

COUNCIL OF LEGAL EDUCATION
NORMAN MANLEY LAW SCHOOL

LEGAL EDUCATION CERTIFICATE
SECOND YEAR SUPPLEMENTARY EXAMINATIONS, 2012

CIVIL PROCEDURE AND PRACTICE II

(THURSDAY, AUGUST 9, 2012)

Instructions to Students

- (a) Time: **3½ hours**
- (b) Answer **THREE** questions from Part A **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) Unless the question otherwise suggests, all questions in Part A should be answered on the assumption that the date of the examination is the date on which you have received the instructions and are taking the steps required by the question.

PLEASE REMAIN SEATED UNTIL YOUR SCRIPT HAS BEEN COLLECTED.

PART A

THE FOLLOWING FACTS SHOULD BE USED IN RELATION TO QUESTIONS 1 AND 2

Madoff Madoff & Sons Inc (MMS), a company incorporated in New York, USA, and registered to do business in your jurisdiction, has been operating a manufacturing business locally for many years. Jane Smith recently obtained judgment against MMS for the equivalent in your currency of US\$150,000 for injuries she sustained in an accident which occurred when a crate fell on to the road from a loading station outside MMS' factory. Miss Smith was unable to stop her vehicle in time and drove into the crate. MMS has appealed against the judgment.

MMS contended that Miss Smith was contributorily negligent as she was not wearing a seat belt. At trial, the trial judge permitted Miss Smith to amplify her witness statement and she gave further evidence that she was wearing a seat belt but had managed to free herself of it shortly after the impact. The trial judge accepted Miss Smith's evidence. Miss Smith suffered, among other injuries, multiple fractures in both hands and is now totally disabled in one. MMS relied on the evidence of one of its employees who alleged that he helped Miss Smith out of the vehicle and had not seen her in a seat belt when he went over to her car minutes after the accident. The trial judge refused MMS' application for an expert to inspect the vehicle to determine whether the seat belt could have been operational after the impact so as to allow for it to be released.

Miss Smith's brother, who lives and works in the Cayman Islands, has told her that he read a newspaper article there which says MMS has recently opened a similar factory in Grand Cayman and that MMS' management also indicated that this new enterprise will replace the business in your jurisdiction.

MMS' attorneys have recently written asking Miss Smith's attorneys to agree to a stay of execution of the judgment, failing which they will seek one in an application to the Court. Miss Smith is concerned that if she succeeds in her appeal she may not be able to recover her costs from MMS.

QUESTION 1

You are required to:

- (a) Advise Miss Smith on:
 - (i) the application that may be made to alleviate her concern about recovering her costs, and whether the application is likely to succeed; and
 - (ii) how and when the application should be made.
 - (b) Prepare a draft of the Order the Court should make if the application succeeds.
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QUESTION 2

You are required to prepare a letter to Miss Smith advising her on:

- (a) whether, on the instructions you received, MMS' application for a stay of execution would be likely to succeed;
 - (b) what further information you would need to obtain to respond to the application for a stay of execution; and
 - (c) what order for costs the Court should make if:
 - (i) the application for a stay of execution succeeds; and
 - (ii) the application for a stay of execution fails.
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QUESTION 3

Your firm's client, Maxwell Space, commenced a claim seeking damages for defamatory statements published by Maxine Tweeter. He alleges that she posted those statements about him on Twitter. He has also sued LaFace Booker who, he alleges, published Maxine Tweeter's defamatory statements on Facebook. After being sued, Maxine Tweeter published an apology to Mr Space, and he has decided that he will discontinue the claim against her.

However, Mr Booker has refused to issue an apology, and has threatened to publish the material on several other websites. Mr Booker also counterclaimed against Mr Space for defamatory statements he says were made about him by Mr Space on MySpace. Mr Space obtained an injunction preventing Mr Booker from further publication of the alleged defamatory statements and gave to the court the usual undertakings. An associate in your firm inadvertently filed and then served a Notice discontinuing the claim against Mr Booker.

You are required to:

- (a) prepare a letter to Mr Space advising on:
 - (i) the steps required to discontinue the claim against Miss Tweeter; and
 - (ii) the steps which may be taken to continue the claim against Mr Booker, and the likelihood of success; and
- (b) prepare the notice of discontinuance of the claim against Miss Tweeter as it would appear when being filed in the Supreme/High Court.

QUESTION 4

In 2010 your client, who resides overseas, commenced a claim in the Supreme/High Court for declarations as to entitlement to certain property. After several failed attempts at settlement, a case management conference (CMC) was held in 2011 and trial was scheduled for January 9, 2012 for 5 days. All parties were in attendance at the CMC.

At the pre-trial review in October 2011, all parties were also present. In December 2011 the Defendant's attorneys-at-law successfully applied to the court to remove their names from the record as representing the Defendant. The court also granted an order vacating the trial date to enable the Defendant to engage new counsel and set a new trial date of September 17, 2012 for 5 days.

