

COUNCIL OF LEGAL EDUCATION
NORMAN MANLEY LAW SCHOOL
LEGAL EDUCATION CERTIFICATE
SUPPLEMENTARY EXAMINATIONS, 1998

CIVIL PROCEDURE AND PRACTICE I

(Wednesday, August 12 , 1998)

Instructions to Students

- (a) Time 3 ½ hours
- (b) Answer **THREE** questions from Part A and **TWO** from Part B.
- (c) **Questions selected from Part B must be answered on a separate answer booklet.**
- (d) In answering any question, a student 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 territory.**
- (e) It is unnecessary to transcribe the questions you attempt.

PLEASE REMAIN SEATED UNTIL YOUR SCRIPT HAS BEEN COLLECTED

PART AQUESTION 1

In 1980 Larry bought certain lands from Tom which formed part of a large estate that Tom had subdivided for sale. In order to gain access to his land Larry had the use of a common right of way which was expressly described in the contract for the sale of the land. However, in purporting to convey the property the right of way described in the deed was not properly located. In fact, the true right of way remained on the parcel of land belonging to Tom who sold it in 1985 to Barbara.

Barbara informs Larry that he can no longer use the right of way because he is trespassing on her land although he shows her the contract of sale, the deed of conveyance and even brings Tom to confirm that a mistake was made.

Larry comes to you for advice on possible legal proceedings to protect his interests. As this is his first brush with civil litigation, he wants you to explain to him what the process entails and how you will go about seeking redress for him.

Describe briefly the factors (excluding any pre-litigation steps) that you will take into consideration to initiate legal proceedings and outline as far as you can the various procedural steps that are involved in this process.

QUESTION 2

On January 12, 1998, Furniture Supreme enters judgment in default of defence against Dianne Dearing in respect of a claim of \$155,000 towards the purchase of furniture and household appliances bought from them. She now consults you and instructs you to make an application to the court to have the default judgment set aside. She further instructs you as follows -

That she did, in fact, purchase furniture from Furniture Supreme valued at \$155,000. However, as a longstanding customer of the store, the manager agreed to give her a discount of 25% on that price and further agreed to 24 monthly installments instead of the regular 12 monthly installments usually given the ordinary customers. She dutifully paid the installments as they became due up to the end of October 1997 when she became ill and could not manage her affairs. When she was served with the writ of summons she was only able to instruct her attorney-at-law to enter an appearance/give notice of intention to defend on her behalf. She has just recovered sufficiently to pursue the matter and as her attorney-at-law has since migrated she would now like to instruct you in this matter.

(Continued on page 4)

- (i) Outline the procedure to set aside default judgment, describing the contents of the documents you would use.
 - (ii) Draft the affidavit you would use in support of your application and outline the arguments you advance.
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QUESTION 3

Your client, the first defendant, brings you the statement of claim set out in the appendix to this question. His instructions to you are as follows -

"My name is Hudson Bay and I am a Sales Manager, and I live at 99 Great Line Road, Turnpike.

By a written contract dated December 19, 1995, made between Manley & Sons Limited and myself, I was employed as sales manager at a salary of \$820,000 per annum.

It was an express term of the contract, that I would be paid 1% of the retail value on the sale of all valves and pumps achieved by the area sales department which I managed.

I worked very hard in the company, until November 12, 1996, when I received notice in writing from the ~~Defendants~~ ^{Plaintiffs} that they were delaying paying me the commission. Despite the fact that I wrote to the company several times, I received no further word from them about the commission.

Finally, on March 20, 1997, in disgust I left the company. I was offered a much better job. I estimate the commission due to me between December 1995 and March 20, 1997 is \$1,000,000.

I admit that during my time at the company I had the use of a Suzuki Baleno which belonged to the company. I decided to sell the car to recover at least some of the monies due to me. I sold the car to Codner & Co. Limited for \$400,000, on April 1, 1997. I have retained the money. I understand that the ~~plaintiff~~ ^{plaintiffs} wrote to Codner & Co. Limited about returning the car, but I told Codner & Co. Limited to give them the silent treatment.

Draft an appropriate defence and counterclaim based on your instructions from the defendant Hudson Bay.

