

## **Notes to trainers and students about the 2018 Foundation Certificate Sample Assessment Materials Mark Schemes**

1. All Patent Examination Board mark schemes for live papers are subject to the standardisation process. This includes the examiners considering where alternative and legitimate answers provided by the candidate should be added to the mark scheme.
2. This sample assessment mark scheme has not been through a standardisation process and anyone consulting these Sample Assessment Materials' mark schemes should consider points 3 – 5 below.
3. Where a question contains several parts, the examiners may award marks for relevant points irrespective of whether the candidate has made the point in the same part of the question as the mark scheme.
4. Where the mark scheme indicates a whole mark is to be awarded for an answer or part of an answer, the examiners may award a half a mark if the answer is incomplete, not precise, or partially correct.
5. The Patent Examination Board operates a positive marking policy. Marks are not deducted for incorrect answers.

**FC2 – English Law  
Mark Scheme – Sample Assessment Material**

**SECTION A**

**Question 1**

Briefly describe and give one example of each of the following different forms of evidence:

- a) Direct Evidence; **2 marks**
  
  - b) Real Evidence; **2 marks**
  
  - c) Documentary Evidence. **2 marks**
- Total: 6 marks**

**Answer**

Where examples are required, any reasonable answer will suffice.

- a) First-hand evidence of a witness of relevant facts **1 mark**  
For example given by way of witness statement or oral testimony given on oath **1 mark**
  
  - b) Physical objects, as evidence of themselves frequently requiring additional evidence such as witness testimony to place it in its proper context **1 mark**  
For example the infringing article seized brought into court with additional evidence given as to why it is infringing **1 mark**
  
  - c) Documents used to provide evidence of the information of any description is contained within them **1 mark**  
Such as diary, survey evidence, production records, any reasonable example **1 mark**
- Total: 6 marks**

**Question 2**

State four sources of law relevant to intellectual property.

**4 marks**

**Answer**

Statute **(1 mark)**, Secondary legislation **(1 mark)**, International Convention **(1 mark)**, Custom and Precedent **(1 mark)**

**Total: 4 marks**

**FC2 – English Law  
Mark Scheme – Sample Assessment Material**

**Question 3**

The *Civil Procedure Rules* impose an overriding objective on the court and court user to deal with cases justly. List the obligations imposed by this overriding objective.

**10 marks**

**Answer**

- a) Ensuring the parties are on an equal footing. **1 mark**
- b) Saving expense. **1 mark**
- c) Dealing with cases proportionately **1 mark**
  - i) to the amount of money involved **0.5 marks**
  - ii) to the importance of the case **0.5 marks**
  - iii) to the complexity of the issues **0.5 marks**
  - iv) to the financial position of each party. **0.5 marks**
- d) Ensuring that the case is dealt with expeditiously and fairly. **1 mark**
- e) Allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases. **1 mark**
- f) The court must seek to give effect to the overriding objective when it
  - i) exercises any power given to it by the rules **0.5 marks**
  - ii) interprets any rule. **0.5 marks**
- g) The parties are required to help the court to further the overriding objective. **1 mark**
- h) The court must further the overriding objective by actively managing cases. **1 mark**

**Total: 10 marks**

**Question 4**

- a) What is the principle by which an employer may be held liable for negligent acts of an employee? **1 mark**
- b) State the essential test that should be applied. **1 mark**

**Total: 2 marks**

**Answer**

- a) Vicarious liability. **1 mark**
- b) Whether the employee was acting in a personal capacity, or in the course of their employment. **1 mark**

**Total: 2 marks**

**FC2 – English Law  
Mark Scheme – Sample Assessment Material**

**Question 5**

With reference to the *IPREG Code of Conduct* explain who is a regulated person's 'client':

- a) for domestic purposes; **1 mark**
- b) in the case of foreign originating work. **1 mark**

**Total: 2 marks**

**Answer**

- a) Means the principal on whose behalf a regulated person acts as agent and includes any person for whom the regulated person is address for service for any right regardless of the nature of any current relationship. **1 mark**
- b) The 'client' remains the principal for whom the work is ultimately being done, although the instructions may come from an intermediary foreign patent or trade mark attorney, to whom the regulated person will also owe a duty of professional care.

