

2022 FC2 UK English Law
FINAL Mark Scheme 2022

SECTION A

Question 1

- a) Describe mediation and arbitration in alternative dispute resolution, highlighting differences between the two processes.

4 marks

- b) Describe the use of UKIPO opinions in cases of patent matters.

3 marks

Total: 7 marks

Answer

- a) *Other insightful statements should be addressed on their own merits*

mediation:

- *use of a non-lawyer or non-specialist go-between (“mediator”)*
- *without prejudice settlement discussions*
- *confidential resolutions are possible*
- *decisions are non-binding unless a settlement contract/deed is signed*
- *commonly parties may include a term on mediation into a commercial contract as a first method of resolving disputes though courts will not force parties to mediate*

(0.5 marks each up to a maximum of 2 marks)

arbitration:

- *choice of rules is up to the parties*
- *though the Arbitration Act 1996 sets out some compulsory aspects (knowledge of the Arbitration Act 1996 is not required)*
- *likely to be a binding decision*
- *subject to the parties’ choice of rules or the unreasonableness of a decision, a court is reluctant to interfere with a decision on arbitration*

(0.5 marks each up to a maximum of 2 marks)

- b) *Other insightful statements should be addressed on their own merits*

open to anyone, by email if possible

can concern infringement or validity of patent/SPC

must relate to a UK or EP(UK) or SPC(UK) whether it is in force or not

the UKIPO will notify interested parties (egs holder, licensee) of the request for an opinion

anyone can make an observation on a request for an opinion (4 weeks after publication) and a response can be made to the observations (2 weeks after the observations)

lasts no more than 3 months (good reasons required for further time)

opinion is sent to requester, holder and observers and published

opinion can be challenged within the UKIPO

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*UKIPO can in limited circumstances commence revocation
if an opinion is upheld on review there may be a costs sanction*

(0.5 marks each up to a maximum of 3 marks)

Total: 7 marks

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Question 2

- a) What is meant by:
- i) *obiter dicta* **1 mark**
 - ii) *stare decisis* **1 mark**
- b) Describe the nature of appeals to, and the role of, the Appointed Person. **4 marks**
- c) Name two of the three principal divisions of the High Court. **1 mark**
- Total: 7 marks**

Answer

- a)
- i) non-essential element of a court's opinion and therefore not legally binding **1 mark**
 - ii) *stare decisis* is the principle of legal precedent by which the legal reasoning of a more senior court must be followed by a junior court. **1 mark**
- b) *Other insightful statements should be addressed on their own merits*

The Appointed Person is a senior lawyer appointed by the Ministry of Justice to hear appeals from the UKIPO tribunals or hearing officers matters of trade marks and designs both ex-parte and inter partes appeals are low cost with a single hearing review only, not re-hearing of a case is final, appeal not possible unless the case can be dealt with by way of judicial review (rare) decision can be by way of hearing or on the papers costs awards use the UKIPO scale of costs

(0.5 marks each up to a maximum of 4 marks)

- c) *Chancery, Queen's Bench, Family*

(0.5 marks each up to a maximum of 1 mark)

Total: 7 marks

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Question 3

- a) Describe two situations identified by the court in *Ray v Classic FM PLC* in which a contractual term may be implied assigning legal title in a copyright work to a commissioner of the work notwithstanding that no express assignment agreement exists between the commissioner and the author of the work

5 marks

- b) What factors did the court state must be considered in each of these situations?

3 marks

Total: 8 marks

Answer

- a) *Any two of the following situations described by the court:*

(i) where the purpose in commissioning the work is for the Client to multiply and sell copies on the market for which the work was created free from the sale of copies in competition with the Client by the Contractor or third parties;

(ii) where the Contractor creates a work which is derivative from a pre-existing work of the Client, e.g. when a draughtsman is engaged to turn designs of an article in sketch form by the Client into formal manufacturing drawings, and the draughtsman could not use the drawings himself without infringing the underlying rights of the Client;

(iii) where the Contractor is engaged as part of a team with employees of the Client to produce a composite or joint work and he is unable, or cannot have been intended to be able, to exploit for his own benefit the joint work or indeed any distinct contribution of his own created in the course of his engagement:

2.5 marks maximum per situation described

- b) *In each case it is necessary to consider the price paid, the impact on the Contractor of assignment of copyright and whether it can sensibly have been intended that the Contractor should retain any copyright as a separate item of property.*

3 marks

Total: 8 marks

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Question 4

Describe the Whitford guidelines for the admission of survey evidence into court proceedings in a case of passing off. You may describe them in summary form as set out by Lord Justice Lewison in *Marks and Spencer PLC v Interflora Inc* [2012] EWCA Civ 1501 (known as *Interflora I*).

