

IPLC1 – Intellectual Property Litigation Certificate – Module 1 Written Paper

Thursday 9 July 2015

Time: 2.00pm – 4.00pm

Time allowed – TWO hours

INSTRUCTIONS TO CANDIDATES

1. You should attempt **all** the questions in this paper.
2. Enter the question paper reference number (IPLC1), the question number, and your candidate number in the appropriate boxes at the top of each sheet of paper.
3. Start each question (but not each part of each question) on a new sheet of paper.
4. Use **black ink**.
5. Write on one side of the paper only.
6. Write within the printed margins.
7. Do not use highlighter pens on your answer script.
8. Do not state your name anywhere in the answers.
9. Write clearly as examiners cannot award marks to answers that cannot be read.

INFORMATION FOR CANDIDATES

1. The total number of marks for this paper is 60.
2. At the end of the examination the invigilator will instruct you to:
 - a. Count the number of pages you have used.
 - b. Use the boxes on each answer sheet to number sheets in the format '1 of 25', '2 of 25', etc.
 - c. Place your answer sheets in order in the white envelope, seal the envelope and leave the envelope on the desk.
3. Do not staple the pages or use adhesive tape or treasury tags.
4. You may **NOT** take the examination paper out of the examination room. Leave it on the desk.
5. This question paper consists of **8** pages in total, including this page.

Question 1

- a) What is the difference between a witness statement and an affidavit?
1 mark
- b) Should an interim application for a search order be supported by a witness statement or by an affidavit?
1 mark

Total: 2 marks

Question 2

Around 14 weeks ago, your client received the decision of the Comptroller refusing to treat the date of receipt of a PCT application by the IPO as the international filing date. All informal and formal appeal procedures at the Intellectual Property Office have been exhausted. In your opinion, there is a good argument that all the requirements of Art.11 of the PCT had been complied with. Your client went into hospital immediately after this and has only now been able to give you instructions. He wants your advice on whether the Comptroller's decision can be reviewed.

- a) What advice would you give about the scope for judicial review in the UK?
2 marks
- b) What action is required regarding the deadline for requesting judicial review?
2 marks

Total: 4 marks

Question 3

You have recently received an unfavourable final decision from IPEC and permission to appeal was refused by IPEC. Your client still wants to appeal.

- a) What would you advise your client about any remaining option(s) for appeal?
2 marks
- b) What is the relevant procedure for pursuing any remaining option(s) for appeal?
2 marks

Total: 4 marks

Question 4

You are approached by a client who holds the patent on a new type of impermeable membrane used in road building. He says that a former employee of his, Gary Grant, has set up a company called Waterpel Ltd and appears to be manufacturing an infringing product. He thinks that Waterpel may be a subsidiary of Rhoads plc, which is a large construction company.

Your client wants to take action to protect his rights but is concerned that there may not be any money to meet any judgment obtained.

What steps would you take to ascertain the means of each potential defendant?

4 marks

Question 5

One of your longstanding clients, Gemma Atter, approaches you with details of infringement by Anthony Roberts of one of Gemma Atter's patents. The earliest known infringing act by Anthony Roberts was just over 6 years ago. The last known infringing act was 6 months ago with several infringing acts in the interim.

In view of the limitation period:

- a) How long does Gemma Atter have to issue proceedings against Anthony Roberts for patent infringement?

3 marks

- b) Explain any disadvantage of delaying issuance of proceedings in this case.

3 marks

Total: 6 marks

Question 6

The Practice Direction – Pre-action Conduct (Pre-action PD) requires the claimant to send a Letter before Claim.

- a) Explain why a Letter before Claim may not be appropriate in patent infringement actions.

1 mark

- b) If a Letter before Claim is sent in a patent infringement case, what considerations need to be kept in mind?

2 marks

- c) Can writing 'Without Prejudice' on such a letter in a patent infringement case be sufficient to alleviate the risk that may arise from sending it? Provide a reason for your answer.

1 mark

- d) Suggest an alternative to a Letter before Claim in patent infringement actions which still complies with the Pre-action PD.

1 mark

Total: 5 marks

Question 7

You are instructed by a new client which is a company registered in the Dutch Antilles. The client instructs you to write a Letter before Claim to another Dutch Antilles registered company which they accuse of infringement. The Letter before Claim receives a prompt reply and an offer of a very large settlement. The client accepts and the monies are received into your firm's client account.

- a) What question does this raise?

1 mark

- b) What action should you and your firm take?

2 marks

Total: 3 marks

Question 8

Benedict is a Chartered Patent Attorney working for the firm of Bailey & Scott. He is asked to act as the Commissioner for Oaths for a Declaration in support of a restoration request for a patent application. The restoration request relates to a patent application which lapsed due to a deadline being missed by Bailey & Scott. The deponent is one of his work colleagues and the Declaration is part of the evidence to support the restoration request.

State two reasons why Benedict should decline to act as the Commissioner for Oaths in this situation.