**1 mark**

**Total: 2 marks**

**Question 6**

- a) Name three different types of Alternative Dispute Resolution ('ADR'). **3 marks**
- b) For each type of ADR you have named explain whether the outcome is binding. **3 marks**

**Total: 6 marks**

**Answer**

- a) Arbitration, Mediation, opinions of the UKIPO (other reasonable examples of formal processes are acceptable). **3 marks**
- b) Arbitration – binding decision of the arbitrator.  
Mediation – non-binding, parties merely partake in without prejudice discussions.  
UKIPO opinion – non-binding, the opinion without full representations being made does not bind the UKIPO or the court from reaching a conclusion of full proceedings. **3 marks**

**Total: 6 marks**

**Question 7**

- a) According to Section 30 (*'Nature of, and transactions in, patents and applications for patents'*) *UK Patents Act 1977*, what is the nature of the property right when a patent is held by two people together in the absence of agreement to the contrary? **2 marks**

**FC2 – English Law  
Mark Scheme – Sample Assessment Material**

- b) Explain whether it makes a difference to the nature of this property right if the patent is being held by three or more people.

**1 mark**

**Total: 3 marks**

**Answer**

- a) Held jointly in an equal undivided share, unless there is agreement to the contrary. **2 marks**
- b) No difference, as the property will still be held in equal undivided shares unless there is agreement to the contrary. **1 mark**

**Total: 3 marks**

**Question 8**

With reference to the *IPREG Code of Conduct* state the four situations in which a regulated person may communicate directly with another party who has retained a registered person.

**4 marks**

**Answer**

To request the contact details of that party's professional adviser **1 mark**  
where reasonably it appears messages have not been passed on and then only after a warning of your intention to do so **1 mark**  
with the professional advisor's consent **1 mark**  
in exceptional circumstances. **1 mark**

**Total: 4 marks**

**Question 9**

Tracey comes to you asking you to advise her and act for her. She has been convicted of selling counterfeit Nike shoes under the *Copyright Designs and Patents Act 1988*. She must attend a court hearing to decide on what fine to impose.

- a) **When considering whether to advise and act for Tracey what does the *IPREG Code of Conduct* say a regulated professional should consider in this situation?** **2 marks**
- b) **If you do decide to take Tracey on as a client, what must you send to Tracey at the outset of the relationship?**

**1 mark**

**Total: 3 marks**

**FC2 – English Law  
Mark Scheme – Sample Assessment Material**

**Answer**

a) Regulated professionals who do not have the right to conduct criminal litigation may offer advice on what constitutes criminal acts under the CDPA88.

**2 marks**

b) Written terms of business must be sent to Tracey at the outset of the relationship.

**1 mark**

**Total: 3 marks**

**FC2 – English Law  
Mark Scheme – Sample Assessment Material**

**SECTION B**

**Question 10**

Akram is currently bringing a claim for patent infringement in the Intellectual Property Enterprise Court ('IPEC') against Flora. Flora and Akram have a meeting to try to settle the claim. They discuss Flora paying Akram £50,000 to settle the claim but nothing is concluded. A week later they meet unexpectedly at a wedding.

Initially they engage in polite general conversation only. Then Flora buys Akram an orange juice, hands it to Akram and offers a settlement saying "OK, I'll give you the £50,000." Akram says nothing but smiles and carries on talking.

The next day Flora tells the court that the parties have settled. Akram disputes this.

**Prepare notes for a meeting with Flora in which you:**

- a) **analyse whether a settlement agreement might exist including identifying any problems for Flora;**  

**9 marks**
  
- b) **explain what standard of proof is required to prove that a settlement agreement exists; and**  

**1 mark**
  
- c) **describe in what form the evidence alleging the existence of the settlement agreement would be put before the court. Include reference to any formalities and what happens if Flora cannot attend court.**  

**4 marks**

Before the court has taken a decision on the alleged settlement Flora sends Akram a letter headed 'this letter is intended to have the consequences set out in CPR Part 36' offering £100,000 in damages ('Part 36 letter'). At trial Akram succeeds in his claim and the court awards him £50,000 in damages.

