COUNCIL OF LEGAL EDUCATION

NORMAN MANLEY LAW SCHOOL

LEGAL EDUCATION CERTIFICATE

FIRST YEAR EXAMINATIONS, 2012

LEGAL DRAFTING AND INTERPRETATION

(FRIDAY, MAY 25, 2012)

Instructions to Students

(a) Time: **3½ 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

Twenty-five years ago, there was internal conflict within the local Rastafarian movement, and a splinter group, styling itself "the Defenders", was formed. Members of the splinter group quickly adopted a distinctive style of speech, dress, religious practice and other cultural expressions so as to unmistakably identify themselves as belonging to a separate entity from any other group.

Earlier this year, On Track Trucking (OTT), a trucking business, advertised for truck drivers to fill existing vacancies. Kofi Mantel, a member of the Defenders, was short-listed for one of the vacant positions based on the quality of his resumé and references. He attended the job interview with long hair groomed in the manner typical of that associated with members of the Defenders.

At the outset of the interview, OTT's representative indicated that if Mantel was serious about his application, he would have to cut his hair, in line with OTT's strict policy. Mantel responded that as a Defender, he had to remain true to his beliefs. The representative abruptly terminated the interview, and Mantel's application was subsequently formally rejected.

Believing that he is the victim of illegal discrimination, Mantel has consulted your law firm for advice. A colleague of yours was initially assigned to Mantel's case, but has been reassigned to another matter. His file notes disclose the following:

> *"Section 27(1) of the Anti-Discrimination Act ("the ADA") prohibits discrimination by employers against a "racial group", and section 27(2) defines "racial group" with reference to "race, colour, or ethnic or national origins". Of all these factors, the client's case could only potentially come within discrimination on the basis of "ethnic origins", but the case law doesn't really assist him: Mandla v Dowell Lee*

[1983] 1 All ER 1062; Commission of Racial Equality v Dutton [1989] 1 All ER 306; Dawkins v Department of the Environment [1993] IRLR 284.

No valid claim under the ADA."

Mantel's file has now been passed to you. Critically consider your colleague's assessment, and advise Mantel as to whether he has a viable claim under the ADA against OTT.

QUESTION 2

The telecommunications industry in your jurisdiction is controlled by the Telecoms Authority (TA), a public body, and Koole Ltd ("Koole"), a private sector company. Connections Union (CU) is a trade union representing TA's employees, while Dynamic Union (Dyna) is another union representing Koole's employees.

TA's operating expenses are met from its own revenues, as well as from Government funding. In January of this year, CU sought a pay increase for its members from TA. The claim was rejected on the ground that the Government had reduced its financial support to TA due to budgetary constraints. Dissatisfied with this response, CU called its members out on strike in March, but this failed to change TA's position.

Adjusting its strategy, CU appealed to Dyna last month to persuade the latter's members to join the strike as a demonstration of solidarity with CU's cause. It was hoped that the prospect of a shut-down of the entire telecommunications industry would pressure the Government into increasing its financial contribution to TA, which would induce TA to award the desired wage increase.

Alarmed by these developments, Koole recently sought a court injunction to restrain CU from committing the tort of inducing Koole's employees to withdraw their services, and thereby

breach their contracts of employment. CU countered by claiming its actions in seeking to widen the dispute to the private sector are completely protected by the provisions of section 7 of the Employment Disputes Act (the EDA), which reads:

> *"7. Any act done by a trade union in furtherance of an employment dispute shall not give rise to any action in tort."*

The incorporation of this provision in the EDA was designed to afford greater protection to employees' unions as the typically vulnerable party in industrial disputes.

In court, counsel for Koole contended that:

- the logical consequences of CU's actions would be to cause incalculable harm to the national economy, and that Parliament could not have intended to grant trade unions such absolute immunity from liability in tort;
- accordingly, to avoid such a patent absurdity, the court should adopt a narrow construction of section 7 of the EDA, in keeping with the reasoning of Lord Blackburn in River Wear Commissioners v Adamson (1876-77) 2 App Cas 743, 764-5;
- an appropriate application of the provision to the facts would be to consider the call for a sympathy strike as creating a secondary dispute between CU and the Government; since the Government was not the employer, CU's tactics could not be characterised as action done in furtherance of the employment dispute between CU and TA.

Persuaded by these submissions, the judge granted the injunction sought by Koole.

