

Question 1

'Theory of the case' is a logical and plausible explanation for what actually happened or why your client will be based on the facts and evidence you have.

The theory of case may develop or change as the case proceeds as new facts are discovered.

MARKS AWARDED 1/1

Question 2

One option is 'After the Event' insurance. This is an option in which the client's costs will be covered and in the event they lose will also cover the other side's costs that they may be liable for.

Another option is a Damage based Agreement. In this the legal advisor may agree for costs incurred to be covered by damages received in the event the claim is successful.

Another option is a conditional fee arrangement in which it may be agreed that the client will not pay any fees, or will pay reduced fees, unless a specific outcome occurs, such as winning the case.

MARKS AWARDED 4/4

Question 3

A skeleton argument will need to be lodged at least 24 hours before the trial, although the deadline for the skeleton argument, which may be earlier than 24 hours before, will be set at the CMC.

A list and copies of authorities on which you wish to rely will need to be lodged at the court.

You will also file a suggested reading list and predicted reading time.

You may also consider lodging a technical primer, which sets out the agreed technical background, a dramatis personae and a chronology although these are not essential in IPEC.

You will also lodge an agreed trial timetable.

MARKS AWARDED 4/4

Question 4

To be binding an earlier case needs to be:

- 1) indistinguishable in terms of the facts which led to the earlier decision.
- 2) from a higher (e.g. Supreme Court or Court of Appeal) court of England and Wales or the same court.
- 3) the earlier part of the case you wish to be binding needs to be part of the ratio of the case and not the *obiter dicta*.

MARKS AWARDED 3/3

Question 5

- a) The statutory right of appeal is to the Patents Court, which is part of the High Court.
- b) An interim order from the multi-track in the IPEC is appealed to the Patents Court, and a final order from the multi-track in the IPEC is appealed to the Court of Appeal.

MARKS AWARDED 3/3

Question 6

The general rule is the 'loser should pay the winner's costs'.

- a) Costs can be awarded on a standard basis which is when the costs should be reasonably incurred, reasonable in amount, proportionate to the claim and in case of doubt it is decided in favour of the paying party or on an indemnity basis which is when the costs should be reasonably incurred, reasonable in amount and in the case of doubt it is decided in favour of the receiving party.

Costs are usually issued on the standard basis unless a party has acted unreasonably and then cost may be awarded on an indemnity basis.

In either case, a party cannot recover more in costs than they have actually spent.

In IPEC the recoverable costs are capped at a total of £50,000 and this is divided over each of the stages of the claim which each is subject to their own cap.

The costs awarded, although on the premise that the loser should pay the winner's costs, is assessed on an issue by issue basis. Therefore as the defendant lost their counter claim this should be taken into account when summarily assessing the costs to be awarded.

Also the costs should be proportionate and this should be taken into account when deciding the amount to be awarded in costs.

Additionally if costs have been incurred unnecessarily due to the attorney's inappropriate approach the attorney may be subject to a wasted cost order in which they are liable for at least some of their own client's cost and potentials at least some of the other side's cost.

If there has been an abuse of procedure a party may be entitled to costs off the scale.

- b) I would submit that each of the parties lost their part of the claim that they are entitled to each other's costs in respect of that part of the claim.

Moreover, as the defendant abused the procedure in respect of the counter claim, I would submit that the claimant is entitled to costs off the scale (i.e. more than the IPEC cap for that stage) on an indemnity basis in respect of the counter claim.

I would submit that the £60,000 spent on the counter claim was reasonably incurred and reasonable in amount and therefore the defendant should pay the claimant the full £60,000. I would also submit that as the other side's attorney has clearly acted unreasonably that he should be liable for the costs as a wasted costs order.

MARKS AWARDED 5/5

Question 7

- a) I would ask the third party for information which would assist in identifying the defendant.
- b) If the third party did not comply you could request the court to make a Norwich Pharmacal order so that you can obtain information that will allow you to identify the third party.

You could also consider applying for pre-action disclosure.

MARKS AWARDED 2/2

Question 8

- a) Dr Martin is not impartial and therefore not a suitable witness. He is not impartial as he thinks his duty is to the paying party and because he has said that he will include our stance into consideration when writing his report.
- b) Dr Martin's primary duty is to help the court on matters within his expertise. Therefore his understanding that his duty is to those paying him is incorrect. His report should be addressed to the court.

- c) Dr Martin's understanding regarding disclosure of instructions is also incorrect. The instructions are not privileged. Whilst the instructions are not usually disclosed during proceedings they could be if the other side requests they are and this may be allowed if they suspect that the instructions may have influenced his report.

The Expert's report should set out the material facts of the instructions.

MARKS AWARDED 4/5

Question 9

- a) Yes, a breach of licence of case can be brought in IPEC. Depending on the damages involved this case may be suitable for the IPEC small claims track.
- b) The cause of action may be breach of contract.
- c) Three of the essential elements may be
- 1) details of the licence
 - 2) details of the breach
 - 3) the consequence and damage caused by the breach of the licences.

Thus the statement of case may include

the parties
details of the licence
details of breach of the licence
details of the damage suffered
remedies and interest sought.

The claim should be accompanied by a copy of the licence.

