

COUNCIL OF LEGAL EDUCATION
NORMAN MANLEY LAW SCHOOL

LEGAL EDUCATION CERTIFICATE
SECOND YEAR SUPPLEMENTARY EXAMINATIONS, 2016

CIVIL PROCEDURE AND PRACTICE II
(AUGUST 10, 2016)

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.

INSTRUCTIONS FOR PART A

All figures referred to in Part A of the paper are stated in United States Currency.

You may either:

- (i) use the figure as is assuming that it is sufficient for the matter to be before the Supreme/High court of your jurisdiction; or

- (ii) update the given figure to an equivalent sum in the currency of your jurisdiction using the following exchange rates.

- Jamaica: J\$120.00 -US\$1.00
- OECS: XCD\$2.70 – US\$1.00
- Belize: BZD\$2.00 - US\$1.00

The claims are not for United States currency.

The questions are all based on a matter for which you have conduct as an associate attorney-at-law at the firm acting for and on behalf of the Defendant.

Although they concern the same parties to the matter each question is to be read independently.

Any application or other activity appearing in one question is relevant to that question only and does not impact on the other questions on the examination.

The facts applicable to all the questions are as follows:

You are an associate attorney-at-law at the firm of Cheeky, Checkers & Co.

Your firm acts for and on behalf of Kissime Productions Limited, a company incorporated under the laws of your jurisdiction, in a claim brought against them in the Supreme/High Court by Gibbler Party Suppliers Limited, a company incorporated under the laws of New York, United States of America and Limelight Light Suppliers Limited, a company incorporated under the laws of your jurisdiction.

Gibbler and Limelight have sued Kissime for damages arising from a breach of contract. The claimants have sued for \$350,000 being the sum remaining outstanding for merchandise sold by Gibbler through its local suppliers, Limelight, to Kissime.

Gibbler and Limelight had provided Kissime with \$500,000 worth of supplies. Kissime has paid the sum of \$150,000 but refuse to pay the balance as they are of the opinion that the items delivered were not of good quality.

Kissime has counterclaimed for the sum of \$50,000 which it had to pay to a customer injured at one of its events when a chair purchased from the claimants collapsed.

PART A

QUESTION 1

The background facts are as previously provided.

The managing director of your client, Kissime, is concerned about recovery of costs if Kissime were to succeed on its defence and counterclaim. He has asked for advice on how to address this concern.

- (i) Advise Kissime Productions Limited, by way of a letter, on the following:
 - (a) what application(s) may be made that might to alleviate the concern;
 - (b) when the application(s) should be made; and
 - (c) whether the application(s) is/are likely to succeed.
 - (ii) Prepare a draft of the order the Court should make if the application succeeds.
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QUESTION 2

The background facts are as previously provided.

Your firm has been exchanging without prejudice communications with White, Wash and Wingers, the Attorneys-at-Law acting for and on behalf of the Claimants, with the aim of settling issues between them, including those in the claim and counterclaim.

The parties have agreed that Kissime will pay Gibbler and Limelight a further sum of \$50,000. Gibbler and Limelight will replace the \$350,000 worth of merchandise already supplied with items of good quality. Gibbler and Limelight would also replace \$30,000 worth of supplies provided under a previous contract and provide Kissime with a 25% discount on all orders placed for the next two years. Each party is to bear its legal costs to date.

The parties would like a court order setting out only the terms necessary and to be at liberty to easily enforce any obligations not met by the other.

You are required to prepare:

- (i) the document(s) needed to carry out the parties' objectives; and
- (ii) a short letter to your client, briefly explaining what terms ought to be in the order to be signed by the Judge/Registrar and why.

QUESTION 3

The background facts are as previously provided.

- (a) At the recently concluded case management conference, an order was made for standard disclosure.

Write to your client advising it, in keeping with the firm's obligations as its attorneys-at-law, as provided in your civil procedure rules.