You are counsel for CU. Critically evaluate the arguments advanced on behalf of Koole, and advise CU whether there are arguable grounds to support an appeal against the judge's ruling.

QUESTION 3

Sun Pen is one of several inner-city communities which over the years have been overtaken by urban blight, and high unemployment, failing schools and youth crime feature prominently.

In a decisive move, the legislature in 2009 enacted the Urban Areas (Renewal) Act (URBAR). Section 3 of URBAR establishes the Social Advancement Tribunal (SAT) with the general mandate to implement strategies for urban renewal.

Section 20 of URBAR empowers SAT to "allocate resources in order to provide facilities" in accordance with its statutory responsibilities. Section 20 forms part of a group of sections falling under the heading: *"Measures to Promote Social Regeneration".*

SAT has been operating under tight financial constraints, and has to be selective as to the projects it undertakes in any given year. For 2012, SAT has decided to transform an overgrown area of land with derelict buildings in Sun Pen into a youth centre, comprising a homework facility, indoor games room and a refurbished football playing field.

The land is adjacent to an abandoned property with a long-standing sewage problem. SAT is aware that years ago, football matches occasionally had to be interrupted or cancelled due to the foul odour periodically emanating from the adjoining property. Despite this, SAT has opted to proceed with the allocation of funds to establish the youth centre.

A public announcement of SAT's plans was made. A lobby group, Citizens for Fairness in Governance (CFAIR), objected to the proposed location of the youth centre, and ultimately sought judicial review of SAT's decision in the Supreme/High Court. CFAIR argued that the proposed facilities would not be fit for purpose.

Justice Aqua accepted CFAIR's arguments, and ruled in part:

> *"By section 20 of URBAR, Parliament could not have intended SAT to carelessly authorise the provision of facilities, regardless of their quality. Whatever the literal meaning of "facilities", a proper interpretation of the section, against the background of the purpose of the legislation, must require SAT to fund the development of only such facilities as are reasonable and appropriate. Clearly, a youth centre next to this contaminated property does not meet these criteria.*
>
> *Further, the heading "Measures to Promote Social Regeneration" (emphasis added) strengthens my view in this regard.*
>
> *To my mind, SAT's decision is one degree (at most two) short of perverse, and this court cannot allow it to stand."*

Accordingly, the judge quashed SAT's decision. Unhappy with this ruling, SAT's chairman consults you for an opinion on the prospects of a successful challenge of Justice Aqua's decision before the appeal court.

Critically analyse Justice Aqua's ruling and advise SAT's chairman.

QUESTION 4

For several months Jay Kips, a prominent businessman, had been in negotiations with agents for Radio WXY with a view to acquiring a substantial shareholding in that media entity, which is a publicly-listed company. The discussions were aborted when the agents advised Kips that a take-over bid for Radio WXY had been made by another party, and would be accepted. In

addition, the agents made it clear that an official announcement of the take-over would be made, but that in the interim, this information was strictly confidential.

However, armed with this restricted information, Kips promptly bought a large number of shares in the company, and made handsome returns on the investment following the take-over. He has now been charged with insider trading under the Securities (Insider Trading) Act (SITA). Section 42 of SITA makes it an offence for any person to make use of price-sensitive information to purchase shares in a public company, where that information was knowingly "obtained" from a party connected to the company.

There is no dispute that the agents constituted a party connected to Radio WXY and that the information shared with Kips was price-sensitive.

The enactment of SITA was inspired by the Report of the Securities Law Reform Committee, which highlighted the widespread misuse of price-sensitive information, by persons both within and outside of companies, as a major concern.

In court, counsel for Kips submitted that:

- the literal, grammatical meaning of "obtain" in section 42 is to procure <u>through purpose and effort</u>; since the information had come to Kips unsolicited, he had not "obtained" it, but was merely a passive recipient;
- since the ordinary meaning of "obtain" is clear and unambiguous, the court should not consider the background to SITA to determine the mischief prompting the statute's enactment;
- alternatively to the above, since section 42 is a penal provision, any ambiguity in the provision should be resolved in Kips' favour.

The trial judge accepted the first two submissions and Kips was acquitted of the charge.

You are counsel in the office of the Director of Public Prosecutions/Attorney General. Critically examine **all** the arguments raised on Kips' behalf, and advise your supervisor as to the prospects of a successful appeal against the trial court's ruling. (Assume prosecution appeals are permitted in the jurisdiction).

