the very least, the information is a misrepresentation, since it is a false statement which induced Nicholas to enter into the contract.

b)

- i. A misrepresentation is a fake statement which one party makes to another which induces the second party to enter into a contract.
- ii. A fraudulent misrepresentation is where the false statement is made wilfully, with the knowledge of its falsity and the aim of falsely inducing the other party into the contract.

- iii. A negligent misrepresentation is where there has been recklessness as to the falsity/the statement.
 - Both must be proved on the balance of probabilities.
 - In both cases, remedies:
 - o Rescission of the contract.
 - o Sue for damages at Common Law or under the Misrepresentation Act.
 - o In the case of fraudulent misrepresentation, can also sue in tort.
- iv. Adelita could have tried to exclude liability under the Unfair Contracts Terms Act: Any exclusion of liability for negligence must be objectively fair, having regard to the circumstances which were known or ought reasonably to be known at the time of entering the contract. – if such exclusion was seen as objectively fair, it could have been included as a contractual term.

c) Terrence's advice to make a fake allegation breaches many areas of the Code of Conduct:

- Rule A integrity...act with integrity...
- Rule 14: during litigation, do not make an allegation which is not supported by credible material.

d) Fundamental breach of contract (breach of a condition) allows suing for damages and also the right to rescind the contract. The breach of a lesser term (a warranty) allows suing for damages only and no right of recourse.

It is likely that the delivery of tooling might be considered to be an innominate term (neither explicitly a condition or a warranty) if its breach substantially deprives the innocent party of the benefit of the contract law here: 6 months lost from 12 month contract), it may be considered as a condition, whose breach is repudiatory, thereby allowing rescission.

Can also, in both cases, apply for specific performance: equitable, so is discretionary.

e)

- i. Basic rule for assessing damages is to put the injured party in the position they would have been if the contract had been fulfilled. Damages which are not remote may be recovered.
- ii. Nicholas has a duty to mitigate his loss by undertaking reasonable steps to minimise his loss and forbearing from steps which increase his loss.

MARKS AWARDED 12/15

Question 9

a) A sole trader is an individual in business for himself: arises automatically, with no ongoing formalities.

A limited company is a separate legal entity formed under the Companies Act 2006 by incorporation at Companies House. There are onerous ongoing formalities including public accounts, publication of activity and need to register changes. It is owned by its shareholders and managed by directors. It has Memorandum and Articles of Association.

Limited Co. is advantageous because it is a separate legal entity able to more readily own assets, employ staff and enter contracts. Also, the liability of the shareholders is limited to their unpaid-up shares. Disadvantageously there are the onerous formalities, filing public accounts and lack of privacy due to public *activity* (word unclear).

Joe could not readily continue as sole trader: more difficult to enter contracts and employ people. More difficult to get external investment since cannot sell shoes. Also, unlimited personal liability for debts of the business.

b) Charges are a means of securing a loan over an asset. Default on the loan may allow the lender to seize the asset to pay off the loan. Charges must be registered at Companies House to be effective.

Fixed charges are secured over a particular asset and prevent the company from dealing with or disposing of the asset without the lender's permission. By contract, floating charges (only available to LLPs and Ltd. Co.'s) are secured over a class of assets, or all the present and future assets of the company and so do not prevent the company from dealing with the assets in the case of business. The floating charge is said to crystallise and become fixed over the present assets under certain circumstances e.g. default or appointment of a receiver.

Tooling: floating charge is most appropriate since likely to be continually used and replaced.

Patent: fixed charge since this is a single fixed asset.

c) Conflict of interest: regulated person must not act when he has a conflict of interest with the client (Rule 7). In this, Aiden may be seen to not be neutral since he has previously worked for Greg and so may show him favour. This would breach Rule 5: must act with integrity, putting the client's interests foremost.

d) Abbett can apply to the Co Names Tribunal (form CNA01) if his new company name is:

- i. The same as a name in which they have goodwill;
- ii. Is sufficiently similar to suggest a correction with their business.

Abbett does not need to own a registered company, but must simply show goodwill in the name.

The Companies Adjudicator will give Joe the opportunity to file a *defence* (word unclear) and then will make a decision.

MARKS AWARDED 11.5/15

Question 10

a) There are four elements required for actionable negligence:

1. Existence of a Duty of Care

- Lord Atkins Neighbour Principle: take reasonable care to avoid acts or omissions which may injure my neighbour.

Refined in Caparo v Dickman:

- i. Reasonably foreseeable that defendant's action would damage claimant? Yes here.
- ii. Proximity: nature of relationships between parties? Yes here since client + attorney.
- iii. Fair, just and reasonable to impose duty of care? Yes here.

Jason owes a duty of care to Books Ltd.

2. Breach of the Duty: did standard of care provided fall below standard expected by law?

Assess using 'Reasonable Man' Test: did defendant fail to do something that reasonable man would have done, having regard to likelihood and severity of damage and cost of avoiding? – Yes here: reasonable man (patent attorney since Jason is skilled practitioner) would have filed expert evidence.

3. Causation in Fact: was the defendant's act a cause of the damage to the claimant. Burden on claimant to demonstrate this on balance of probabilities. In simple cases may use 'but for' tests damage would not have occurred but for the defendant's negligence.

- Here Jason's act has led (probably) to the damage.

4. Legal causation/Remoteness.

- Wagon Mound Test: Was damage of the kind that actually occurred foreseeable by the reasonable man? Yes: Jason's failure could foreseeably have led to this outcome.

- Novus actus interveniens: was there a new intervening act which breaks the chain of causation so that the damage is remote from the defendant's action. Maybe natural or by independent third party. – no new act in this scenario.

- Jason is likely to be found negligent.

b) Assessing damages is principle of 'restitutio in Integro': to put claimant back into position they were in before the negligent act occurred.

c) Rule 14: Duty to Act with Independence in the Interests of Justice. When conducting litigation, the regulated person must not communicate with a witness about the case after the witness has begun to give evidence, without the permission of the court or other party. Also, must not coach or rehearse a witness in relation to giving of evidence.

- Jason should not be communicating with her.

d) Yes, during litigation there is an ongoing duty of disclosure, even in relation to material which adversely affects your own case.

e) A malicious falsehood is a false statement published maliciously which causes damage to the claimant: (Kaye v Robertson)

False statement

- Must be calculated to cause damage.
- Must be made with false/dishonest/improper motives and without just cause.
- May be made with recklessness to the falsity of the statement.
- Claimant must prove malice.
- If defendant had grounds for reasonably believing the statement is true, there is no malice.

Causes damage:

- Claimant must prove they have suffered damage.
- No requirement for special damages.
- Must go beyond mere advertising puff.

The statement made by Boxes is false, is published out of malice and may well cause damage. Malicious falsehood.

MARKS AWARDED 14/15