

FC2 (Law) – English Law
Mark Scheme 2015

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) Explain what is meant by:

- i) direct evidence;
- ii) hearsay evidence.

Explain what weight should be given to hearsay evidence in:

- iii) civil cases;
- iv) criminal cases.

4 marks

b) What principal type of opinion evidence can be given in court and why is opinion evidence generally not permitted?

2 marks

c) Distinguish between an affidavit and a witness statement.

2 marks

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

2 marks

Total: 10 marks

Answer

a)

i) Any reasonable example such as a statement by a person made in a witness statement with explanation that there is no intermediary evidence of the facts.

1 mark

ii) Any reasonable example such as a statement made, otherwise than by a person giving oral evidence in proceedings, which is tendered as evidence of the matters stated (CPR rule 33.1) or demonstrating understanding that evidence of what someone else said who is not in court.

1 mark

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A reasonable discussion including at least one point from both types of cases:

- iii) In civil cases such evidence is not excluded on the ground that it is hearsay but a notice (Civil Evidence Act Notice) must be served on the other parties. Weight may be affected by all the relevant circumstances including whether such a Notice has been served. **1 mark**
 - iv) Demonstrating understanding that in criminal cases the general common law rule is against admissibility of such evidence unless there is a statutory exception and even then it will only be allowed if it is of probative value and other such circumstances. The weight to be given is up to the jury or magistrate. **1 mark**
- b) Expert evidence is the only type of opinion evidence permitted in court as evidence in proceedings should be to the facts **1 mark**
- the only relevant opinion is that of the court (there is one type of non-expert opinion where there is no conscious rationalisation) **1 mark**
- c) An affidavit is a statement made by an individual made under oath or affirmation, signed and the signature witnessed as that of the individual making the statement. A witness statement need only be signed by an individual provided that the statement includes a statement of truth. A mark may be awarded to each part of the answer. **2 marks**
- d) To request the contact details of that party's professional adviser; where reasonably it appears messages have not been passed on and then only after a warning of your intention to do so; with the professional advisor's consent; in exceptional circumstances. **2 marks maximum, 1 for any one of the possible 4 points**

Total: 10 marks

Question 2

- a) Describe the essential characteristics of 'consideration' in the formation of a contract. **3 marks**
- b) i) Explain what 'privity of contract' means.
- ii) How does the *Contracts (Rights of Third Parties) Act 1999* alter this? **4 marks**
- c) What is the remedy for breach of:
 - i) warranty?
 - ii) an innominate term?

3 marks
Total: 10 marks

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Answer

- a) Full marks may be awarded for three of any of the following: Anything of value; must be sufficient but need not be adequate; must not be past and must not be an existing duty; must pass from the promisee but need not pass to the promisor. **3 marks**
- b) i. 'Privity of Contract', the general rule that a contract cannot be enforced by or against third parties to the contract. **1 mark**
- ii. permits enforcement of a term of a contract where the contract expressly provides for it **1 mark**
- or a term that confers a benefit on a third party **1 mark**
- its application may be excluded by contractual term. **1 mark**
- c) To sue for damages only, there is no right to rescind the contract. The court must determine whether an innominate term is a warranty or condition – if a condition a party may rescind the contract and sue for damages. A mark may be awarded to each part of the answer. **3 marks (Total marks for a reasonable answer on parts i) and ii))**

Total: 10 marks

Question 3

- a) What is a 'bona fide purchaser of property for value without notice'? **2 marks**
- b) State the elements required to establish malicious falsehood. **4 marks**
- c) Explain the term 'without prejudice'. Give one example of a situation in which it cannot be relied upon. **4 marks**

Total: 10 marks

Answer

- a) A purchaser of property over which another has an equitable interest may take free of such an interest where that purchaser purchases for valuable consideration without actual or constructive notice of the earlier equitable right. A mark may be awarded to each part of the answer. **2 marks**
- b) A false statement of fact and not of opinion; published in writing or any permanent form; the statement is made with malice (an intention to cause loss or an improper motive by defendant including recklessness); damage is caused to the claimant but

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no requirement for special damage. A mark may be awarded to each part of the answer but the answer need not classify the issues in the manner stated here.

