

COUNCIL OF LEGAL EDUCATION
NORMAN MANLEY LAW SCHOOL

LEGAL EDUCATION CERTIFICATE
SECOND YEAR EXAMINATIONS, 2014

CIVIL PROCEDURE AND PRACTICE II
(WEDNESDAY, MAY 14, 2014)

Instructions to Students

- (a) Time: 3 ½ hours
- (b) Answer **THREE** questions from Part A and **TWO** from Part B.
- (c) **Answer Part A and Part B on separate answer booklets.**
- (d) In answering any question, a candidate may reply by reference to the law of any Commonwealth Caribbean territory, **but must state at the beginning of the answer the name of the relevant territory.**
- (e) It is unnecessary to transcribe the questions you attempt.
- (f) Answers should be written in black or dark blue ink.
- (g) Calculators may be used and are provided.

PLEASE REMAIN SEATED UNTIL YOUR SCRIPT HAS BEEN COLLECTED.

PART A

QUESTION 1

You are an Associate in the firm Trotters, Tripe and Trifle, Attorneys-at-Law (“TTT”). Your client, High Flying Motors Limited (“HFM”), manufactures high performance sport and luxury motor vehicles. It engages, as independent contractors, professional drivers to test-drive its motor vehicles.

Riskta Kerr was one such independent contractor. On January 15, 2012, while test-driving the latest YJZ71 sports car from HFM, Riskta had an accident and suffered physical injuries.

In March 2012 he brought a claim in the Supreme/High Court against HFM for damages for negligence, claiming that the brakes on the car failed, thus causing the accident. He is represented by Bagel, Bread and Croissants, Attorneys-at-Law (“BBC”).

Your client has defended the claim on the grounds that, in the contract for engaging Riskta’s services, he acknowledges the danger of his job and waives any and all rights he has to any claims against HFM. HFM has also defended the claim on the ground that Riskta was either wholly or partly negligent, in that he drove the YJZ71 at a speed faster than the top speed he had been advised to utilise.

At the recently concluded case management conference, an order was made for standard disclosure requiring a List of Documents to be filed and served on or before June 6, 2014. Having conducted a reasonable search, the following are the documents found in the possession of your client.

- (a) Letter dated July 10, 2012 from Reservealot Limited, HFM’s insurance company, to HFM, with details of the strengths and weaknesses of the case and the portion of any liability determined which they would meet.

- (b) Contract for services between Riskta and HFM dated August 9, 2011.
 - (c) A report dated February 10, 2012 addressed to HFM from Trouble Assessors Limited (“TAL”).
(You are instructed by the Safety Officer of HFM, who commissioned the report, that it was created to ascertain the cause of the accident with a view to correcting any kinks in the new vehicle. The information in the report is relevant to the issues raised in the claim.)
 - (d) Letters dated September and October 2012 between the Attorneys-at-Law representing the Claimant and the Defendant in which the parties attempted, but failed, to settle the matter.
 - (e) The operations manual on the YJZ71 sports car;
 - (f) Various court documents including statements of case, applications and affidavits filed in the claim.
 - (g) Letter dated April 3, 2012 from HFM to TTT asking if BBC was acting on behalf of Riskta.
- (i) Draft your client’s List of Documents.
 - (ii) Provide brief explanations on your treatment of the documents numbered (a), (c), (d) and (g).

(The relevant form is provided)

QUESTION 2

A judgment, the equivalent of US\$200,000 in your currency, has been this month entered in favour of your client, the Claimant, in a claim in the Supreme/High Court in your jurisdiction.

The Defendant has to date ignored demands for payment of the judgment.

Investigations conducted on behalf of the Claimant have revealed that the Defendant, who is gainfully employed as a store manager, has the following assets:

- (a) a motor vehicle valued at approximately the equivalent of US\$30,000 in your currency;
- (b) a bank account held at The Nation's Commercial Bank Limited with the equivalent of US\$100,000 in your currency; and
- (c) a sum the equivalent of US\$30,000 in your currency, due and owing to him for work carried out on the weekends between January 1, 2013 and December 31, 2013 under a contract for management services with Commission Plus Limited.

Your client has no further information on any other assets of the Defendant.

Advise the Claimant on how he may proceed to recover the sum due to him by the Defendant.

