

| Paper Ref | Sheet | Percentage Mark Awarded |
|------------|----------------|-------------------------|
| FC5 | 1 of 29 | 68% |

Examiner's use only

Question 1

a)

✓½

i) 30 days from registration – can extend up to 60 days

ii) 3 months from publication – can extend by additional 2 months by filing notice of threatened opposition

½

b)

i) US – have to declare bona fide intention to use ✓½

Have to submit declaration of use for each class, including affidavit and specimens at 6 year point and then every 10 years with renewal fee

ii) Ireland – yes, declare bona fide intention to use ✓½

iii) EU – no declaration needed ✓1

2

2½

MARKS AWARDED:2.5/7

Page sub-total

| Paper Ref | Sheet |
|------------|----------------|
| FC5 | 2 of 29 |

Examiner's
use only

Question 2

a) Charlie can simply extend the International Registration (IR) – apply to WIPO, using the prescribed form and paying the prescribed fee ✓1

1

b)

- IR is attached to basic registration for 5 years, in which it is vulnerable to central attack
- Charlie registered IR in 2015 + 5years = 2020, this has now passed ✓1
 - The IR is now independent of the US base, even if it gets revoked, cancelled etc.
 - Hence, with respect to the IR, this does not cause any concern
- However, with respect to the US mark itself, this has now become vulnerable to revocation ✓1
 - Have to submit declaration of use at 10 year renewal point (and 6 years from US registration)
 - So 2019 and 2023 – which is coming up
 - Charlie will need to give declaration, affidavit and specimens for each registered class

2

3

MARKS AWARDED: 3/4

Page sub-
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| Paper Ref | Sheet |
|------------|----------------|
| FC5 | 3 of 29 |

Examiner's
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Question 3

a)

Conversion is when a EUTM is converted into separate national registrations for each country for which this is desired ✓½

- EUTM uses its unitary character in the process

½

b)

Can be used to overcome absolute grounds objections that only exists in one part of the union, but would hinder registration of the mark everywhere – conversion is a safeguard that means you won't lose your filing date if you have to convert to obtain protection in countries where this is possible. ✓1

1

c)

- More expensive to go through to the EUTM process to only convert at the end of if
 - o If only want TMs for certain countries, it's cheaper to go through this process
 - o Might also be able to claim priority in each country, if within 6 month time limit ✓1

1

2½

MARKS AWARDED: 2.5/4

Page sub-
total

| Paper Ref | Sheet |
|------------|----------------|
| FC5 | 4 of 29 |

Examiner's
use only

Question 4

a)

earlier copyright or design right ✓1

b)

mark was registered by an agent or representative without the proprietor's

consent ✓1

2

MARKS AWARDED: 2/2

2

Page sub-
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| Paper Ref | Sheet |
|------------|----------------|
| FC5 | 5 of 29 |

Examiner's
use only

Question 5

- It is not possible to amend an application to change classes, only to expand classes
 - o Juliet would therefore have to refile the application, she would lose her filing date and would have to pay another application fee

0

MARKS AWARDED: 0/2

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Page sub-
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| Paper Ref | Sheet |
|------------|----------------|
| FC5 | 6 of 29 |

Examiner's
use only

Question 6

- A Madrid Protocol application needs to be based on a basic application
 - o Basic application needs to be in a country in which the applicant has a real and effective commercial establishment
 - Foxtrot only has a real and effective commercial establishment in the UK, hence they must use a UK application or registration as the base
- It is possible to use more than one application/registration as base, as long as the applicant is the same and they were made in the same country
 - o Hence, Foxtrot can use both '123 and '345 as base (retaining priority date for '345 and getting date of making IR application as filing date for '123)
- To claim priority, a subsequent application needs to be made within 6 months of the earlier application's filing date
 - o Additionally, the applicant needs to be the same or their successor in title, and the subject matter of both applications needs to be the same, classes also need to be the same
 - o '123: filing + 6 months = 1 September 2022
 - Can't claim priority anymore
 - o '345 filing + 6 months = 1 February 2023
 - Can claim priority

Thus, priority can still be claimed from '345 for Gin, but not from '123.

Page sub-
total

| Paper Ref | Sheet |
|------------|----------------|
| FC5 | 7 of 29 |

Examiner's
use only

Can't claim priority from '234, because classes aren't the same, and it can't be used as the base because Foxtrot doesn't have a commercial establishment in Canada.

