COUNCIL OF LEGAL EDUCATION

NORMAN MANLEY LAW SCHOOL

LEGAL EDUCATION CERTIFICATE
FIRST YEAR EXAMINATIONS, 2006

LEGAL DRAFTING AND INTERPRETATION

(FRIDAY, MAY 26, 2006)

Instructions to Students

(a) Time: **3 ½ hours**

(b) Answer **FIVE** questions.

(c) 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**.

(d) It is unnecessary to transcribe the questions you attempt.

(e) Answers should be written in ink.

PLEASE REMAIN SEATED UNTIL YOUR SCRIPT HAS BEEN COLLECTED.

QUESTION 1

Your client Ken East, was recently found guilty of rioting contrary to Section 2 of the Riot Act, which states –

> "2. If any persons, to the number of twelve or more being unlawfully, riotously and tumultuously assembled together to the disturbance of the public peace at any time after the passing of this Act, and being required or commanded by any one or more Justices of the parish or place where such assembly shall be, by proclamation to be made in the Queen's name, in the form hereinafter after directed, to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, shall, to the number of twelve or more, notwithstanding such proclamation made, unlawfully, riotously and tumultuously remain or continue together by the space of one hour after such command or request made by proclamation shall be adjudged felony, and the offenders therein shall, upon conviction, be liable at the discretion of the Court to be imprisoned for life with or without hard labour.

The evidence before the court was that on the 5th day of February 2006, at about 6:20 a.m., a crowd in excess of 1000 adults and a number of children blocked the main road in Queen's Town and thereafter behaved in a riotous and tumultuous manner.

About 10 minutes after the crowd had gathered on the road a detachment of police arrived on the scene. The police inspector in charge of the detachment then requested the assistance of a Justice of the Peace to dispel the crowd. At 6:50 a.m. a Justice who lived nearby came to the Inspector's assistance and standing within fifty feet of the crowd and using a megaphone the Justice made the proclamation as prescribed in Section 3. The Section states -

> "3. The order and form of the proclamation that shall be made by the authority of this Act shall be as hereafter follows, that is to say, the Justice, shall among the said rioters, or as near to them as he can safely come, with a loud voice, command or cause to be commanded silence to be while proclamation is making, and after that shall openly, and with a loud voice, make, or cause to be made, proclamation in these words or like in effect: "Our Sovereign Lady the Queen chargeth and commandeth all persons being assembled immediately or disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the riot Act – God Save the Queen".

The police thereafter remained on the scene attempting to dispel the crowd which had gradually diminished, until there were about 50 adults on the road. All the children had dispersed. At approximately 7:30 a.m. they proceeded to arrest those persons, including Ken East.

Ken wishes to appeal his conviction and has sought your advice.

He tells you that on the morning in question at about 7:15 a.m. he was on his way to work travelling on a bus when the bus came to the road block. It could not proceed any further so he came off the bus along with the other passengers and walked though the crowd with the hope of getting a bus on the other side of the crowd. Suddenly he was held by two policemen and arrested along with many others and taken to the nearby police station.

Before the magistrate he was unrepresented, but he tried to explain that he was not a rioter and that he was on his way to work. However, the magistrate said it was absurd for Ken to believe that the police were required to identify persons who were present at the outset of the riot in order to determine who was still there beyond the hour as prescribed.

Advise Ken. Give reasons.

QUESTION 2

Rory and Rosie Visa were married in July 2004. Rosie, who is a citizen of a foreign state, had come as a visitor to your jurisdiction had met Rory and they had fallen in love. Three weeks later they were married and soon after Rosie returned home to begin proceeding to permit Rory to join her. But a number of obstacles arose that have delayed matters.

In the meantime, Rory met and fell in love with another overseas visitor, Angie, who is very wealthy, and whose national laws are less stringent on overseas husbands.

Rory is anxious to divorce Rosie in order to marry Angie. In March 2006 he instructed Perry Mason, his attorney-at-law, to commence proceedings for a divorce.

