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SECTION A

Question 1

1)a)

A third party, including anyone (any person) who has the same or similar name for their business as the name being challenged as 'opportunistic' and believes that the person who is attempting to register the new name is trying to benefit from the goodwill attached business of the person/third party challenging the.

✓1

The third party applying can show that they have goodwill attached to that name, and that the person now using that name is trying to mislead their customers or clients into thinking that they are associated with that business or are the same, which could cause damage to their business.

✓½

1)b)

Opportunistic registration of a company name: where a person knowingly or not, registers their company under a name similar to an existing company in order to take advantage of the goodwill (the force bringing in custom to that other business) of another business. This can be done, for example by having the same or a very similar name to that other business. This party may then try to sell their business to the party with the goodwill.

✓1

MARKS AWARDED: 2½/4

2½

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Question 10:

2)a)

A person who is an investor in the company. The person is a beneficiary in the business, who received a share of the profits without having invested in the

✓1 partnership.

The person who is not able to make executive decisions for the business but is named as someone who is to receive a share of the profits.

A creditor of the partnership, where there is an agreement that the creditor or investor will receive payment depending on the profits of the business.

e.g. this person may not be able to make binding decisions on behalf of the partnership.

2)b)

For a partnership (not registered with companies house): each partner is liable for the debts of the partnership as a whole therefore each partner is liable for the undertakings of any other partner in the business and himself. This includes the partner's personal assets being available to pay off the debts of the business.

✓½

✓½

Limited partnership: only the general partner(s) is/are liable for the debts of the partnership. The limited partners in a limited partnership have limited liability, the maximum amount of which is their initial investment in the partnership.

Limited liability partnership: the partnership is formed as a separate legal entity, therefore there is personal liability for any debts of the partnership.

2

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Question 3:

3)a)

A deposition is an out of court examination/interview conducted by usually lawyers/solicitors/barristers of witnesses to a case/^{✓1}claim. It is a recording of the oral testimony of the witness under oath or affirmation and is direct evidence of ^{✓1}what the witnesses' statement.

3)b)

Although the affidavit is a statement made by a witness under oath or affirmation and has been signed by the witness to this effect. However, if the person making the statement is not able to be present at trial (e.g. if they have since died, or are abroad or just refusing to come to trial), then this will be classed as hearsay ^{✓1}evidence.

3)c)

Through a witness statement – which is accompanied by a statement of truth signed by them. This will also be classed as hearsay evidence if they are not able to be present at the trial.

MARKS AWARDED: 3/4

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Question 4:

4)a)

Legal profession privilege:

Legal professional privilege is where any communication between 2 or more parties cannot be disclosed in court (except in some circumstances) as evidence, including any oral, written or communication through conduct, and will not be admissible in court if it was submitted.

The first type is the privilege of communication between the legal advisor (e.g. the solicitor or barrister or patent or trade mark attorney) and their client. ✓½

Another type of legal professional privilege is in relation to any type of communication between patent attorney, their client and a third party, only to the extend that this communication is related to bringing proceedings against

✓½ someone or initiating litigation. This includes communication between the primary legal advisor of the client and the third party, the client and the third party, or all three.

4)b)

A client can be an existing client or a prospective client. This means that it includes anyone who has already completed any formalities for becoming a client, for example by signing the engagement letter, or anyone who is seeking initial advice regarding their legal matter, but has not officially appointed the legal professional to represent them, or decided to hire them.

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4)c)

Any communication between the patent attorney and their client, unless the client
^{✓ 1/2}
wishes to disclose this privileged information – in which case, the information
may be released of its legal status.

4)d)

The legal professional privilege applies to in-house patent attorneys in the same
way as any other patent attorney.

