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Question 1

- a) Any person that has already acquired goodwill in that company name, or acquired goodwill in a name that does not have a distinctive identity to that company name, such that there may be a likelihood of confusion between the two names.
- b) Opportunistic refers to making the registration in bad faith, knowing that the name was already used by another business. May be referring to passing off, using the goodwill accrued in someone else's company name to deceive public as to origin of goods.

MARKS AWARDED: 1½/4

1½

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Question 2

- a) Investor in the business on return of their investment in the business. ✓₁
- b) Each partner in a partnership has unlimited liability towards their fellow partners. ✓_{1/2}

MARKS AWARDED: 1½/3

1½

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Question 3

a) Deposition is an interview taken of a witness giving evidence. It may occur outside of court. The interview may be recorded. The person being deposed may be asked questions during the interview, and they would be answering the questions under oath. ✓^{1/2} ✓¹

b) Affidavit is a written statement of facts made by an individual under oath, and signed by that individual where the signature is observed by a witness to be that of the individual.

The affidavit evidence will be treated with the same weight as if the person making the statement is present at trial, as the statement was made under oath. Depends on whether proceedings are criminal or civil proceedings.

c) Evidence may be presented using a witness statement. The witness statement is a written statement that comprises statements of fact and a statement of truth, and is signed and dated by the witness. Such evidence would be treated as hearsay evidence unless the person giving the evidence was present at trial and recited the same evidence orally.

MARKS AWARDED: 1½/4

1½

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Question 4

- a) Absolute privilege and qualified privilege.
- b) Client is the person who gives any information that is treated as privileged
by the legal professional. ✓ $\frac{1}{2}$
- c) Any information, material, documents that are disclosed in relation to an
invention, copyright, design, passing off, trademarks and which is
communicated to the patent attorney by their client. ✓ $\frac{1}{2}$
- d) Legal professional privilege in England and Wales applies to in-house
patent attorney and their dealings with their client, in the same way as if
the patent attorney is a solicitor and the dealings was the same as if it had
occurred between a solicitor and their client.

MARKS AWARDED: 2½/7

2½

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Question 5

- a) In the multi-track the cap on the compensation that may be claimed is £500, 000. ✓1

In the small claims track the cap on the compensation that may be claimed is £10, 000. ✓1

- b) The cap on the award of costs in the multi-track is £100, 000.

The cap on the award of costs will be less than the cap on compensation that may be claimed. In general, the overriding objective of the Civil Rules of Procedure will apply when determining the cap on award of costs.

Cases will be dealt with justly and at proportionate cost, proportionate to the amount of money involved, the importance of the case, the complexity of the case, and the financial position of each party.

MARKS AWARDED: 2/6

2

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Question 6

- a) Damages in contract will take into account the seriousness of the breach of a term in the contract, whether that term was a condition or a warranty of the contract.

Damages in tort seek to restore the parties to the status quo before the tort was committed. Damages are thus compensatory. ✓1

- b) Types of remedy available in IP infringement cases include:

Damages or an account of profits; ✓1

Injunction; ✓1

Delivery up of infringing articles; ✓1

Declaration that the IP right is valid and infringed ✓1

MARKS AWARDED: 5/6

5

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Question 7

- a) Must be kept in a separate bank account in the UK; ^{✓1}
Must be made available to the client where they request it; ^{✓1}
- b) If client money above £25, 000 is being kept, one must notify IPREG.
- c)
- d) Must not be misleading, must not deceive the public. ^{✓1}
- e) Client must receive information from a registered patent attorney in regard to any complaints handling procedure. Must give information about why complaint was not resolved and right to contact legal ombudsmen, how to contact legal ombudsmen and time limit for contacting legal ombudsmen.
- f) Exceptions to a registered patent attorney's obligation to keep a client's affairs confidential include when it is in the interest of public, such as safeguarding wider public interests.
- g) Workforce diversity data must be published and made accessible. ^{✓1}

MARKS AWARDED: 5/10

5

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Question 9

- a) William may be able to seek an interim injunction to stop Maria producing her feeder cups.