0

MARKS AWARDED: 0/2

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Page sub-
total

| Paper Ref | Sheet |
|------------|----------------|
| FC5 | 8 of 29 |

Examiner's
use only

Question 7

a)

- If the licence is not registered before commencement of an infringing act, and subsequently, infringement proceedings are brought, no award of costs or expenses will be made to the claimant ✓¹
 - Advantage of registering is then that you get costs
- Registering the licence protects against subsequent transactions in which the other party did not know of the earlier right (e.g. licence) and the transaction was made in good faith ✓¹
 - If the licence is not registered, the subsequent transaction, if registered, will supersede the rights granted under the licence ✓¹

3

b)

- All transactions should be registered within 6 months of the transaction, or ✓¹
- If this is not practicable, as soon as practicable ✓¹

Consequences of not doing in time, you don't get benefits from a):

- If the licence is not registered before commencement of an infringing act, and subsequently, infringement proceedings are brought, no award of costs or expenses will be made to the claimant ✓¹ ✓¹
 - Advantage of registering is then that you get costs
- Registering the licence protects against subsequent transactions in which the other party did not know of the earlier right (e.g. licence) and the transaction was made in good faith

4

Page sub-
total

| Paper Ref | Sheet |
|------------|----------------|
| FC5 | 9 of 29 |

Examiner's
use only

- If the licence is not registered, the subsequent transaction, if registered, will supersede the rights granted under the licence

7

MARKS AWARDED: 7/7

Page sub-
total

| Paper Ref | Sheet |
|------------|-----------------|
| FC5 | 10 of 29 |

Examiner's
use only

Question 8

Infringing acts are

- Offering to supply goods/services under the sign
- Placing goods on the market under the sign
- Selling, stocking goods under the sign
- Affixing the sign to goods
- Using the sign on business papers or advertising materials
- Importing/exporting goods under the sign
- Using the sign in comparative advertising, if it directly identifies the goods/services of a competitor contrary to regulation

Oscar is placing the goods on the market, selling and stocking them without the proprietor's consent (the proprietor explicitly provided a condition for use of their sign on their goods – that goods must not be resold individually), and in bad faith.

Bravo's rights have not been exhausted by Oscar buying the chocolate bars from them – they are allowed to stop Oscar from selling goods under their sign if they believe the quality of the products has been compromised, in this case, the label 'NOT FOR INDIVIDUAL RESALE' might be interpreted as the goods not being sold in the condition Bravo intended – i.e. with the outer wrapper, which Oscar removed. ^{✓1/2} ^{✓1} ^{Allow} ✓1

2½

MARKS AWARDED: 2.5/4

2½

Page sub-
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| Paper Ref | Sheet |
|------------|-----------------|
| FC5 | 11 of 29 |

Examiner's
use only

Question 9

a)

- revocation is the sign being revoked on the basis of non-use, the original application/registration was however valid and there were no absolute or relative grounds for refusal
- invalidity is an action brought after the sign is registered, on the basis of absolute or relative grounds to cancel the registration ✓1

1

b)

- invalidity: retroactive, as if sign had never been registered in first place ✓½
- revocation: from date of revocation ✓½

1

c)

- non-use ✓½
- registered in bad faith
- lack of consent of proprietor

½

d)

- an earlier registered trade mark that is identical, registered with identical goods or services ✓1
- earlier copyright ✓1

2

4½

MARKS AWARDED: 4.5/8

Page sub-
total

| Paper Ref | Sheet |
|------------|-----------------|
| FC5 | 12 of 29 |

Examiner's
use only

Question 10

a)

s1(1) Capable of representation – Sieckmann criteria (precise, objective, self-contained, easily accessible, intelligible, durable, clear)

- registering a 'dodecahedron' (i.e. just the term) would not satisfy the requirement for being intelligible or clear – the average consumer is unlikely to know what this looks like just from hearing the name of the geometrical shape, this is a specialist term – analogous to the chemical formula for the smell for which registration was sought in the Sieckmann case
- samples – placing samples of the shape at various locations would not satisfy the requirement for being easily accessible and possibly also not for being durable (although samples could be made from metal or similar to prolong durability) – analogous to containers of smell deposited at various location in Sieckmann case
- registering a 3 dimensional representation of the shape to be placed on the register – this might satisfy the representation requirements if the graphic design was of sufficient quality (e.g. animated rotation 3D illustration) **Allow ✓½**

s1(1) capable of distinguishing goods/services of one undertaking from another

- a geometrical shape is unlikely to be capable of distinguishing the goods and services of one undertaking from another