MARKS AWARDED: 1½/7

1½

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Question 5:

5)a)

The maximum amount that can be claimed in damages at the IPEC multi-track is £500,000, whereas the maximum amount that can be claimed in damages at the ^{✓1} small-claims track of the IPEC is up to £10,000. If throughout the proceedings it is ^{✓1} found that the damages to be awarded for a case in the small-claims track is actually more than £10,000, then the claim may be transferred to the multi-track – allocation to either track is not permanent. If the court thinks that the damages to be awarded for a case at the IPEC multi-track is likely to exceed £500,000, then it may be transferred to High Court.

5)b)

Cost-shifting is not available as part of the small-claims track, which means no awards are made in respect of any costs incurred by either party as a result of the proceedings.

For Multi-track of IPEC: the cap is £60,000 ^{✓1} for the proceedings for liability, and £30,000 ^{✓1} for costs incurred during court procedures for the determination of damages.

MARKS AWARDED: 4/6

4

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Question 6:

6)a)

In contracts, the award of damages aims to put the injured party in the position they would have been in had the contract not been breached – this is forward looking, so the court aims to award damages to the injured party/victim of the breach to put them as close as possible, financially, in the position they would have been, had the contract not been breached. ✓1

In contrast, when awarding damages in tort, the general principle is to put the injured person or party in the position they were in before the tortious act occurred. This is backward looking, and the aim of the court is to put the injured party in a position, financially, as close as possible to before the tort occurred. ✓1

6)b)

- a final injunction ✓1
- a declaration that the patent is valid and has been infringed ✓1
- damages or account or profits ✓1
- deliver up and/or destroy. ✓1

MARKS AWARDED: 6/6

6

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Question 7:

7)a)

The client money is any money that is not firm money, but excludes: money paid by the client to settle an invoice for work already carried out, or advance payment, where it has been agreed, in writing with the client that it is an advance payment, as well as the work to be carried out, the and the costs (at least a good estimate) of carrying out such work).

Client money should be kept safe, separate from the firm's money and clearly identifiable. ✓1

There are risks associated with holding client money – e.g. fraud, error, or cyberfraud.

Therefore, the firm must have insurance against this risk (for the client money that they hold).

They can use a UK-based separate bank or building society account to hold the money in, or in a TPMA (Third Party Managed account) – which is FCA-approved or the equivalent. ✓1

The first and/or the person(s) within the firm responsible dealing with client money should aim to pay it off, wherever it is due (to the client or a third party) without delay – client money should only be held for a short period of time, and active effort should be made to ensure that it is dealt with efficiently and quickly and safely. ✓1

The firm should keep the client informed of where the money is kept, when it is paid, and the terms and conditions of the TPMA if it is used.

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7)b)

On the annual review, the first must let IPREG know of any client money held for more than 12 months, or any client money they hold currently. ✓¹

They should also inform IPREG whether they have used a TPMA account in the last 12 months, and provide details of it, and let them if it is FCA-approved or the equivalent.

7)c)

Client money which is held over a long time and which is below the prescribed amount – i.e. less than £500, can be donated to a charity of your choice, given

✓¹ that reasonable efforts have been made to contact the client or the person to whom the money is owed and to return this money to them. Approval of the IPREG is not needed where the amount of money held is less than £500.

7)d)

It is recommended that the patent attorney and/or the patent attorney firm are

✓^{1/2} transparent about their costs/fees and advertise this, for example on their website.

7)e)

After the initial meeting with the client, if this was an verbal/oral meeting, then the patent attorney should summarise the work to be undertaken in writing that has

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been agreed with the client at the beginning, before initiating any work and incurring costs. If relevant and/or necessary, then later to update the client on the progress of the work and once it is complete.

7)f)

Where the client discloses something that is a criminal offence or illegal, or could harm another person.

7)g)

This should be regularly reviewed by the practice, and the data should be submitted with IPREG.

MARKS AWARDED: 6½/10

6½

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SECTION B

Question 8:

P = Patricia

N = Nichoas

Summary of facts:

P makes a sales phone call to N.