- (b) After the filing and service of the List of Documents on behalf of Kissime, you discover that the following documents were sent in error to White, Wash and Wingers, attorneys-at-law acting for and on behalf of the claimants, in response to their request for inspection:
 - (i) a copy of a letter from Gottur Back Limited, Kissime's insurance company, to Kissime, which had been included in Part 2 Schedule 1 of the List; and
 - (ii) a copy of a letter from your firm to Kissime, setting out the strengths and weaknesses of its case, which had accidentally been included in Part 1 of Schedule 1 of the List.

Write a memorandum to the senior partner in your firm setting out the steps that may be taken, and by whom, concerning the use of the documents in the proceedings, and the likely outcome of those steps.

QUESTION 4

The background facts are as previously provided.

A few months after the case management conference was held in the matter, the claimants applied for an order to rely on the expert evidence of Jican Tellu concerning the quality of the merchandise provided by Gibbler and Limelight.

Tellu is the Quality Assurance Manager of Gibbler and has over twenty years' experience in the industry.

The judge granted the application, despite your opposition, and refused leave to appeal. His decision was expressed as follows:

“The Defendant opposed the application for permission to rely on the expert evidence of Mr Tellu on the grounds that expert evidence is not needed in this matter and further that Tellu is an employee of the First Claimant, but I do not believe there is any merit in the Defendant’s arguments.

I also consider that an appeal would have little or no chance of success.

The Court therefore orders as follows:

- (a) The Claimant is permitted to rely on an expert report to be prepared by Mr Tellu.*
- (b) Costs of this application are to be paid by the Defendant to the Claimant.*
- (c) Leave to appeal refused.*

(d) *The Claimant is to prepare, file and serve this order.*”

Following the decision, senior counsel in your firm discusses with you appealing the decision.

You are required to prepare for said senior counsel drafts of the following:

- (i) an application for permission to appeal; and
- (ii) a Notice of Appeal for filing in the Court of Appeal for your jurisdiction.

QUESTION 5

The background facts are as previously provided.

Ten days before the trial date, you are faced with the following challenges:

- (i) Charlize Efron, former manager of the event planning department of Kissime, is needed as a witness on behalf of Kissime in the claim. Efron was recently dismissed from Kissime following a poorly reviewed wine and cheese event planned by her. She now advises that she will not be attending the trial. Her evidence is crucial to the defendant’s case.
- (ii) You realise that the Witness Statement filed on behalf of Stephen Amell, sales manager at Kissime, was incomplete. It stated that the chair, subject of the counterclaim, collapsed because it was not able to accommodate the weight promised by Gibbler and Limelight. The statement failed to state the weight promised and the weight of the individual that sat on the ill-fated chair.
- (iii) Kissime indicates that they have found some old files relating to the merchandise, subject of the claim. In one of the files they found a letter to Kissime from Gibbler, dated prior to

commencement of the claim. Kissime believes the letter should be relied on at the trial. In the letter, Gibbler apologises for the ill-fated chair and states that it may have collapsed because of Limelight's faulty assembly of it.

(iv) The managing director of Kissime advises that the company will be having its annual general meeting on the date set for trial. All its officers are required to attend the meeting which is expected to last the entire day. Accordingly, the officers scheduled to give evidence on behalf of Kissime will not be available for the trial. The managing director would therefore like the trial to be rescheduled.

Write a letter to your client setting out the options available to address each of the circumstances and the likely outcomes.

PART B
LAW OF ASSOCIATION

QUESTION 6

Franken Energy Systems Limited is a private company with five directors and fifteen shareholders. The company's managing director is James Taylor.

The alternative energy market, though somewhat less buoyant due to the low cost of oil, is nevertheless a growing one with a bright future, and the directors of the company believe that it would be a good time to expand the business. This expansion requires an investment of capital, which the existing shareholders do not have. Although bank interest rates are relatively low, the company and its shareholders do not have an appetite for borrowing the money required.