QUESTION 5

Under the Nationality Act in your jurisdiction, an adult foreign resident who satisfies certain conditions may apply to the court and be granted a naturalisation order, which confers on the applicant the full status of a citizen of the country. By section 10 of the Act, once a naturalisation order has been granted, any minor child of the applicant automatically gains full citizenship as well.

Further, by section 15 of the Act, where a naturalisation order is revoked by special annulment procedure "or otherwise", the naturalised adult will lose his entitlement to citizenship, but any minor child will continue to enjoy full citizenship status. This benefit in favour of minors was incorporated to ensure that as vulnerable parties, they are not made to suffer as a result of the misdeeds of their parents.

Fay Wayte, a Canadian national, is 36 years old and has been resident in your jurisdiction for several years. She applied to the court for, and was granted, a naturalisation order on April 1, 2012, which automatically conferred citizenship rights on her 16-year old daughter Nicky by virtue of section 10 of the Nationality Act. However, the Minister for Citizenship Affairs only recently received intelligence linking both Fay and Nicky Wayte to an international human trafficking syndicate, and now wants to revoke their citizenship rights. He therefore lodged an appeal against the naturalisation order.

In court, counsel for the Minister has advanced the following arguments:

- even if the appeal were successful, while its effect would be to revoke the April 1 naturalisation order, this would only adversely affect Fay; Nicky's citizenship status would still be preserved, since any successful appeal is tantamount to revocation, not by special annulment procedure, but "otherwise", within the wide terms of section 15 of the Nationality Act;
- such an outcome would substantially defeat the purpose of the appeal, since one of the respondents (Nicky) could not be affected by it;
- if Parliament had intended, by the language of section 15 of the Act, to abrogate or restrict the very purpose of an appeal in the proceedings, which is a fundamental legal right, it would have communicated this in clear and unambiguous terms; it was therefore evident that the section had inadvertently been drafted too widely;
- to properly give effect to Parliament's intention, the court should read words into section 15 to make it clear that revocation has no application to procedures occurring during the naturalisation proceedings themselves, including any appeals.

You represent the Waytes in the appeal, and are aware of the three conditions for modifying statutory language, as enunciated by Lord Diplock in Jones v Wrotham Park Settled Estates [1980] AC 74, 105-6, and qualified by Inco Europe Limited v First Choice Distributors [2000] 2 All ER 109.

You have now been called on by the court to respond to the submissions of counsel for the Minister.

Detail your response to the court in light of the decision in Re K (a minor) (adoption: nationality) [1994] 3 All ER 553.

QUESTION 6

Under section 16 of the Health Protection Act 1990 (the HPA), landlords are required to abate any nuisances created on their rented premises as a result of the property "being in such a state as to be prejudicial to health." The language of section 16 can be directly traced to the Nuisances Removal Act 1879 (the NRA), which was enacted to counter the rising number of cases where occupiers of property fell ill due to the effects of defective drains, or the use of unsuitable material in the construction of the premises.

Jason Rye is the tenant of a dwelling-house owned by Realty Investments Limited (RI), and lives there with his wife and three young children. The house has a large garden with a children's playing area, complete with a small swimming pool and a set of swings positioned within a very short distance of the pool.

On one occasion, while the children were using the swings, one of them was ejected and landed on the edge of the pool, sustaining bruises to the body. Rye contacted RI's Chairman, Mel Pond, about the incident, and requested that the swings be relocated some distance away from the pool to prevent injuries to his children. Pond agreed to carry out the requested work in the following week, but this was not done. Weeks later, another of Rye's children was similarly injured in a virtual replay of the first incident.

The injuries in both cases are **not** attributable to any defect in the pool or the swings themselves.

Disgruntled, Rye consults Tom Hardy, senior attorney-at-law in the firm to which you are employed. Hardy sends you a memorandum, which reads in part:

> *"The reference in section 16 of the HPA to the 'state' of the premises is ambiguous. It is conceivably wide enough to capture our client's case where the*

very physical layout of the playing area, with pool and swings so dangerously close together, suggests the property is in a 'state' prejudicial to the health of the Rye family.

The original legislation (the NRA) seems narrow, being directed to cases of inherent structural defects, which is not the case with the facilities here.

However, the updating approach to statutory construction is applicable today, and I believe Royal College of Nursing of UK v Department of Health and Social Security [1981] 1 All E R 545 supports a purposive and liberal interpretation of section 16 of the HPA so as to accommodate a claim against RI for failing to abate this nuisance.