7 marks

Answer

Candidates may structure their answer using the following summary from Imperial Group plc v Philip Morris Ltd [1984] RPC 293 Whitford J ("the Whitford guidelines") but marks will be awarded for any other structure providing the following points are made (1 mark per point, exact wording not required):

- i) if a survey is to have any validity at all, the way in which the interviewees are selected must be established as being done by a method such that a relevant cross-section of the public is interviewed;*
- ii) any survey must be of a size which is sufficient to produce some relevant result viewed on a statistical basis;*
- iii) the party relying on the survey must give the fullest possible disclosure of exactly how many surveys they have carried out, exactly how those surveys were conducted and the totality of the number of persons involved, because otherwise it is impossible to draw any reliable inference from answers given by a few respondents;*
- iv) the questions asked must not be leading; and must not direct the person answering the question into a field of speculation upon which that person would never have embarked had the question not been put;*
- v) exact answers and not some sort of abbreviation or digest of the exact answer must be recorded;*
- vi) the totality of all answers given to all surveys should be disclosed / where the answers are coded for computer input, the coding instructions must be disclosed; and*
- vii) the instructions given to interviewers must also be disclosed.*

Total: 7 marks

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Question 5

Elijah announces to his patent attorney, Jill, that he is taking his instructions to another firm. Elijah has an imminent deadline approaching on his patent application. Jill tells Elijah that he will not send the papers to another firm as there isn't sufficient time for a new firm to meet the imminent deadline. When Elijah does instruct another firm, Jill delays sending the papers to the new attorney and refuses to speak with the new attorney.

By reference to the *IPREG Code of Conduct* including the Rules and/or Guidance, briefly discuss how Jill may or may not have breached the Code of Conduct.

7 marks

Answer

Rule 5 Integrity, Regulated persons shall at all times act with integrity putting their clients' interests foremost (1 mark), so, Jill must not put Elijah at risk of missing the imminent deadlines (1 mark), however sending the papers to a new attorney is subject to any lien Jill may claim over the papers (1 mark) provided that such lien has been agreed (Rule 13 Liens) (1 mark).

Alternative mark up to a maximum of 1 mark for discussing whether Jill was correct not to send over the papers in order to protect Elijah's interests

Rule 9 Relationships with other Professionals, A regulated person should co-operate with a client and any new representative of the client to ensure the client's interests are protected on any change of responsibility (1 mark), so Jill should speak with the new attorney (1 mark) but (see Guidance) this Rule does not prevent Jill from exercising any lien over Elijah's papers (1 mark).

Total: 7 marks (maximum)

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Question 6

a) The *IPReg Guidance to the Code of Conduct*, Rule 4 (*Competence*), states three 'circumstances' which a regulated person should consider in particular when considering whether to act for a client. List two of those circumstances.

1 mark

b) What does the *IPReg Guidance to the Code of Conduct*, Rule 4, say regarding acting for clients in criminal matters?

3 marks

Total: 4 marks

Answers

a) *the gravity, complexity and likely cost*

(0.5 marks each up to a maximum of 1 mark)

b) *a regulated person does not have rights of audience in respect of criminal litigation (0.5 marks)*

In addition, legal professionals (including patent and trade mark attorneys and solicitors) (0.5 marks) practising in an IPReg-regulated firm may not practise criminal work (0.5 marks)

This does not prevent a regulated person from offering advice on sanctions in the Copyright, Designs and Patents Act 1988 and the Trade Marks Act 1994 and other legislation relevant to copyright, designs, patents and trade marks (0.5 marks)

but if asked for such advice a regulated person must consider carefully on what it is within their competence to advise (0.5 marks) and the point at which it would be advisable to refer the client to another lawyer, such as a solicitor (0.5 marks)

3 marks

Total: 4 marks

SECTION A Total: 40 marks

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SECTION B

Question 7

Anthony has developed a new mobile phone stand. He owns a patent for the stand.

