

Question 1

“Theory of the case” = Summary of the legal, factual & emotional basis on which you should win the case. Usually 1-2 sentences (i.e. short).

MARKS AWARDED 1/1

Question 2

- Conditional fee agreement/arrangement (CFA) with us (i.e. “no win, no fee”). Still potentially liable for large company’s costs (if awarded for some reason).
- After the event (ATE) insurance in respect of any costs that may be awarded to the large company.
- After the event (ATE) insurance in respect of costs that might be incurred by client.
- Bringing any infringement action in the IPEC would limit client’s exposure to wealthy company’s litigation costs to £50,000 (& potentially limit exposure even further due to scale costs regime).
- A (non-threatening) letter before action / letter of enquiry may lead to the resolution of this matter amicably without the need for litigation.
- Give a competitor of the wealthy company an exclusive licence to the patent (in exchange for consideration) & then let them bring an infringement action. Patent owner would not therefore be liable for costs, unless he was active in proceedings.

MARKS AWARDED 2/4

Question 3

- Skeleton argument (usually 2 days before trial date and if ordered)
- Reading list (usually 4 days before trial date)
- N260 form (to accompanying docs) (as will usually be making a claim for costs – usually 24 hours before trial date)
- Chronology of facts (usually 4 days before trial date)
- Chronology of proceedings (usually 4 days before trial date)
- List of issues (usually 4 days before trial date)

- Proposed trial timetable (usually 4 days before trial date)
- Dramatis Personae

MARKS AWARDED 4/4

Question 4

- Previously decided case must emanate from a higher court in the courts system (i.e. Court of Appeal or Supreme Court / House of Lords).
- Previously decided case must have been decided on the same material facts (i.e. cannot be distinguished on the facts).
- Relevant part of the previously decided case must not have been obiter dictum. Relevant part of the previously decided case must be ratio decidendi, otherwise not binding.
- Previously decided case must not have been made incuriam.

MARKS AWARDED 3/3

Question 5

(a) Patents Court (High Court of England & Wales)

(b) Final judgement of IPEC is appealed to Court of Appeal of England & Wales.

Interim decision of IPEC is appealed to Patents Court (High Court of England & Wales).

MARKS AWARDED 3/3

Question 6

(a)

- Whether arguments pursued were reasonable to pursue (i.e. the conduct of the parties)
- Whether either party has been successful (either as a whole in part)

(b) Defendant's counter claim was an abuse of process, as was based on hopeless prior art attacks.

Defending against hopeless counter claim has caused claimant (my client) to incur £60,000 of unnecessary cost.

Will therefore submit that costs order should be an award of £60,000 to claimant on the indemnity basis, given defendant's conduct.

Also given the defendant's conduct, will submit that no costs award should be made to the defendant in respect of the failed infringement claim. If costs award is to be made to defendant in respect of failed infringement claim, should be on the standard basis.

MARKS AWARDED 5/5

Question 7

- (a) Ask the 3rd party for the information. Failing that apply for a Norwich Pharmacal order to force 3rd party to disclose information assisting in identifying the defendant.
- (b) Court's powers of equity (& also CPR) precedent set in Norwich Pharmacal case.

MARKS AWARDED 2/2

Question 8

- (a) Dr Martin is not a suitable expert witness in the matter. His expertise is stated by him to be influenza vaccines, but the relevant issues in the proceedings relate to meningitis vaccine development which involves issues not faced in influenza vaccine development.
∴ Martin's expertise is in another field & he is not suitable. He cannot give 'expert' opinion outside his field.
- (b) His understanding of the duties of an expert witness is mistaken.
Expert's duty is to the cart, not the party paying his bills. 'Expert opinion' must therefore be his impartial opinion, regardless and not taking account of a party's 'preferred stance'.
- (c) Lawyer's instructions to expert witnesses are technically privileged. However, they are as a matter of course appended to the expert opinion provided in the proceedings & thereby disclosed (losing privilege). The aim of this appendix is to show that the expert has not been biased by the party that engaged him (which would clearly be the case here!).

MARKS AWARDED 5/5

Question 9

(a) Yes, breach of an IP licence / contract proceedings can be brought in the IPEC.

(b) Breach of contract.