In assessing whether to grant William an interim injunction the court will apply the principles established in *American Cyanamide v Ethicon*, and apply the balance of convenience test.

To grant an interim injunction the court will:

- take into account the seriousness of the issue to be tried;
- whether damages are an adequate remedy;
- weigh the damage to the defendant if the injunction is granted;
- weigh the damage to the applicant if the injunction is not granted.

As a last resort, the court will look to the merits of the case.

Seriousness of issue to be tried

William owns a patent covering a new child's feeder cup,

Maria is manufacturing a feeder cup, which William insists falls within the scope of his patent claims. Therefore, there is a serious issue to be tried, i.e. whether Maria's feeder cups infringe William's patent.

Furthermore, William's patent attorney is able to convincingly rebut Maria's arguments, which Maria supposedly made to try and invalidate William's patent, regarding the novelty and inventive step of his claim. Based on this information we can assume that William's patent is likely to be valid.

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Not clear whether Maria's feeder cup does infringe William's patent, further information will be required to determine this.

Therefore, overall would conclude that there is a serious issue to be tried.

Are damages an adequate remedy?

✓½ William is concerned that he will not be able to quantify his loss, which indicates that damages may not be an adequate remedy.

Damages may not be an adequate remedy if William loses market share or goodwill in his product. For instance, if Maria's goods are of comparable quality

✓1 to William's, but cheaper than William's goods people may start to purchase Maria's goods instead of William's in which case damages would be an adequate remedy. However, if the quality of Maria's goods are not comparable to William's, and people mistake Maria's goods for William's then he may lose market share

✓1 as people may stop purchasing his goods altogether.

Damage to defendant if injunction is granted

Factors to take into account:

- Maria's first ever product;
- Manufacturing using a friend's factory in UK;
- Uses another friend with a startup business to import plastic into UK
- Necessary for this project to continue to develop her business in other markets
- ✓1 - 3 months supply of plastic that must be used in that period, otherwise goes brittle

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Unlike William, Maria does not own her own factory and is therefore reliant on others to manufacture her goods, such as her friend whose factory she is using to manufacture the feeder cups. If an interim injunction is granted and she stops manufacture in her friend's factory, her friend may lose money from the factory being unused in that time. This may consequently make her friend less likely to lend her the factory to use in the future. Such damage to a Maria could not be adequately compensated for by William if for instance it is found the injunction was wrongly sought.

✓1

Alternatively, if Maria has paid her friend for the use of the factory, she may lose the money she paid to her friend, although such damage could be recovered and compensated for by William if the injunction is wrongly sought.

Furthermore, Maria may have use of the factory for a specific period of time, after which her friend has already committed the factory for use for other goods with other clients. Therefore, Maria may lose the time she has allocated at her friend's factory to manufacture her goods, which she might not be able to obtain so readily again.

This is Maria's first ever product, therefore she may have a difficult time convincing other manufacturers to give her use of a factory to manufacture her goods.

Maria is also using another friend who has a startup business in importing plastic. Start up businesses are more likely than other more well established businesses to require a steady, consistent stream of income. Therefore, granting an injunction may have a significant impact on Maria's ability to pay her friend for

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the plastic, and further may affect the start up business to carry out work in the future.

Maria has three months supply of the plastic that must be used in that period. If the injunction is granted, it will not be able to use the plastic during the time the injunction is in force, therefore the plastic may go brittle and be unusable in the future. Therefore, there would be significant damage to Maria's ability to manufacture her product if the materials used to manufacture the cups are unusable. As she is using a friend who runs a start up business it is unclear how easily she may be able to acquire plastic in future if injunction is lifted.

In conclusion, there is likely to be significant damage to Maria if the court grants an injunction.

Damage to applicant if injunction not granted

William has his own factory, therefore he has more control over whether to increase or decrease supply of his product, therefore the damage to William is not as significant as compared with the potential damage that may be sustained by Maria.