Anthony is at the wedding of his friend, the groom. Elizabeth is one of the bridesmaids. She tells Anthony that her work is selling mobile phone contracts. Anthony is drinking alcoholic drinks. Elizabeth doesn't drink alcohol.

Before the ceremony, Anthony tells Elizabeth of the patent and asks, "Would you like to sell my mobile phone stand to your phone contracts customers?" Elizabeth says, "Yes, that'd be great. If I get 3,000 units from you at £7 each, then I can sell them on at £10." Anthony replies, "Well, what about 5,000 units, then I can get those to you for only £5 each?" Elizabeth says "Fantastic!"

Whilst dancing to loud music, Elizabeth says, "I suppose they're quite cheap to make." Anthony says, "Yes, I get them from China." Then Elizabeth says, "Great, I'll get that organised. 5,000 of them over six months?" Anthony says, "Brilliant! Send me over an order and we'll get that arranged."

Neither speaks to each other again. Six months later Anthony finds out that Elizabeth has been selling the phone stands to her customers which she has been getting manufactured in China.

Anthony sues Elizabeth for patent infringement but Elizabeth says in response there was a contract between them allowing Elizabeth to manufacture and sell the phone stand.

- a) Advise Anthony whether a contract is formed between him and Elizabeth. Ignore any other potential claims.**

14 marks

Anthony successfully sues Elizabeth for patent infringement of his mobile phone stand.

Anthony sells his stands for £20 each and each unit costs him £10 in total to sell (including manufacturing and marketing).

Elizabeth has sold 2,000 infringing stands. Elizabeth sells her stands at £10 each, which cost her £8 to buy.

The evidence shows that both Anthony and Elizabeth sell only from bricks and mortar shops, both based in Norfolk but 20 miles apart. Despite the price difference, both Anthony and Elizabeth use what are perceived to be 'exclusive' high street retail brands.

- b) Advise Anthony how a court might approach the assessment of damages for Elizabeth's infringement. You should use the relevant figures to illustrate your approach; however, marks will not be awarded for calculations.**

6 marks

Total: 20 marks

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Answer

- a) See generally eg *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256: A reasonable structure and discussion covering the following:

Intention to create legal relations.

Anthony and Elizabeth have met at a wedding, they are dancing to loud music, Anthony is drinking.

Arguably meeting as friends of bride and groom but could work other way as they are not friends themselves and don't meet up again.

however Anthony never stops working; Elizabeth makes her work known to Anthony, also their discussion about the supply is quite definite; awareness of patent.

A total of 4 marks may be awarded

Offer / Acceptance

To gain full marks candidates must distinguish treatment of manufacture and selling even if the conclusion is the same for both. Flexible approach to structuring answer.

An offer needs to be certain as to its terms.

1 mark

Acceptance of all terms of the contract, needs to be to be communicated, but can be by conduct.

1 mark

Licence to Sell:

Elizabeth possibly then makes an offer to take 3000 units at £7 each. Certainty as to subject matter / numbers to be sold / terms as to over what period. Simplicity might suggest clarity of terms. Anthony counter offer 5000 units at £5 each.

Uncertainty as to Elizabeth's acceptance – whether part of the fun of the wedding; was acceptance to all terms of the contract communicated clearly?

Licence to Manufacture:

Anthony saying he gets stand manufactured in China – does Elizabeth take this as an intention to treat? Elizabeth possibly offers to get them manufactured. Anthony saying "Brilliant" possible acceptance but appears to talking about selling not manufacturing.

Acceptance appears unclear and therefore suggests no agreement to manufacture.

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Implied licence to manufacture:

Candidates may also identify this latter discussion as a continuing negotiation for a licence to sell. Such candidates may also refer to an implied right to manufacture on the basis that Elizabeth is allowed to sell and organise her own supply.

A total of 5 marks may be awarded

Consideration.