Page sub-
total

| Paper Ref | Sheet |
|------------|-----------------|
| FC5 | 13 of 29 |

Examiner's
use only

- consumers are not accustomed to associating shape with specific undertakings, so this is unlikely to be accepted

½

b)

devoid of distinctive character

- only indication that cheeses are sold by DDD is the shape – labels do not list DDD, but only producers
 - o likely that consumers don't associate the cheese with the shape but rather with the producer's labels attached to the shape ✓1
 - pentagonal label might be considered distinctive, maybe in conjunction with the 3D shape, whose sides are also pentagonal, but on its own the shape is very unlikely to be distinctive of its origin
- particular shape is not usually used in cheeses, so might be distinctive of DDD's cheese
 - o however, consumers are not accustomed to associating shape as being distinctive of a specific undertaking
- in Kit Kat, it was decided that the shape of a Kit Kat is not distinctive of a Kit Kat, consumers would not recognise the Kit Kat without the sign printed on the shape
- also a good chance that customers already believe that there is more than one undertaking producing DDD's cheese in that particular shape, since there are two different labels attached to the cheese
 - o it doesn't matter that both producers are producing exclusively for DDD, the average consumer has no way of knowing this

1

Page sub-
total

| Paper Ref | Sheet |
|------------|-----------------|
| FC5 | 14 of 29 |

Examiner's
use only

- DDD's customers might now, since they always buy their cheese from DDD and get different labels on the cheese

descriptive – designating kind, quality, quantity, value, time of production,

geographical origin, purpose of goods/services

- the shape does not designate any of the above properties of the goods or services, i.e. the cheese ✓1

generic – customary in practices of the trade/language

- the shape is not customary in the trade – usually cheeses have been manufactured as cuboid blocks, cylindrical 'wheels' or near-spherical balls ✓1

3

shape marks –result of nature of goods themselves?

- Clearly not, cheese can be packaged in any number of forms, there is no need to make it the shape DDD has chosen ✓1

Shape marks - result of technical character/considerations?

- advantage of a cheese with multiple flat sides (over cylindrical or spherical shapes) is that the cheese can be easily sliced at a variety of angles without the risk of it rolling off the cutting-board
 - this is arguably a technical consideration – making cheese cutting easier for the customer ✓1
 - however, it's not really a technical effect as such

Shape marks - gives substantial value to goods?

Page sub-
total

| Paper Ref | Sheet |
|------------|-----------------|
| FC5 | 15 of 29 |

Examiner's
use only

- advantage of a cheese with multiple flat sides (over cylindrical or spherical shapes) is that the cheese can be easily sliced at a variety of angles without the risk of it rolling off the cutting-board
 - o this adds substantial value to the goods – ease in cutting the cheese, and might be a reason why consumers prefer it to cheese of other brands
 - consumers that have struggled to cut cheese of other formats may prefer DDD's cheese shape

1

Acquired distinctive character (ADC)? – can cure distinctive, descriptive, generic objections

- DDD's customers: wholesalers, cheesemongers and supermarkets
 - o DDD does not sell directly to consumers, consumers would have no contact with DDD as such ✓
- Factors for ADC set out in Windsurfing Chiemsee:
 - o Does a significant portion of the public recognise as being distinctive of a particular undertaking?
 - Customers have noticed the shape: 'novel', 'futuristic', 'cool'
 - However, this is limited to DDD' customers, completely unclear what the rest of the public thinks and whether they would notice the shape or not ✓1
 - Also unclear if customers associate the shape with DDD's goods – very likely that they if another undertaking started producing shape, customers would not notice ✓1

Page sub-
total

| Paper Ref | Sheet |
|------------|-----------------|
| FC5 | 16 of 29 |

Examiner's
use only

- Also unclear if customers don't already believe that there are two manufacturers of cheese of that shape
 - namely both of DDD's suppliers
 - Sales have grown steadily indicates that they are still growing – still in process of building reputation/ADC
 - Length of use
 - 3 years of marketing – have been marketing for some length of time
 - How geographically widespread use is
 - Unclear, but can be assumed that widely sold from the distribution channels (wholesalers, cheesemongers and supermarkets)
 - Sales have grown steadily, suggests some spread
 - Amount of money invested in advertising
 - Unclear, but marketing for at least 3 years suggests not insignificant amount spent
 - Statements from chambers of commerce or trade
 - Could get a statement from relevant body to speak to uniqueness of shape
 - Survey evidence
 - Evidence of what customers think of shape unlikely to be persuasive – does not give any indication of whether they associate the cheese with DDD, just seemed to ask how they perceive shape