William's market share fluctuates, but it is not clear whether this is a deviation from the market share William had before Maria launched her product.

Fluctuating market share implies the market share goes down as well as up. If

William's market share had only been going down concomitant with Maria's share growing exponentially, then would be more conclusive of William losing market share due to Maria's product.

Undertakings William is likely to have to give to the court

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Full disclosure of all facts irrespective of whether those facts appear relevant to the case.

Promise to commence full infringement proceedings within a time limit, which would involve drafting pleadings. ✓1

Promise to compensate defendant if injunction wrongly sought, for any damage suffered by defendant as a result of granting of injunction. ✓1

Conclusion

Overall do not think court will grant an interim injunction, as it would unfairly damage the defendant.

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b) William may be able to claim damages for any lost sales.

✓1 The damages from lost sales = % of sales lost * 2000 (total number of cups sold) * amount of profit William would have made on each cup.

Amount of profit William would have made on each of his's cup is unclear from the question.

Assuming there is a typo in the question, and that each cup costs him £5 to sell (incl. £4 manufacturing and £1 marketing) and he sells them for £10, assuming he makes a £5 profit on each cup.

To calculate the percentage of sales lost the following will be taken into account:

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- If the quality of William and Maria's cups are comparable. If they are not comparable the percentage of lost sales would reduce.
- William is selling from bricks and mortar shops in London, some of which have recently closed, while Maria is selling from shops across the country. Therefore, sales in his London shops could have been affected if Maria's shops were also in London, and more likely if they were located on the same street.
- Maria also offers her product online, so she reached a market that William does not. The number of sales online would therefore not be taken into account in calculating the percentage of lost sales.
- In first two months Maria struggled to get her sales moving, and concomitant with her sales increasing, William's sales start to decrease, which may be evidence of lost sales due to Maria's products.

For all sales that were not lost sales, William could claim a royalty on those sales: sales that were not lost * reasonable royalty * profit made by Maria (£3).

Reasonable royalty may be 50% of profit made by Maria.

William may be entitled to convoyed sales, sales of the tabletop holder that were sold with the infringing item and would not have been sold without the infringing item.

1000 holders * reasonable royalty on convoyed sales * profit on holder (£1).

MARKS AWARDED: 16/20

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Question 10

a) Parvati may be liable for the tort of negligence.

To determine whether Parvati is liable for tort of negligence would have to prove that:

- Parvati owed Edward a duty of care;
- There was a breach in that duty;
- And there was causation in fact or causation-in law.

Did Parvati owe Edward a duty of care?

The case of Caparo v Dickman is relevant in determining whether Parvati owed Edward a duty of care.

Could Parvati have generally foreseen the consequences of her actions?

✓½ Yes, Parvati would be able to foresee that if she gave Edward the wrong advice regarding whether Edward has given away all his rights, this could have financial implications for his business.

Was there a relationship of sufficient proximity between Edward and Parvati?

✓1 Edward and Parvati are old work colleagues. Edward discusses the matter with Parvati, and Edward relies upon the advice given directly by Parvati

✓½ therefore there is a relationship of sufficient proximity.

Assumption of liability?

Does Parvati assume responsibility for her advice. Yes she does not given

✓1 any disclaimer to her advice, or suggest that it should not be relied upon. She knows that Edward may rely on her advice.

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Was there a breach in that duty of care?

