

Question 1

Theory of case are the facts of the case on which a claimant/defendant would rely during the CAP process. The facts include agreed facts and disputed facts. The disputed points in law and facts we need to rely and need to prove to win the case. So, the theory of case would look into the disputed facts. The theory of case should focus on matters which will help to win the case.

MARKS AWARDED 1/1

Question 2

- The best option is to write to the potential defendant regarding pre-action activities.
 - The defendant is selling for 3 years. Thus it is still within the 6-years limitation period and thus we will be able to recover damages since the first infringement.
- Since the infringement is still going on, we don't have any rush to issue the claim, since we still take 6 years (recurring feature).
 - Since he is only selling, our letter before claim has to be carefully worded to avoid making any threat. We should merely state that the patent no: and enquiry.
- We should follow active Dispute Resolution techniques through:
- Discussing the infringement and try to settle with lump sum for the damages incurred by the defendant's action.
- Try through Mediation through a mediator.
- We can get a binding expert evaluation to confirm infringement.
 - We can get IPO non-binding opinion to prove infringement.
- We can get non-binding expert opinion.
- By following the above ADR steps we can negotiate and try to settle the matter with them. This is better than full trial, as it is not expensive at all, compared to a full blown trial.

MARKS AWARDED 0/4

Question 3

- Expert evidence
- Orders
 - Correspondence
 - Any exhibits.

MARKS AWARDED 0/4

Question 4

- If the material facts are all agreed by all the Judges then these facts are binding.
- If the case is decided in Court of Appeal or Supreme Court and if the decision was not flawed in these Upper Court then the decision would be binding to Patents Court.
- Ratio Decided is determined by material facts which are agreed by all the Judges.

MARKS AWARDED 1/3

Question 5

- (a) Section 97 PA 1977 give statutory right of appeal from the Comptroller to Patent Court of High Court.
- (b) For the multi-track in the IPEC, we can appeal to the Judges of Patent Court or High Court.

MARKS AWARDED 2/3

Question 6

- (a) Costs are calculated on standard basis and Indemnity basis. In this case the counterclaim was hopeless and was unnecessary. The cost was not reasonably incurred. The legal Principles are: whether the costs are reasonably incurred, reasonable amount and proportionate to the Claim.
- (b) As explained above, the counter claim was not reasonably incurred because it was made deliberately to incur costs for my Client. So, we will submit to re-award us the counter claim cost on the basis of Indemnity so that we can get the benefit as a receiving party if there is a doubt.

Also in IPEC, the cost cap on liability is £50,000, we can recover £50,000 (but not £60,000). Our core submission would therefore be that costs were incurred unreasonably.

MARKS AWARDED 2/5

Question 7

- (a) We can apply to the Court to issue an order to the 3rd party to release the information it has or disclose the actual Defendant so that we can identify the actual Defendant.
- (b) This is proved by Norwich Pharmacal order, which is based on a court Decision.

MARKS AWARDED 2/2

Question 8

- (a) Dr Martin is not suitable as an expert witness because he is an expert on 'influenza' vaccines, but we need someone who knows issues not faced in influenza vaccines but who knows about meningitis vaccines.

The expert has to be someone who is a skilled person on the art. It does not have the right expertise for the issues related to the development of 'meningitis' vaccines.

- (b) Dr Martin's understanding of the duty of expert witness is not correct. An expert has to be neutral in his analysis and should not have any conflict of interest. But Dr Martin is willing to be instructed by us in the technical matter so that we can win the case and can eventually pay his fees. This is against the duty of expert witness. We should not send him the write-up to win the case, he should be neutral.
- (c) Dr Martin's understanding is correct in that I, being the lawyer, instructing an expert is entitled to 'privilege' and will not be disclosed in the court.

But, since he is proceeding in an ethical way by not fulfilling his duty as a potential expert, I have to disclose this, because I cannot/must not mislead the court.