In April 2006 Perry filed a petition for divorce, but the Registrar requested that the petition be withdrawn because it did not comply with section 8(1) of the Matrimonial Causes Act. Section 8 states as follows –

> "8(1) No petition for a decree of dissolution of marriage shall be presented, without the leave of the Court, unless at the date of the presentation of the petition two years have passed since the date of the marriage.
>
> (2) A Judge of the Court may, upon application being made to him in accordance with rules of court, grant leave for a petition to be presented before two years have passed if he is satisfied that one of the parties have with the assistance of an approved marriage counselor attempted a reconciliation and there are special circumstances that would justify the hearing of the petition."

Perry wishes to apply to the court on behalf of Rory, for a direction to be issued to the Registrar to accept the petition.

Perry submits as follows –

1. A petition for divorce is ‘presented’ to the court by the petitioner giving oral evidence in support of the petition and seeking that the remedy claimed in the petition be pronounced by way of a *decree nisi* and for further orders.

2. Section 8(1) refers to a restriction as to the time of presentation of a petition not a restriction as to the time of filing.

3. A petition may therefore, without prior leave, be properly filed in the registry, a notice to appear issued and service of the petition and notice effected on the respondent before the expiry of two years from the date of marriage.

4. The Registrar may not however, set a date for the hearing of the petition before the expiry of the two years. Three options become open to the Registrar at the stage, and only at the stage where the petitioner applies for a certificate that the pleadings are in order and that the petition be set down for hearing. These are as follows:

    (a) to set the petition for hearing on a date subsequent to the expiry of the two years,

    (b) to wait until after the expiry of the two years before setting the matter down for hearing, or

    (c) to indicate to the petitioner that in the absence of grant of leave by the court to present the petition before two years have elapsed that it would not be set down.

5. The literal interpretation of the word ‘presented’ as used in Section 8 should be given its ordinary meaning unless applying such a meaning would bring about an illogical and impracticable situation.

6. The Registrar for this present petition has interpreted the word ‘presented’ to mean ‘filing’. This interpretation is not in keeping with the reading of the Act. By way of demonstration; where Parliament means the word ‘filing’, it uses that word. So in Section 5(2) of the Act it is stated as follows:

> “(2) Subject to subsection (3), in proceedings for a decree of dissolution of marriage the ground shall be held to have been established, and such decree shall be made, if, and only if, the Court is satisfied that the parties separated and thereafter lived separately and apart for a continuous period of less than twelve months immediately preceding the date of filing of the petition for that decree.”

As the judge hearing the application, what is your judgment? Give reasons.

QUESTION 3

In 2000 the Human Fertilisation and Embryology Act was passed to control the creation of human embryos outside the body (*in vitro*) by means of a licencing authority.

In 2004, a group of scientists (RESEARCH) engaged in research with respect to human cloning and the use of embryos for research, sought by way of judicial review, a declaration that organisms created by cell nuclear replacement were

not embryos within the provisions of the Act and therefore not subject to the control of the licencing authority.

The Long Title to the Act and the relevant provisions are as follows –

> "An Act to make provision in connection with human embryos and any subsequent development of such embryos; to prohibit certain practices in connection with embryos and gametes; to establish a Human Fertilisation and Embryology Authority.
>
> 1. (1) In this Act, except where otherwise stated – (a) embryo means a live human embryo where fertilization is complete, and (b) references to an embryo include an egg in the process of fertilisation and, for this purpose, fertilisation is not complete until the appearance of a two cell zygote.
>
> (2) This Act, so far as it governs bringing about the creation of an embryo, applies only to bringing about the creation of an embryo outside the human body …
>
> 3. (1) No person shall – (a) bring about the creation of an embryo, or (b) keep or use an embryo, except in pursuance of a licence.
>
> (2) No person shall place in a woman – (a) a live embryo other than a human embryo, or (b) any live gametes other than human gametes."

The judge, Mr. Justice Smart, granted the declaration and rejected the submission by the Attorney General that the words "if it is produced by fertilisation" should be inserted in the definition of embryo so that it would read "embryo" means "a live human embryo where <u>if it is produced by fertlisation</u>, fertilisation is complete". By doing this the Attorney General had submitted, that

one would give effect to the legislative policy to bring the creation and use of embryos produced *in vitro*, under strict regulatory control for ethical reasons.

