

**Question 1**

A fact in issue is a fact that is in dispute between the parties and is relied upon by a party in a statement of case.

It is therefore something that will need to be decided by the judge.

**MARKS AWARDED 1/1**

**Question 2**

- (a) The applicant for the interim application is responsible for preparing the court bundle for the interim application.

Therefore, my client is responsible for preparing the court bundle for the interim application since they are the applicant.

- (b) The trial bundle for an interim application must be lodged with the court at least two working days before the hearing for the interim application.

- (c) A skeleton argument must also be lodged with the court and served with the other party.

**MARKS AWARDED 3/3**

**Question 3**

A Court of Appeal Judgement is binding on the High Court, because it is from a more senior court (subject to the material being in the ratio decidendi and the material facts being sufficiently analogous to justify the imposition of the same legal principle)

I have a duty to the court and an ethical duty not to mislead or deceive the court, and these duties mean I have a duty to tell the court about any relevant legal precedents that are relevant to the issues, that I am aware of, even if they adversely affect my case, otherwise I will be misleading the court.

This duty to the court and ethical duty outweigh my duty to the client.

I should therefore tell my client that it is my duty to inform the court about this Court of Appeal judgement because it is a relevant legal precedent.

If the client forbids me from mentioning the judgement to the court, I should withdraw from the case because my duty to the court and duty of integrity mean that I cannot obey my client's instructions.

If there is insufficient time for me to withdraw representation before the trial, I should seek a postponement if possible to allow sufficient time, otherwise I will need to inform the court

of the Court of Appeal judgement, because that is my overriding duty to inform you of the legal precedent and I cannot mislead the court at trial.

**MARKS AWARDED 4/4**

#### **Question 4**

I cannot act as a Commissioner for Oaths for my sister because she is my close relative and a Commissioner for Oaths must be independent, and therefore, cannot act for a close relative such a sister.

However, since the other attorneys in my firm have not previously acted for the company or my sister in any capacity, and the affidavit is not prepared by my firm and does not relate to my firm or employer, the other attorneys in my firm should be able to act as a Commissioner of Oaths in the case, provided they do not have any personal interest in the matter.

The fact that the deponent is my sister should not affect the independence the other attorneys in my firm.

Therefore, I should ask one of the other attorneys in my firm to act as Commissioner for my sister in this matter.

**MARKS AWARDED 3/3**

#### **Question 5**

(a) The court of appeal can diverge from a decision of the Supreme Court where that decision was made 'Per incuram', i.e. by carelessness or mistake. Also where the case can be distinguished on the material facts.

(b) The court of appeal can diverge from its own previous decision where:

- the case can be distinguished from the earlier decision based on the material facts
- the earlier decision was 'per incuriam' i.e. by carelessness or mistake
- there are conflicting earlier decisions of the court of Appeal
- the earlier decision has been expressly or implicitly overruled by the Supreme Court (on appeal)
- following the case, 'Activis' where the technical boards of the Appeal of the EPO have reached settled case law that is inconsistent with the earlier Court of Appeal decision.

**MARKS AWARDED 5/5**

#### **Question 6**

We should appeal to the decision of the IPEC judge.

We should appeal to the Court of Appeal within 28 days of the decision at the CMC

We should appeal on the grounds that the issue of commercial success is very important in the case, since it is relevant to the main issue of the proceedings

I think our prospects of success are low.

**MARKS AWARDED 0/4**

### **Question 7**

The costs for establishing liability in the IPEC are subject to a total cap of £50,000. There are also separate caps for different stages of the procedure, such as preparing for trial.

Costs at IPEC are assessed summarily. This means that the IPEC judge will decide the costs based on the summaries of costs provided by the parties, without any detailed assessment of the costs, subject to the total costs cap of £50,000, and the individual costs cap. The judge will therefore use a broad brush approach in deciding the costs based on the summaries in a matter of minutes.