**Prepare notes for another meeting with Flora in which you:**

- d) **explain what information the letter should have contained if it really was going to have the consequences of *CPR* Rule 36; and**  

**4 marks**
  
- e) **explain the consequences of Akram being awarded £50,000 in damages, assuming Akram did not accept the Part 36 letter.**  

**2 marks**

**Total: 20 marks**

**Answer**

- a) A reasonable structure and discussion covering the following:

Intention to create legal relations.

Though Akram and Flora have met to discuss settlement, the 'payment' has occurred at a social event and Flora must show that the settlement discussions were still in their minds when they had 'general conversation'.  

**2 marks**

**FC2 – English Law  
Mark Scheme – Sample Assessment Material**

Offer needs to be certain as to its terms.

The £50,000 is certain but are there other terms to be discussed so, if detailed terms were not finalised at the meeting, then Flora would find it hard to show Flora is making a definite offer. **2 marks**

Acceptance of all terms of the contract, needs to be to be communicated, but can be by conduct.

Flora would have to show that Akram saying nothing but smiling and carrying on talking was acceptance of the £50,000 or other terms, not merely being polite (which was the social occasion). **2 marks**

Consideration.

Must be sufficient but need not be adequate; Flora and Akram's agreement not to continue proceedings can constitute sufficient consideration. **3 marks**

b) On the balance of probabilities. **1 mark**

c) Flora must make a witness statement.

With a statement of truth.

Where a witness attends court, the statement stands as Flora's evidence in chief.

If she does not attend court, the statement can still be admitted as hearsay evidence.

**4 marks**

d) 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. **4 marks**

e) Akram's award is less advantageous than the offer Flora made, so even though Akram has won at trial, Flora is entitled to costs from the date set out in the Part 36 offer.

**1 mark**

Either

Unless the court considers it unjust to do so

or

Interest.

**1 mark**

**Total: 20 marks**

**Question 11**

William owns a patent covering a water pump. Maria wants to manufacture the same pump at her factory. During negotiations for a licence to manufacture, Maria tells William that she only has capacity to manufacture 100,000 pumps. William grants Maria a licence to manufacture 100,000 pumps.

Two hours ago William discovered that Maria has manufactured 200,000 pumps and is continuing to manufacture them. Maria denies that William's patent covers the water pump. William needs to stop Maria manufacturing the pump urgently and approaches you for advice.

**FC2 – English Law  
Mark Scheme – Sample Assessment Material**

Write notes for a meeting with William to explain:

- a) what kind of court order William can seek to make Maria stop production, pending trial; 2 marks
  
- b) whether he is likely to be successful in obtaining such an order with reference to the principles that the court will consider; and 9 marks
  
- c) what undertakings William is likely to have to give to the court. 3 marks

Before the contract was signed, Maria told William that the factory had all the necessary skilled staff to manufacture that pump. The pumps that are produced contain a faulty widget. It turns out that there was no skilled widget worker working at the factory. William claims that Maria lied about there being the necessary skilled staff working at the factory. Maria responds saying that her factory manager told Maria the factory had all of the necessary staff. William brings a claim to court against Maria for misrepresentation.

- d) For each of the following, explain in a memo to William the difference between William’s allegation and Maria’s response for misrepresentation:
  - i) the nature of the misrepresentation;
  - ii) remedies available for the misrepresentation; and
  - iii) the standard of proof required to prove the claim for misrepresentation. 6 marks

**Total: 20 marks**

**Answer**

- a) Ex parte/without notice interim injunction. 2 marks

- b) A reasonable discussion covering the following:

Is there a serious issue to be tried?

There is clearly a contract between William and Maria and, on the face of it, it has been breached. 2 marks

Are damages an adequate remedy in the event the defendant’s behaviour continues and that behaviour were to be found at trial to be wrongful?

It is possible that the court would view damages as an adequate remedy. 2 marks

Where does the balance of convenience lie as between the parties (including the merits of the case)?

The case appears strong but if William can show particular damage by Maria’s over production (e.g. breach of IP rights) then court should step in.

