Examiner’s Report 2023
FC2 – English Law

Patent Examination Board

Introduction

The pass rate this year was quite high compared with previous years. The marks demonstrated broad knowledge across the syllabus and showed that a larger proportion of candidates could excel. This was reflected in the spread of marks.

When answering problem questions, where a candidate is asked to “advise X” or similar, it is permissible (and will regularly occur in practice) to try to argue in favour of the view the client wishes to have, provided that the attorney highlights strengths and weaknesses in the case that the client prefers to put forward. For example, where a client wants to argue that there was no contract in place, a candidate can construct advice to support this conclusion provided that the weaknesses of that view are highlighted. Such an approach may assist some candidates who find it difficult to arrive at a conclusion where there is uncertainty arising because of the scenario.

Questions

Part A

Question number	Comments on questions
Question 1	This question was well answered and no problems were evident.
Question 2	This was poorly answered. It is significant that the common law privilege enjoyed by solicitors is extended by statute to *registered* patent attorneys and candidates should be aware of this. Many candidates understood “privilege” to refer to the without prejudice rule.
Question 3	This was well answered and candidate showed not only knowledge of the overriding objective under the CPR but also that these rules have a direct application in practice. This understanding should extend to proceedings before bodies that rely on the overriding objective under the CPR, such as the UK IPO.
Question 4	This was generally answered well, particularly knowledge of the close connection test. It is useful to separate out the justifications for imposing liability on employers for employee actions, whilst understanding that an employer cannot be liable for an employee’s own frolics.
Question 5	This question required straightforward recall and was poorly answered.

Question 6	To achieve high marks, candidates needed to be aware that only email addresses "normally" used for business purposes can be used and the postal address must be chosen based on the last known address (which arguably has an element of due diligence involved).
Question 7	This question was generally well answered. Candidates should be aware that they will be required to act only on the client's full instructions. As regards conflicts, having relevant knowledge cannot be overcome by permission of the other party as it is impossible for an attorney to ignore actual knowledge that they possess.
Question 8	This was very well answered.

Part B

Question number	Comments on question
Question 9	Part (a): Most candidates picked up on the issue of privity of contract and statutory intervention in this area. This is an area that practitioners should be aware of when dealing with contracts handed to them by clients, particularly the importance of reviewing the entirety of a contract including the "boiler plate". Part (b): Most candidates made good attempts at this section including choosing an appropriate way to structure their answer and arrive at a firm view. Few candidates considered whether an initial statement might be "mere puff" to start off a commercial conversation. Approaching the advice from Edward's point of view, that he doesn't believe a contract to have existed whilst highlighting the weaknesses in arguing this, might have helped some candidates navigate the complex conversation that took place.
Question 10	Part (a): This was mostly well answered. Only the better candidates picked up on the mechanism by which Mia as a shareholder could benefit in the business but also have an influence over who could be appointed as directors (or specialist personnel) with special skill sets to assist William to grow the business. No knowledge of shareholder agreements *per se* is expected, but candidates should be aware of the influence

	investor shareholders can have. Good knowledge of charges was shown. Part (b): This section was generally well answered. Most candidates made the distinction between contributory negligence and causation.
Question 11	Part (a): Many candidates recognised the need to apply the relevant tests in *Ray v Classic FM* for implying an implied assignment of copyright. Few candidates knew the factors the court will take into account when applying the relevant tests (such as price paid, impact on the creator, whether sensible in the context), but this is an important part of the court's assessment and therefore full marks could not be achieved on this part. Part (b): Although many candidates did show knowledge of the *American Cyanamid* test for interim injunctions, a surprising number only referred to the "balance of convenience" test without reference to whether damages were an adequate remedy, serious issue to be tried etc. A particular structure to the answer was not required, but it was difficult to award marks if these discrete issues were not addressed.
Question 12	Part (a): The answers from a number of candidates were disappointing as they referred to the common law test in *Coco v Clark*, not the statutory test which was asked for. Some candidates did not identify all three types of information which could be considered as protectable information and so limited the total marks they could achieve. Part (b): This was generally well answered but a number of candidates failed to assess whether the statement induced Alexandra from entering into the contract, a key issue in misrepresentation cases.