Must be sufficient but need not be adequate; no monetary consideration apparent, Elizabeth is aware that Anthony claims IP rights so she would be giving up exclusive rights and Elizabeth would be promising to purchase so forbearance to sue/mutual promises could be sufficient and can be considered consideration

(the price of the products per se will NOT be accepted though if candidate uses this to describe mutual obligation to purchase minimum amounts that is fine).

A total of 3 marks may be awarded

- b) *Damages for IP Infringement eg see Alfrank Designs Ltd v Exclusive (UK) Ltd [2015] EWHC 1372 (IPEC)*

*The proportion of sales of infringing stands by Elizabeth which are to be treated as having caused equivalent loss of sales by Anthony, ie stolen sales, £1 for £1 damages a % of Elizabeth's 2000 units will be classed as stolen sales, damages as if Anthony had sold them at his profit = £10
evidence supporting this % includes,
customers could not have purchased online so their choice of outlets was the bricks and mortar shops which were located reasonably closely, but were not next door*

3 marks

(Account of profits can attract up to 2 alternative marks from stolen sales as an alternative (even though questions refers to "damages")

The royalty to which Anthony is entitled in relation to Elizabeth's sales of infringing tables which caused Anthony no loss of sales – i.e. damages according to the 'user principle',

reasonable royalty:

reasonable royalty –

willing licensor – licensee – likely to include profits from Elizabeth's sales of batteries as well,

% royalty chosen will be of Elizabeth's profits from both stands (£2) and batteries (£10)

3 marks

Total: 20 marks

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Question 8

Tracy is a patent attorney. Her client, Percy has invented a novel spout for a teapot. Percy believes that the spout could be applied to wine bottles but not to large wine bottles such as magnums.

Percy tells Tracy of this variant by a quick email describing how the invention can be applied to wine bottles generally but with a diagram in a separately attached document which makes clear that that the variant would not work for large wine bottles such as magnums. Tracy fails to open and review the diagram and files the application claiming that the invention applies to all wine bottles generally. Tracy did not exclude the use of the invention on large wine bottles such as magnums.

A court later failed to make a finding of infringement on an article using the spout on normal sized wine bottles because Percy's claim was invalidated on grounds of insufficiency.

Percy suffers damage. In particular:

- i) the article that was found not to infringe reduces Percy's licensing revenue for use of his spout on normal sized wine bottles by 20% because of increased market competition;
- ii) Percy also manufactures wine bottles in which the spout can be replaced either with his (more expensive) new spout or with another cheaper non-infringing version. Percy loses 50% of this market for these wine bottles. Percy argues that this is because the purchaser can now buy the wine bottle with the new spout more cheaply. Tracy argues that Percy stopped marketing this part of the business after losing the court case and there is no connection between the markets as the cost of alternative wine bottles is the same;
- iii) Convinced as a result of the court case that the claim to his novel teapot spout will be found invalid Percy decides to sell the teapot business at a 75% reduction in value.

- a) Advise Tracy if she is liable to Percy and, if he were to be, for which of these types of damage.**

13 marks

Percy threatens Tracy with court proceedings for her negligence. Tracy speaks to her neighbour, Fred, an expert in teapot manufacturing. Fred says that i) Percy's teapot is 'of course' novel and inventive and ii) because it was an inventive teapot it was stupid for Percy to sell his entire business at such a large reduction.

- b) Advise Tracy whether she is likely to be able to admit evidence of Fred's opinions to the court.**

4 marks

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Tracy and Percy have a “without prejudice” meeting to try settle the dispute. During the meeting Percy tells Tracy that he will not pursue his case against her for damages relating to the sale of the teapot business. A month later Percy commences court proceedings including a claim to losses due to sale of the teapot business. Tracy wants to put her notes of the meeting to the Court to demonstrate that she and Percy have agreed that the claim relating to the sale of the teapot business has been settled.

- c) By explaining what the term “without prejudice” means including its limitations, advise Tracy whether she can include his meeting notes as part of his defence. (Do not discuss any issues relating to formation of contract.)**

3 marks

Total: 20 marks

Answer

- a) *Eg generally Caparo v Dickman [1990] 2 AC 605: Any reasonable clear discussion covering:*

Tracy must owe duty of care to Percy for her to be liable in negligence

1 mark

It is an objective standard, depending on a relationship of sufficient proximity / neighbour principle

1 mark

Tracy must have breached this duty to be liable / discussion of reasonable man test.