Page sub-
total

| Paper Ref | Sheet |
|------------|-----------------|
| FC5 | 17 of 29 |

Examiner's
use only

- Unlikely that it actually covered relevant portion of public

Other exclusions

- No other exclusions seem to apply ✓1

3

In summary, DDD is unlikely to be successful in registering a shape mark for their cheese. It is unlikely that there is ADC, and even if it does exist, it would not overcome objections under s1(1) or the requirements aimed at shape marks. ✓1

1
TOTAL – 8

c)

- would not help with ADC, because the coatings are again specific to who made the cheese, so consumers unlikely to associate both colours with DDD
- colour can add distinctiveness to the shape ✓1
- colour cannot help overcome objections under sections aimed at shape marks – the shape adds substantial value to goods
- colour also can't help overcome objections on representation, although colour can be represented easily in a manner satisfying the Sieckmann criteria

1

10½

MARKS AWARDED: 10.5/20

Page sub-
total

| Paper Ref | Sheet |
|------------|-----------------|
| FC5 | 18 of 29 |

Examiner's
use only

Question 11

a)

Enforceable

- '111 was filed and registered more than 5 years ago, therefore, VMW will have to proof use to oppose Mike's mark
- was '111 used in the 5 years before '222's filing date in substantially the same way? (minor alterations that don't affect the character may be allowed)
 - o No, because the text has changed, so the mark was never used, even if the jingle is the same

Therefore, VMW cannot enforce their mark.

b)

Law

Can oppose a TM application on the basis of an earlier if:

- Identical sign + identical goods/services
- Similar sign + similar/identical/dissimilar goods/services + likelihood of confusion

Similarities in signs

Visual

- Mike's sign is a logo
 - o Printed in bold, capital letters, underlined
 - o Number 24 used

0

Page sub-
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| Paper Ref | Sheet |
|------------|-----------------|
| FC5 | 19 of 29 |

Examiner's
use only

- VMW's mark is non-standard and there is no visual representation, since it is only intended to be sung to a specific tune

Hence, visual similarities are very low. ✓1

Aural

- Syllables: number, same?
 - o Mike's mark has 6 syllables – 24 is pronounced quite differently from 4 and adds 2 syllables
 - o VMW's mark has 4 syllables ✓1
- Second and third syllables are the same “ath-lon”
- Both words end on the same sound – “four”
- Words start on very similar sounding sounds – “bi” and “tri”
 - o Both have an “i” though, which is a dominant sound in that syllable and might be easily confused, especially if sung to a particular tune and with no visual representation for the consumer ✓1
- Musical notes seem to indicate that “four” is elongated, consumers might also miss the “2” in Mike's sign and focus more on the “4” since this is the last number in the mark
 - o Enforced by the fact that number given as numbers and not letters, so up to consumer to pronounce, the might also pronounce as “2” “4” instead of “24”, which would reduce dominance of “20” sound ✓1
- Mike's mark not associated with any tune

Conceptual

- Both biathlon and triathlon are sports events

Page sub-
total

| Paper Ref | Sheet |
|------------|-----------------|
| FC5 | 20 of 29 |

Examiner's
use only

- Both marks include number at the end of the text
 - o Number is similar “24” and “4”, in that both end on the same number and the 2 might be overlooked ✓1
- Biathlon is a winter sports event, a triathlon is not
 - o The type of sports for each are different
 - o However, both biathlon and triathlon combine a number of different sports
- Unclear if average consumer would be able to differentiate between a biathlon and a triathlon – they might just associate each with sports
 - o Especially since “bi” and “tri” are just prefixes that designate a number, i.e. two types of sports, three types of sports

Overall Conclusion

- High aural and conceptual similarities. ✓1

SOM – 6

Similarities in goods/services

Purpose

- Both bicycles
- One motorcycle
 - o Aimed at adult consumer, with driver’s licence
 - o Going at high speeds, capable of long distance travelling
 - o However, may also include electric motorised bicycle which does not necessarily require driver’s licence and is aimed at shorter distance travelling and recreational use
- Children’s pedal bicycle

Page sub-
total

| Paper Ref | Sheet |
|------------|-----------------|
| FC5 | 21 of 29 |

Examiner's
use only

- Aimed at children
- Going slowly, more a toy than a mode of transport
- But registered class is “bicycles”, so includes adult bicycles, which can also be used as a mode of transport ✓1

