

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.

**FC4 Design and Copyright Law
Mark Scheme – Sample Assessment Material**

SECTION A

Question 1

Explain:

- a) what initial actions the EUIPO takes if it finds that a design is non-registrable; **1 mark**

 - b) what possible actions the applicant needs to take in response; and **2 marks**

 - c) the possible outcomes of the applicant's actions. **1 mark**
- Total: 4 marks**

Answer

- a) i) According to Article 11 CDIR, EUIPO will issue an examination report **(0.5 marks)**
ii) ... setting a time limit **(0.5 marks)**. **1 mark**

 - b) i) According to Article 11 CDIR, the applicant can submit observations **(0.5 marks)**
ii) ... withdraw the application **(0.5 marks)**
iii) ... or amend it by submitting an amended representation of the design, provided that the identity of the design is retained **(1 mark)**. **2 marks**

 - c) If the applicant fails to overcome the grounds for non-registrability within the time limit, EUIPO will refuse the application for the designs concerned, or for all designs as appropriate. Otherwise, assuming all else in place, is registered. **1 mark**
- Total: 4 marks**

Question 2

In relation to a UK unregistered design right in a design created after 1 October 2014, explain whether the following meet the qualification requirements under *Section 217* ('Qualifying individuals and qualifying persons') CDPA:

- a) **A company that employs a designer, where the company is formed in accordance with Italian law.** **4 marks**

 - b) **A designer, resident in Japan, of a product that embodies a qualifying design. The product was first marketed in Spain.** **3 marks**
- Total: 7 marks**

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Answer

- a) i) Section 219 CDPA – qualifies if design created in course of employment with a qualifying person **(1 mark)**.
ii) Section 217 CDPA – a company would be a body corporate or other body having legal personality as mentioned under Section 217(b) CDPA, which, for there to be UDR, must be formed under the law of a part of the UK/other qualifying country **(0.5 marks)**.
iii) Italy is in EU so is a qualifying country **(0.5 marks)**.
iv) ... and has, in any qualifying country, a place of business at which substantial business activity is carried on **(0.5 marks)**.
v) For determining substantial business activity, no account is taken of dealings in goods which are at all material times outside that country **(0.5 marks)**.
vi) We do not know this – we would need to find out if the requirements re qualifying designer, individuals, etc would be met **(1 mark)**.

4 marks

- b) i) For the first marketing provisions to apply, the design cannot qualify for protection by reference to designer (Section 218) or employer (Section 219) **(1 mark)**.
ii) Then, qualifies if the first marketing is by a qualifying person and first marketing takes place in the UK, another country subject to a Section 255 (but not Section 256, reciprocal protection) order or another EU member **(1 mark)**.
iii) So a designer who is Japanese, because Japan is not a qualifying country but the first marketer does qualify under one of the requirements mentioned above **(1 mark)**.

3 marks

Total: 10 marks

Question 3

Assuming no authority or licence to use has been granted, explain, with reasons, whether or not the following acts constitute infringements of UK copyright.

- a) **A student who photocopies a couple of pages of a book to help with her exam revision.**
2 marks
- b) **A film club watching a film on a DVD brought in from home by one of the members.**
2 marks
- c) **Reissuing advertising materials to households in the UK, where the materials have already been distributed with the copyright holder's consent in France.**
2 marks

Total: 6 marks

Answer

- a) i) The copyright owner has the exclusive right to do acts including copying (Section 16 CDPA) **(0.5 marks)**, so no,
ii) ... and 'copying' means reproducing in any material form (Section 17) and would include photocopying, but exam revision would constitute private study, which is not considered an infringement (Section 29 CDPA) **(1 mark)**.
iii) Copying just a chapter would be fair dealing and is acceptable under section 29 CDPA **(0.5**

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marks).

2 marks

- b) i) Section 16 CDPA says the copyright owner has the exclusive right to, inter alia, perform or show a work in public **(1 mark)**, so yes,
ii) ... and Section 19 CDPA restricts the playing or showing of such a work in public. The DVD is likely to be a personal, not-for-public showing copy of the film, and thus restricted **(1 mark)**.
2 marks

- c) i) Issuing copies of a work to the public is a restricted act under Section 16 CDPA **(1 mark)**, so no,
ii) ... but Section 18 CDPA allows subsequent distribution of copies in an EEA state previously put into circulation within the same or another EEA state **(1 mark)**.