4 marks

- c) A public policy recognised by the courts that statements made in writing or otherwise in pursuance of negotiations between the parties in connection with a dispute will not be considered by the court as evidence of admissions by that party, whether the term 'without prejudice' is used or not – it is a case of substance over form; marks up to the total available may be awarded.

3 marks

examples including use of the rule to pursue a fraud, evidence of perjury or unambiguous impropriety nor if there is no genuine attempt at settling the dispute.

1 mark

Total: 10 marks

Question 4

- a) Distinguish between a limited company and a sole trader.

5 marks

- b) With reference to the IPREG *Code of Conduct* how must a regulated person deal with client monies? What is the normal limit (in aggregate) of client monies that may be held and, if exceeded, what needs to be done?

2 marks

- c) What is the nature of ownership of a patent granted to two proprietors and explain briefly what is meant by this.

3 marks

Total: 10 marks

Answer

- a) A limited company has individual and separate legal identity

0.5 marks

governed by its Articles of Association

0.5 marks

is created by a process of incorporation set out in its Memorandum of Incorporation and/or reference to formalities of incorporation at Companies House in contrast to that of a sole trader

0.5 marks

owned by its shareholders who have limited liability

0.5 marks

managed by its Directors.

0.5 marks

A sole trader is an individual acting in business acting for themselves in their own legal identity

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- A sole trader is liable for all the debts of the business **0.5 marks**
- but a limited company is solely liable for the debts of the company's business **0.5 marks**
- beyond the shareholders liability according to the value of the unpaid up shareholding **0.5 marks**
- unless a Director can be found personally liable usually for reasons of misconduct in fulfilling the Directorship. **0.5 marks**
- b) Conduct Rule 11, must have appropriate procedure and controls to ensure high standard of service in relation to the management of client money, held in an account separate from the firm's business account. Over £250,000 monies held in aggregate then additional compensation arrangements must be put in place. Marks up to the total available may be awarded. **2 marks**
- c) i) Is said to be owned in 'equal undivided share'. **1 mark**
- ii) Means the interest in the property is undivided, each share is equal, property is held under the same title. Marks may also be awarded for demonstrating understanding that a co-owner may use for own benefit without consent of the other, may not assign, mortgage or licence without consent of the other. **2 marks (1 mark for any one of these points)**

Total: 10 marks

Question 5

- a) Briefly distinguish between the terms 'tenants in common' and 'joint tenants'. **2 marks**
- b) Distinguish between fixed and floating charges. **6 marks**
- c) i) With reference to the IPREG *Code of Conduct*, in relation to the rule on conflicts of interest, what is meant by 'relevant knowledge'?
- ii) How does 'relevant knowledge' affect the operation of the rule or exceptions to it? **2 marks**

Total: 10 marks

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Answer

- a) Co-owners holding as tenant in common hold identifiable parts of the property in specified proportions which can be transferred to others without permission of the other co-owners;

1 mark

joint tenants both own the whole of the property, their interest in the property is undivided, each share is equal, property is held under the same title and the whole passes to the other co-owners if one of the owners die.

1 mark

- b) A fixed charge is a charge or mortgage secured (ie that the asset may be used to satisfy a debt owing) on particular specified property which usually restricts the owner's ability to deal with that property on terms. A floating charge is an equitable charge available only to companies or LLPs that does not attach to specific assets but rather over classes of assets, such as stock, 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. The floating charge only crystallizes or attaches to the property when the debenture specifies (including for example non-payment) and catches only property held at that moment, at which point it becomes a fixed charge. Marks up to the total available may be awarded.

6 marks (Marks up to the total available may be awarded)

- c) i) Conduct Rule 7, Guidance 7.1; knowledge of the client's affairs that is not widely disseminated to the public that is or is likely to become relevant to the action concerned against the client.

1 mark

ii) Conduct Rule 7; there is an exception to the rule on conflicts where both parties (clients or former clients) have given their consent however regardless of consent a person may not act where they have relevant knowledge of the party they are to act against.