QUESTION 3

You are an Associate with the firm of Truffle, Brulee and Caramel, Attorneys-at-Law acting for and on behalf of Mr Give Alick.

Mr Alick is the Defendant in a claim for damages by Ms Teka Bounce against him. Ms Bounce claims that she suffered extensive personal injury when Mr Alick, while driving his motor vehicle, disobeyed a red light and ran over Ms Bounce as she was crossing the road.

Mr Alick has defended the claim, stating that the traffic light in question was on green and Ms Bounce stepped into the road without first checking for oncoming vehicles.

You were charged with the task of assessing the evidence in the case and advising Senior Partner on the best course forward.

Having completed your assessment you are of the opinion that it would be advisable for your client, the Defendant, to make a Part 35 offer to settle the claim pursuant to the civil procedure rules of your jurisdiction.

You believe it is likely that the court will award the equivalent of US\$500,000 in your currency, for damages together with the equivalent of US\$100,000 for interest and the equivalent of US\$10,000 for costs.

- (i) Draft the offer to settle.

- (ii) Write an inter-office memo to Senior Partner:
 - (a) setting out the calculations for the sum being offered; and
 - (b) advising him of the effect of the Claimant:
 - (I) accepting the offer to settle; and
 - (II) refusing to accept the offer to settle.

QUESTION 4

Your client, Kool Produce Supermarket Limited (“KPS”), is named as the Defendant in a claim filed by Premium Manufacturers Limited (“PML”). The claim is for sums due and owing by KPS to PML for goods sold and delivered by PML to KPS in January and February 2013.

KPS has defended the claim on the ground that the goods provided were of a poor quality. KPS has counterclaimed for loss suffered from the content of the goods dripping on the floors in its stores and causing them to corrode.

It has come to the attention of your client that PML is in the process of moving its assets from your jurisdiction to an associated company located in Miami, Florida. Your client is concerned that if it were successful in defending its claim it would have no way of enforcing any costs order which may be made in its favour.

- (i) Draft the Notice of Application for Court Orders to address your client's concern regarding the enforcement of any costs order.
- (ii) Briefly advise your client on any other application it may consider in the circumstances.

(The relevant form is provided)

QUESTION 5

Mr Bill Eyonair, Chief Executive Officer of Tidy Tots Limited ("TTL"), attends your office and meets with you today.

He instructs you that his company is the sole owner of the intellectual property of TTL's flagship product, Calmonator. This product is an electronic baby carriage which vibrates in a manner that usually causes an agitated child to almost immediately be calm.

It has come to the attention of his company that a rival company, Tief Your Tots Limited ("TYT"), has launched a similar product on the market. The packaging and price of the product are similar to the Calmonator and it is in fact called the Calmernater.

The Calmernater is of a lower standard than the Calmonator and TTL is concerned that the inferior product may harm its reputation. TTL is also losing sales as persons are purchasing TYT's product thinking it is that of TTL.

Your client would like to immediately restrain TYT from selling its product. They are also of the opinion that if TYT realises they are about to be sued, they will destroy or adjust the carriages in a manner which will conceal that they were being passed off as TTL's product.

You advise your client that a claim could be commenced in the Supreme/High Court of your jurisdiction and that you could apply to the said court for a prohibitory injunction and a search order.

Your client asks a number of questions including the following:-

- (i) How is the search order going to be executed?
- (ii) What is the likelihood of TYT successfully applying to discharge the search order?
- (iii) What are the possible orders for costs which may be made by the court on TYT's application?

Answer your client's questions listed above with appropriate explanations.

PART B
LAW OF ASSOCIATION

QUESTION 6

Edgar is an attorney-at-law who has been practising as a sole practitioner for about six years. He has an office in his uncle's chambers and, with some guidance from his uncle, has steadily built a good litigation and industrial relations practice.

May is an attorney-at-law of about twelve years standing with a sole practice in non-litigation work. May's practice has been thriving and she has been getting a fairly large number of real estate developments. She is content to continue to do this type of work which she does exceedingly well but her developer clients, whom she wishes to please, have also been referring other types of work to her, including a number of contentious matters, which she is unable to deal with effectively. May has therefore been looking for a partner with the requisite skills and experience.