N is an expert in the manufacturing of goods – uses others to advise of packaging issues.

P says that she has been researching ways to wrap goods for 5 years (goods doesn't specify what types of goods).

P says that her technology will increase N's capacity to wrap goods by 100% - this later turns out to be false so a misrepresentation was made to get N to enter the contract. ✓1

No mention in the signed document of 100% increase – can terms be implied?

After the contract has been entered into, N shows P around the factory, P lies about 20 other factories using the technology.

In order for there to be an actional misrepresentation in tort, there must have been a duty of care – this is an objective standard – and P had a duty of care towards N in delivering what she promised him into entering the contract.

P made a misrepresentation in order to induce the other party, in this case N, into entering the contract. N would have reasonably believed her since P tells

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him that she has special skill and knowledge in this area of wrapping goods and

✓1 makes a representation by virtue thereof. She this claim is not made in an off-hand way and no disclaimer is given as to the fact that she wouldn't be liable for if the 100% increase in efficiency was not achieved. ✓½

N made clear that he has no experience in the packaging of goods, therefore P should have been more careful in advising him and dealt with the matter with more honesty. ✓½

Since P claims to be an expert in the field of packaging and makes no disclaimer of to let N know that she has only previously packaged clothes using this technology, a reasonable person would know that packaging clothes is not the same as packaging food – hence this is not negligent misstatement as P is referring to a specific number in terms of an increase in the wrapping of fresh food goods – so this is not just a misrepresentation through carelessness, but is made either knowingly or recklessly. ✓1

Hence this is a type of fraudulent misrepresentation inducing a party into entering a contract – hence the remedies available to N are that he can make the contract void, claim damages and sue in tort. ✓½

However, an important point to consider is that the 100% increase in capacity in the signed written agreement.

So can the verbal conversation between P and N before entering the contract be considered as an implied term be considered? According to the Parol rule, once a written agreement has been signed no further terms can be added which were made verbally between the parties. The only exceptions are where there is an

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ambiguity in terms of the written terms, or if it is in regards to whether a term should or shouldn't be implied, or for a collateral contract – the increase in the efficiency can also be considered a consideration under a collateral contract – P telling N about the increase in the capacity is consideration in exchange for N buying her product for packaging.

According to the conversation between P and N which they had before the signing of the written contract, it is just that this term for 100% increase should be implied:

- It is reasonable and equitable
- It is important for business efficacy
- It is so obvious that it goes without saying – N must have thought that it is obvious and that P was giving personal guarantee for her product so an express term in contracts doesn't have to be implied – but hes a trades-man who should know the importance of written contracts.
- It is clear and capable of close expression
- It doesn't contradict any of the express terms of the contract – from what we are told about the written contract, there is nothing that would be contradicted by implying the terms that N should expect a 100% increase in capacity for packaging.

According to the above, it seems that 100% increase in capacity is an implied terms of the contract and even though it was not expressly mentioned in the written agreement, it should be binding, and N can sue P at least in tort.

The misrepresentation P made regarding there being 20 other factories that are using the same wrapping process is not actionable, as at this point P and N has

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already entered into the contract, so anything P says from this point onwards will

✓1 not count as misrepresentation as she is not trying to induce N into entering any contract.

However, it may also be argue that N should have checked P's credibility, e.g. by

✓1 asking her about the other factories who are using the process and contacting their owners or managers to enquire about her product – before entering the contract.

It also appears that there was contributory negligence from N as he did not check whether she had any experience in food wrapping (she mentioned wrapping goods in her initial phone call, but it was N's responsibility to check whether she had any experience in wrapping food).

There is a chance that P did not know that food had to be wrapped multiple times, and made the misrepresentation under the assumption that it only needed to be wrapped once – she should have checked this – in which case this would be negligent misrepresentation.

For negligent misrepresentation, N could end the contract and sue for damages.