1 mark

Total: 10 marks

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PART B
Question 6

Steven was convicted in the Magistrates Court of selling counterfeit CDs. He represented himself despite having little legal knowledge. The defence he claimed at trial was that he had the copyright owner's consent because he had informed the copyright owner of the sales but they had not responded. Discussions during the trial were about whether the nature of the consent alleged was insufficient to amount to a defence. The prosecution barrister said to Steven afterwards that the matter of law was *stare decisis* and that the *ratio decidendi* covered Steven's case entirely, though the *obiter dicta* suggested there was some leeway.

- a) **Explain the burden and standard of proof applicable to the prosecution's case and Steven's defence.** **2 marks**
- b) **Explain what the terms *stare decisis*, *ratio decidendi* and *obiter dicta* mean.** **4 marks**
- c) **Steven wants to appeal directly to the European Court of Justice and the Supreme Court. Advise Steven on the routes and basis of appeals from the Magistrates Court.** **6 marks**
- d) **With reference to the IPREG *Code of Conduct* what requirements does a regulated person have in respect of taking Steven on as a client?** **3 marks**

Total: 15 marks

Answer

- a) The prosecution must prove their case **0.5 marks**
beyond reasonable doubt **0.5 marks**
however Steven's defence need only be proven by him **0.5 marks**
on a balance of probabilities. **0.5 marks**
- b) *Stare decisis*: the legal point has already been decided by a court; **1 mark**
Ratio decidendi: the legal rationale of a court's decision on a matter of law; **1 mark**
Obiter dicta: non-essential element of a court's opinion **1 mark**
And therefore not legally binding **1 mark**
- c) To the High Court on the law 'by way of case stated' **1 mark**
to the Crown Court on mixed matters of fact or law **1 mark**

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after that appeal is to the Court of Appeal Criminal Division on matters of law only with leave **1 mark**

the final point of appeal on a matter of law of general public importance only is to the Supreme Court **1 mark**

the ECJ has no jurisdiction over matters of domestic law but only over matters of Community law if the nature of consent in Copyright licensing did turn out to be a matter of Community law then a reference can be made by any court at any time under Article 267 TFEU **1 mark**

to decide the matter of law but the case will revert to the national court to make the final decision on the facts. **1 mark**

d) Conduct Rule 4, Guidance 4.6: regulated professionals do not have the right to conduct criminal litigation but may offer advice on sanctions that apply to criminal acts under the CDPA88 **1 mark**

however 'if asked for such advice you must consider carefully on what it is within your competence to advise and the point at which it would be advisable to refer the client to another lawyer, such as a solicitor.'
1 mark

Further Rule 6, Guidance 6.1, written terms of business must be sent to the client at the outset of the relationship. **1 mark**

Total: 15 marks

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Question 7

Jonathan has issued High Court proceedings for patent infringement. He hopes to get £100,000 in damages from the infringer James. James is representing himself and gets the case transferred to the Intellectual Property Enterprise Court (IPEC).

- a) **Describe the differences in the jurisdiction of the IPEC and the High Court.**
5 marks
- b) **What principles must the Court follow to achieve the overriding objective set out in CPR Rule 1?**
8 marks
- c) **State and explain the standard of proof required for Jonathan to prove his case.**
2 marks

Total: 15 marks

Answer

- a) Marks may be awarded up to the maximum for a reasonable description including e.g. the following: The IPEC is part of the High Court but has special rules relating to its jurisdiction including a limit on damages claimed of £500,000 and limited to cases on intellectual property, but can handle small cases of a value less than £10,000 in damages; IPEC judges tend to apply simpler/streamlined rules of procedure and limited to cases requiring a trial of up to 2 days max; judges of the IPEC have the same powers of remedy as a judge of the High Court though in the small claims track there is no power to award interlocutory relief, there is a special scale of costs in place awarded against the losing party with a cap of £50,000; the High Court has no limit on the type or size of claims within it and there is no limit per se on the costs that can be awarded against a losing party; otherwise the CPR applies equally in the IPEC as well as the High Court.
5 marks
- b) Deal with cases justly including i) parties on equal footing ii) saving expense iii) deal with cases proportionately (2 further marks may be gained by listing factors under this point iii)) iv) dealings must be expeditious and fair v) allotting an appropriate share of the court's resources vi) give effect to the overriding objective when exercising any power under the rules vii) the parties must help the court achieve the overriding objective viii) the court must further the overriding objective by actively managing cases. One mark may be awarded for each point.
8 marks max from a pool of 10 (One mark may be awarded for each point)
- c) Jonathan must prove his case on the balance of probabilities, which is the civil standard of proof not the criminal standard of proof which is beyond reasonable doubt. Marks up to the total available may be awarded.
2 marks

