

COUNCIL OF LEGAL EDUCATION

NORMAN MANLEY LAW SCHOOL

**LEGAL EDUCATION CERTIFICATE
SECOND YEAR EXAMINATIONS, 2006**

CIVIL PROCEDURE AND PRACTICE II

(WEDNESDAY, MAY 17, 2006)

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 ink.

PLEASE REMAIN SEATED UNTIL YOUR SCRIPT HAS BEEN COLLECTED.

PART A

QUESTION 1

A claim in negligence was commenced in June 2005 against St. John's Hospital and Dr. Peta-Gaye Campbell arising from an alleged incorrect diagnosis of the claimant's/plaintiff's condition. The firm in which you are an associate represents the hospital and you had advised the hospital based on the preliminary information received when drafting the defence that the claim had about a 50 percent chance of succeeding against the hospital.

At a case management conference held on February 1, 2006, with the concurrence of both parties, an order for standard disclosure was made. It was also ordered that witness statements were to be exchanged by May 26, 2006, a pre-trial review be held on January 9, 2007, and the trial set for 5 days beginning March 12, 2007.

The order required standard disclosure by April 9, 2006, the judge and the attorneys-at-law not having realized that that day was a Sunday. On April 7, 2006, Dr. Campbell's attorney-at-law on her behalf filed and served a list of documents, listing 8 documents numbering 16 pages. On April 10, 2006, the doctor's attorney-at-law sent copies of all the documents on her list to the attorneys-at-law representing the other parties. The following day, the claimant's/plaintiff's attorneys-at-law filed their list of documents, with about 50 documents with a total length of approximately 150 pages. They have not sent copies of the documents on the list to any of the parties.

To comply with the requirements of standard disclosure, the hospital had to review thousands of pages in documents from different hospital wards and produce the list. The hospital staff, thinking the exercise would have taken about a week, started working on it on March 20, 2006. The estimate of a week was a

significant underestimate. Even with a nurse working full-time on it under the supervision of the hospital's chief administrator, the hospital was unable to have the list ready until May 15, 2006. On that day the list was filed and served and copies of all the documents were sent to the parties' attorneys-at-law. Meanwhile, on April 13, 2006, not having received the hospital's list of documents, the claimant/plaintiff had filed an application for an unless order. The order was made by the Court without hearing any party, and provided that the hospital's defence was to be struck out unless the hospital made standard disclosure by April 20, 2006. The claimant's/plaintiff's attorneys-at-law were notified on April 17, 2006, that the order had been made. The following day, they served the order on your firm. The order was left on your desk but did not come to your attention because you were out of office and have only returned today (May 17, 2006).

Prepare a memorandum to the partner in the firm with whom you are appearing in the matter. The memorandum should indicate –

- (a) what application(s) are to be made to the court;
 - (b) the terms of the specific orders that would be included in the application for court orders; and
 - (c) the likelihood of the application(s) succeeding.
-

QUESTION 2

The defendant in a claim for breach of contract made a Part 35 offer to settle, which was ignored by the claimant/plaintiff. The claimant/plaintiff subsequently

applied for an interim payment, and in his affidavit in support of the application, made reference to the fact that a part 35 offer had been made. The defendant objected to the paragraph in the affidavit making reference to the offer but, without ruling on that objection, the Court ordered the interim payment.

At short notice, you have been asked to be junior counsel for the defendant in the trial. At the end of the first day of trial, you discover that a copy of the order for interim payment and the claimant's/plaintiff's affidavit in support of it are in the judge's bundle prepared by the claimant's/plaintiff's attorneys-at-law. Apparently, no one else has yet noticed this.

Prepare a memorandum to your senior counsel setting out your views on the issues that arise, the course that should now be taken and your reasons.

QUESTION 3

Answer both (a) and (b).