2 marks

Total: 10 marks

Question 4

How is joint authorship defined in Section 10 ('Works of joint authorship') CDPA?

1 mark

Answer

A work produced by collaboration of two or more authors in which the contribution of each author is not distinct from that of the others.
1 mark

Question 5

- a) Explain when, according to *Article 2 ('Multiple Application')* CDIR, more than one design may be included in an application for registration of a Community registered design (CRD).
1 mark
- b) Explain whether the situation is the same or different for UK registered designs.
1 mark
- c) What is the time limit for providing information identifying the applicant where this has not been specified on filing a CRD?
1 mark
- d) What effect, if any, does this have on the filing date?
1 mark
- e) Further to (c) and (d), what happens if the information is not provided in time?
1 mark

Total: 5 marks

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Answer

- a) According to Article 2 CDIR, you can have several designs in the same application so long as they are within the same Locarno classification **(0.5 marks)**. This does not apply to surface decoration **(0.5 marks)**. **1 mark**
- b) Multiple applications available in the UK **(0.5 marks)**. No restriction in UK on Locarno classification **(0.5 marks)**, and is independent of surface decoration **(0.5 marks)**. **Up to max 1 mark**
- Article 10 CDIR: two months of receipt of the notification from the EUIPO. **1 mark**
- c) Filing date is changed to the date on which all information is provided/deficiencies are remedied. **1 mark**
- d) Article 10 CDIR: The application is not dealt with as a Community design and any fees paid are refunded. **1 mark**

Total: 5 marks

Question 6

To determine the novelty and individual character of a UK registered design, a comparison must be made with earlier designs.

- a) **Under what circumstances is a design considered to have been made available to the public according to Section 1B ('Requirement of novelty and individual character') RDA?** **1 mark**
- b) **What exclusions apply?** **6 marks**

Total: 7 marks

Answer

- a) Section 1B RDA: A design is considered to be made available to the public if it has been published (following registration or otherwise), exhibited, used in trade or otherwise disclosed before the filing/priority date, unless any of the following apply: **1 mark**
- b) i) It could not reasonably have become known before the relevant date in the normal course of business to persons carrying on business in the European Economic Area and specialising in the sector concerned **(1 mark)**.
- ii) It was made available to a person other than the designer, or any successor in title of his, under conditions of confidentiality (whether express or implied) **(1 mark)**.
- iii) It was made by the designer, or any successor in title of his, during the period of 12 months immediately preceding the relevant date **(1 mark)**.

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- iv) It was made by a person other than the designer, or any successor in title of his, during the period of 12 months immediately preceding the relevant date in consequence of information provided or other action taken by the designer or any successor in title of his **(2 marks)**.
- v) It was made during the period of 12 months immediately preceding the relevant date as a consequence of an abuse in relation to the designer or any successor in title of his **(1 mark)**.

6 marks

Total: 7 marks

Question 7

- a) When and by whom can a Community registered design (CRD) be surrendered?

1 mark

- b) Explain what is meant by 'partial surrender' of a CRD.

1 mark

- c) When is partial surrender of a CRD allowable? Give an example.

2 marks

Total: 4 marks

Answer

- a) Article 51 CDR only applies to registered CRDs, so any time **(0.5 marks)**, if requested in writing by the CRD owner **(0.5 marks)**.

1 mark

- b) Partial surrender refers to amendment of a design to remove or disclaim features so the design complies with requirements for protection.

1 mark

- c) Where the features removed or disclaimed do not contribute to the novelty or individual character of a Community design (eg in invalidity proceedings) **(1 mark)**.