MARKS AWARDED 3/5

Question 9

- (a) Yes, it is possible to bring proceedings for breach of licence at the IPEC.
- (b) The relevant course of action is breach of contract and how to prove it. What are the damages.
- (c)
 - (i) Parties : who are involved
 - (ii) Particulars of breach of contract : which clauses are breached and how that affects my client.
 - (iii) Damages due to the breach.
 - (iv) Remedy and interest.

MARKS AWARDED 5/5

Question 10

- Conciliation : Hire a 3rd party who can help to come to a resolution.
- Mediation : Hire a professional/qualified Mediator who can help to settle the dispute.
- Arbitrator : Dispute resolution. Not used in 79 cases.
- Expert Witness : 3rd party expert who can provide non-binding opinion.
- IPO Opinion : UKIPO provides non-binding opinion.

MARKS AWARDED 3/3

Question 11

If it is proved in the trial that there is indeed infringement and he did not accept the offer made before then he would have to give damages for the infringement as well as costs for the other party. If the overall cost and damages are more than the Part 36 offer, then his costs won't be capped and he would have to eventually incur more costs in line with the proceedings clauses and costs.

MARKS AWARDED 0/5

Question 12

I should not generally accept the instructions due to conflict of interest with Defendant.

I acted for the Defendant 8 years ago and I do have some responsibility of confidentiality with the Defendant.

Although it can be argued that my responsibility was to do with design application for a different mechanical device (shower head) than that in proceedings (bathroom tap).

- Given that it is in a different device I can consider presenting them but in litigation it is not preferable. Furthermore, I have information about the CEO's Statement.

However, given that it is a considerable time ago (8 years) I can contact the defendant and ask them if they are OK, but generally in litigation matters, I should not represent them and accept instruction.

MARKS AWARDED 3/5

Question 13

- I can be the commissioner of others because Mr Dhani is from a separate firm.
- I need to make sure he is present, which he is.
- I need to ensure that he is representing truth. In this case the affidavit has 2 exhibits, but given that his English is not I need to test him more carefully to ensure that he is fully knowledgeable about the exhibits. I can ask him questions from the exhibits and if he can answer clearly (even in R's poor English), then I can satisfy myself that he is representing truth.
- He can affirm instead of swear. If I have Hindu holy book "Geeta" then I can use that.
- I need to sign each exhibit separately.
 - I need him to sign the affidavit as a statement of truth.
- Then I need to sign as a commissioner of oath.

MARKS AWARDED 4/5

Question 14

I must not mislead the court and/or deceive anyone. As a legal professional, my duty to court overrides to my duty to client and confidentiality.

The conversation between me and my client is privileged and I don't have duty to disclose this to court. Also, the client said confidentially, so I may not disclose this. But as I said my duty to court comes first and I cannot do what the court has instructed me.

- I will be lying and misleading the court if I followed client's instructions.
- Submitting false affidavit would be to deceive the court.
- I must advise him to withdraw the case now. If he refuses to do so, I must withdraw representation. Given that trial is next week, not much time left, I should let the other party know about this that this will be used, but withdraw representation.

MARKS AWARDED 3/5

Question 15

- (a) The deadline is 3 months from the Refusal Decision of the Comptroller of UKIPO.
- (b) The Judicial Review application has to establish that

- (i) The Comptroller was so unreasonable in his/her decision making,
- (ii) The Comptroller did not apply the law properly.
- (iii) The Comptroller did not apply the fact properly.
- (iv) The Comptroller made procedural errors.
- (v) The Comptroller's decision goes against human right.

In this case, we may argue that the Comptroller did not apply the procedure properly or made procedural error.

- (c) We are not sure exactly if the Comptroller is correct in his refusal. If we have a good argument that the Comptroller was wrong and made procedural error from Judicial review is a way forward, otherwise a new PCT may be preferable because if the Judicial Review process fail then the overall appeal proceeds to Court of Appeal may get very expensive, a new PCT would be cheaper.

MARKS AWARDED 5/5