- (a) A search order obtained by the claimant/plaintiff was served on the defendant at 6:10 p.m. on a Friday. The defendant contacts you while the claimant/plaintiff and her attorneys-at-law are outside. You ask to speak with the independent/supervising attorney-at-law, but are told that none has come, and the order does not provide for one. The defendant also tells you that there are affidavits that have been given to him along with the order, and they do not mention the fact that before filing a claim the claimant/plaintiff had written to him and he had denied liability and set out his reasons for so denying in detail.

Advise the defendant.

- (b) Discuss the undertakings that are usually to be given and the provisos that are usually to be imposed when a court is asked to make a freezing order.
-

QUESTION 4

Answer both (a) and (b).

- (a) As attorneys-at-law for the defendant company in a claim in which an order for standard disclosure has been made, you have made copies of all the documents on your client's files. You now possess originals or copies of the following documents (from your own files or those copied from the defendant company's files):
- (i) a letter bearing a date in January 2006 from the claimant's/plaintiff's attorney-at-law to you consenting to the filing of the defence out of time;
 - (ii) an internal memorandum bearing a date in May 2005 from the defendant company's vice president of finance to the defendant company's president saying he thinks the claim should be settled because the defendant company is clearly liable;
 - (iii) an internal memorandum bearing a date in June 2005 from the defendant company's in-house attorney-at-law the contents of which are similar to those of the memorandum at (ii) above; and

- (iv) a letter bearing a date in February 2006 from you to the claimant's/plaintiff's attorneys-at-law asking whether their client would accept \$2,000,000 in full and final settlement of the claim.

Prepare a List of Documents, in which you need not list any documents not set out above, and briefly explain your treatment of each document.

- (b) A document which is the subject of legal professional privilege has been included in a list of documents and a copy sent to the other party's attorneys-at-law in response to their request for inspection.

Discuss what steps may be taken, and by whom, concerning the use of the documents in the proceedings and what is the likely outcome of those steps.

QUESTION 5

John Grief obtained a Bachelor of Laws degree, but rather than study for the Legal Education Certificate, decided to become an engineer. Acting in person, and using a fixed date claim form, he filed a claim against the Attorney General seeking a declaration from the court as to the interpretation of a provision in the Mining Act, arising from a dispute with the Minister with responsibility for Mining as to its true construction. The Minister is alleging that properly construed, Mr. Grief requires a mining licence to carry on certain works. Mr. Grief has not sought such a licence because he is of the view that one is not needed.

After acknowledgment of service, the Attorney General's Department wrote to Mr. Grief indicating that they intended to file a defence to the claim as well as

counterclaim for breach of the Act. On the day Mr. Grief received that letter, a decision of the Judicial Committee of the Privy Council was delivered interpreting a similar provision in the New Zealand Mining Act. Based on the decision, a person in Mr. Grief's position would need to obtain a mining licence. Two days later, Mr. Grief filed a notice of discontinuance, which he then served on the Attorney General's Department which ignored the notice and proceeded with its preparations for the first hearing and the filing of their defence and counterclaim. The court's registry also appears to have ignored the notice filed by Mr. Grief, as it did not vacate the date for the first hearing.

At the first hearing, Mr. Grief contended that the hearing of neither the claim nor the counterclaim should proceed. He also asked the judge to order that, in the light of the Privy Council's decision, he should not pay costs to the Attorney General. The representative from the Attorney General's Department indicated to the judge that he did not agree with Mr. Grief's attorney.

After hearing Mr. Grief's arguments, and before hearing the arguments on behalf of the Attorney General, the judge adjourned the matter part-heard. In preparation for the continuation of the hearing, the judge has asked you, her judicial clerk, to prepare an opinion advising on the issues she should consider.

Prepare the opinion.

PART B

LAW OF ASSOCIATION

QUESTION 6

Aliya Hinds is a business consultant, offering her services to small enterprises in your jurisdiction. At present Ms Hinds conducts business under the name “**Ali Hinds & Associates.**” However, she is now discussing with a long time friend and colleague, Jaswinder Grant, (also a business consultant) how they could formalize their collaboration in business in such a way as to attract bigger business and generally to expand their client base.