For example:

where the Community design is incorporated in a product that constitutes a component part of a complex product, and the removed or disclaimed features are invisible during normal use of this complex product (Article 4(2) CDR); or

the removed or disclaimed features are dictated by a function or by interconnection purposes (Article 8(1) and (2) CDR); or

where the removed or disclaimed features are so insignificant in view of their size or importance that they are likely to go unnoticed by the informed user. **(1 mark for a reasonable example.)**

2 marks

Total: 4 marks

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Question 8

- a) What requirements must the applicant of a Community registered design (CRD) application meet in order to substantiate a claim to priority from an earlier application?
3 marks
- b) What action must an applicant take to claim the priority of an earlier application after a CRD application has been filed?
3 marks

Include any relevant time limits in your answers.

Total 6 marks

Answer

- a) Article 8 CDIR:
Application should indicate the file number **(0.5 marks)** and country **(0.5 marks)** of the previous application; file a certified copy of representations **(1 mark)** from earlier application within three months of the filing date **(1 mark)**.
3 marks
- b) i) Submit a declaration of priority within one month of the filing date **(1 mark)**.
ii) Declaration must state the date on which, and the country in which, the application was made **(1 mark)**.
iii) Need to attend to the requirements of (a) within three months of receipt of the declaration of priority **(1 mark)**.

3 marks

Total: 6 marks

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SECTION B

Question 9

Over the summer your client designed a jewellery box which, on the outside, looks like a thatched cottage, and has painted roses climbing the walls. The front opens up and, on the inside, small ‘cupboards’ and ‘drawers’ are provided for storing items of jewellery.

a) Assuming that no similar design currently exists, explain in a memo to your client what UK unregistered design rights (UDRs) and Community unregistered design (CUD) rights, if any, might subsist and why, for each of the following:

i) the overall configuration of the whole cottage; **2 marks**

ii) the shaped ridge area of the thatched roof; **2 marks**

iii) the painted roses; **2 marks**

iv) the drawers and cupboards. **2 marks**

Your client tells you she heard that CUD protection is not available for parts of a design not visible in normal use and that she is concerned that parts of her design may not be protectable.

b) Briefly explain to her whether this is true and whether it applies to any parts of her design. **2 marks**

Your client is also concerned that one of her competitors is manufacturing very similar jewellery boxes. She has asked you for some general information on infringement of a UDR in both the UK and the European Union.

To help her, write notes which you will use to explain to her:

c) what acts constitute primary and secondary infringement of a UK UDR; **6 marks**

d) what acts constitute infringement of a CUD right; **3 marks**

e) for a CUD right, and with reference to Article 19 (*‘Rights conferred by the Community Design’*) CDR, when is contested use of a design deemed not to result from copying. **1 mark**

Total: 20 marks

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Answer

- a) UK UDR Section 213 CDPA:
- i) Yes, eg in overall shape and features: definition of design includes design of the shape or configuration (whether internal or external) of the whole article **(1 mark)**.
 - ii) No. 'Parts of a part' are excluded so no UDR (removal of text after IP Act 2014) (but marks awarded for reasonable argument on 'part of a part') **(1 mark)**.
 - iii) Probably no. Surface decoration excluded so no UDR **(1 mark)**.
 - iv) Yes/maybe. These are separate parts so there may be UDR in appearance of these features (subject to must fit/must match exclusions) **(1 mark)**.

EU CUD Article 3, 4:

- i) Yes. Definition of design includes appearance of the whole of product resulting from, inter alia, the contours, shape, texture and/or materials of the product itself **(1 mark)**.
- ii) Probably no. 'Parts of a part' are excluded so no CUD (but marks awarded for reasonable argument on 'part of a part') **(1 mark)**.
- iii) Yes. Surface decoration not excluded so may be CUD **(1 mark)**.
- iv) Yes/maybe. These are separate parts so there may be CUD in appearance of these features (subject to must match exclusion) **(1 mark)**.

8 marks

- b) Article 3, 4 CDR: This exclusion only applies to complex products composed of multiple components which can be replaced permitting assembly and reassembly. The components such as the drawers and cupboards are unlikely to fall within this definition and so this exclusion does not apply in this scenario.