Costs will only be rewarded within these caps if they are reasonable and proportionate in amount, and reasonably and proportionally incurred, with any doubt being resolved in the favour of the person paying the costs (so called standard basis)

Any wasted costs, cut costs or recoverable VAT are not included in the cost caps.

**MARKS AWARDED 3/3**

### **Question 8**

- (a) I should I should explain who I am, who I represent (i.e which party) and in general terms why I am interviewing them (remembering that there is no 'property' in a witness)

I should explain the confidential nature of the interview and proceedings, i.e. the need for them not to publicly disclose what I tell them about the proceedings, and that what they tell me will, in most cases, remain confidential (unless disclosed in open court).

I should explain to them that after the interview I will be preparing a witness statement for them to sign, which will be verified by a statement of truth so that lying or misleading may be contempt of court, and that this witness statement will be submitted to court, and it is likely that they will be required to attend court in person to give evidence under oath at court during the trial.

- (b) Stage 1 = free expression, where the witness is encouraged to tell the story in their own words as completely as they are able or willing using open questions from the interviewer and minimal interruption.

Stage 2 = Clarification, where open and some closed questions are asked to clarify things the witness has said if necessary.

Stage 3 = Testing and Challenging, where the witness is asked open and closed questions to test/challenge what they have said, for example, looking for inconsistencies.

- (c) It should be set out in the first person in the witnesses own words in numbered paragraphs in a logical, normally chronological, order

**MARKS AWARDED 7/7**

### **Question 9**

- Disclosure of documents is different between IPEC and Patents Court. In the Patents court, disclosure is typically automatic across all issues. In IPEC disclosure is normally specific disclosure for only specific issues.
- Cross examination of witnesses is more closely controlled in the IPEC than in the Patents Court.
- In the Patents Court, parties can normally agree extensions to the timetable for trial among themselves Normally in IPEC the permission of the judge is required for extensions.
- In the IPEC the length of the trial is normally limited to two days or less, whereas trials in the patent courts can be longer.
- The number of witnesses and expert witnesses is more strictly controlled and limited in the IPEC than in the Patents Court
- In the patents court there is a costs management conference before the CMC to set a reasonable amount of costs. This does not happen in the IPEC

**MARKS AWARDED 3/4**

### **Question 10**

My duty as a commissioner for oaths include

- checking the deponent is the correct deponent named in the affidavit
- checking he is confident to swear evidence under oath
- checking he understands that he will be swearing or affirming the truthfulness of the affidavit
- checking that he confirms the exhibits present are those referred to on the affidavit.

In this case, it appears that the deponent does not speak English very well. The affidavit is in English. Therefore, I must check that the deponent/client has read and understood the contents of the affidavit and can confirm to me they are true.

If I can not reassure myself that he has read and understood the affidavit, I cannot act as Commissioner for Oaths and instead the affidavit should be prepared in Italian, his language.

I need to get the deponent/client to check and confirm that all 15 of the exhibits are the correct exhibits referred to in the affidavit. They should also each have a cover page that includes the name by which they are referred to in the affidavit.

Since the deponent/client does not believe in the bible it is not appropriate for him to swear an oath on the bible since this would not properly bind his conscience. Instead, I should check if he is happy to make an affirmation instead, since this is more appropriate for an agnostic person and he should again not swear.

I should look for any alterations and ask the deponent to initial these.

I should cross out any blank spaces and get the deponent to initial these as an alteration.

**MARKS AWARDED 4/4**

### **Question 11**

- (a) I should be concerned about threat provisions according to section 70 of the UK patents act.

A threat made to the manufacturer of the lever arch files is not an actionable threat since according to section 70 threats relating to manufacture of a patented product or other threats made to such a manufacturer are not actionable.

For the supermarket, since there is a strong risk that the patent is invalid and I know this, the super market will have a good case for a groundless threat action if we threaten them with infringement.