1 mark

Discussing whether Tracy has failed to consider a limited claim for normal sized wine bottles

1 mark

(Use marks flexibly across duty / breach possible)

Heads of Damage *(some flexibility of marks between these heads of damage)*

- i) *discuss application of the ‘but for’ test and that there appears to be a direct factual link between not having a valid patent and losing the 20% of Percy’s licensing revenue;*

similarly the damage is of a reasonably foreseeable type as it relates to the monopoly flowing from the nature of patents with no intervening acts

2 marks

- ii) *it appears from the question that there is causation in fact*

candidate should discuss causation in law (remoteness) – this is the issue debated by Tracy and Percy – this is unclear and further evidence of the markets should be put forward

Percy must mitigate his loss and if he has given up marketing his product then he cannot claim for that – more information on what he has done is required / mention of eggshell principle acceptable

3 marks

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- iii) candidate should discuss that even if there is causation in fact (consider whether there is a break in the chain of causation where the loss on sale of the business as this is Percy's decision)

it is likely that there is no causation in law as the damage is too remote relates to another claim that may still remain valid,

2 marks

Contributory negligence

Percy sent details of the variant only at the last minute and failed to alert Tracy of the limitation that should be applied to the claim therefore possible contributory negligence

1 mark

if contributory negligence then some % reduction to damages awarded

1 mark

- b) opinion evidence which the court will not generally admit into proceedings, but expert evidence is one type the court will admit into proceedings to the extent that the person has expertise;

Novelty of spout is outside Fred's experience and court will not take his opinion on this – Fred is not a patent attorney or design expert

Fred may be able to provide evidence on whether it was reasonable to carry on manufacturing teapots – evidence goes to remoteness of damage/sale of business at discount

expert must be impartial and owes their first duty to the court – Percy could argue that Fred is likely to be biased in Tracy's favour and so cannot give such evidence;

4 marks

- c) Means that the court will not consider the contents of such correspondence or discussions including any admissions made when considering the merits of the case at trial;

1 mark

it is a public policy based on encouraging parties in a dispute to attempt settlement discussions, so

- 1) there must be a real dispute whether proceedings commenced or not
- 2) the correspondence or meeting must be genuine attempts at settlement.

1 mark

it cannot be used to hide evidence of a properly obtained settlement agreement so Tracy can arguably use her notes in respect of damage heading iii) in her defence.

1 mark

Total: 20 marks

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Question 9

Sylvia holds a patent over a child's drinking cup that has an inventive top lid with a double threaded screw. The lid can be opened by adults but not by children.

Timothy Fish has an import/export business with a warehouse in a trading estate in North London called "Fairview Trading Estate". The business handles many different products some of which are highly commercially sensitive.

The phone directory indicates that most of the other businesses on the estate are furniture makers or car parts warehouses. The business is listed in the magazine titled "*Clandestine Business Today!*"

Sylvia has discovered poor quality imitation cups being sold where the second screw thread fails to prevent the lid falling off. The imitation falls within her patent claims. The lids have been reported in the press to fall open and hot water pour over the children holding them. Separately there are press reports of a "Mr Fish" working on the Fairview trading estate who has recently been released from prison having been convicted of destroying false accounting documents.

Sylvia has found some of the imitation cups being sold at car boot sales with a label saying, "originating from Fairview, London". The person selling the cups at the car boot sale says he gets his supplies from "Tim" in North London.

Sylvia conducts a phone directory search which indicates two people by the name Timothy at the Fairview trading estate, but doesn't tell this to her lawyers.

Sylvia wants to make an application for an ex parte interim search and seizure order against Timothy Fish's warehouse on the "Fairview Trading Estate" in North London.

- a) Advise Sylvia on the grounds that need to be satisfied for the court to make such an order in this case. Your answer should include an assessment of the evidential issues described above.**

12 marks

Rather than spend the money on making court applications, Sylvia decides to post on social media that "In my opinion, the cups that Timothy Fish is importing are causing children to have hot water poured over them".

It turns out that Timothy Fish does import children's cups which he says have double threaded screw lids and so the lids don't fall off.