(c) The Parties

- That there is a contract
- That it has been breached
- That damage has been caused
- Copy of the licence (contract) in question will need to be provided with statement of case (per CPR 16)

MARKS AWARDED 5/5

Question 10

Arbitration - parties submit to the binding decision of a 3rd party arbitrator. Arbitration decision is not public.

Conciliation - 3rd party appointed to shuttle between the parties to help them come to any agreement.

Mediation - 3rd party mediator appointed to try to enable parties to come to an agreement. Can involve provision of non-binding opinions.

MARKS AWARDED 2/3

Question 11

If client at trial does not obtain a more advantageous judgement :

- Client (defendant) will have to pay both his own costs from end of relevant period of Part 36 offer to trial date and claimant's costs & interest on claimant's costs & damages on indemnity basis (interest at 10% above court rate) from end of relevant period of Part 36 offer to trial date.
- If damages are awarded to the claimant they will be increased by 10% for damages up to £500,000 (assumption is that this case is in IPEC as I am instructed).
- Client (defendant) will also have to pay his own costs & claimant's costs incurred before the expiry of the relevant period (Part 36) & interest on claimant's costs (at the standard court rate) before the expiry of the relevant period.

In short, ignoring the Part 36 offer could be very, very costly.

MARKS AWARDED 2/5

Question 12

Should not accept claimant's instructions, as doing so would create a conflict between the duty of confidence owed to the defendant in respect of the CEO's remarks & the duty to disclose those CEO remarks to the claimant if the claimant became a client.

In such circumstances, the duty of confidence owed to the defendant would trump the duty of disclosure to the claimant, but would then would be in breach of duty of competence (take all actions in the least interest of client) to the claimant (if became a client). For this reason alone, should not accept claimant instructions.

Furthermore, Community Registered Design is presumably still in force, and if so would be acting for both sides in a dispute.

This is prohibited by the IPReg Code of Conduct.

Would also be acting in a way that doesn't uphold the integrity of the profession if accepted claimant's instructions (contrary to C of C).

MARKS AWARDED 5/5

Question 13

- Find a copy of the Bhagavad Gita for him to swear on, or else Mr Dhani must make an affirmation.
- Commissioner for oaths must ensure that defendant is competent to swear/affirm. This encompasses understanding the affidavit & exhibits before him. Unless I am satisfied that Mr Dhani understands the exhibits & affidavit, those documents must be translated into a language he does understand before the affidavit can be sworn.
- Mr Dhani must understand that he is swearing to the truth of the affidavit. If he does not understand this, I must refuse to administer the oath. If he does understand this, can administer the oath. (Obtain services of a translator?)
- If above all satisfied, ensure affidavit signed then administer oath/affirmation.
- Sign jurat on affidavit & exhibits.

MARKS AWARDED 5/5

Question 14

Firstly, must tell the client that I am under a duty to inform the court that the overseas affidavit & his witness statement are false because I cannot allow the court to be misled or deceived in this regard. If the client will not allow me to do so, I must cease representing him. Should also inform the client that he may be in contempt of court and his overseas associate has perjured himself. Both serious offences.

Should also inform client that I am specifically under a duty not to impugn the character of witnesses, in particular by making fraud allegations where there is no prima facie case for doing so. (IPReg Code of Conduct & Litigate's Code)

Also under a duty not to advance submissions that I know are unarguable. This is a separate reason why must withdraw representation if client still wishes these arguments/submissions to be made.

Only way I can remain as representative is if client allows me to inform court regarding falsity of affidavit & witness statement & apply to amend statements of case to remove allegations of fraud. Otherwise must withdraw representation.

MARKS AWARDED 3/5

Question 15

(a) 3 months from decision date (2 weeks time, approx.)

(b) That Comptroller's decision: (inter alia)

Was irrational (i.e. had regard to facts which it should not, or did not have regard to facts it should have) or unreasonable or

Erred in application of law or

Erred in application of procedure

Application of JR will also have to establish standing of claimant (not likely to be a problem in this case)

That JR will have a material effect.

(c) File the new PCT application as soon as possible whilst pursuing JR of Comptroller's PCT 1 decision.

This preserves rights in the invention (intervening publication between priority date & PCTZ notwithstanding) in the event that JR of PCT 1 decision fails.

MARKS AWARDED 5/5