

COUNCIL OF LEGAL EDUCATION
NORMAN MANLEY LAW SCHOOL

LEGAL EDUCATION CERTIFICATE
SECOND YEAR EXAMINATIONS, 2012

CIVIL PROCEDURE AND PRACTICE II

(WEDNESDAY, MAY 16, 2012)

Instructions to Students

- (a) Time: **3½ 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.
- (g) **Unless the question otherwise suggests, all questions in Parts A and B 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 in the question.**

PLEASE REMAIN SEATED UNTIL YOUR SCRIPT HAS BEEN COLLECTED.

PART A

QUESTION 1

Local Light Limited is a client of the law firm to which you are employed as an attorney-at-law. Local Light Limited has for several years held the only licence issued under and required by the Electricity Act to generate and supply electricity commercially in your jurisdiction. After hearing rumours that a second licence might be issued in 2007, Local Light Limited consulted the Minister of Energy, who was empowered by the Act to issue licences. The Minister was approached to determine whether such a second licence was likely to be issued as Local Light Limited did not wish to expend significant amounts increasing its generating capacity if, by reason of a licence being issued to another company, the expected growth in demand for electricity from Local Light Limited did not occur. The Minister advised the chief executive officer of Local Light Limited, “No application for another licence has even been received, so you can go ahead with your plans to expand.”

Early in 2012, Newcomer Power Limited was incorporated and made an application to the Minister for the issue of a licence under the Act to generate and supply electricity commercially in your jurisdiction. The Minister wrote Newcomer Power Limited on April 20, 2012 advising that he had decided to issue the licence. The letter was copied to Local Light Limited which was the first confirmation its officers had of the rumours that such a licence was being considered. Local Light Limited immediately instructed your firm, which on April 24, 2012 wrote the Minister indicating an intention to file a claim seeking an order of certiorari, and asking that the Minister not sign the actual licence at this time. The Minister responded, by letter dated April 30, 2012, confirming that he would not sign the licence at this time.

On May 11, 2012, following such procedures as may be required by the Civil Procedure Rules in your jurisdiction, your firm filed a Fixed Date Claim Form. However, on that day, you also received a letter, dated May 10, 2012, from the Minister indicating that having heard from

Newcomer Power Limited in respect of his April 30, 2012 letter, he had reconsidered and had decided that he would issue the licence.

Local Light Limited has asked you to take steps to prevent the issue of the licence to Newcomer Power Limited before the claim is heard by the Supreme/High Court.

You are required to prepare –

- (i) a draft [notice of] application for court orders, based on Local Light Limited's instructions, which should set out the precise terms of the order(s) that will be sought; and
- (ii) skeleton submissions in support of the application, including such order as to costs as the Court will be asked to make.

(The relevant form is available.)

THE FOLLOWING FACTS SHOULD BE USED TO ANSWER BOTH QUESTION 2 AND QUESTION 3:

You are an associate in the law firm Good, Better & Best. The firm has been instructed by insurers, Accident Coverage Insurers Limited (ACIL), to represent Donnie Drivah who was involved in a motor vehicle accident on November 14, 2011 in which two vehicles crashed into an electricity pole which fell and injured the right leg of a pedestrian, Millie Misfortune. Mr Drivah says that he does not remember what happened prior to impact.

On January 2, 2012, the law firm Jump & Sue filed a claim in the High/Supreme Court on behalf of Miss Misfortune against Adrian Alsoh, the driver of the other vehicle involved in the accident, and Mr Drivah. At the case management conference held on April 2, 2012, standard

disclosure was ordered. The pre-trial review has been set for July 30, 2012 and the trial for November 29 and 30, 2012.

Your firm, Good, Better & Best, has in its possession the following documents:

1. A copy of a statement, which is consistent with his instructions to you, given by Mr Drivah to the police on November 15, 2011, the day after the accident;
2. A copy of a letter dated December 22, 2011 from Dr Kingston Knowing to ACIL opining that Mr Drivah suffered a mild concussion which affected his memory of what happened before the impact;
3. A copy of an April 18, 2012 offer by Mr Alsoh's attorneys-at-law (Settle & Leave) to settle the claim, pursuant to Part 35 of the Civil Procedure Rules; and
4. A copy of a letter from ACIL to Jump & Sue dated December 30, 2011 advising that your firm was being instructed in the matter and that any claim could be served on your firm.

ACIL is concerned about the likely costs of defending the claim, when there appear to be no significant permanent injuries to Miss Misfortune. Mr Seymour Senior, the partner with whom you are working on the matter, has recently done an opinion in which he estimates the likely award of damages to Miss Misfortune, in the event of her succeeding on the claim, to be the equivalent in **your currency** of US\$11,000.

QUESTION 2

You are required to prepare:

- (i) A draft List of Documents to be filed on behalf of your firm's client in compliance with the order for standard disclosure (Mr Senior has advised you that Part 1 of Schedule 1 of the List must identify each document and **must not** be by category); and
- (ii) a memorandum to Mr Senior briefly explaining the treatment of each document.