2 marks

- c) Primary infringement – Section 226 CDPA: UDR owner has exclusive right to reproduce (ie copy) for commercial purposes, and infringement occurs if another person, without licence of UDR owner, does or authorises the making of an article to that design, ie copying the design to produce articles exactly or substantially to that design, or the making of a design document recording the design for the purpose of enabling such articles to be made. **3 marks**

Secondary infringement – Section 227 CDPA: UDR is also infringed by a person who, without licence of the UDR holder, or imports into UK for commercial purposes, has in possession for commercial purposes, or sells, lets for hire, or offers or exposes for sale or hire, in the course of a business, an article which is, and which he knows or has reason to believe is, an infringing article. **3 marks**

- d) Article 19 CDR: CUD owner has exclusive right to use design and prevent any third party not having his consent from using it. Use covers, in particular: making, offering, putting on market, importing, exporting, using a product in which design is incorporated or to which design is applied, or stocking such a product for those purposes ... if the contested use arises from copying. **3 marks**

- e) Article 19 CDR: If it results from an independent work of creation of a designer who may reasonably be thought not to be familiar with the design made available to the public by the CUD holder.

1 mark

Total: 20 marks

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Question 10

Explain, with reasons, whether the rights listed under (a) to (e) below are protectable. State in your answer for how long and from when each type of right lasts.

In each case, assume there is novelty, individual character or originality, as appropriate. There is no need to discuss any issues relating to ownership or qualification requirements.

- a) **An application for a UK design registration for a logo for a pro-monarchy group including a portrait of the Queen in front of the Union Jack flag.** **5 marks**
- b) **Copyright in an X-ray.** **4 marks**
- c) **UK unregistered design right in a car door.** **6 marks**
- d) **Community unregistered design right in a vehicle bumper sticker showing very offensive language.** **2 mark**
- e) **Copyright in a painting by an unknown artist.** **3 marks**

Total: 20 marks

Answer

- a) i) Schedule A1 to the RDA says a registration shall be refused if involves a Union Jack and the registrar considers its use would be misleading or grossly offensive, but a supporters' group would not appear to fall into this category **(1 mark)**.
ii) However, Schedule A1 also stipulates that an application including a representation of Her Majesty will be refused unless the Queen has given permission **(1 mark)**.
iii) Assuming she has not, as it would be unlikely **(0.5 marks)**
iv) ... the answer is No **(0.5 marks)**.
v) Registration lasts five years from the date of registration **(0.5 marks)** (which is the date of filing **(0.5 marks)**) initially, up to a maximum of 25 years **(0.5 marks)** if renewed every five years **(0.5 marks)**. **5 marks**
- b) i) Maybe **(0.5 marks)** (equivalent marks be given if say Yes or No and give support with good reasons).
ii) Copyright subsists in an artistic work (Section 1 CDPA). Can the X-ray be considered artistic **(0.5 marks)**?
iii) Section 4 CDPA defines artistic works to include photographs, a photograph being a recording of light on any medium on which an image is produced by any means and which is not part of a film **(1 mark)**.
iv) **(One mark)** is alternatively available for saying copyright subsists in the arrangement of the X-ray subject.)

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- v) Copyright lasts for 70 years **(1 mark)** from the end of the calendar year in which the (last) creator dies **(1 mark)**.

4 marks (2 marks max for (i)–(iv))

- c) i) Section 213(2)(b)(ii) CDPA indicates there is no design right in features of shape or configuration which are dependent upon the appearance of another article **(0.5 marks)**
ii) ... of which the article is intended to form an integral part **(0.5 marks)**.
iii) Section 213(3)(b)(i) excludes must fit features **(0.5 marks)**
iv) ... and Section 213(3)(c) excludes surface decoration **(0.5 marks)**.
v) Thus, unless there are 3D features not dependent upon the appearance or fit with other components such as the door opening **(0.5 marks)**,
vi) ... the answer is no **(0.5 marks)**.
vii) Section 216 CDPA: Earlier of 15 years from the end of the calendar year in which the design was first recorded in a design document or an article was first made to the design **(1 mark)**, or, if articles made to the design are made available for sale or hire within five years from the end of that calendar year **(1 mark)**, ten years from the end of the calendar year in which that first occurred **(1 mark)**.