MARKS AWARDED 5/5

Question 10

Three forms of ADR

<u>Mediation</u>	This involves a mediator which is a third party used to help in negotiations with the aim of trying to settle the case.
<u>Arbitration</u>	This involves an arbitrator who comes to a binding decision on how a case should be resolved.
<u>Expert determination</u>	This can be a decision made by an expert which is either binding or non-binding (as the parties agree) which is used to settle the case.

MARKS AWARDED 3/3

Question 11

If your client does not obtain a judgement more advantageous than that made in the Part 36 offer then he may be liable for the claimant's cost on an indemnity basis from the point at which the Part 36 offer is made. Costs awarded on an indemnity basis are those reasonably incurred, reasonable in amount and will be decided in the favour of the receiving party, i.e. in this case the claimant.

Therefore the defendant risks having to pay the less favourable amount in damages, the claimant's cost on a standard basis up until the offer was received, the claimant's costs on an indemnity basis since the offer was received, in addition to all his own costs, which will include those for trial which is relatively costly.

MARKS AWARDED 2/5

Question 12

You cannot act in a matter in which you have a conflict of interest. This includes former clients.

Given that the subject matter involved in the present case is different to that which was the subject of the Community Registered Design there may not be a conflict.

However you have a duty of confidentiality to clients and this includes former clients. Therefore you cannot tell the new client your knowledge that the other side 'prefer to settle actions rather than fight'. However, you also have a duty to inform a client of all the information you know and to act in their best interests. This duty is trumped by your duty of confidentiality and so you cannot tell your new client this information. However these two duties are clearly in conflict.

Even if you do not tell your client that they prefer to settle, this may influence your advice and so acting may be unethical. Also, you need to consider that what you should be seen by the reasonable public to be acting with honesty and integrity.

Therefore, even if you do not think the information could sway your advice, if others reasonably think it might you should not act.

You could consider writing to the other side to get their permission for you to act for the new client. However I do not think that this would resolve the conflict and therefore I do not think that the instructions should be accepted.

MARKS AWARDED 5/5

Question 13

You should ask Mr Dhani to confirm that he understands the content of the affidavit. If Mr Dhani does not fully understand the affidavit you should inform him that the affidavit should be in a language he understands and then the affidavit should be accompanied by an English translation and the translator should sign an affidavit to attest that the translation is accurate.

If Mr Dhani confirms that he does fully understand the content of the affidavit, you should ask him to confirm that he believes the content of the affidavit to be true. You should ensure that Mr Dhani understands the consequences of lying in an affidavit (i.e. perjury).

You should then check the exhibits are correct and those described in the affidavits.

You should check for any amendments and have these initialled if present.

You should also strike through any blank spaces and also have this initialled by Mr Dhani. As Mr Dhani is a practising Hindu you can offer to do an alternative oath suitable for a Hindu or if he prefers he can affirm. Either an alternative oath or an affirmation are equal to a Christian oath.

You should have Mr Dhani sign the affirmation or confirm the signature present is his.

You should then have Mr Dhani take the alternative oath or affirmation and refer to the exhibits and then you sign the jurat at the end of the document and write your name and business address next to the signature.

You should also sign the exhibits and initial amendments or strike through.

You should charge a fee of £5 plus £2 per exhibit (i.e. £11 in total).

MARKS AWARDED 5/5

Question 14

Your primary duty is to the court and you cannot mislead the court. However you cannot act against your client's instructions. Therefore unless you can convince your client to change his instructions you should state you can no longer act and withdraw representation.

You should advise your client to withdraw the affidavit and amend their witness statement to remove the allegation of fraud and to not make the allegation of fraud. If your client does not agree you will have to withdraw. You cannot call a witness you know will lie and therefore cannot call your client to give evidence unless you know he will not make the allegation of fraud.

You cannot make an allegation of fraud unless it is properly supported by evidence which in this case it is not.

You also cannot make any allegations, the purpose of which is to annoy, vilify or punish the other side.

In this case I would withdraw representation.

MARKS AWARDED 5/5

Question 15

- a) The deadline for judicial review is 3 months from the date of the decision to be reviewed, therefore around two weeks from now. This deadline may be extended on request but I see no reason here why such a request would be granted.
- b) An application for judicial review will need to show that the decision was unreasonable or irrational. This means that the Comptroller had regard for matters he should not have had regard for or did not have regard for matters which he should have had regard for.

The application may alternatively establish that the decision was wrong on a point of law, the correct procedure was not followed or the decision is in violation of the Human Rights Act.

An application for judicial review should be set out on form N461 and include the statement of grounds on which the application is made, the remedy sought, which should be drafted in terms of the order to be agreed, and a statement of facts.

- c) My practical advice is to file the new PCT application but to ensure that it is changed as appropriate to ensure that it is given the filing date. Alternatively I would check whether there is any scope to amend the existing PCT so that it is accorded a filing date. This will save having to pay the official fees again.

Provided the PCT application (either a newly filed PCT or the PCT but amended) are accorded a date which entitles the priority date to be claimed this makes no difference and is safer (i.e. it has a more reliable outcome) and is likely to be cheaper than continuing with a judicial review.

MARKS AWARDED 5/5