

COUNCIL OF LEGAL EDUCATION

NORMAN MANLEY LAW SCHOOL

**LEGAL EDUCATION CERTIFICATE
SECOND YEAR EXAMINATIONS, 2008**

CIVIL PROCEDURE AND PRACTICE II

(WEDNESDAY, MAY 14, 2008)

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 a separate answer booklet.**
- (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

Brook Inc., a company incorporated in Delaware USA, has been doing business in your jurisdiction for many years. Brook Inc. is a distributor operating out of premises leased from your client, Property Owners Limited. It also leases (but from other persons) the trucks used to distribute the retail goods for which it is distributor in your jurisdiction. Over the past year, there have been delays by Brook Inc. in paying Property Owners Limited rent and it has now stopped paying altogether. It contends that Property Owners Limited has failed to properly maintain the leased premises. The lease does not say who is responsible for repairs. Property Owners Limited contends that the premises are properly maintained and that the problem is that Brook Inc. does not take reasonable care of the premises, and does not even conduct minor repairs as any lessee would be expected to do. Property Owners Limited has brought a claim against Brook Inc., which has recently filed a counterclaim.

The management of Property Owners Limited is concerned about whether, if it succeeds on its claim and its defence to the counterclaim, it will be able to recover its costs from Brook Inc., and has consulted you for advice on the making of an application that might alleviate its concern.

You are required to:

- (i) Advise Property Owners Limited on:
 - (a) what application may be made that might alleviate its concern;
 - (b) whether the application is likely to succeed;

- (c) when the application should be made.
 - (ii) Prepare a draft of the Order the Court should make if the application succeeds.
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QUESTION 2

Several weeks ago, the head of state in your jurisdiction, purporting to act under powers given to him/her by the Constitution, dismissed members of the Police Services Commission on the basis that they had been guilty of misconduct. The head of state did not provide the members with a hearing, as he/she was acting on the advice of the head of government. The head of government, however, also did not provide the members with a hearing. The leader of the opposition wishes to challenge the dismissal of the members.

The firm in which you are an associate has been engaged to represent the leader of the opposition. You are required to prepare a memorandum to senior counsel in the firm which must:

- (i) outline the procedure (through to judgment) by which the dismissal may be challenged by the leader of the opposition;
- (ii) advise on the difficulties your client will face in pursuing the contemplated challenge; and
- (iii) advise on the full terms of the order the Court should make (including as to costs) in the event that the opposition leader's challenge is successful, and your reasons for considering an order in those terms to be appropriate.

QUESTION 3

You represent the defendant in a claim for breach of contract. Although your client has consistently denied liability for the claim, he made an offer to settle the claim without prejudice save as to costs pursuant to the Civil Procedure Rules. The claimant/plaintiff never responded to the offer and the time for acceptance has long passed.

Three days before the trial was to commence, the claimant/plaintiff made an application for an interim payment and exhibited to her affidavit in support of the application a copy of the offer to settle. Although you objected to the exhibiting of the offer, your objections were overruled. The Court refused to strike out the paragraph exhibiting the offer and ordered the interim payment. The estimated duration of the trial is 5 days, and the interim payment was due to be paid prior to the commencement of the trial.

On the first day of the trial, just before the Court adjourned for the day, the claimant's/plaintiff's attorney-at-law referred the Court to both the offer to settle and the order for interim payment, complaining that the payment ordered by the Court had not been made.

Your client is still very upset about the interim payment order and is now also distressed about the comments made by the attorney-at-law for the claimant/plaintiff. He asks you what, if anything, can and should be done about his concerns.

Prepare a letter advising the defendant.

QUESTION 4

Your client owns a store in your jurisdiction which sells compact discs, and has an agreement with the recording label “Rela” to distribute CDs under their label in your jurisdiction.

Recently, however, and notwithstanding your client’s agreement with Rela, Rela entered into an exclusive agreement with Music Unlimited for the distribution of Rela CDs in your jurisdiction.

Music Unlimited, having seen Rela CDs in your store, and without asking any questions of either your client or Rela, brought a claim against your client alleging that the CDs your client is selling must be counterfeit. Music Unlimited obtained a search order which was served on your client by Music Unlimited’s attorney-at-law, who was the only person serving the order.

Your client permitted the search, and the attorney-at-law left with all the Rela CDs that were in your client’s store, with the consequence that your client’s store has very little on its shelves and cannot remain open. Your client has consulted you for advice on what steps can be taken now in relation to the search order obtained by Music Unlimited.

Advise your client on:

- (i) any application(s) that may now be made to the Court; and
- (ii) what order(s) you would expect the Court to make, including as to costs, and why.

QUESTION 5

Three parties, Adamson, Brown and Chang executed a document. Chang later contended that the document amounted to an enforceable contract, but both Adamson and Brown disagreed. Chang brought separate claims against each of them for damages for breach of contract. In the claim against Adamson, Chang brought an application for summary judgment. After some questioning by the judge, who suggested that there was clearly a contract, Adamson's attorney-at-law eventually conceded that there was an enforceable contract and the Court ordered "*By consent, judgment for the plaintiff/claimant Chang for damages for breach of contract to be assessed.*" However, the claim by Chang against Brown proceeded to trial, where the trial judge ruled that on careful examination, there did not appear to be an intent to create legal relations and the document therefore did not amount to a contract.

Chang has now commenced a claim against your client, Davidson, alleging tortious interference by Davidson with Chang's "contract" with Adamson and Brown. Having been made aware of what happened in the claims involving Adamson and Brown, Davidson is considering making an application to strike out Chang's claim.