2 marks

Question 9

Lucy is a Chartered Patent Attorney who is asked by her friend, Helen, to act as the Commissioner for Oaths in respect of a Declaration being executed by Helen's boyfriend. Helen's Argentinean boyfriend is present to make the Declaration, which is drafted in English, but he does not appear to speak any English. Moreover, the Declaration refers to several Exhibits and Helen says she forgot to bring the Exhibits along but assures Lucy that she has seen them.

- a) Can Lucy administer the Declaration at this time? Explain your answer.

1 mark

- b) What else stands out from the above facts that Lucy would need to check if she were to administer the Declaration?

1 mark

Total: 2 marks

Question 10

Your client, Jeff, is a sole trader who sells and repairs mountain bikes from his shop, Jeff's Bikes. The shop is well known and attracts custom from all over the UK. Jeff is especially valued for his creative approach to solving mechanical problems encountered by customers with their bicycles.

Jeff was recently horrified to receive a letter from Speed Bikes Limited, threatening proceedings for infringement of a patent. The patent concerned a removable mechanical device which ensures the smooth changing of gears on mud-encrusted mountain bikes. Jeff has been selling a snap-on plastic cover to prevent the clogging of gear wheels by mud, but it has no mechanical capability of its own, and has a totally different function to the device protected by the patent. This point has been made to Speed Bikes, but proceedings now appear imminent. Jeff depends on the goodwill of at least 15 suppliers of merchandise, some of whom have raised concerns about the risk to them of being dragged into proceedings by various patent holders if they continue to supply goods to Jeff.

You have advised Jeff to issue proceedings for the groundless threat of infringement and are now drafting the Particulars of Claim.

- a) Name **three** elements which you will take care to include in the Particulars of Claim in order to make out the cause of action.

3 marks

While drafting the particulars you receive an anxious telephone call from Jeff. He directs you to the Cycle Nut website, where Speed Bikes have posted comments about Jeff and his business under the heading 'Pedalling through the gutter'. It says 'Anyone who cares about the great sport of cycling should stay clear of shyster Jeff and his shop. He's been ripping off our ideas for months.' Jeff fears his business will be greatly damaged as a result.

- b) What effect, if any, will this development have on your choice of causes of action when drafting the Particulars of Claim? Give reasons for your answer.

3 marks

- c) Jeff is concerned that there will now be a race between the filing of his claim and the filing of the Speed Bikes claim. He asks whether the filing of his claim before that of Speed Bikes will bring the matter to a conclusion.

What advice will you give to him?

2 marks

Total: 8 marks

Question 11

Angpharm Limited has developed a vaccine to combat a strain of the influenza virus. Infringement proceedings have been brought by GloMed Limited, which claims that rights in the vaccine are already protected by its own patent. Experts are now being sought by Angpharm Limited in order to defend GloMed's claim.

Explain **three** points of procedure which will operate in the selection of any experts upon whom Angpharm eventually relies.

3 marks

Question 12

You are preparing for a trial next week. There is an important point of law which could be decisive of the case although such will depend to some extent, on the findings of fact by the court. In your research, you have identified the Court of Appeal authority of *Smith v Matthews* which was decided on similar facts to your case. You file your skeleton argument referring to this decision. After you have filed your skeleton argument, your assistant, Gurvinder, informs you of another relevant Court of Appeal authority, *Moody v Davis*, which was handed down a few days earlier than the *Smith v Matthews* decision.

Moody v Davis is contrary to *Smith v Matthews* but was not cited in *Smith v Matthews*. It is distinctly unhelpful to your client's case. You read *Smith v Matthews* and you form the view that *Moody v Davis* goes into the legal issue much more thoroughly than *Smith v Matthews*.

You receive your opponent's skeleton argument in which he too cites only *Smith v Matthews*. You explain to your client that you have found the authority of *Moody v Davis*, which is distinctly unhelpful to your client's case. He asks you why you had not found it before and says to you that if the other side did not find it then, as they are represented, it is not your job to make their case for them. He expressly instructs you not to inform the judge of it and says that if you cite it to the judge and as a result lose, he will sue you for professional negligence in not having advised him at the outset of the proceedings about *Moody v Davis*. You consider your position.

- a) What duties override the patent attorney's duty to act in the best interests of the client?

2 marks

- b) What duties, if any, does a patent attorney have to inform the opposing side?

1 mark

- c) What action would you take regarding:

- i) Informing the court of *Moody v Davis*?
- ii) Addressing the points made by your client?

4 marks

Total: 7 marks

Question 13

At what stage(s) of a trial is an advocate:

- a) Permitted to make a submission that the other side's witness has committed fraud or been otherwise dishonest?

1 mark

- b) Forbidden from communicating with a witness?

1 mark

Total: 2 marks

Question 14

What categories of documents should **not** be put before the court even if they relate to an issue in the proceedings?

2 marks

Question 15

Explain the difference between costs assessed on the standard basis and costs assessed on the indemnity basis.

3 marks

Question 16

Explain why you must not reveal details of your evidence, strategy or tactics to a witness while interviewing them.

3 marks

Total marks [60]