Mr. Justice Smart said, however,

> "I decline any invitation to attempt to rewrite any of the sections of the 2000 Act to make them apply by analogy to organisms produced by cell nuclear replacement. Further the question is whether to insert the additional words is permissible. With reluctance I have come to the conclusion that to insert these words would involve an impermissible rewriting and extension of the definition."

The Attorney General in turn appealed the judgment on the following grounds –

1. unforeseen scientific developments can carry with them the necessity to strain statutory language;

2. the purpose of the legislation is of prime importance;

3. incoherence of other parts of the Act is no bar to a purposive construction of section 1.

The Court of Appeal accepted these submissions and Mr. Justice Clever said *inter alia* -

> "It was essential to give the definition of "embryo" in section 1(1) a purposive construction so that an organism created by cell nuclear replacement came within the definition and a regulatory regime which excluded such an organism was contrary to the policy. That the questions to be asked were whether or not an organism fell within the terms covered by the legislation and whether the clear purpose of the legislation would be defeated if the definition was not extended. Embryos created by fertilisation and by cell nuclear

replacement were essentially identical in structure and both shared the capacity to develop into a human being."

RESEARCH wishes to appeal the decision of the Court of Appeal and has sought your advice as to whether they should do so.

What is your advice? Give reasons.

QUESTION 4

Sergeant Peacemaker tells you that on April 16, 2006, Clive Matlock, an attorney-at-law entered the charge room at the City Centre Police Station at about 6:30 p.m. and requested that he enter in the station diary a report in reference to a client of his, who was detained at the station. Peacemaker thereupon informed him that his report was not of a kind intended for the diary.

Matlock then began striking the counter with his fist and demanded in a loud voice that the report be entered. When Peacemaker again refused to do so, Matlock took the diary which was on the counter and made two circles against the time column while still demanding 'at the top of his voice' that his report be entered. When he was requested to hand over the diary he threw it down on the counter with a loud bang.

Matlock was then arrested and charged with unruly behaviour contrary to section 56 of the Summary Offences Act. Section 56 provides as follows –

> "56. Every person who in any police station is guilty of riotous, indecent, disorderly or similar behavior shall be liable to a fine of two hundred dollars or to imprisonment for two months."

The magistrate before whom the matter was tried acquitted Matlock holding that his conduct did not in his opinion amount to disorderly behavior, that he did not use obscene language and that there was no breach of the peace.

Sergeant Peacemaker wishes to appeal this judgment (which he is entitled to do) and has sought your advice.

What is your advice? Give reasons.

QUESTION 5

In January this year (2006) your client Eager Beaver, the landlord of commercial property located on Breadnut Hill, in carrying out his half-yearly inspection of the demised property noticed that parts of the stonework on the front wall of the building were loose and that pieces of the wall at the first floor level were falling onto the sidewalk below. He was very concerned that pedestrians could be injured by the falling masonry and by the fact that although there was a full repairing covenant on the part of the tenant, Bad Boyz & Co., they had not corrected the problem. He therefore served a notice on them requesting that they immediately carry out repairs, otherwise he would forfeit the lease, as there was a proviso for re-entry and forfeiture in the lease.

In adopting this procedure Beaver was satisfied that he had complied with section 14 of the Property Act 1980, which provides:-

"(14) A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable by action or otherwise, unless and until the lessor serves on the lessee a notice:

(a) specifying the particular breach complained of;

(b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and

(c) in any case, requiring the lessee to make compensation in money for the breach,

and the lessee fails within a reasonable time thereafter to remedy the breach if it is capable of remedy and to make reasonable compensation in money to the satisfaction of the lessor for the breach."

Two weeks later, Bad Boyz & Co. having failed to carry out any repairs, Beaver began the necessary repairs which were completed ten days later.