- b) Advise Sylvia whether he could be liable for malicious falsehood.**

8 marks

Total: 20 marks

Answer

- a) *Any reasonable discussion, (flexibility of marks especially between points 3 and 4 below regarding discussion of evidence issues only), a structure using the grounds set out in *Indicii Salus Ltd (in receivership) v Chandrasekaran* [2006] EWHC 521 (Ch), at para [85], which need to be satisfied before a search order is made is usually the clearest:*

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(1) *“extremely strong prima facie case”*

Sylvia has examples of the infringing cups which fall within the claims

1 mark

(2) *“damage potential or actual must be very serious for the applicant”*

Not only does there appear to be damage to Sylvia’s market but there is also potential for very bad reputational damage.

2 marks

(3) *“there must be clear evidence that the defendants had in their possession incriminating documents or things”*

there does not appear to be ‘clear evidence’ in this case:

the cup labels only say from “Fairview” and it is not certain that they originate from Timothy Fish’s warehouse even though other warehouses manage car parts or furniture

there are other people by the name “Tim” working on the trading estate.

2 marks

(4) *“there is a real possibility that the defendants may destroy such material before an on notice application is made”*

Possible evidence showing this is that the business operates as a “clandestine business” and that “Mr Fish” has been convicted of destroying accounting documents

2 marks

(5) *“the harm likely to be caused by the execution of the search order on the respondent in his business affairs must not be out of proportion to the legitimate object of the order”*

Likely to be disruption to Mr Fish’s business because i) he handles many different products and ii) they are highly commercially sensitive

Balanced with

Object of the order to preserve evidence of infringement – but Sylvia has some evidence of infringement already

3 marks

(6) *the applicant’s obligation to make full disclosure.*

Information showing that there could be another Tim on the trading estate would put doubt into the courts mind as to whether to grant the order, which is why there is an obligation of full disclosure

So Sylvia could be in contempt of court by not making full disclosure

2 marks

b) *malicious falsehood is a false statement of fact and not of opinion – the statements is said to be an opinion but Sylvia is making a particular statement of fact (in addition to the question of malice)*

could be seen as ‘mere puff’ where the customers are unlikely to take the precise statement seriously

but

the statement about the nature of the harm caused could be taken seriously

2 marks

published - required- made on social media

1 mark

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the statement is made with malice (an intention to cause loss or a dominant improper motive by defendant including recklessness) – we need to show more than just that the statement is false but that is made with malice, that is more than negligence, must have a ‘dominant improper motive’

Sylvia clearly wants to hurt Timothy Friend’s business

And

she appears to be using social media to avoid checking more thoroughly on Timothy’s business

3 marks in total for discussing these issues

claimant must show that identifiable damage (special) is caused as a result of the oral statement

however Timothy should be able to rely on the exception in s3(1) Defamation Act 1952 the gist of which (where the said words are calculated to cause pecuniary damage to the claimant in respect of any office, profession, calling, trade or business held or carried on by him at the time of publication), “calculated” meaning ‘more likely than not’) means that the statement is actionable

*possible alternative **1 mark** for giving Timothy damages for hurt feelings*

2 marks in total for discussing these issues

Total: 20 marks

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Question 10

Nathan worked for over 15 years at Quickbeam Ltd as a consultant. He has no written terms as to confidentiality. Quickbeam develops laser distance measuring devices for measuring cracks in semiconductors using different combinations of lenses and lasers of different wavelengths.

Quickbeam holds i) the results of tests which are contained in a series of 20 laboratory notebooks recording the combinations of lasers and lenses used and ii) holds a schedule of different lasers publicly available on the market, including the technical information and recommended uses connected with each.

Nathan leaves Quickbeam and joins Seek Ltd, which specialises in detecting intercontinental ballistic missiles in flight. Seek employed Nathan because of his experience at Quickbeam. When Nathan begins to tell them of the information he has from Quickbeam Seek tell Nathan “We don’t want to know about it”. Nathan creates a new detector at Seek.

Nathan started his work at Seek using only green lasers because he knew from his work at Quickbeam that green lasers work better at longer distances which reduced the development time by six months. He had also taken copies of the first 3 laboratory notebooks from Quickbeam which reduced the development time by a further six months. Nathan also used the database of different lasers that he took from Quickbeam in his research.