However, Maria might claim that her factory would close with the loss of jobs if she has to stop production. 3 marks

**FC2 – English Law  
Mark Scheme – Sample Assessment Material**

If otherwise balanced between the parties, objective is to preserve the status quo ante  
In which case, the court will order production to be stopped. **2 marks**

- c) Cross-undertaking in damages,  
to commence proceedings as soon as possible,  
to bring the defendant notice of the application and set an earliest date for  
an inter partes hearing. **3 marks**
- d) i) William is claiming Maria knowingly lied (fraudulent).  
Maria said she had checked and was merely relaying information she  
was given (innocent). **2 marks**
- ii) Fraudulent: rescission and damages. **2 marks**  
Innocent: damages only. **2 marks**
- iii) Fraudulent: akin to beyond reasonable doubt. **2 marks**  
Innocent: balance of probabilities. **2 marks**

**Total: 20 marks**

**Question 12**

Frank has designed a new kind of low-powered fan for laptops. He needs investment for a patent application, to manufacture the fan and to employ people to sell the fan. He is currently a sole trader. Rosemary is interested in lending Frank money, but is concerned about getting security for her money.

**Make notes to advise Frank:**

- a) **about the advantages and disadvantages between trading as a sole trader or a limited company; and** **3 marks**
- b) **how Rosemary can obtain security over Frank's stock and his expected patent. In doing so, describe the nature of the securities and discuss which is most appropriate for which type of asset.** **6 marks**

Frank has decided to register a limited company using the name FanTop Ltd. A successful sole trader, Ayesha, making desktop fans and trading for many years as FanTap, has filed an objection at the Company Names Tribunal against the use of Frank's choice of name. Frank was not aware of Ayesha's business before registering his company.

**In your notes to Frank:**

- c) **advise Frank what Ayesha has to show and any problems Frank will face to succeed in his case.** **6 marks**

**FC2 – English Law  
Mark Scheme – Sample Assessment Material**

Ayesha sues Frank for passing off. In the agreement settling the dispute, the parties agree that Ayesha will not bring any passing off proceedings against Rosemary. As soon as the agreement is signed Ayesha sues Rosemary for passing off.

**Make notes to Frank to explain:**

- d) whether Rosemary can rely on the contract between Ayesha and Frank to defend the claim.**

**5 marks**

**Total: 20 marks**

**Answer**

- a) Reference must be made to the scenario with a reasonable discussion impacting on the following:

As a sole trader, Frank would be liable for all the debts of the business but a limited company is solely liable for the debts of the company's business (beyond the shareholders liability). **2 marks**

He can offer a broader range of securities to lenders as a company, ie floating charges. **1 mark**

- b) Rosemary can place a charge on Frank's assets as security for her lending. This can be a fixed charge on particular specified property such as IP rights, real property, **1 mark**  
which usually restricts the owners ability to deal with that property. **1 mark**

If Frank sets up a limited company, Rosemary can also take a floating charge, which is an equitable charge available only to companies or LLPs.

Or

Floating charges do not attached to specific assets but rather over classes of assets that are changing, such as stock. **1 mark**

Usually of such nature as will be dealt with frequently in the course of business by the owner, making it impractical for the owner to seek permission of the debenture holder each time the asset is bought or sold. **1 mark**

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 mark**

A fixed charge would be appropriate for Frank's patent rights and a floating charge over Frank's stock. **1 mark**

- c) Provides a remedy for a person aggrieved by opportunistic registration of company name for a similar name.

The name is similar, but what does opportunistic mean? **2 marks**

In which that person has goodwill or a reputation, which Ayesha has: **1 mark**

opportunistic means:

- i) suspicion that name has been registered to extract money
- ii) or preventing registration of variation of a name
- iii) name of newly merged company.

**0.5 marks x2 max**

**FC2 – English Law  
Mark Scheme – Sample Assessment Material**

But on what we have been told, none of these seem to apply. **1 mark**

It does not matter that Ayesha does not have a limited company herself. **1 mark**

- d) The normal rule of contract is one of 'privity', which means that only parties to the contract can enforce the terms.

