Examiner's Report 2018 (DRAFT)
FC2 – English Law

Patent Examination Board

Introduction

This was the first year of the new Part A / B format. The change in format has not affected the pass rate but did allow a greater number of marks to be awarded for candidates' application of the law to the facts, not just recitation. Candidates handled this well, demonstrating that candidates are understanding the law not just reciting it.

Part A

Question number	Comments on questions
Question 1	Part a): Most candidates gave the meaning of this term. Part b): Many candidates were again unfamiliar with the role of the Appointed Person in summary appeals from certain decisions of the UKIPO. Reference to "infringement", a matter for a court, is incorrect. Part c): Candidates generally seemed unaware that tribunals (such as the Appointed Person) as well as courts can make a reference. Some candidates confused references to the ECHR in which cases all avenues of appeal (in the UK the Supreme Court) must be exhausted. Candidates are expected to be able to distinguish CJEU jurisdiction as limited to questions of *EU* law only (not "law"). Some candidates described the decision of the CJEU as "non-binding". This is incorrect, although some answers went on to explain that this meant that the national court still had jurisdiction to decide the case on the facts.
Question 2	This question was generally answered well. A minority of candidates wrote down the entire test for the overriding objective which was not what the question asked for.
Question 3	A range of answers was accepted. The standard was, what would a competent adviser say to a client who had made an initial enquiry about mediation? Answers that referred to a "decision" in the context of a mediation showed misunderstanding of what happens and were incorrect. Referring to mediation being "private" is too imprecise. Terms such as "confidential" or "without prejudice" are required.
Question 4	A range of answers was accepted. The standard was, what would a competent adviser say to a client who had made an initial enquiry about the Case Management Conference? This question was generally answered well.

Question 5	Very few candidates answered this incorrectly. "1-2 days" did not answer the question.
Question 6	Part a): Many candidates confused a misrepresentation with malicious falsehood. In the latter the false statement is one of fact not opinion, in the former the false statement can be one of fact or law. Some indication of causation between the communication of the false statement and the other party entering the contract is essential. The word "induces" is best. Part b): Fraudulent misrepresentation includes not only knowingly misrepresenting but also recklessness as to the truth of the statement. Negligent misrepresentation covers carelessness.
Question 7	Most candidates answered this well. Some candidates mentioned horizontal effect of an implemented Directive. If the Directive is implemented then it is the national statute that applies not the Directive.
Question 8	Parts a), b) and c): Most candidates followed closely the language of the Code. Many candidates thought this was a questions about conflicts but the language in the questions reflects the IPReg Code of Conduct: it is a simple case of supplying information to the foreign agent and thereby fulfilling obligations to the ultimate client.
Question 9	The question asked for the name of the IPReg Rule to be identified. Many candidates failed to do this and therefore could be awarded those marks. It is important for candidates to recognise that in the event of a prosecution by their regulator, IPReg would be required to identify the precise Rule under which a regulated person could be disciplined.

Part B

Question number	**Comments on question**
Question 10	Part a): Candidates needed to identify that it is an issue whether the tyre tread could be treated as confidential information. Marks available on this issue were awarded flexibly depending on the way in which candidates answered. Many candidates failed to note (even if they stated it is as a test) that breach can be by misuse as well as disclosure. These answers focussed on public disclosure only rather than William's use of the tyre tread in his business for his own purposes.

	Part b): A number of candidates referred to springboard injunctions. These were not strictly relevant as these relate to final injunctions but some credit was given as it showed candidates were considering William's misuse in his business rather than in public disclosure. Part c): The key here was the nature of the trade secrets rule which is not a property right and therefore is not an obligation owed by third parties. However, where a third party should have known the information was obtained from a breach of confidence then the courts will grant injunctive relief.
Question 11	Part a): Provided candidates could recite section 1(1) and (2) of Contracts (Rights of Third Parties) Act 1999 then they simply had to fit the facts into that structure. Candidates who did not know this structure came up with questions as to whether Felicity was a licensee and party to the contract, which the question had made clear she was not. Part b): Higher marks were achieved by candidates who realised that the offer and acceptance were made in respect of development but not sales. Even if a candidate had concluded that there was no contract (provided the conclusion was argued from the facts), they could still pick up on this distinction. The making and selling was not a counter-offer, and no marks awarded for arguing a counter-offer.
Question 12	Part a): A number of candidates thought that this question related to negligent misstatement. This was not a misstatement: it was the offer to undertake work and a failure to undertake that work. Nicholas was not expected to act on what Ayesha said. It was Ayesha's obligation to take action that was at fault. Referring to an assumption of responsibility under extended Hedley Byrne principles for PEL was acceptable. Part b) was generally answered well. Marks available were adjusted according to how answers were structured. Marks were awarded for identifying relevant tests for causation and reasonable discussion applying the test to the facts, for example, whether the candidate had demonstrated that they could make further reasonable enquiry as to the circumstances of the damage. Damage 1 and 4 should have been straightforward. Part c) related to vicarious liability. Many candidates came unstuck because they considered the test to be "in the course of employment". More successful candidates identified the "close connection" assessment which overcame problems with out of the office and fraudulent scenarios.

Question 13	Part a): A number of candidates did not show sufficient knowledge of the detail and did not refer either to "opportunistic" registration or to similar names "likely to mislead". Part b): This topic was better answered than in previous years. The question asked for the test for permission to allow not how to assess the survey. Part c): Few candidates appreciated that a court can be asked to review "without prejudice" material to ascertain whether a settlement contract has been agreed. Part d) was generally well answered..