James Taylor is exploring ways of raising the required funds on the capital market and, specifically, by way of a public offering of shares in the company. He has consulted your firm on the matter.

You are an associate attorney-at-law assigned to the partner with responsibility for the matter. She has requested you to prepare a draft letter to Mr. Taylor advising him on the legal issues which would need to be considered, and outlining the procedural steps and documents involved, if the decision is taken to make the proposed public offering.

Prepare the draft letter as requested.

QUESTION 7

Manchurin Building Systems Limited was incorporated by the Manchurin brothers in your jurisdiction as a private limited liability company. From its incorporation in 1980, the company has operated successfully, but the shareholders and directors of the company, brothers, John and Geoffrey, are migrating to join their children overseas, and they want to terminate the life of the company.

The company owns the premises which house its administrative offices, as well as premises where equipment and materials are stored. It has a few contracts which it is still in the process of fulfilling, but has been entering into fewer and fewer of these, given the brothers' retirement goal. In addition, it is not taking on any new contracts.

John and Geoffrey do not want to go through a winding up and want to end the life of the company in as cheap and painless a way as possible, and are exploring having it struck off the register by the Registrar of Companies under the Registrar's power to strike off. Their children have also told them to find out whether the company can be restored to the register after it has been struck off in this way.

John and Geoffrey have sought advice from you.

Prepare a letter of advice to John and Geoffrey:

- (i) indicating whether the company could be struck off as desired and what, if any, steps they would have to take to prepare the company for striking off;
 - (ii) outlining the procedural steps and documents involved in having the company struck off including a description of the content of the said documents; and
 - (iii) indicating whether the company, having been so struck off, can be restored to the register of companies and, if so, explaining how this can be effected.
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QUESTION 8

Kenny Francis, Gail Harris and Michael Nam are recent graduates of the Caribbean School of Dentistry.

They propose to open a dental practice, in general partnership with each other, in your jurisdiction, under the name “K.G.M. Dental Associates”.

They are inclined to save the costs of hiring a lawyer and have asked you, a close friend of Gail’s, to meet them at the local café to “talk through” their plans. Gail has mentioned to you that Kenny, in particular, does not see the need for any “bureaucratic legal mumbo-jumbo”. He has been pushing them to simply seek the financing they need to buy necessary equipment, find suitable premises and begin. According to him, they are perfectly capable of working things out as they go along and there is no need for a written partnership agreement, which “some lawyer” will charge them a fortune to prepare.

In anticipation of your meeting with the three would-be partners, prepare an outline of the points you will make to them on:

- (i) the procedural requirements for general partnership formation and the arguments in favour of a written partnership agreement;
 - (ii) the broad areas which should be covered in any such agreement; and
 - (iii) any legal issues which may arise in respect of the proposed name.
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QUESTION 9

Hope and Jenny both suffer from chronic kidney disease. They met, while undergoing dialysis at the dialysis centre in your jurisdiction, some five years ago, and have become firm friends. Both are women of relatively comfortable means and so are able to afford the treatment required for their illness. This is not the case with many of the persons whom they have encountered at the dialysis centre, and they want to do something to help.

Their wish is to establish a charitable company which would raise awareness of the disease in the wider community, as well as raise funds to give financial assistance to those kidney patients who cannot afford the treatment they need. One of their long-term goals is for the company to operate a comprehensive treatment centre for low-income kidney patients. No profit made by the company would be distributed to its members but would, instead, be ploughed back into the company.

The ladies have asked for your firm's assistance in the matter and the partners have decided to take it on, *pro bono*, as the firm's contribution to the cause.

You have been instructed to draft a letter to Hope and Jenny in which you outline for them:

- (i) the type of company which would be suitable in the circumstances, giving reasons; and

- (ii) the procedural steps involved in the incorporation of the type of company identified by you at (i) above and its establishment as a charity.

Draft the letter as instructed.

END OF PAPER