Total: 15 marks

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Question 8

Sacha has discovered Warren is about to launch some new motorbike components at a trade show. She believes the components are covered by her UK design registration.

- a) **Explain what Order can be applied for to stop the launch without Warren present, and what issues the court must be persuaded of.** **8 marks**
- b) **What undertakings must Sacha give?** **3 marks**
- c) **What form must the supporting evidence for the Order take and what essential formality must be observed?** **1 mark**

Sacha alleges that Warren told her he believes the components infringe her design registrations.

- d) **What type of evidence is this?** **1 mark**

George, Sacha's representative, is aware that Sacha discussed her design registration with Warren two months ago. Sacha may thus have known Warren intended to infringe the design registration. George fails to ensure this is brought to the court's attention.

- e) **With reference to the IPREG Code of Conduct what obligation has George breached and what effect might there be on the grant of the Order by the court?** **2 marks**

Total: 15 marks

Answer

- a) A 'quia timet' or urgent ex parte application for an interim injunction; **2 marks**
the decision will be governed by the principles set out in the American Cyanamid case **1 mark**

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- i) is there a serious issue to be tried
- ii) 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
- iii) where does the balance of convenience lie as between the parties (including the merits of the case)
- iv) if otherwise balanced between the parties, objective is to preserve the status quo ante
- v) An additional mark may be awarded for any reasonable discussion of the *American Cyanamid* criteria

5 marks up to the total available may be awarded.

- b) 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**
 - c) In a witness statement
with a statement of truth. Marks up to the total available may be awarded. **1 mark**
 - d) Hearsay evidence. **1 mark**
 - e) Such an injunction might not be granted where there is delay in the claimant coming to court with the request. **1 mark**
- Conduct Rule 14: on observing rules relating to the conducting of litigation – to give full and frank disclosure and especially on an ex parte application even to matters that are not in the interests of the person seeking the Order. **1 mark**

Total: 15 marks

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Question 9

Miranda and Donald informally discussed Donald manufacturing toys to Miranda's registered designs. Nothing was recorded in writing. They could not agree on the cost per toy but Donald started manufacturing anyway.

- a) **Explain the requirements for formation of a valid contract under English law. With reference to the above scenario, does a valid contract exist between Miranda and Donald?**

8 marks

Miranda commences an infringement action against Donald.

- b) **Explain the nature of, and issue with, the following types of evidence:**
- i) **Miranda's witness statement is presented at trial without her being present;**
 - ii) **Miranda's in-house designer says her registrations are valid, but a local expert disagrees. Miranda thinks the court should hear her designer's opinion.**

3 marks

Several toys are present at trial without being referred to in any witness statement. Miranda's representative Xavier tells the judge they are the infringing toys manufactured by Donald.

- c) **With reference to the IPREG Code of Conduct discuss Xavier's breach of his obligation.**

1 mark

Miranda agrees to assign the registered designs to Donald and he gives her £1. Nothing is recorded in writing and no further action taken. Later, Donald commences proceedings against another manufacturer, Sebastian, for infringement of the same registrations.