In February, Beaver submitted the bill for the repairs to Bad Boys & Co. who responded one week later through their attorney-at-law by way of a counter-notice that they were not obliged to make any such payment as they were protected by section 24 of the Landlord and Tenant Act 1968 which provides:-

"24. (1) Where a lessor serves on a lessee, a notice that relates to a breach of a covenant or agreement to keep or put in repair during the currency of the lease all or any of the property comprised in the lease, the lessee may within twenty-eight days from that date serve on the lessor a counter-notice to the effect that he claims the benefit of this Act.

(2) A right to damages for a breach of such a covenant as aforesaid shall not be enforceable by action commenced at any time unless the lessor has served on the lessee not less than one

month before the commencement of the action such a notice as is specified in subsection (1) and where a notice is served under this subsection, the lessee may, within twenty-eight days from the date of the service thereof, serve on the lessor a counter-notice to the effect that he claims the benefit of this Act.

(3) A notice served under subsection (1) in the circumstances specified in subsection (1) shall not be valid unless it contains a statement, in characters not less conspicuous than those used in any other part of the notice, to the effect that the lessee is entitled under this Act to serve on the lessor a counter-notice claiming the benefit of this Act, and a statement in the like characters specifying the time within which, and the manner in which, under this Act a counter-notice may be served and specifying the name and address for service of the lessor."

Beaver now wishes to know what are his rights in the circumstances.

Advise Beaver. Give reasons.

QUESTION 6

Craig, a young attorney-at-law, in drafting a release for his client decided to redraft the precedent set out below which is regularly used by other attorneys-at-law in the firm.

"**RELEASE**

I, James Silver of Hibiscus Path, Midtown, in the parish of St. James, for the consideration of the sum of One Thousand Five Hundred Dollars lawful money to me in hand paid by ABC Company Limited of Princess Street, Midtown have remised, released and forever discharged and by these presents do for myself my heirs executors and administrators remise, release and forever discharge the said ABC Company Limited their respective heirs and assigns of and from all causes of action, suits controversies, trespasses, damages, judgments, executions, claims and demands whatsoever against the said ABC Company Limited which I ever had, now have, or which I, my heirs, executors or administrators hereafter can, shall or may have by reason of any matter or thing whatsoever and also by virtue of any claim or demand for damages by reason of any accident and injury to me claimed to have been sustained on or about the 5th day of April, 1963.

The aforementioned sum is accepted by the undersigned in settlement of all damages injuries and disabilities which may hereafter result from said accident, as well as for those now known to have been caused thereby.

IT IS EXPRESSLY UNDERSTOOD that said sum is paid and accepted not only for time and wages lost, expenses incurred (including legal and medical expenses, if any) and property damaged and destroyed, **BUT ALSO** in full and final settlement of all claims of every nature whatsoever caused by the said accident.

IN WITNESS WHEREOF I have hereunto set my hand
this 10th day of June, 1968.

SIGNED by the said
in the presence of:-

……."

Craig's draft release provided as follows –

"**RELEASE**

RECEIVED from THE GENERAL INSURANCE COMPANY LIMITED on behalf of Newton Abrahams & General Ins. Co. Ltd. the sum of Eighteen Thousand Dollars only ($18,000.00) which I accept in full discharge and satisfaction of all claims, costs and demands whatsoever whether now or hereafter to become manifest involving injury damage and/or loss sustained arising directly or indirectly from an accident which occurred at Swan Lane on the 8th day of December, 2004 involving NG 3006 and motor vehicle Registration No. FM 8660 (passenger in bus).

This amount is received by way of compromise only of the claim Roland Harker has make and is not an admission of liability on the part of the said Newton Abrahams & General Ins. Co. Ltd from all claims arising out of the above accident.

DATED the day of 2006

SIGNATURE: ……..

WITNESS: ……."

Comment on the adequacy or otherwise of Craig's draft.