6 marks

- d) i) Assuming the language is bad enough to be deemed to be contrary to public policy/accepted principles of morality – no (Article 9 CDR) **(1 mark)**.
ii) Article 11 CDR: Three years from the date on which the design was first made available to the public within the Community **(1 mark)**.

2 marks

- e) i) Protectable as an artistic work **(1 mark)**.
ii) Section 12 CDPA: At the end of 70 years from the end of the calendar year in which the painting was painted or, if during that period the painting is made available to the public, at the end of the period of 70 years from the end of the calendar year in which it was first so made available **(2 marks)**.

3 marks

Total: 20 marks

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Question 11

Josie Bloggs contacts you for advice regarding her design. She designs fixtures and fittings for yachts, and a few months ago she went to a boating convention in Greece to show off her new design. She talked to a lot of important people in the industry, and her design was very well received. She is now getting lots of enquiries and wants to understand what rights she has and whether she should do anything else to maximise her protection.

Assuming the design meets the requirements for being a design and has novelty and individual character, make notes advising Josie:

- a) **what Community design rights she has or may have;** **7 marks**

- b) **if the situation would be different had she not publicly displayed her design and had only spoken to people at the convention in confidence;** **2 marks**

- c) **what UK rights she has or may have in this situation.** **1 mark**

Josie later receives a query from a large company who want to be given permission to use her design in France and Italy – it wants to include it in the yachts it sells. It wants to be the only company allowed to use it. Josie thinks this sounds appealing as she has lots of other ideas that she wants to develop and that would give her time to do so. However, given the interest she received in her design she wonders if she should give up all rights to her design.

Make notes for a meeting with Josie in which you:

- d) **explain whether Josie can authorise the company alone to use her European design rights;** **4 marks**

- e) **consider what Josie needs to do to formally authorise the company to use her design;** **2 marks**

- f) **explain what rights and/or limitations such an authorisation of use would give Josie or the company.** **4 marks**

Total: 20 marks

Answer

- a) i) Article 11 CDR: Convention was a few months ago, so within the last three years. Assuming this was the first disclosure she could have CUD **(1 mark)**.
- ii) For CUD to subsist, design must have been made available to the public within the last three years **(1 mark)**.

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As stipulated in Article 11 CDR:

- iii) Greece is in EU, so if that was first disclosure that counts. Disclosure in one state counts as disclosure, if also meets the other requirement below **(1 mark)**.
- iv) Article 11 CDR: Must be made available by being published, exhibited, used or disclosed such that, in the normal course of business, these events could reasonably become known to the circles specialised in the sector concerned operating within the Community **(1 mark)**.
- v) Yachting would be quite a niche sport, and she talked to lots of important people in the industry. So it sounds like the disclosure would meet these criteria **(1 mark)**.
- vi) Article 7 CDR: She can apply to register a Community design within 12 months from public disclosure as discussed above **(1 mark)**.
- vii) A CRD offers stronger protection, as she would not need to prove copying in the event of an alleged infringement, and it lasts longer, so it is recommended that she file for registered protection as well **(1 mark)**.

7 marks

- b) Yes – Article 11 CDR: CUD only comes into being from date of first public disclosure in the Community, ie the Convention **(1 mark)**. So no CUD would subsist (assuming no other disclosure) and she would have longer to file a CRD. **2 marks**
- c) Yes – Section 216 CDPA: UK UDR only subsists when design recorded in a design document or model, and we do not know exactly when that happened. Term of protection is also longer. **1 mark**
- d) Section 15C:
 - i) The proprietor of an EU design (ie registered or unregistered) can license use of that registered design to someone else (Art 32 CDR) **(1 mark)**.
 - ii) The licence may be for all or part of the community **(1 mark)** (Art 32 CDR) or for a limited time **(1 mark)**.
 - iii) The proprietor can exclusively license use (Art 32 CDR) so, yes, she can **(1 mark)**.**4 marks**
- e) She should get an agreement in writing **(1 mark)** and record it at the EUIPO **(1 mark)**. **2 marks**
- f) Any four reasonable examples, and examples based on Art 32 CDR:
 - i) An exclusive licence would preclude Josie licensing use of the design to anyone else **(1 mark)**.
 - ii) A licensee can bring proceedings for infringement if the proprietor consents **(1 mark)**.
 - iii) If no consent is received in a reasonable time, the licensee can then bring the proceedings without consent **(1 mark)**.
 - iv) A licensee can obtain compensation for damage suffered by intervening in an infringement action brought by the proprietor of a CRD **(1 mark)**.**4 marks**