Edgar was recommended to her as someone who might be interested and they have had fruitful discussions which seem to be headed towards the formation of a general partnership between them.

Edgar has come to you for advice on:

- (a) whether it will be necessary or advisable for there to be a written partnership agreement between himself and May (giving reasons) ; and
- (b) how he can structure their agreement to ensure that:
 - (i) he can continue, without breaching his partnership obligations, to spend his Friday afternoons working with his favourite charity;

- (ii) he has a stream of income during the year from the practice, before profits are ascertained at the end of the year;
- (iii) May does not dominate the decision-making in the partnership and partnership matters are considered in a timely and orderly way;
- (iv) in the event of a disagreement between them as to their partnership rights, May does not immediately take the matter to court;
- (v) they share in the profit of the partnership in accordance with their contribution to that profit but share the losses equally;
- (vi) May does not acquire any interest in the office equipment which he will be bringing with him for use in the partnership business;
- (vii) the firm keeps proper financial records and that at least on a yearly basis profit is ascertained and allocated in a timely way as between himself and May;
- (viii) there is a clear demarcation in time between the end of his and May's sole practices and the beginning of their partnership;
- (ix) upon termination of the partnership for any reason that he gets a fair share of the value of any tangible or intangible assets belonging to the partnership at that time; and
- (x) he does not, as May's partner, become liable to a creditor for any of her personal debts.

Advise Edgar.

QUESTION 7

John and Cedric are middle-aged academics and cycling enthusiasts. For some months they and a number of fellow enthusiasts have been cycling fairly regularly, but in an *ad hoc* fashion. John and Cedric enjoy these rides but wish that there was more structure to the activity so that their outings could be more organized and regular and that, in addition to these local rides, regular

meetings of the group as well as longer bicycle tours might be facilitated. They feel that with more structure they could not only plan rides for their own pleasure but also raise funds for charity. Social events among members of the group would also help to build camaraderie and provide another source of enjoyment.

The membership of the group is also an issue. Current riders feel quite at liberty to invite others to join them on rides from time to time, so that the group has grown steadily from an initial eight participants to about thirty. So far all of these additions have been welcome ones but they fear that this may change.

John and Cedric neither want too formal a structure, nor one that is subject to regulatory oversight. Although they are spearheading the initiative they have no desire for themselves or any other particular members to be in charge.

Advise John and Cedric on:

- (i) the type of organization which you would recommend they adopt to achieve their objectives, giving brief reasons;
 - (ii) the steps to be taken and any document(s) required or recommended to be prepared to form the organization recommended at (i) above; and
 - (iii) the recommended content of the document(s) identified at (ii) above.
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QUESTION 8

Herman Lofters has operated a haulage business as a sole proprietor for several years under the name "Lofters Haulage". As the business has grown so too has his risk of being liable

personally to creditors of the business and so he has decided to incorporate it. As far as possible, Herman wants to be able to operate his incorporated business in the same fashion as his sole proprietorship and subject to as little regulation as possible. He also wants to use the same name.

Mr. Lofters has asked for your written advice on the matter.

Write a letter to Mr. Lofters:

- (i) indicating the type of company you recommend that he incorporate in the circumstances and indicating the extent to which he can achieve his objectives, including re-using the name; and
 - (ii) describing the procedural steps and documents involved in forming it.
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QUESTION 9

Selburn Morton is the owner of a dental supplies company. The company is a private company limited by shares in which Selburn and three members of his family are equal shareholders and directors. Selburn manages the day to day operations of the company and has realized that, while it is doing well, there is a desperate need for capital if it is to take advantage of opportunities for growth. His family agrees but does not have the money required to either lend to the company or to put in as additional capital. None of the directors or shareholders want the company to take on any external debt.

One of his friends, with whom Selburn sometimes discusses these matters, has said to him, albeit in an offhand manner, that he will need to “go public”. Selburn is doubtful but figures that he should at least investigate the matter and has come to you for some advice. He has seen prospectuses of companies supposedly “going public” in the press but has never read any of them.

Write a letter to Selburn:

- (i) outlining the possible legal obstacles which would need to be overcome for his company to “go public” and any legal or practical issues which should be considered; and
- (ii) explaining the role of the prospectus in the process of going public and describing its content.

END OF PAPER