The packaging capacity only increases by 30% - this is partial consideration if it is assumed that an implied term of the contract is that 100% increase should be achievable – Pinnel's rule – partial consideration – the defendant is still liable for the full consideration.

From the facts of the case, it appears that N can sue P for misrepresentation – this may be negligent misrepresentation because a court may find that N omitted

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some of the necessary steps a reasonable man in his position would have carried out to ensure P's credibility. N can end his contract with P.

Damages:

P may be liable to pay for the damages in respect of either the cost of the goods wrapping technology, or the loss of profits for N from not being able to achieve the full 100% increase in wrapping capacity.

8

8)b)

For there to be a claim for malicious falsehood:

✓1 The statement made must be untrue, with an intent to cause economic harm to the other party – in this case statement is not necessarily true – whilst his goods may have been damaged in transit, this does not mean that all goods wrapped with P's wrapping technology are damaged in transit. He seems to want to cause economic damage to P, since he has posted this on an online forum for those engaged in small online sales of goods (who may have otherwise bought P's wrapping technology), and has clearly named P in this statement.

✓1 The statement is made with malice – out of person spite and to harm the other party's reputation with respect to their trade or other personal property which may injure them economically or their business – in this case, since N is 'frustrated' about his loss (or no 100% increase in wrapping technology) a court may find that he is making these statement with malice since he doesn't like P for causing damage to his business. ✓1

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The statement made causes damages.

the claimant must show that the damages are actual damage.

✓¹/₂

Except where the statement is made in writing, and it has identified the person directly – in this case N makes the statement in writing on the online forum.

3¹/₂

Hence it is likely that P could validly bring claims for malicious falsehood against N.

MARKS AWARDED: 11¹/₂/20

11¹/₂

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Question 9:

W = William

Maria = M

8)a)

The type of court order that W should seek is an interim injunction. In awarding an interim injunction, the court will have regard to the following things:

- Whether W has a genuine case against M (and that it is not vexatious or frivolous)

There is an ongoing dispute regarding infringement between M and W – if this is at the court, then William doesn't need to start a separate claim – he can apply for an interim injunction under this.

Since W's patent invention has been found to be novel and inventive over M's arguments, it can be assumed for this purpose that W has a genuine claim against M, and that M could indeed be infringing.

- Whether damages is a reasonable/alternative remedy

Damages may not be a reasonable alternative remedy for W as they will be difficult to calculate due to the fact that W will have to reduce the production of his other products which have a larger profit margin, in order increase the manufacturing of feeder cup.

However, it is W's own decision to reduce the production of other products and increase the production of the feeder cup – if her had just kept things as they are,

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then later if M is found by the court to be infringing, then the court will award damages to W to make up for that loss.

✓¹ Even if damages were awarded, these will likely be in respect of only the market share that M stole from W.

- The balance of the damages that would be incurred by M if the injunction was granted, vs the damages that will be suffered by W if the injunction was granted ✓¹

The damage to M if the interim injunction was granted is that the plastic she has imported will go brittle if not used within the 3 months.

✓¹ M is also trying to set up a business, and this is her first ever product (and assuming it is her only product) she does not have profits that she would be making from other products to fall back on.

Whereas W manufactures many other types of products, so can fallback on these for profit and therefore income.

✓¹ If she is not allowed to continue with the project, her business will likely be unsuccessful/she may have to sell it, hence the damage to M is greater than the damage to W.

W's market shares fluctuate, whereas M's business is growing exponentially,

✓^½ which means that W does not dominate the market with his product, and M may not necessarily be stealing his sales directly.

- the court has a tendency to maintain the status quo – i.e. they have a preference for keeping things as they are;

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✓½ M has already been making the apparently infringing article for 6 months – the court will prefer to keep things as they are.

✓1 If W has already incurred damages with respect to infringement in the last 6 months, then a few more months to wait for a decision on infringement to come out before taking action (e.g. using a final injunction) may give a similar result – essentially it is quite late now, to try and and M to stop. Best to wait on a decision of the court regarding infringement.