(The relevant form is available.)

QUESTION 3

ACIL has raised with your firm the question of whether an offer to settle, pursuant to Part 35 of the Civil Procedure Rules, should be made on Mr Drivah's behalf. In response to a request from Mr Senior, you are required to prepare:

- (i) a draft offer to settle pursuant to Part 35 based on Mr Senior's assessment of the claim; and
 - (ii) a draft letter from Mr Senior to ACIL's claims manager advising ACIL on why the firm has drafted the offer to settle in the terms set out at (i) above and what would be the effect of the offer being (a) accepted or (b) refused.
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QUESTION 4

You frequently represent Always Defending Limited in their legal matters. They are a local subsidiary of a Delaware corporation, Defenders Corporation Inc., and operate from leased premises using mostly leased equipment and motor vehicles. However, they have substantial balances in their bank accounts, exceeding the equivalent in **your currency** of US\$100,000. The internal legal counsel for Always Defending Limited, Melissa Maha, has advised you of the following:

For several weeks, they have been having a dispute with Onattack Limited regarding invoices from Onattack Limited that have not been paid by Always Defending Limited relating to software purchased by Always Defending Limited. Onattack Limited contends that invoices are due for the purchase, installation and maintenance of the software. Ms Maha has advised you that payment was made for the purchase of the software licence, and part payment was made, but the installation was incomplete, as a consequence of which the sums charged for installation and maintenance are not yet due. Onattack Limited disagrees.

Yesterday morning, Always Defending Limited sent a bearer to their bank to make a withdrawal and he was told that due to a Court Order, no withdrawal could be made from the account. Ms Maha says that early that afternoon, while at the office, she received a Claim Form seeking an award of the equivalent in your currency of US\$50,000 plus interest and costs. With it, she received Particulars of Claim/Statement of Claim with various accompanying forms, a [Notice of] Application for Court Orders, Affidavit of Anna Jackson (Managing Director of Onattack Limited) and a document entitled "Without Notice Freezing Order". The Order restrained Always Defending Limited until judgment from disposing of any of their assets. Ms Maha expressed the concern that based on the Order, Always Defending Limited would be unable to deal with their bank accounts at all, and could not pay bills that were legitimately due or make salary payments.

This morning, Ms Maha provided you with copies of the documents, from which you noted that Ms Jackson's affidavit summarized the information Ms Maha had provided as to why Always Defending Limited was refusing to make further payments, but disputed the accuracy of that information. You have also noted that based on the language of the order, Ms Maha's conclusions regarding the payment of bills and salaries was correct. She has asked that you make an appropriate application to the Court based on these instructions.

You are required to prepare:

- (i) a draft [notice of] application for court orders, based on Always Defending Limited's instructions, which should set out the precise terms of the order(s) that will be sought; and
- (ii) a letter to Ms Maha advising her on what order(s) you expect the court to make on the hearing of the application, including as to costs, and why.

(The relevant form is available.)

QUESTION 5

Following a five day trial of a claim for breach of contract for the supply of bulk paper, judgment was awarded in favour of the Claimant, Pansie Press (trading as "Hot Press"), against your client, the supplier, Wright Wronged Limited. Your client had contended that there was no breach as the paper was supplied on the day required (May 5, 2010), but "Hot Press" was closed at the time and refused to take the supply on the following day. The contract required delivery of the paper on May 5, 2010, but did not specify a time. Ms Press refused to accept

delivery the following day or any day after that, contending that the contract was already breached.

At the trial, you had contended on behalf of Wright Wronged Limited that there was no breach of contract but, if there was, Ms Press had failed to take reasonable steps to mitigate her loss as if she had taken delivery the following day from Wright Wronged Limited or another supplier, she would have been able to operate her business as usual. In giving judgment for Ms Press, the Court awarded no compensatory damages, but awarded her exemplary damages in an amount equivalent in **your currency** to US\$500,000. The reasons for judgment did not say why exemplary damages were awarded.

Wright Wronged Limited has pointed out to you that the damages award exceeds by several multiples all the known assets and annual income of both Ms Press and Wright Wronged Limited, both of which are fairly small businesses. Wright Wronged Limited has instructed that you appeal the judgment. The company is very concerned about being obliged to pay the judgment now, and has indicated that it would be impossible to pay all of the judgment even in installments over the next few years.

You are required to prepare:

- (i) a draft [notice of] application for court orders, based on Wright Wronged Limited's immediate concern about paying the judgment, which should set out the precise terms of the order(s) that will be sought; and
- (ii) a letter to Wright Wronged Limited advising on the likely success of the application and the order(s) likely to be made, including as to costs.

(The relevant form is available.)