**1 mark**

However, the Contracts (Rights of Third Parties Act) 1999 alters this rule by specifying circumstances where a third party may enforce a right created by a contract, **1 mark**  
including where a term purports to confer a benefit on that third party, **1 mark**  
unless on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party. **1 mark**

Here, it seems that Rosemary was meant to benefit from the contract. **1 mark**

**Total: 20 marks**

**Question 13**

Flavian, a patent attorney, works for a patent agency firm called Pargitt Patents, which describes itself as 'a limited partnership'. Flavian is described as a 'limited partner' after he put in £10,000 to launch the firm. The firm only acts for small businesses and individual clients. Client care letters must be sent before work commences.

To earn a bit of extra money, Flavian does the occasional small piece of work without telling the firm. Last year he agreed to help a large pharmaceutical company, Patrick Intelligence Library Ltd ('Pill'), to validate a European patent on a new drug (hoping to get them as a client to take to another firm). He didn't set Pill up on the firm's internal records system or send them a client care letter, and he communicated with them via his personal email address.

He put details of the patent into his home computer (he did do some work from home) but put the deadlines in incorrectly. All deadlines, including any appeal deadlines, have now passed and Pill's drug is now not protected. Pill has lost £20 million in profits as a direct result. Further losses include:

- £10 million lost because a licencing arrangement with another company fell through, though that could have been because Pill's Managing Director was so angry that he punched the MD of the other company;
- £5 million lost because a senior researcher got fed up due to not being funded to continue research on the drug, left and joined a rival so that another project foundered.

- a) **Explain Flavian's role in the 'limited partnership'.**

**4 marks**

- b) **Setting out the requirements to establish actionable negligence, explain whether Flavian is liable for these losses.**

**10 marks**

- c) **Discuss briefly whether the firm Pargitt Patents may or may not be liable for Flavian's negligence.**

**3 marks**

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Mark Scheme – Sample Assessment Material**

Later that year, during a documentary about insolvent patent attorneys, Flavian mentions in passing that Pill's drug didn't work anyway. It turned out that the drug did work but Flavian hadn't tried to look at all the evidence. Pill suffers damage. In an action for malicious falsehood, Flavian claims that he honestly believed that the drug didn't work.

- d) Assess whether Flavian's statement was made with malice for the purposes of an actionable malicious falsehood.**

**3 marks**

**Total: 20 marks**

**Answer**

- a) A partnership in which only one partner is required to be a general partner with unlimited liability but in which other partners may have limited liability. **1 mark**

Flavian's liability as a limited partner accords to the amount that he has invested into the business. **1 mark**

The general partner manages the business, so Flavian is not responsible for general management of the firm, **1 mark**  
unless there is an agreement between the partners making him responsible. **1 mark**

- b) i) Flavian has a duty of care to Pill **1 mark**  
because he has a relationship of sufficient proximity to impose such a duty and accepted responsibility as a professional advisor. **1 mark**  
ii) Flavian has breached this duty **1 mark**  
because, on an objective standard, he has failed to take the necessary steps to remind him of the need to validate that would be required of a person in exercising that duty. **1 mark**  
iii) Flavian is liable for losses caused by his negligence both in fact and in law, and that are reasonably foreseeable. **1 mark**

£20 million – we are told this loss is a direct result. **1 mark**

£10 million – issue is factual causation and whether, 'but for' the negligence, would the licence have been lost; the court will have to make a decision on whether the punch was the cause of the loss of the licensing arrangement.

**Up to 2 marks for reasonable discussion**

£5 million – loss of researcher was direct result of negligence, but is there causation in law? Is the damage too remote?

**Up to 2 marks for reasonable discussion**

- c) Vicarious liability of Pargitt depends on whether Flavian could be considered to have performed the work in 'the course of his employment'. **1 mark**

Any reasonable discussion on whether Pargitt may or may not be liable given the factual scenario. **Up to 2 marks**

- d) Malice is usually made out when the defendant knows the statement is false, but in this case Flavian says he did not knowingly believe it was false. **1 mark**

However, he made the statement recklessly as he did not make the necessary investigations. **1 mark**

**FC2 – English Law**  
**Mark Scheme – Sample Assessment Material**

Either

His honest belief could be used to negate malice if the court believes him

or

The statement could be considered 'mere puff' in the documentary.

**1 mark**

**Total: 20 marks**