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QUESTION 7

John and Joy Rolle, who are currently residing in the Bahamas, appoint your client, May Steel, as their attorney under the following power of attorney –

"POWER OF ATTORNEY

BY THIS POWER OF ATTORNEY given on the 28th day of December Two Thousand and Five **WE JOHN AND JOY ROLLE of Bay Street, Apartment 5, Nassau, New Providence in the Commonwealth of the Bahamas, Horticulturist and Accountant respectively,** appoint **May Steel of "Hellstone House", King Street, Businesswoman, our Attorney** for and in our name to do and execute all or any of the following acts deeds and things that is to say:

1. To manage our restaurant, business affairs, investments securities and personal property for the time being in such manner as the Attorney shall think fit and make any payments in connection with our restaurant, business affairs, investments, securities and personal property.

2. To lease our apartment located at "Alps Apartments", Bayview, without the furniture therein.

3. To commence carry on or defend all actions and other proceedings touching our property or affairs or any part thereof or touching anything in which we or our property or affairs may be in anywise concerned.

4. To settle compromise or submit to arbitration all accounts claims and disputes between us and any other person or persons.

5. To sell our motor cars by public auction to the highest bidder.

6. To carry into effect and perform all agreements entered into by us with any other person or persons.

7. Generally, to act in relation to our property and affairs and to this deed as fully and effectually in all respects as we could do.

AND WE HEREBY UNDERTAKE to ratify everything which our attorney or any substitute or substitutes or agent or agents appointed by her under this power in that behalf hereinbefore contained shall do or purport to do by virtue of this Power of Attorney."

The instrument was properly executed and registered/recorded.

May Steel now seeks your advice with respect to a number of things she proposes to do under the power. She tells you that –

(i) the restaurant owned by the grantors which is in a busy commercial area and which sells local dishes is losing money. However, an overseas fast food company is interested in entering into a joint venture with her to operate the restaurant;

(ii) She has identified a used car dealer to purchase both motor cars and wishes to sell them to him;

(iii) She has identified a lessee for the apartment but has nowhere to store the furniture and therefore proposes renting space in a warehouse for that purpose.

(iv) She wishes to sell their shares in the National Bank, as they have recently appreciated substantially in value, and then to open an account in that Bank and lodge the proceeds of sale.

What is your advice? Give reasons.

QUESTION 8

Ann Frank comes to see you. She tells you that her live-in boyfriend for the past six years, Randy Boy, moved out of their apartment after Christmas (2005) on the ground that she was having an outside affair.

She further tells you that Randy, over that six year period, had regularly been supported by her since his various "sure winner" ventures from cat fish farming to snail rearing had all come to nought. However, he has been a loving and warm person and has kept 'house fires' burning while she had to travel extensively as part of her job.

Last week she received a letter from an attorney-at-law which she shows you. The letter states that the attorney-at-law is acting on behalf of Randy and that Randy is seeking maintenance from her as he is unemployed and financially embarrassed.

It also states that as of the 7th of December, 2005 the new Maintenance Act came into effect and under the Act, Randy is entitled to be maintained by Ann.

The relevant provisions of the Maintenance Act are as follows –

"2. In this Act –

"cohabit" means to live together in a conjugal relationship outside marriage;

"dependant" means a person to whom another person has an obligation to provide support under this Act;

"maintenance order" means an order made under this Act for the maintenance of a dependant;

"respondent" means a person who, pursuant to this Act, has an obligation to maintain another person;

"single woman" or "single man", used with reference to the definition of "spouse", includes a widow or widower, respectively, or a divorcee;

"spouse" includes

(a) a single woman who, for a period of not less than five years, has cohabited with a single man as if she were in law his wife; and

(b) a single man who, for a period of not less than five years, has cohabited with a single woman as if he were in law her husband.

PART III. Obligation of Parties on Termination of Cohabitation

6. (1) In the case of cohabiting parties and subject to the provisions of this section, after the termination of cohabitation each spouse has an obligation, so far as he or she is capable, to maintain the other spouse to the extent that such maintenance is necessary to meet the reasonable needs of the other spouse, where the other spouse cannot practicably meet the whole or any part of those needs.

(2) An application for maintenance upon the termination of cohabitation may be made within twelve months after such termination, and the Court may take a maintenance order in accordance with Part VI in respect of the application."

Ann, who now seeks your advice, is of the view that the Act ought not to apply to her.

Advise Ann.