You are required to:

- (i) prepare a draft of the application to be filed in Court (you are not required to prepare the affidavit(s) in support of the application); and
- (ii) prepare a letter to Davidson advising him on whether you expect the application to succeed and why.

PART B

LAW OF ASSOCIATION

QUESTION 6

John Finch and Andrew Hogarth have recently been admitted to practise as attorneys-at-law. While they were students they had sometimes speculated on their future and fancied themselves partners in their own firm. They were in fact good friends despite their different personalities and outlooks on life. Andrew was the earnest one. Cautious, trustworthy and always on top of his work, he was highly organized. Everyone expected that he would make a fine lawyer one day. John was more carefree and impulsive but very likeable and bright. In fact in the opinion of some he was “too bright for his own good”. He was also not particularly industrious and figured he could “wangle” his way out of any situation.

Prior to their graduation from Law School they each applied to various firms and companies for positions as attorneys-at-law. Neither of them has been successful in obtaining a job. John and Andrew have discussed the situation in which they both find themselves. John is convinced that the solution is for them to enter the profession as partners in their own firm. In addition he has said to Andrew that “We could call ourselves something really original, not anything as stuffy as Finch and Hogarth!” Andrew has agreed to think about it.

Andrew has consulted with you on the matter. Advise him on the following:

- (i) the procedural steps and formalities necessary to form the partnership and commence practice;
- (ii) in light of partnership law principles, any concerns which he ought to have in respect of the proposed partnership with John and the steps which

Andrew might take to protect himself if he does decide to enter into partnership with his longtime friend.

QUESTION 7

Amy, Nadine and Marcia are all mothers of children with physical disabilities. Caring for such children is difficult and is often the source of great stress. They have found that their friendship, which provides each of them with two other persons who understand and are sympathetic with their situation, has helped them greatly in coping with their problems.

From their time spent in doctors' waiting rooms and at physiotherapists they have become aware that there are in fact many mothers in a similar situation but without the type of support which they enjoy from each other.

Amy, Nadine and Marcia want to form an association to which mothers in a similar situation may belong and in which problems and solutions concerning the care of these children may be shared. They have no desire to make any profit from the endeavour and would prefer something which is not subject to a high degree of regulation. Nadine has called you, her childhood friend, to ask your advice on the matter.

- (i) Advise Nadine on the options available to her for forming an association of concerned parents to pursue the objectives outlined above and the type of association that you would recommend in the circumstances.

- (ii) Outline the steps and the document(s) required or recommended in order to form the type of association which you recommend including a description of the contents of such document(s).
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QUESTION 8

Answer either (a) or (b):

- (a) Antoine Havital, Harry Wansome and Barrington Folfash each own 1000 shares in HBW Chemicals Limited and are the company's directors. The company has been very successful since its inception and the directors have enjoyed a cordial relationship. All three are employed in the business.

Recently, however, Antoine who is Managing Director and Chairman of the company has become overbearing and domineering and has been running the business as if he were a sole proprietor. Barrington, who was never a particularly strong personality, has got so fed up that he has transferred his shares to Antoine and resigned as a director and employee of the company.

There is no communication between Antoine and Harry, despite many attempts by Harry, who is also the company secretary, to talk with Antoine about the situation. Harry has also recently learned from the company's accountant that Antoine has used company funds to purchase a car for his girlfriend.

Harry has reached the end of his tether and simply wants to bring the matter to an end.

Advise Harry on:

- (i) the legal option(s) open to him in the circumstances, justifying those option(s) by reference to the facts as well as relevant legal principles; and
 - (ii) the procedural steps involved in exercising those option(s).
- (b) You have recently been appointed the Corporate Secretary and Legal Officer of Enterprise Motors Limited an unlisted public company limited by shares.
- (i) You are planning a retreat with your department and need to make a presentation to them on the responsibilities of the department. Prepare an outline of that segment of your presentation concerning the statutory filing and record-keeping requirements of the company under the Companies Act/Ordinance.
 - (ii) The managing director has told you that the company is preparing to hold its annual general meeting. A junior staff member in your department has sent you a draft of the notice of the meeting which reads as follows:

“NOTICE IS HEREBY GIVEN that a general meeting of the shareholders will be held on May 31, 2008 to do the following business :

1. *To receive, consider and if thought fit, adopt the audited accounts for the year ended March 31, 2008 together with the Directors' and Auditors' Reports thereon.*
2. *To appoint Mr. Ramesh Falkan as a Director of the Company.*
3. *To re-appoint the Auditors, Barnes and Sinclair and authorize the Directors to fix their remuneration for the ensuing year.*
4. *To consider and if thought fit, approve the amendment of the articles of incorporation/association of the company to reduce the quorum required for meetings of the shareholders and directors.*

***New Kid on the Block
Secretary”***

Write a memorandum to the staff member outlining your comments on the draft notice.

QUESTION 9

Jack and Jill Limited is a company which operates a children's clothing store and has done so successfully for some twenty years. The only shareholders are sisters by the name of Mary and Jane Chambers. Just when she thought it was never going to happen Jane has met the man of her dreams, a debonair banker

from Pennsylvania, and is proposing to be married and to migrate to the USA within the year. Jane is not interested in continuing with the business and Mary does not want to do so alone. They have therefore decided to wind up the company.

They have come to you for advice on the steps required to achieve this and on what is involved in the entire process of winding up a company such as theirs. They have also asked whether this process will involve the appointment of a receiver.

Advise Mary and Jane.