To assess whether there was a breach in duty of care, one needs to take into account the following factors at the time of the negligent act:

- ✓1 - Objective test that takes into account the standard of care expected of a reasonable person in Parvati position. As Parvati is a patent attorney, and is about to be promoted to a partner, the standard expected of Parvati is higher as she professes a special skill. Therefore, would be the standard of care expected of a patent attorney in Parvati's position.
- Reasonable man test takes into account the likelihood of damage, the cost of preventing damage, the seriousness of the damage and the importance of the object to be attained.
- A reasonable patent attorney in Parvati's position would not tell Edward not to worry about it, especially as she was not with Edward and Sangita for some of the conversation. Therefore, she would not be able to comment on everything that was said between Edward and Sangita.
- ✓1 - Furthermore, patent attorneys are not competent to advise on contractual agreements, therefore a reasonable patent attorney would have disclaimed their advice, stating that it may be better to ask someone competent to advise on contractual agreements.
- It would not have taken a lot in cost to prevent the damage, by merely telling Edward that he should seek further advice regarding the matter,

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especially given that she knew Edward and Sangita were not merely friends and had previously done business together.

Causation in fact or causation in law?

Use the “*but for test*” to determine if there was a causation in fact. But for Parvati’s actions would each of the heads of damage have occurred. Was there a direct factual link between Parvati’s actions and the damage. To assess whether there was causation in law, need to assess the remoteness of the damage and foreseeability of the damage.

i) But for Parvati’s actions, Edward may have sought advice or another meeting with Sangita to clarify the rights in his contract, and may have dissolved the contract in the two-week period, and sold his patent to someone else at a higher price. Edward believes that the discussion with Parvati was sufficient so does not take any more action in respect of the conversation with Sangita. Therefore, there is a direct factual link between Parvati’s actions and Edward’s lost opportunity to sell his patent for a higher price, and there is a causation in fact.

✓1 There is also causation in law, as the damage is not too remote from Parvati’s actions and could generally be foreseen.

ii) But for Parvati’s actions, would Sangita have obtained use of Edward’s patent.

There is a direct factual link between Parvati’s advice and Sangita getting the right to use the patent. However, Edward had already been discussing a deal with Sangita, and was more concerned of whether he had given away all rights to his patent. Therefore, he was not concerned about giving Sangita the right to his

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patent. But for Parvati's advice, Edward may still have given Sangita the right to his patent, but perhaps not exclusive right to the patent. Therefore, Edward may still have given Sangita the right to use the patent and suffered reputation
✓1 damage for his other inventions. It would not be generally foreseeable that Sangita's immediate use of Edwards's patent would be so poor that Edward suffers reputational damage, therefore the damage is too remote for causation in law.

iii) But for Parvati's actions, the deal may not have been so bad as Edward may have consulted another specialist and rediscussed the deal with Sangita.

✓1 Therefore there is a direct factual link between Parvati's advice and Edward losing his factory and business. However, Parvati could not foresee that her actions could lead to this as it is not clear whether Parvati knew of Edward's
✓1 business loan, and that his factory was used to cover the business loan. No causation in law as the damage was not foreseeable.

Was there contributory negligence?

✓1 Parvati did send Edward an email to follow up on the discussion they had. Edward did not take the opportunity to do so, and hence Parvati may claim there was contributory negligence, which would lower the damages awarded to
✓1 Edward.

b) A limited company has a separate legal identity once it is incorporated.

A sole trader does not have a separate legal identity, and a sole trade is personally responsible for any business debts, and the liability of a sole trader is unlimited.

A limited company is more attractive to potential investors.

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A limited company has better tax incentives, when compared with a sole trader.

A limited company comprises a director, and may also comprise shareholders.

The liability of the director is limited, and the company is liable on an unlimited basis for any business debts accrued.

The patent may be assigned to the company, and the company may borrow money based on such intellectual property assets. ✓½

The amount of money that could be borrowed may for instance depend on the value of the IP that the company owns. Such IP would have floating charges, that vary with time. Floating charge would not become fixed, until it sold or the company goes into liquidation or administration. ✓1

Shareholders may invest in the company, therefore Rosemary may invest in the company and her liability would be limited to the amount she invests. ✓1

Shareholders may also replace the director of company, and therefore she may have some control over his actions while he runs the business. ✓1

Edward may be able to borrow money under assets that the company owns.

3½

MARKS AWARDED: 16½/20

16½

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Question 11

a) Confidential information can be protected under common law.