- a) Prepare notes for a meeting in which you advise Quickbeam whether they can take action for common law breach of confidential information against Seek, including a brief description of the remedies available.**

10 marks

Separately Quickbeam sold one of its lasers to Crack-It! Ltd for detecting cracks in semiconductors. Quickbeam’s director Frances knew of Crack-It’s marketing literature which offered detection rates of cracks “no larger than 600 nm”. Frances said to Crack-It’s managing director that the detector’s best results were “about 450 nm but usually it showed cracks that were a bit larger and should be fine for your needs”. Crack-It purchased Quickbeam’s detector as it was the only detector currently available.

The detector is only picking up large cracks of 900 nm. Frances was aware that this was a risk with this detector. Crack-It is now suing Quickbeam alleging misrepresentation.

- b) Advise Frances whether Quickbeam is likely to be liable to Crack-It in misrepresentation.**

7 marks

Crack-It accuses Frances of being liable for the same misrepresentation as Quickbeam.

- c) Briefly advise Frances whether she is likely to be liable.**

3 marks

Total: 20 marks

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Answer

- a) *A reasonable structure and discussion covering the following (note that the question asks about action against Seek for full marks):*

*the information has the necessary quality of confidence –
the laboratory test results are clearly valuable technical information in the extent to which Quickbeam’s detector works
it is not so clear cut whether the database has commercial value it is a useful database but online searches can be performed quickly and cheaply*

3 marks

whether there is an obligation of confidence – the defendant must have known or ought reasonably to have known that the information had been given in confidence - Nathan has no express obligation of confidentiality – nature of obligation whether disclosure to public or otherwise

there may however be implied terms as a result of the circumstances – here the companies are not in direct competition with one another but the work Nathan is doing is key to the success of Quickbeam’s technology

unlikely Nathan will have restriction not to use his own skill and knowledge ie his knowledge generally of the application of green lasers at long distances

3 marks

there has been breach by misuse by Nathan

a third party can be liable for a breach of confidential information where they have been willfully ignorant that the information is confidential or have closed their eyes to the fact that the information may be confidential

so Seek are likely to be liable for use of the laboratory notes but not Nathan’s knowledge of green lasers

2 marks

Damages for the breach

an injunction will not normally be granted once the information has fallen into the public domain (equity will not act in vain)

courts may be willing to grant a so called “springboard” injunction to compensate Quickbeam where the breach has been used by Seek to cut development time as a result of the actionable breach – here 6 months

however a court may refuse to grant such an injunction as the parties are not competing with each other

a maximum of 2 marks may be awarded

- b) *Action for a misrepresentation*

A misrepresentation made in is a false statement of fact (size of cracks detectable) that is made prior to concluding a contract

1 mark

where the statement is made in such circumstances that a person is induced into entering the contract (CrackIt makes the purchase because of the representation made to the director)

is it reasonable that reliance should be placed upon the statement? (Frances’ statement to CrackIt’s MD is precise and the detector should work at a level that is well within the claims made to CrackIt’s own customers, but did they buy the detector because that was the only detector on the market?)

3 marks (half marks may be awarded)

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Discussion including does Quickbeam's misrepresentations about the size of the cracks that can be detected amount to

Fraudulent: (where the maker of the statement knows or is reckless as to the untruth of the statement – such as Frances making a claim to the purchasing manager that she knows will be attractive to CrackIt) or;

Negligent: (where the person making the statement is negligent in making a statement that turns out to be untrue – it is possible to interpret Frances as merely careless as she speaks to the director and caveat's the claim with a lack of precision)

3 marks (half marks may be awarded)

c) common design for tortious acts, The Kursk [1924] P 140.

As a director of Quickbeam Frances can be personally liable under the law of common design which can have the effect of 'piercing of the corporate veil'

1 mark

Frances must have

- participated in the actions that amount to the common design*
- had some agreement with the company (tacit agreement is sufficient)*
- the collective acts must amount to a tortious act whether they knew about it at the time or not*

1 mark (ie 2 x 0.5 marks, one for a point made)

If liable, Frances will be jointly and severally liable with Quickbeam for the whole amount of damage caused by the tort

1 mark

Total: 20 marks