Total: 20 marks

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Question 12

You are contacted by Bob Smith, an individual who filed his own application for a UK registered design a few years ago. He tells you he has been enjoying success in selling his product and that he hadn't really thought about his design registration until one of his competitors told him his design shouldn't have been registered, although he didn't tell him why. Bob tells you he'd left the 'administration' relating to the design to his wife, but she'd been ill over the last few months. He looked at the online register last week and saw his registration had lapsed. He tells you he filed his design application on 7 January 2013.

Prepare notes for a meeting with Bob in which you:

- a) **explain to Bob on what grounds his UK registered design may be found to be invalid, according to Section 11ZA ('Grounds for invalidity of registration') RDA; and** **10 marks**
- b) **explain to Bob why his registration has lapsed and what his options are for trying to get his registration back. (You need not consider whether any of the dates you refer to in your answer fall on a weekend or other day when the UKIPO is closed.)** **10 marks**

Total: 20 marks

Answer

- a) Maximum **10 marks** from the following:

Section 11ZA RDA:

- i) Does not fulfil requirements of Section 1(2) RDA, ie does not fall within definition of a 'design' **(1 mark)**, or does not fulfil requirements of Section 1B to 1D, ie:
- ii) Design not novel (Section 1B) **(1 mark)**.
- iii) Design does not have individual character (Section 1B) **(1 mark)**.
- iv) Design relates to features of appearance solely dictated by technical function (Section 1B) **(1 mark)**.
- v) Design relates to 'must-fit' features (Section 1C) **(1 mark)**.
- vi) Design is contrary to public policy or morality (Section 1D) **(1 mark)**.
- vii) Design relates to certain emblems as defined (in Schedule A1) **(1 mark)**.
- viii) If design is not new/does not have individual character when compared to a later published/earlier filed UK/EU/Hague (EU) design (Section 11ZA(1A)) **(1 mark)**.
- ix) Registered proprietor is not the proper proprietor (Section 11ZA(2)) **(1 mark)**.
- x) Design involves use of an earlier distinctive sign, the use of which is prohibited in the UK if rights holder objects (Section 11ZA(3)) **(1 mark)**.
- xi) Design registration constitutes unauthorised use of copyright protected work and © owner objects (Section 11ZA(4)) **(1 mark)**.

10 marks max

- b) Section 8 RDA, Rule 13 RDR:

- i) Application filed 07/01/13 and initially lasts five years **(0.5 marks)**,
- ii) so first renewal fee would be due by 07/01/18 **(0.5 marks)** (NB: Unlike patents, no extension to the end of the month).
- iii) There is a six-month grace period, ie by 07/07/18 **(0.5 marks)**,
- iv) ... in which, after the first month, the fee can still be paid with a surcharge **(0.5 marks)**.

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- v) If the renewal fee is not paid on time **(0.5 marks)**,
- vi) ... the registration expires **(0.5 marks)**.
- vii) He can request restoration **(0.5 marks)**
- viii) within max 12 months from due date, ie by 07/01/19 **(1 mark)**.
- ix) Need to demonstrate the lapse was unintentional **(1 mark)**.
- x) He's an individual whose wife normally looked after that side of things but had been ill – what evidence do we have that he intended to pay the fee? **(1 mark** for reasonable discussion/comment on chance of success)
- xi) Need to file form requesting restoration **(0.5 marks)**
- xii) ... and include evidence **(1 mark)**
- xiii) ... + pay restoration fee **(0.5 marks)**.
- xiv) If restoration is successful **(0.5 marks)**, will need to pay missed fee **(0.5 marks)**
- xv) ... + any additional fees due **(0.5 marks)**.

10 marks

Total: 20 marks