In July 2012 your firm was served with a Notice of Change of Attorneys filed on behalf of the Defendant along with an application for security for costs scheduled for hearing on September 24, 2012. The Defendant's new attorneys-at-law have written to you to advise that they intend to ask the court to adjourn the trial so that the application for security for costs can be heard.

You are required to advise your client on:

- (a) the likelihood of success of the Defendant's intended application for an adjournment;
- (b) the factors the court would likely take into consideration when hearing such an application;
and
- (c) the costs order the court should make if:
 - (i) the application succeeds; and
 - (ii) the application fails.

QUESTION 5

You are required to indicate what order for costs should be made, or to whom costs should be paid, in each of the following circumstances, briefly explaining the meaning of each order and the reasons you consider it to be appropriate:

- (i) The Claimant files a notice of discontinuance against the Defendant;

- (ii) The court orders that the notice of discontinuance be set aside on the basis that there was an outstanding undertaking to the court, and the Claimant was therefore not at liberty to discontinue;
 - (iii) The Claimant obtains an order permitting her to discontinue the claim;
 - (iv) The Defendant obtains an order permitting him to appeal the order at (iii) above; and
 - (v) The Court of Appeal allows the appeal of the Defendant/Appellant.
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PART B
LAW OF ASSOCIATION

QUESTION 6

Kenyon Limited is a private limited liability company incorporated in the jurisdiction. Its principal business is the rental of water sports equipment to tourists staying at seaside resorts. The company has enjoyed some success and its directors feel that in order to create a more distinctive brand for their services the name of the company should be changed to Sea and Surf Water Sports Limited.

Advise the directors of the company on:

- (i) the legal issues which may arise in respect of the proposed change of name; and
 - (ii) the procedure which must be followed to accomplish the change.
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QUESTION 7

Answer Either A or B:

(A) Wolf Schuster is a German entrepreneur who owns companies all over Europe. One of them, ANKINA, was incorporated in Sweden and produces and sells furniture and other items for the home. Mr Schuster believes there is a ready market for his company's products in your jurisdiction and wishes to establish a place of business there as an overseas/external company. Mr Schuster has e-mailed an enquiry to your firm as to:

- (i) how his company may establish itself as an overseas/external company in your jurisdiction; and
- (ii) what, if any, ongoing obligations the company would have once it was established.

He has asked that your detailed response to his e-mail message be sent to his company's general counsel, Hans Pretzel.

Draft the response to Hans Pretzel.

Or:

(B) The partner with whom you work at the law firm of LeBranch and Associates, has asked that you meet with and advise a group of darts players who wish to form a club. It is not clear what their objectives are but it will involve playing darts.

In preparation for your meeting, prepare a checklist of the matters which are important for you to receive instructions on in order to advise the group as to the type of club which you would recommend, giving reasons for each item on the list.

QUESTION 8

Your friend, Lionel King, is one of four partners in an engineering firm. He advises that the firm, a general partnership, has no written partnership agreement and he needs your guidance as follows:

- (a) One of his partners, Henry Billings, is somewhat overbearing and often takes unilateral decisions on the firm's routine operations. Generally, this has been convenient as things

get done quickly, and it appears that none of the partners has ever objected to it. Recently, however, Henry unilaterally decided to enter into a long term rental of an apartment in a rural town for use by the partners when working in the area. Lionel thinks this was unwise and unnecessary. He wants advice on his rights in respect of the management of the firm and on whether he can resist being made liable for the rental.

- (b) Last week, one of the firm's clients saw Lionel at a car show and mentioned that after the last routine maintenance inspection of the client's factory, which the firm is contracted to do, the client was asked by one of the partners to draw the usual cheque for fees in the partner's name instead of the firm's. Lionel is disturbed to receive this information and wants to know what he and his other partners can do about it, if it turns out that the partner involved has taken the money for himself.
- (c) One day two months ago, the office manager for the firm called Lionel in some distress as the office had run out of certain supplies. As he was the only partner in town at the time and their mandate at the firm's bank was that at least two of them had to sign any cheques drawn on the firm's account, he had paid for the items with his personal credit card. He also gave the office manager some money for petty cash. He had since claimed for both amounts but felt that there was some reluctance on the part of his partners to repay him. He wants clarification of his rights in respect of the matter.
- (d) While the other partners do not seem bothered by the absence of a written partnership agreement, Lionel would at least like to know from you whether there is any advantage in having one.

Advise Lionel.

QUESTION 9

Gracie Levy is a successful businesswoman who requires general advice on how to proceed in respect of the following matters:

- (a) She has a private limited liability company, Nirvana Limited, which she formed together with her ex-husband, Will, to hold the matrimonial home and other real estate. The company was never used for this or any other purpose because the marriage ended dramatically before any real estate was purchased. Gracie and Will own one share each in the company. Gracie wants to have it removed from the companies register by the most expeditious means possible.

- (b) Gracie owns another private limited liability company, Retroguard Limited, together with her brother, Andrew, which provides solid waste management services. The government entity which offers similar services has not been performing anywhere up to par and there is therefore a burgeoning market for Retroguard's services. She wants to raise additional funds by inviting the public to subscribe for shares in the company.

Advise Gracie.

END OF PAPER