PART B
LAW OF ASSOCIATION

QUESTION 6

You are a new associate at a prominent law firm in the jurisdiction. Henry Thomas and his wife Millicent have asked to see an attorney-at-law at the firm in relation to a proposed venture. The note from the administrative assistant, who received the call from Mr Thomas, indicates that Mr and Mrs Thomas currently operate a local pastry-making business on an entirely informal basis. A third party, James Williamson, who is a trained pastry chef, is interested in investing in the business and being an active participant in its operation. Mr and Mrs Thomas are amenable to going into business with him as it provides opportunities for improvement and expansion but are desirous of implementing a more formal business structure. They therefore require advice on the type of business organisation which they should adopt.

Your supervising attorney, Vanessa Vanderkamp, has arranged to meet with the couple but has asked that you attend the meeting with her. Ms Vanderkamp has asked you to prepare a memorandum to her outlining the types of business organisations which might suit the purposes of Mr and Mrs Thomas and the further instructions which the firm should get from them in order to advise on the one they should utilise. You have been told that your memorandum should give reasons for your choice of possible business organisations as well as explain the need for the further instructions identified by you as required.

Prepare the memorandum to Ms Vanderkamp as requested.

QUESTION 7

Giselle Redwood is a freelance interior designer and a graduate of the internationally recognised Marston’s School of Design. Richard Tracey graduated as an interior designer from the same school a few years before Miss Redwood and the two have worked together, on an *ad hoc* basis, on a number of commercial and residential building projects. They have decided to place their business relationship on a more long-term footing by entering into a general partnership under the name “R & T Interiors Inc.”. Miss Redwood and Mr Tracey have consulted you in respect of the matter and, in particular, have asked your advice on:

- (i) the steps to be taken to form the partnership;
- (ii) the contents of any documents which need to be drafted in connection with the formation of the partnership; and
- (ii) any legal issues which arise with respect to the proposed name.

Write an appropriate letter of advice to Miss Redwood and Mr. Tracey.

QUESTION 8

Mr Oswald Watson is a faithful member of the Roman Catholic Church in the jurisdiction. The Church operates many schools, both primary and secondary. The operation of the canteens is a sore point in these schools as, although they should be a source of income to the schools, they invariably operate at a loss. The church hierarchy has determined that rather than each school operating its own canteen, concessionaires should be procured to do so for appropriate

concession fees. It has sought applications in this regard from its church members across the jurisdiction.

Mr Watson, a sole proprietor, already operates canteens at two public schools and is deeply desirous of making applications for concessions to operate canteens at three of the Church's schools which are located nearby. Mr Watson wishes to incorporate his business as church insiders have advised that this would likely cause his application to be more favourably considered. He proposes that the company be called National Canteen Services and that it be as private and as minimally regulated as possible.

Mr Watson has asked for your advice on:

- (i) the steps which need to be taken and documents prepared in order to establish the company (he has indicated that, if legally required, he would include his wife, who helps him out in the business from time to time, as a co-owner); and
- (ii) the name which he has chosen for the new company.

Prepare an appropriate letter of advice to Mr. Watson.

QUESTION 9

Answer Either (A) OR (B)

(A) Better Homes Limited is a private limited liability company incorporated in the jurisdiction and engaged in residential real estate development. For many years the company was highly successful and its shareholders (who are also directors of the company) enjoyed significant returns on their investment in it. In recent times business has become more difficult.

The company is able to meet its expenses and generate a small profit but the shareholders/directors, who are aging, are beginning to feel that it may be time to bring the life of the company to an end and for them to retire. Better Homes Limited has substantial assets and, while it is indebted to the bank for a substantial sum, its debts are significantly less than the value of its assets.

Advise the shareholders on:

- (i) the way(s) in which they may achieve their objective of terminating the company's life;
- (ii) if there is more than one way to do this, the course of action which you would recommend, giving brief reasons for your recommendation; and
- (iii) the procedure involved in your recommended course of action from initiation of the process to completion.

OR:

(B) Matthew Mothersill, a well known human rights activist, wants advice on forming an association in his district. The objectives of the association will be to foster greater interest in, and knowledge of, human rights issues which arise within and outside of the jurisdiction and also of lobbying the government in respect of human rights policy or legislative initiatives. He is certain that, if persons become aware of how these issues have the potential to affect the quality of life for all and how easily human rights can be eroded if there is insufficient vigilance by ordinary citizens, the association will soon be a force to be reckoned with. At the moment, he knows of at least ten other persons who are interested in becoming members of the association. He is wary however of establishing an entity which will be very formal or subject to regulation.

Mr Mothersill's father, who is very sympathetic to his son's cause, is willing to donate an old house, which he inherited from a relative, as the headquarters of the association. Matthew Mothersill has consulted you for advice on:

- (i) the appropriate legal structure for such an association with a brief explanation of its legal characteristics;
- (ii) the steps and any documentation required to establish it; and
- (iii) the usual and recommended content of any documentation identified by you at (ii) above.

Advise Matthew Mothersill.

END OF PAPER