Ms Hinds tells you that since setting up her business almost 5 years ago, she has operated substantially on her own although she has informally collaborated with Jaswinder from time to time on specific projects. She claims that In the five years of business she has managed to build up significant goodwill in the market and would like to carry on business in a name similar to the one under which she now operates.

Although she is hoping that the business relationship with Jaswinder will be a long term one, at this stage she would prefer to start by putting in place some formal arrangement for collaboration but without the burden of any involved regulatory compliance issues attached. She would also like to have in place a clear exit strategy in the event that things do not work out with Jaswinder.

Advise Ms Hinds on the procedural steps she should take to restructure her business to accommodate further collaboration with Jaswinder Grant and the matters she should take into account to address her concerns.

QUESTION 7

The Member of Parliament for the Shooters Hill community has asked that you make a presentation to delegates at the next constituency branch meeting on the approaches that may be adopted and the procedural steps to be taken to set up an organization to be called “Delegates for Justice” (“DFJ”).

The objective of the group is to promote love and unity in the community in general by educating and training members of the community on the available options for dispute resolution as provided by the judicial system, promoting the concept of a crime and violence free community, denouncing the use of violence, particularly vigilante justice in dispute resolution in the community, among other things. It is hoped that the cause will spread beyond the boundaries of the Shooters Hill community and across the island. Funding and other forms of support from international sources is high on the DFJ agenda.

Prepare a draft of the presentation to be made to delegates on the following:

- (i) the available options for setting up the DFJ organisation and your recommended approach in the circumstances;
- (ii) the procedural steps to be taken to organize DFJ based on your recommendation in (i).

You are required to state the document(s) required (if any) and the contents of such documents.

QUESTION 8

Your client is a group of investors that has just acquired the business of VAM Telecoms Ltd, a private company limited by shares, incorporated under the laws of your jurisdiction. The company had faced severe financial problems for some time and the new investors would like to give it a new image and a fresh start. The group is well known regionally and wishes to establish a presence in the neighbouring islands so as to capitalise on the opportunities presented by a liberalised regional telecommunications market and the Caribbean Single Market and Economy (CSME) whenever that becomes a reality.

Advise the group on the following matters:

- (i) The procedural steps to be taken to change the name of the company to **“FAST Telecommunications Ltd.”**
 - (ii) Outline the contents of the required document(s) to effect the name change.
 - (iii) What procedural steps can be taken by the group to establish a business presence in the territories of the region?
-

QUESTION 9

Charles Buntin is the sole shareholder and managing director of Buntin Auto Sales Ltd, a used car business in your jurisdiction. Increasing competition in the used car market has caused his once vibrant business to suffer tremendous loss in patronage and consequently a steady decline in returns. The financial

statements for the last quarter of the current financial year show that the company has substantial assets in dollar value supported by an inventory consisting of real estate and a large fleet of vehicles. However, there is very little cash available for the payment of debts as they become due.

Mr Buntin tells you that in the last few days he received letters from two of his main creditors which raise serious concerns for the future of his business. The first creditor, Finance Bank International plc, has threatened to appoint a receiver consistent with the terms of the debenture as the company is now two months in arrears of payments of its loan which is secured by the company's warehouse and office buildings. Spare Parts 'R' US, the company's main supplier of spare parts has threatened to get a court order to have a liquidator shut down the company if it cannot get its outstanding debt paid in short order.

Mr Buntin seeks your advice on –

- (i) the differing roles of the receiver and the liquidator in the life of a company;
- (ii) any immediate steps that he can take to address his difficulties with all of the company's creditors since it seems clear that the chances of successfully negotiating for more time to pay are remote in the circumstances.

Advise Mr Buntin.