Users

- Arguably very different for children’s bikes and petrol motorcycles
- Very similar for bicycles and electric motorised bicycles – both used recreationally, as transport ✓½

Nature of goods/services

- motorbikes/bicycles, so physical mode of transport/sporting good
- both have two wheels
- similar appearance, materials ✓1

Complementary

- possibly, if considering petrol motorbikes and “normal” bicycles – both modes of transport, one for long distances, one for short distances ✓1

Competition

- yes, if bicycles and electric motorbikes
- both sold in same shops, at similar price points (although electric motorbikes can be more expensive) ✓1
- same target audience, both used to commute, for recreational activities

Distribution channels

Page sub-
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| Paper Ref | Sheet |
|------------|-----------------|
| FC5 | 22 of 29 |

Examiner's
use only

- same for bicycles and electric motorbikes – bike shops, sporting goods stores
- different for petrol motorbikes – usually sold alongside cars ✓₁

Manufacturing

- very similar construction for bicycles and electric motorbikes – one just includes an electric engine
- probably same supplier
- petrol motorbikes usually produced by different manufacturer – possibly car manufacturer ✓_{1/2}

Overall Similarities

High, especially when considering bicycles and electric motorbikes. ✓₁

SOG – 7

Average Consumer

- Reasonably well informed and circumspect
- Would not dissect marks in detail
- For bicycles and electric motorbikes: commuters, adults, recreational users, as sporting good
 - Commuters probably not particularly attentive to branding, there are a lot of different bike manufacturers, could easily be confused if there is a suggestion that the sign is similar Allow ✓_{1/2}
 - Mike prints his brand name on the bike, VMW's contained in jingle – this might reinforce similarities, since consumers have not actually seen what the sign looks like, so might easily confuse the two

Page sub-
total

| Paper Ref | Sheet |
|------------|-----------------|
| FC5 | 23 of 29 |

Examiner's
use only

- For petrol motorbikes: more specialist consumer
 - o Can be expensive, usually sold alongside cars
 - o Usually more research involved in buying petrol motorbikes ✓^{1/2}
 - o Average consumer might use for travelling, not necessarily commuting
 - o Can be an “expensive toy”, so likely to be some care put into which brand to buy, exact specifics

AC – 1

Likelihood of Confusion

- Cannon see-saw test: weigh similarities and differences in marks and goods/services
- The marks are quite similar, which is reinforced by the fact that VMW’s mark is a jingle, so consumers have not seen it and might misidentify Mike’s mark on a bicycle when they buy one ✓¹
 - o This could even be the case if VMW is only selling petrol motorbikes, consumers might still associate their jingle with Mike’s children’s bikes
- The goods and services are sufficiently similar that the average consumer might be confused
 - o Often, manufacturers of petrol bikes might also branch into electric motorbikes which the average consumer might perceive as equivalent with a normal bicycles

LOC – 1

Therefore, there is a high likelihood of confusion for the average consumer.

Conclusion

Page sub-
total

| Paper Ref | Sheet |
|------------|-----------------|
| FC5 | 24 of 29 |

Examiner's
use only

Opposing the mark has a high chance of success. ✓1

16

MARKS AWARDED: 16/20

C - 1
TOTAL - 16

Page sub-
total

| Paper Ref | Sheet |
|------------|-----------------|
| FC5 | 25 of 29 |

Examiner's
use only

Question 12

a)

Passing off characterised by trinity of goodwill, misrepresentation, damage

Goodwill

- Relates to the 'get-up'/marketing dress of the manufacturer
 - o More than just a sign/design, but accrued through sale of the products – consumers recognise the goods/services through marketing dress
- Extant? Known by consumers?
 - o Unclear how long Quebec has been using/selling their cereals in this particular type of box
 - Have they accrued goodwill? Are they well know by consumers? Do consumers associate QUEEN BEE honey flakes with Quebec's particular 'get-up'? ✓1 (M)
 - o Can assume that sales are currently ongoing, so unlikely that any goodwill would have been extinguished
- Quebec used the particular shape of the box, the black and yellow stripes and also prints a hexagonal logo on the boxes
- Name 'honey flakes' is generic, so this is not part of Quebec's 'get-up', but the name of the cereal is printed in large letters on the box
- The yellow and black stripe design is striking – yellow is a colour that is perceived very quickly by the brain, so likely to draw attention
 - o Consumers might overlook other design differences because of the striking yellow and black pattern ✓1 (M)

