

English Law FC2 (Law)

Monday 17 October 2016 15:00 to 17:00

INSTRUCTIONS TO CANDIDATES

1. You should attempt **four of questions 1 to 5** in Part A and four of **questions 6 to 10** in Part B.
2. The marks awarded to each question are shown at the foot of the question and sub-questions. If more than the required four questions are answered in Part A, or more than the required four questions are answered in Part B, only the first four presented in each respective part will be marked.
3. The total number of marks available for this paper is 100.
4. Start each question (but not each part of each question) on a new sheet of paper.
5. Enter the question number in the appropriate box at the top of each sheet of paper.
6. Do not state your name anywhere in the answers.
7. Write clearly as examiners cannot award marks to answer scripts that cannot be read.
8. The scripts may be photocopied for marking purposes.
 - (a) Use only **black ink**.
 - (b) Write on one side of the paper only.
 - (c) Write within the printed margins.
 - (d) Do not use highlighter pens on your answer script.
9. Instructions on what to do at the end of the examination are on the Candidate Cover Sheet.
10. Any candidate script removed from the examination room will not be marked.
11. This question paper consists of nine sheets, including this sheet.

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) With regard to judicial review:
- 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

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

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*.

4 marks

Total: 10 marks

Question 4

- a) Briefly contrast the jurisdiction of the following courts:
- i) County Court
 - ii) Intellectual Property Enterprise Court
 - iii) The three principal divisions of the High Court
 - iv) The different divisions of the Court of Appeal
 - v) Supreme Court.
- 5 marks**
- b) With regard to equitable remedies:
- 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

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

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

Total: 15 marks

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* require 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

Cont...

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 Code of Conduct* in the above scenario?**

3 marks

Total: 15 marks

Question 8

Adelita makes a sales call at Nicholas's office telling him about her technology. She claims it will increase Nicholas's 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's 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's patent attorney, advises Nicholas to allege Adelita has made a fraudulent misrepresentation anyway, saying they will gather the information later.

- b) **With reference to the scenario:**

- i) **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.**

5 marks

Cont...

iv) Could Adelita have excluded liability for each and, if so, how?

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 six 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 six months be considered a fundamental breach?

3 marks

e) In a contract case:

i) What is the basic rule for assessing damages?

ii) When considering the level of loss that can be compensated for, what duty does Nicholas have?

2 marks

Total: 15 marks

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 Ltd. He knows a successful sole trader making tape recorders that trades as Abbett. Joe will probably trade under a different name, but wants Abed Ltd 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

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 probably have shown claim 2 to be patentable. With reference to this scenario:

a) Concerning 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 your 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