1. Did the confidential information have necessary quality of confidence?

2. Was there a legal and not just a moral obligation of confidence?

Employment contract has implied obligations of confidentiality during employment and after employment as determined by relevant case law.

3. Was there breach by misuse or disclosure?

Relevant case law would be Faccenda Chicken v Fowler.

1. Did the employee have a duty of good faith to the employer?

2. Were there any express terms in employment contract regarding obligations of confidentiality. No express terms in employment contract.

3. During employment, Alexander would have a duty to company to keep stock of knowledge, skills and trade secrets confidential.

✓1 4. After employment has terminated Alexander would only be obligated to keep any information that could be classed as a trade secret confidential.

Passive asks Alexander to use own body of research on which to base new hospital lighting.

Alexander new design uses similar but not identical colour combinations, except for one coloured panel which is of an identical wavelength to Floral's current combination.

Different types of confidential information present:

- Research into combinations of coloured glass panels
- Research into combinations of coloured lights that can alleviate SAD.

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- Past history of changing attitudes
- Last 2 years of research
- Last 20 years of research
- List of current coloured glass wavelengths

Floral may only be able to take action for misuse of confidential information for any information that was used by Passive that would have been classed as a trade secret.

Alexander uses Passive's own body of research to base the new hospital lighting. Therefore, this information was not owned by Floral and would not constitute a trade secret.

Would the wavelength used by Alexander that is identical to Floral's current combination be classified as a trade secret?

A trade secret must meet the following criteria:

- It has commercial value because it is secret;
- The information is not readily known or accessible to persons in circles concerned who would typically have access to such information;
- The legal trade secret holder has taken measures to keep the information secret.

List of the current coloured glass wavelengths does have commercial value because it is secret. It gives Floral a competitive advantage in the market as

✓½ Floral are the only ones that are able to offer such a specific wavelength of coloured glass that helps alleviate SAD.

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The last 20 years of research is said to be lying around the office, but the list of current coloured glass wavelengths does not appears to be lying around the office. It does appear that this information is made readily available. Therefore, in this respect it could be classified as a trade secret.

Thirdly, does the trade secret holder taken reasonable measures to keep it secret. No specific provisions mentioned at keeping it secret. Is the list of coloured glass wavelengths kept under lock and key, or password protected?

Assuming that it is, it would be considered a trade secret.

But did Alexander create use the identical wavelength based on his own stock of knowledge and skill or by copying the identical wavelength of light used. If it can be proved it is the latter then they may be able to take action for misuse.

b) Robin Ray v classic FM relevant case law.

If no employment contract exists between Floral and Takla, and no express terms of assignment of intellectual property right in freelance agreement need to rely on whether Floral would have any implied terms of assignment in copyright?

1. Was work commissioned for purpose of multiplying and selling copies of the work?

No, work commissioned for next year's lampshade that would then be used for manufacturing drawings. The sketches themselves would not be sold and distributed.

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2. Were the sketches based on arrangement of a lampshade already created by Floral? In which case sketches would be recreation of work, and Floral may already own copyright in arrangement of glass panels. Or did Takla create the new arrangement herself. Likely the former scenario given that Floral does a lot of research on the exact combination of glass panels. In which case, Takla may not own copyright as she just produced a sketch of lampshade already created by Floral.
3. Copyright subsists in an original artistic work. Could the sketches be considered artistic? In which case copyright may not subsist in the work.

1

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3½

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Question 8

- a) Misrepresentation occurs when a false statement is made by a party, that induces another party into entering into a contract. Reliance is made on that representation such that it becomes a term of the contract.

What false statements were made by Patricia prior to the signing of the contract?

- Her technology will increase Nicholas' capacity to wrap his fresh food goods by 100%.

There was misrepresentation by Patricia as she made a false statement that the technology would increase Nicholas' capacity to wrap his fresh food goods by 100%. There is no basis to Patricia making the statement

Types of misrepresentation:

Conclusion:

Remedies available:

Damages, end

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