Therefore we should send the proposed letter to the manufacturer, but not send the proposed letter to the supermarket because the supermarket could bring a groundless threats action against us.

- (b) The letter to the supermarket should instead be a letter of inquiry, saying who we and our client are, providing information about the patent as necessary, and asking the supermarket what they know about the making of the potentially infringing lever arch files. We should also ask for a response.

These acts are explicitly specified in section 70 as not being threats.

Since the threats to the manufacturer are not actionable, we can write a normal pre-issue letter to them threatening proceedings.

**MARKS AWARDED 4/5**

### **Question 12**

- (a) In this case, there are a number of possible causes of action including patent infringement, trademark infringement, and malicious falsehood.

I am not competent to advise the client in relation to the trademark infringement aspect of the case because I have not kept up with the laws of trademarks.

According to the IPREG guidelines, I can only act in cases where I am competent to act and have kept up to date with the law.

I have a duty to act in the best interests of the client, and it is not in their interests for me to address them about trademarks if I am not competent to do so.

- (b) I cannot handle this case alone, because I am not competent to handle the trademarks part of the case.

However, I am competent to handle the patent infringement and malicious falsehood aspects of the case which a trademark attorney would not be competent to handle.

Assuming that there is an appropriately qualified trademark attorney in my firm I could handle the case together with them, because in combination, we would be suitably competent.

If there isn't, I will have to refuse to handle this case because I am not suitably competent and therefore it will not be in the client's best interest for me to handle a case in which the trademark issues are one of the primary issues.

**MARKS AWARDED 4/5**

### **Question 13**

I cannot in general act where there is a conflict of interest between two clients or a current client and a former client.

In this case, Christine is a client and Martyn is a former client (of the now merged firm)

In some cases, I can act where there is a conflict of interest provided both clients gave informed written consent to this.

However, I cannot act even where there is informed written consent where I have learnt confidential information from a client/former client that is relevant to my work that is relevant to my work for another client in a contentious matter.

In this case the information that Howlett has failed to enforce his patent before and will back down if pushed is confidential information. I have a duty to Howlett as a former client of the merged firm to keep this information confidential unless he says otherwise.

However, this information is relevant to my work for Jenkins, because the fact Howlett could back down if pushed could significantly affect how she would proceed.

I have a duty to disclose to clients information that I know is relevant to their case.

However, this duty is beaten by my duty of confidentiality.

Therefore, in this case, my duty of confidentiality to Howlett means I cannot act in the best interests of Jenkins by disclosing this relevant information to her.

Since I cannot fulfil my duty to act in the best interest of Jenkins, on balance, I believe I will have to stop representing her because I should not act for her if I cannot fulfil my duty of disclosure to her

**MARKS AWARDED 4/4**

#### **Question 14**

- (a) Where the decision of the Comptroller is in relation to the UKIPO acting as a receiving office in relation to a PCT application, since in doing this, the Comptroller is exercising a public function.
- (b) No. Judicial review is only available where all other avenues for challenging the decision such as formal or informal appeals have been exhausted. Here, we can still challenge the decision before a hearing officer, so Judicial review is not appropriate.
- (c) Judicial review is a review of the way in which the decision was made, rather than a review of the decision itself.

The judicial review will therefore concentrate on how the decision of the comptroller was made, to see if it was wrong in law or procedure, against the human rights act or unreasonable/irrational.

- (d) Since the Judicial review is a review of how the decision is made, and not a review of the decision itself, the court will return the application to the Comptroller for him to reconsider the application following the judicial review. The Comptroller must then revisit his decision

**MARKS AWARDED 4/5**

#### **Question 15**

- (a) So that the experts can identify the point of expert evidence on which they agree and the points of expert evidence in dispute.
- (b) A document setting out the points of expert evidence on which the parties agree and the points of expert evidence that are in dispute, and for those points in dispute each expert's version.

**MARKS AWARDED 3/3**