- as a very last resort, they will consider the merits of the case. ✓½

There is not sufficient information to comment on this in the question, hence no comments on this – the court will likely not consider this as the other considerations listed above will likely allow the court to reach a decision.

Undertakings:

William will have to either pay money into the court or show that he has the funds to be able to pay damages to M if it was later found that M was not infringing and that the injunction was therefore not justified. ✓½

William should give full disclosure of all facts and documents that he is or was at some point in possession of.

He must not delay bringing the request to the court.

He must start initiate the proceedings by submitting his pleadings as soon as possible after getting the interim injunction. ✓1

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9)b)

There seems to be a mistake in the question – it takes W £5 to sell each cup – so a profit of £5 per cup.

It should be noted that damages cannot be awarded with respect to the tabletop holder sold by M as this does not fall within the scope of W's patent – whilst this might bring in more customers as M is offering to sell 2 compatible and useful products together, it can't be used by W to show stolen sales directly.

If the court found infringement of W's patent at trial, there are 2 approaches for assessing damages:

Loss of sales/stolen sales:

The principle of this type of award is to compensate the claimant, not to take the profits of the infringer.

✓₁ This is calculated based on the sales that W would have made, has M not been selling the infringing the product. This will not be based on the profits that M made, but based on the profits that W would have made, has M not been selling the products instead.

M has sold 2000 cups x £5 profits W would have made on these = £10,000

✓₁ This number would be adjusted for a % as there are other factors at play and M did not directly steal all of W's shares.

✓₁ W only sold at a physical location and had no online presence, whereas M sold both online and in shop. Hence M is liable for stealing sales where she has sold the infringing product in store, but not where she has sold them online – as W is

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not present in the online market – however, the IP rights themselves have inherent value – so for the online sales, W should be awarded reasonable royalties.

Reasonable royalties: these will be calculated based on the hypothetical scenario

✓1 where before the infringement occurred, a willing licensor-licensee entered into a licensing agreement – in this case, if W had granted M the license to sell the feeder cups online before she started selling, based on reasonable terms at the time.

This will be adjusted for the % of weighting on this.

✓1 The court has wide discretion in awarding damages, and may weigh in each of the above methods for awarding damages differently.

It is clear that M has stolen sales from W since in the past 4 months W has suffered 50% reduction in sales. M has been in business for 6 months, but has only managed to move sales in the last 4 months.

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Question 10:

P = Parvati

E = Edward

S = Sangita

10)a)

In order for there to be an actionable negligence in respect of a economic loss, there should be present the following things:

There was a duty of care

In order for there to be a duty of care we need to consider whether E was

✓1 reasonable in relying on P for professional advice.

Firstly, P makes an announcement that she is now a Patent attorney and neither E for S know anything about lawyer – they are lay persons – hence they wouldn't know under what circumstances they can or can't take legal advice from her – e.g. can it be taken in a pub environment, or when people are drinking.

They are all in a semi-work environment – this is an industry event, so it may be reasonable for people to talk about work, even when they are working, and it may be seen as normal for E to rely on P's advice in these environment, especially given that he doesn't know much about law.

It can also be seen that P implies that she has specialist knowledge in the area

✓1 of patents, and when E asks her about his conversation with S being binding, she tells him not to worry about it – in that environment, she is making the statement by virtue of the fact that she is a patent attorney, and she could

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reasonably have known that the others could rely on it since they are not lawyers and have little knowledge.

She may have made the statement in an off-hand way – as everyone including herself are drinking at this event – however, since they are all at a work event, they are likely to be drinking little – hence P is likely not incapacitated from knowing that whatever she says may be taken seriously by E.

She also makes no disclaimer – although later on, she tries to contact E to discuss the matter – in which case she may have been trying to make a disclaimer from her misstatement or giving him proper advice – which E doesn't answer – which is a contributing factor.