Please review this position, and bring to my attention any other relevant cases to help me finalise my advice to Rye."

Respond to Tom Hardy.

QUESTION 7

Earl Garde is employed as a sales representative to Topline Coffee Limited (TCL), the leading supplier of coffee products to the local market. Garde's employment contract contains the following provisions:

"5(1) Except in the circumstances set out in sub-paragraph (2), the representative shall devote the whole of his energies and business time to the business of the employer, and shall not engage or be interested either directly or

indirectly as principal, agent, employee or associate in any other business concerning goods of the kind sold by the employer.

(2) The representative is permitted to engage in minor assignments with other coffee businesses operating from Grade C shopping complexes.

…

14. The representative shall dedicate all his energies and business time exclusively to the business of the employer, and shall be absolutely barred from being engaged or interested either directly or indirectly as principal, agent, employee or associate in any other business concerning goods of the kind sold by the employer."

Garde has been in discussions with the owner of X Enterprises (XE), a rival coffee operator, and is interested in taking up a minor assignment as an associate of that business, a role which falls directly within paragraph 5(2) of his contract with TCL. He informed TCL's marketing manager of his intention to exercise this option, and recently received the manager's response, which reads in part:

"I draw attention to paragraph 14 of the contract, which TCL concedes is completely inconsistent with paragraph 5 on which you rely. However, our lawyers advise that in cases such as this, there is a long-standing rule of law to the effect that the later provision in the document shall take precedence over the earlier one.

Accordingly, paragraph 14 prevails, and you are absolutely prohibited from taking up this assignment as an associate of XE."

Dissatisfied with this response, Garde consults you for advice. You accept that the two provisions are completely irreconcilable, but are required to advise on the validity of the legal argument raised by TCL.

QUESTION 8

Bob Powers, a hotel magnate, wants to extend his chain of hotels to a section of the interior of the country, which is an undeveloped, but lush area featuring many natural attractions. He purchased an extensive property (Lookout Point) in this area, which is not zoned or used for crop cultivation, or the cultivation of plants or rearing of freshwater fish.

Powers applied for and received planning permission to construct a tourist resort at Lookout Point, as required under the National Planning Act 1985 (the 1985 Act). He then brought heavy equipment on the land and proceeded to clear it in preparation for the tourist development.

Subsequently, the Development Board (the DB) applied for an injunction to restrain the development of Lookout Point, on the ground that Powers had failed to secure special approval under the Country Development Act 2010 (the CDA). Section 31 of the CDA requires any person seeking to develop "agricultural or other land" in this area to obtain, in addition to planning permission, special approval from the DB before taking any preparatory steps to execute development works.

During the Parliamentary debate preceding the passage of the CDA, the Minister for Development, in piloting the Bill, noted that the 1985 Act had failed to address certain weaknesses in the development of interior areas. These concerns related to traditional farm land (that is, used for the cultivation of crops), and land dedicated to the related, but more modern industries of horticulture (plant cultivation) and freshwater fish farming.

Consequently, the CDA was designed to add another layer of approval to the development process in these areas.

In court, counsel for the DB argues, *inter alia,* that:

- the language of section 31 of the CDA is plain and unambiguous, and the reference to "other land" is wide enough to capture all types of land other than agricultural land;
- Powers was therefore obligated to obtain special approval from the DB, since he intended to develop "other land" within the wide terms of the section;
- it is impermissible, where the statutory wording is clear, to refer to the Hansard debate on the CDA at Bill stage.

For her part, counsel for Powers argues that:

- while the literal interpretation of "other land" in section 31 of the CDA is wide enough to cover Lookout Point, the current judicial trend favours a purposive approach to statutory construction, and accordingly, the court should avail itself of all relevant material to discover the true purpose of the section;
- reference to the Minister's speech in Hansard would establish that the phrase "other land" was intended to have a narrower construction than that suggested on a literal reading ;
- the *ejusdem generis* rule should be applied to restrict the application of "other land" to land closely associated with "agricultural" land, in the sense of land under crop cultivation;
- accordingly, permission from the DB would only be required if Lookout Point had been zoned or used for crop cultivation, or the related purposes of horticulture or freshwater fish farming, which is not the case.

You are the judge considering these submissions. Critically assess them and advise of your ruling.

END OF PAPER