

Question 1

This is the sentence or two which summarises why the case will succeed. It will distil the strongest evidence supporting a fact which satisfies the relevant legal test.

MARKS AWARDED 1/1

Question 2

Although he has “very little money”, the simplest (+ cheapest) approach would be to pay the money upfront to the attorney (and as the case proceeds). If possible, this approach should be taken, especially as there is a strong case and there may be substantial damages.

An alternative would be to pay on a no-win no-fee basis. Although the attorney fees will be higher at the conclusion of the trial (compared to up-front), it is still attractive in view of the potentially large damages available. Also available are the options of a conditional fee argument. Further still, the client could obtain after the event insurance. Although the case is strong, this will cover him against costs should he lose the case.

MARKS AWARDED 2/4

Question 3

- Skeleton argument.
- Any further evidence, possibly from an expert which has been prepared since the CMC.
- A list of authorities relied on.

MARKS AWARDED 1/4

Question 4

1. It must be a case from a higher court – ie. the Court of Appeal, or the Supreme Court.
2. It must have a clear ratio.
3. It must still be good law – ie. not have been subsequently overruled by a decision of a higher court, or be conflicting with a decision of an equal court.

MARKS AWARDED 2/3

Question 5

- (a) The Patents Court (High Court)
- (b) First to the IPEC judge. If refused, can then appeal to Court of Appeal, within 21 days. If successful, can apply for reconsideration at an oral hearing within 7 days of the reasons for refusal. There is no further appeal to the Supreme Court.

MARKS AWARDED 1/3

Question 6

- (a) The overall costs cap in the IPEC is £50,000, and £16,000 for costs associated with the trial. The judge will consider the overall “winner” of the case (if possible), but also who was successful in each distinct aspect of the case. He/she also consider the conduct of the parties.
- (b) Although the claimant was unsuccessful on the infringement point, the claimant “won” the validity aspect, and should therefore receive costs incurred in preparing for and arguing this point.
The defendant’s conduct was poor (abuse of process) and so we would submit that costs should be awarded on the indemnity basis, which means costs reasonably incurred, reasonable in amount and proportionate to the claim, with any doubt being decided in favour of the receiving party. Indemnity costs should therefore be awarded to the claimant in relation to the validity point.

MARKS AWARDED 4/5

Question 7

- (a) Seek an order that the third party disclose documentation which would assist in identifying the defendant (infringer).
- (b) “Norwich Pharmacal” order.

MARKS AWARDED 2/2

Question 8

- (a) It is unsure whether he has the right expertise. Although he is an expert in influenza vaccines, is he also knowledgeable in relation to the meningitis vaccines? Needs investigation.

His credibility also seems to be in doubt, he appears to be saying that he will give any evidence which is asked for, in return for money. He may well therefore be dishonest, and using him may be unethical.

- (b) He is wrong – his duty is not to the “party paying his bills”, but to the court. There is no property in a witness. He must provide evidence which he believes to be true, and must eventually be in his own words.
- (c) Legally privileged documents do not need to be disclosed, and these include correspondence between patent attorney (legal advisor) and client when they relate to the litigation. However, these instructions are not between attorney and client and therefore may not be privileged. They could be inspected.

MARKS AWARDED 3/5

Question 9

- (a) Yes. The IPEC is competent to hear cases relating to breach of contract in patent matters.
- (b) The cause of action is the tort of breach of contract.
- (c)
- That there is an enforceable contract in place.
 - That the terms of the contract are fair.
 - That the terms have been breached.
 - That the breaching of the terms has caused damage to the claimant.

MARKS AWARDED 5/5

Question 10

- Mediation: Third party is used to aid in reaching an agreement between the parties.
- Arbitration: Third party reached a binding decision on the matter.
- Early neutral evaluation:

MARKS AWARDED 2/3

Question 11

I would explain to the client that the offer isn't simply a matter of who will win, it related to how much costs he may have to pay. Even if my client is successful at trial, if he fails to obtain a judgment more favourable to him than the part 36 offer, he will be liable for the defendant's costs from the date of the offer onwards. The costs will also be assessed in a different way, which will be detrimental to his position – ie. he will have to pay higher costs in view of the refusal of the offer.

MARKS AWARDED 0/5

Question 12

There appears to be a conflict of interest here, or at least a strong possibility of one. The conflict does not arise because of this patent, as the previous representation was for a design. The technology is also different. However, because of the knowledge of the defendant's tendency to settle, my client possibly has an unfair advantage, because we could make a much poorer offer to the other side, knowing it may well be accepted.

From an ethical point of view, the right thing to do is to inform the court and the other side. Should ask my client's permission to take this action. If he refuses, I should consider withdrawing my representation from this client and advise that he should seek alternative representation.

I should withdraw representation in any case, but there is a chance that I could continue to represent my client if the other side does not object to the situation. We could consider asking for the trial to be delayed in view of the situation.

MARKS AWARDED 3/5

Question 13

Although I have confirmed his identity, I also have a duty to ensure he is competent to swear the affidavit, that he understands that he is swearing the truth and the consequences of lying (perjury), and that the affidavit is his own words.

The above are in doubt, in view of his poor English, and so it is not possible to determine whether he knows what the document is (and the exhibits). I would check to see if a relative or friend of his could act as a translator so I can communicate properly with him. If this is not possible, I should decline to act.

If I am able to confirm his understanding then I would ask him to swear on the holy book of his choice, or otherwise affirm. I would sign the attestation clause, including the place and date. I would also sign the exhibits.

The words "commissioner for oaths" needs to be present in the attestation clause.

MARKS AWARDED 3/5

Question 14

My duty not to mislead the court overrides my duty to carry out my client's instructions. We cannot use the affidavit because it is false and would mislead the court. My client is also at risk of committing perjury (alongside the associate who helped).

I would advise the client that it is my duty to inform the other side and the court of the false affidavit. I would then assess the situation to see if we had any prospect of success, despite this situation. If there is no fraud (like the client seems to think), then I would advise that he settles on the most favourable basis. If he refuses to take this advice, I would have to cease representing him, and advise that he seeks alternative representation.

We could possibly seek to delay the trial in view of this matter.

MARKS AWARDED 2/5

Question 15

- (a) Three months from when the grounds for making the claim arose. In this case, it will be three months from the decision of the comptroller. Therefore, in about two weeks' time.
- (b) That the comptroller failed to apply the law correctly or did not follow the correct procedure.

We would need to establish that:

- The comptroller made a decision no reasonable comptroller would have made, or
- He did not have regard for matters that he ought to have had regard for, or
- He had regard to matters which he ought not to have had regard for.

Judicial review is a review of the process rather than the content.

- (c) Simply to proceed with the second PCT filing.
It is within the priority year, We should make sure the first PCT does not publish by withdrawing it, thus removing any possibility that it will become prior art.

MARKS AWARDED 5/5