APPENDIX

STATEMENT OF CLAIM

(Insert usual heading)

BETWEEN

MANLEY AND SONS LIMITED

Plaintiffs

and

HUDSON BAY
CODNER & CO. LIMITEDFirst Defendant
Second Defendants

1. The Plaintiffs are and were at all material times the owners of and entitled to possession of a Suzuki Baleno Motor car registration 1027 BQ, of the value of \$450,000 ("the car").
2. The first Defendant was until 20th March 1997 employed by the Plaintiffs and in the course of his employment was permitted by the Plaintiffs to have the custody and use of the car.
3. On or about 1st April 1997 the First Defendant, wrongfully pledged and delivered the car to the Second Defendants and thereby converted the same to his own use.
4. By a letter dated 15th April 1997 the Plaintiffs demanded the return of the car from the Second Defendants but the Second Defendants have not returned the car and wrongfully detained it from the Plaintiffs.
5. By reason of the matters aforesaid the Plaintiffs have been deprived of the car and have suffered loss and damage.

PARTICULARS OF DAMAGE

- | | | |
|-----|---|-----------|
| (1) | Value of the car | \$450,000 |
| (2) | Loss of use of car from
20th March 1997 to date hereof
and continuing at \$100. per day | \$ 43,300 |

6. Further the Plaintiffs claim interest pursuant to your Act on the amount of damages found to be due to the Plaintiffs at such rate and for such period as the Court thinks fit.

AND the Plaintiffs claim

1. Against the First Defendant damages for conversion.
2. Against the second Defendants, an order for the delivery up of the car or its value, namely \$450,000 and damages for its detention.
3. Against both Defendants, the aforesaid interest pursuant to the aforementioned Act.

Dated 26th day of May 1998

Settled

(Signed)

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Plaintiff's Attorney-at-Law

QUESTION 4

Mr. Duke Orrett, an attorney-at-law, issued a writ of summons on behalf of his client. After the writ of summons was served on the defendant, Mr. Duke Orrett discovered -

- (a) that he misspelt the name of the defendant on the writ of summons;
- (b) that he omitted to include in the endorsement on the writ, a claim for nuisance of which the plaintiff had told him.

On the day of the trial of the action, the plaintiff supplied Mr. Orrett with additional facts which would require him to include in the writ and statement of claim a new cause of action which by that time had become statute barred under the Limitation Act.

- (i) Outline the procedure to be adopted in making the necessary amendments to the Writ of Summons and Statement of Claim in (a) and (b) above, as well as the inclusion of the new cause of action at the trial;
 - (ii) With the assistance of case law describe the Court's attitude to the granting of these amendments.
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QUESTION 5

Mr. Seamus Grow is a farmer who lives with his family on his farm at Mount St. Hope, Newville.

On May 30, 1996, Mr. Grow obtained a loan of \$250,000 from the Johnson's Credit Bank Limited of 28 Lenders Road, Newville.

Mr. Grow's loan application was processed by Miss Biting Gnat of 10 Unscented Drive, Newville, who is the Bank's loans officer and duly signed by each of them. It was agreed that interest at the rate of 25% per annum would be paid on the loan which should be repaid in equal monthly installments over a four year period.

For the past 2 years, there has been a severe drought, so that production on Mr. Grow's farm has been adversely affected and he is unable to repay this loan and interest. In fact, nothing has been repaid since he entered into the agreement.

Mr. Grow is not disputing the fact that the money is owed, but says he is unable to repay it at present.

Johnson's Credit Bank Limited is anxious to recover the outstanding debt and has consulted you for legal advice and has instructed you to institute proceedings on its behalf.

- (i) Advise your client what steps it should take to recover the loan and interest expeditiously.
- (ii) Assume that you filed your writ in this matter on June 14, 1998 and an appearance notice of intention to defend was filed for and on behalf of Mr. Grow on July 1, 1998, draft the affidavit that would be necessary to see the proceedings through to judgment.

PART B

(Facts relating to Questions 6, 7 & 8)

Miss Easie Rumble and Mr. Toni Cockwell, who were living together as man and wife, decided to get married and to move from rented premises into a home of their own. They selected a plot of land at Honeymoon Close which was offered for sale for \$1,185,000. Mr. Cockwell sold his stocks and shares in the Unisex Group Limited for \$1,145,000 while Miss Rumble borrowed \$140,000 from her credit union and they paid for the land from these proceeds.