- d) **Discuss whether Donald owns the registered designs. Will the court allow him to pursue the infringement action?**

3 marks

Total: 15 marks

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Answer

- a) i. intention to create legal relations (review the situation where the arrangement was made where a domestic or social situation might suggest there is no such intention
2 marks
- ii. offer (must be unambiguous and capable of acceptance and must not be a mere invitation to treat)
2 marks
- iii. acceptance (unqualified and of all terms, must be communicated to the offeror)
2 marks
- iv. consideration (something of 'value', must not be past, sufficient but need not be adequate, must move from the offeree but need not pass to the offeror);
2 marks
- Any reasonable discussion of the existence of a contract between Miranda and Donald.
2 marks
- 8 marks out of a possible pool of 10 marks (half or full marks may be awarded)**
- b) i. Miranda's evidence will be hearsay and so will go to weight. (Marks up to the total available may be awarded.)
1 mark
- ii. Opinion evidence may only be submitted by an expert, expert must remain independent and unbiased opinion regardless of what the party may be paying them (CPR r35, Practice Direction 2.2) (Marks up to the total available may be awarded.)
2 marks
- c) Conduct Rule 14, Guidance 14.1: advocates must not present statements of fact when those statements are not supported by the evidence in the case
1 mark
- d) An assignment of registered design is only effective when made in writing
1 mark
- however there is a contract supported by consideration therefore the Court will view this as an equitable assignment (The entire answer must be given to award a mark.)
1 mark
- Donald must join Miranda as a party to the litigation and seek to perfect his title as soon as possible. (Marks up to the total available may be awarded.)
1 mark
- Total: 15 marks**

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Question 10

Jonathan is a patent attorney working for a limited partnership patent firm. Jonathan put in £10,000 to create the firm and is called ‘a limited partner’.

The firm only allows attorneys to work for small businesses and individuals that have been sent a client care letter. Nevertheless, three years ago, Jonathan agreed to help a large pharmaceutical company renew a patent. He didn’t send a client care letter but did put the renewal deadline on his firm’s case management system. Last year, Jonathan also confirmed the validity of the patent when the pharmaceutical company obtained a bank loan.

Unfortunately, Jonathan incorrectly entered the date and the system did not check dates for large companies. Failure to renew was discovered after the patent lapsed irretrievably and the pharmaceutical company lost large profits. Due to its losses the pharmaceutical company couldn’t repay the bank, which lost £100,000.

- a) **Explain what ‘a limited partnership’ is and how it is established.** **4 marks**
- b) **Set out the requirements for actionable negligence.** **5 marks**
- c) **Under what principle can an employer be liable for an employee’s negligence? From the above scenario give one fact which indicates whether the firm is liable for Jonathan’s negligence?** **2 marks**
- d) **Explain the legal issue arising from the bank’s losses.** **2 marks**
- e) **With reference to the IPREG *Code of Conduct* discuss Jonathan’s breaches of his professional obligations.** **2 marks**

2 marks
Total: 15 marks

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Answer

- a) A partnership **0.5 marks**
 In which only one partner is required to be a general partner with unlimited liability **0.5 marks**
 but in which other partners may have limited liability **0.5 marks**
 according to the amount that they invest into the business **0.5 marks**
 the general partner manages the business **0.5 marks**
 as between the partners there is no requirement to enter into a written agreement **0.5 marks**
 however the partnership must be registered at Companies House **0.5 marks**
 and must file annual returns and accounts. **0.5 marks**
- b) i) duty of care **0.5 marks**
 (relationship of sufficient proximity to impose such a duty) **0.5 marks**
 ii) breach of duty **0.5 marks**
 (objective standard of care **0.5 marks**
 required of a person in exercising that duty) **0.5 marks**
 iii) reasonable foreseeability **0.5 marks**
 (reasonable man test) **0.5 marks**
 iv) causation of damage **0.5 marks**
 (would damage have occurred ‘but for’ test or other reasonable discussion of **0.5 marks**
 causation **0.5 marks**
 and remoteness of the type of damage) **0.5 marks**
- c) vicarious liability **1 mark**
 any reasonable discussion on whether employer may or may not be liable **1 mark**
- d) liability for negligent misstatement **1 mark**
 statement of fact made to a party for whom it is reasonable to rely on that statement **1 mark**
 and does in fact do so resulting in damage being caused to that party. **1 mark**

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- e) Conduct Rule 4, Guidance 4.1, consider the firm's competency to deal with the client's matter.

Conduct Rule 6, Guidance 6.1 written statement of terms of business.

Conduct Rule 5, Duty to take due care.

2 marks maximum

Total: 15 marks