Overall, P had a duty of care towards her old work colleague who was seeking her genuine advice on a patent matter and was worried – she should have

✓1 declined to give advice at that point if she was under the influence of alcohol, but it was reasonable to know that E was relying on her advice, therefore she had a duty of care.

✓½ The duty of care was breached – without asking him about further detail about his conversation with S whilst she was away at the bar, P brushes him off by

✓½ saying that it shouldn't matter.

However, P reverted with an email later on, to which E didn't respond.

The breach led to damage to the claimant (causation in fact)

'but for' test

There is a causation in fact, as, if it wasn't for P's advice that the conversation between friends at the pub doesn't mean that he sold his patent, the court would

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not have found that S had in fact bought the patent from E, as otherwise, E would have sought professional advice to rectify the situation, e.g. by withdrawing his offer to S – within the 2 weeks option that the court told him about.

P was suggesting a follow-drink and discussion of the matter – this sounds like a social meet-up rather than a professional one, hence E cannot be held accountable for not going.

It should also be considered that E and S had done business before, that P did not know about – maybe she should have enquired about this; or maybe it is unreasonable to expect P to enquire about this.

The damage was reasonably foreseeable (remoteness/causation in fact).

Heads of damages:

Since P made a representation by virtue of her special skill, and is a legal professional, action can be taken for pure economic loss resulting from negligent misstatement.

Part (i)

- ✓1 There is a clear link for causation in fact – P's advice led to E having to sell part of the patent to S, which led to E not being able to sell for a higher price.

This could have been reasonably foreseeable by P, (causation in law) as from

- ✓1 her experience as a patent attorney she would know of the consequences to E, if it turned out that he had in fact sold to S.

P is liable for this damage.

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Part (ii)

There is a clear link in causation in fact – P's misstatement led to E having to sell
✓½ the part to S, which led to her ruining his reputation.

However, there is a third-party intervening act – P may not have reasonable
✓½ foreseen that S will use the patent poorly, but it may have been within her
contemplation.

Hence, when awarding damages in respect of this aspect, the court will exercise
apportionment of costs – P will not be liable for the entirety of damages in
respect of this.

part (iii)

there is no causation in fact for this damage/loss – this is too remote – P could
not have known that the patent was this important to E that his entire business
✓1 relied on it. She is also not aware that E had taken out a business loan.

There may have been other intervening acts, for example by E himself or failure
from other sources of business, which led E to lose his factory. ✓1

P is not liable for this.

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10)b)

R = Rosemary

The formation of a limited company will allow easier operation on the day-to-day
as well as over the long term.

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Since E is about to take on a new business venture, there are risks involved with this – including financial risks – by incorporating a limited company he will be creating a separate legal entity. This means that as opposed to a sole trader, he will no longer be personally liable for the debts or losses of the business. His losses will be limited to his initial investment into the company, and on personal assets can be used to pay off the debts (as they would for a sole trader).

Since R is interested in becoming an investor, she may be appointed as a member or a director or both under the limited company – most likely a member, ^{✓½} and she can be allocated shares for the company. ^{✓½}

Fixed and floating charges:

Only fixed charges are available to a sole trader, however, ^{✓1} both fixed and floating charges are available to a limited company.

With the floating charges, this will allow R to place a security over the assets of E's business, such that he doesn't have to seek her permission to carry out everyday business, e.g. selling adjustable spanner, ^{✓1} however, this will still give R control over his business as she will be able to crystallise his assets when she ^{✓1} needs to.

With fixed charges, E will have to seek R's consent for every transaction, ^{✓1} hence being a sole trader will not be convenient for this type of business model.

Can use the limited company title – a separate legal entity – to enter into contract with the third parties, e.g. for manufacturing.

Since R is an experienced freelance director, she can be appointed as one of the directors for E's limited company.

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