Page sub-
total

| Paper Ref | Sheet |
|------------|-----------------|
| FC5 | 26 of 29 |

Examiner's
use only

- There could be goodwill associated with both the name of the honey flakes and the particular appearance of the box design

Misrepresentation

- Calling the product 'honey flakes' does not contribute to any misrepresentation, since this is a generic term in the trade
- Does ALDL aim to mislead consumers and use Quebec's goodwill that they have acquired for their honey flakes?
- ALDL does not use the same name for their honey flakes
 - o Their flakes are called "Hive" honey flakes
 - o However, Quebec's honey flakes are called "Queen Bee" honey flakes – both are references to bees and honey
 - Although, Queen Bee can have a different meaning in language as well
 - Honey is a major flavouring ingredient, so references to honey in the name of the product are unlikely to constitute using Quebec's goodwill, since this is just something that consumers would naturally associate with a product that is already called "honey flakes" and contains honey ✓1
- ALDL is using an elongate box design
 - o Cereals to date are being sold in cuboid boxes or bags, so the elongate design is unique to Quebec ✓1
 - o However, the prism shape is more similar to conventional box design that a cylindrical base ✓1
- ALDL is using black and yellow horizontal stripes

Page sub-
total

| Paper Ref | Sheet |
|------------|-----------------|
| FC5 | 27 of 29 |

Examiner's
use only

- These are inspired by bees, who make honey, an important ingredient of the cereal
- However, stripes are unique to Quebec's cereal box ✓1
- Would the average consumer notice that ALDL's box is not cylindrical or would they pay more attention to the elongate design?
 - Elongate design is likely to be more striking, especially if the boxes are on shelves next to each other – unclear if consumers would notice the cylindrical shape when viewing the cereal box from just the front in a shelf ✓1
 - Elongate design plus yellow and black stripes both unique to Quebec, consumer is likely to mainly see this design and think of Quebec's products, even if the logo and name is not the same

Damage

- Lost sales?
 - Can be assumed that ALDL's product is cheaper than Quebec's (national supermarket chain = economics of scale), hence Quebec might lose customers to ALDL who may think they have found the same product cheaper elsewhere ✓1
- Licencing?/ALDL stocking Quebec's products?
 - Potentially lost licencing revenues? Quebec could have licenced their design and potentially permitted ALDL to manufacture their product/sell it

Additional Information/Evidence

- How long has Quebec been trading using this specific box design? ✓1

Page sub-
total

| Paper Ref | Sheet |
|------------|-----------------|
| FC5 | 28 of 29 |

Examiner's
use only

- Has this been sufficient time to acquire goodwill
- Is Quebec currently selling this cereal?
- How widespread is Quebec's use of the design? ALDL is a national supermarket chain – is Quebec has only been selling their product in specialised local stores this might have an impact. ✓1
- Survey evidence of representative cross section of relevant public, showing that Quebec has acquired goodwill
 - Potentially also survey evidence showing that the relevant public associate ALDL's product with Quebec, and hence ALDL is using Quebec's goodwill. ✓1

11

b)

- Injunction
 - To stop ALDL selling their products and using Quebec's goodwill in their trade. ✓1
- Damages or Account of profits
 - To compensate Quebec for lost sales/ALDL's profits ✓½
- Delivery up or destruction of products
 - Delivery up might be less appropriate, since Quebec unlikely to want to sell ALDL's product themselves
 - Destruction – potentially, to stop ALDL from selling, but same can be achieved with an injunction Allow ✓1

2½

c) Defences

- Honey is an important ingredient of honey flakes

Page sub-
total

| Paper Ref | Sheet |
|------------|-----------------|
| FC5 | 29 of 29 |

Examiner's
use only

- Black and yellow stripes commonly associated with bees, so natural to design packaging accordingly
- ALDL still using prism base
 - Could say that elongated shape is simply minor departure from usual cuboid shape ✓1
- Name is different
 - QUEEN BEE is quite prominent on Quebec's packaging – ALDL could argue that customers associate Quebec's product with this name, not the box design ✓1
- 'ALDL' printed at top of box, so makes clear to customers that this is manufacturer ✓1
 - Customers know that ALDL often replicates well known branded products and makes their own, so would generally have no expectation of getting the "original" branded product
 - Moreover, if ALDL only sells own brand products, they may have themselves goodwill associated with their goods, and customers may simply trust that they like ALDL products and quality and this has nothing to do with the branded products that are being imitated ✓1

4

17½

MARKS AWARDED: 17.5/20

Page sub-
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