Just then Miss Rumble qualified for a concessionary 3% mortgage loan from her employers the Treat-you-Right Bank. In order to access this facility, the parties decided that the land should be conveyed into the name of Miss Rumble. This done, she applied for and was granted a mortgage loan of \$2,600,000 with which to build a house. So delighted were Mr. Cockwell's employers at his good fortune in his friendship with Miss Rumble that they decided to do the architectural drawings and to supervise the work free of cost. At Miss Rumble's

directions the bank disbursed the mortgage money direct to Mr. Cockwell who gave all the instructions to the architects and acted as the project manager during the construction of the 4-bedroom, 3-bathroom house.

In April 1992, Miss Rumble and Mr. Cockwell were married and they moved into a lavishly furnished house at 10 Honeymoon Close. As a wedding present, Mr. Cockwell's employers doubled his rent allowance to \$180,000 with a promise to give a 20% annual increase thereon. The mortgage money together with \$175,000 which Mr. Cockwell borrowed on his insurance policies were used to purchase the major items of furniture. The couple received cash gifts as wedding presents amounting to \$200,000 which they used to repair and repaint the wife's 1975 Suzuki Sidekick 4 x 4 motor car.

Mr. Cockwell was uneasy at the huge mortgage which his wife was carrying and so gave her his monthly rent cheque. At his suggestion she insured her life to the extent of \$600,000 with Mr. Cockwell as the sole beneficiary.

Mr. Cockwell provided house money covering all household expenses and the special needs of their son Evergreen who was born before the marriage. He paid the maids and gardeners, and the bills for water, telephone and electricity. The wife paid the mortgage as a deduction from her salary, maintained her car, paid her life insurance premiums, and maintained herself, i.e., paid for all her personal expenses.

In 1993, Mrs. Cockwell sold her Suzuki Sidekick vehicle and bought a Mitsubishi Gallant. She requested of her husband an increase of house money as with the added motor car installments she was unable to cope. He suggested

that she should take a part-time job in the evenings. Already she had been working overtime, but she began to sell cosmetics in her neighbourhood and gained extra money.

Evergreen at age 8 showed promise as a swimmer and at Mrs. Cockwell's insistence, Mr. Cockwell decided to build a swimming pool for recreational purposes and to facilitate practice by Evergreen. The Bank increased the mortgage by \$500,000 at the same concessionary rate and the further \$300,000 needed to construct the swimming pool was borrowed by Mr. Cockwell from his credit union with interest at 15% per annum. In January 1997, the credit union increased its lending rate to 25% per annum.

Mr. Cockwell found that he was unable to keep his payments current. He had been unable to repay any part of the money borrowed from the insurance company and now his interest payments to the credit union have almost doubled.

Mr. Cockwell in a discussion with his wife suggested that as she was getting the rent allowance and full housekeeping allowance she should pay the maids and the gardeners and pay for cooking gas and telephone charges. This infuriated the wife who complained that she had been working like a slave day and night and the husband wanted to place a greater burden on her. She accused him of being without ambition for sitting down as auditor in a firm when as a qualified accountant he could be earning millions on his own account in

private practice. She complained too that the little rent allowance which she received was paid by the firm and not out of his salary so in fact she was getting nothing from him and could well have been living on her own. So bitter was the altercation that the husband left the matrimonial home on April 30, 1997 and has not returned.

In correspondence between the husband and wife, the wife has maintained that the house and the contents are solely hers. She has said that if the bank had not offered her the mortgage based on her years of service, she would have had to pay at least 25% per annum as interest on the mortgage money, plus finder's fee. Mr. Cockwell has now consulted you.

QUESTION 6

Advise him by letter as to the claims he may have with regard to the matrimonial property

QUESTION 7

Draft the appropriate documents for an application in respect of the matrimonial property to the High / Supreme Court

QUESTION 8

Whilst Mr. Cockwell tells you he is more concerned with his property claims, he also asks you to draft the documents for his divorce.

(Omit the notice to appear)
