

COUNCIL OF LEGAL EDUCATION

NORMAN MANLEY LAW SCHOOL

LEGAL EDUCATION CERTIFICATE
FIRST-YEAR EXAMINATIONS, 2005

LEGAL DRAFTING AND INTERPRETATION

(FRIDAY, MAY 27, 2005)

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

John Chippendale, a cabinet maker and upholsterer, comes to see you. He tells you that six months ago he repaired and re-upholstered a living room suite for Mary Sheraton. Mrs. Sheraton had taken the suite to his workshop along with fifteen yards of material for the re-upholstering. She left a cash deposit of 50% of the assessed cost of the work to be done.

Subsequently he re-upholstered it and three weeks later attempted to contact Mrs. Sheraton, first by phoning her home, then by phoning her cellular number and finally by visiting her home. When he visited her home he was told that she no longer lived there and had not left a forwarding address.

Initially he tried to secure the suite in an area of his workshop but as other jobs came in he needed that area and so he rented an outroom next door to store it. He discussed his dilemma with a fellow cabinet maker who told him that The Tradesman Lien Act allowed him to sell the suite. One month ago, however, the owner of the outroom required it for his own use and so Chippendale decided to sell the suite.

Chippendale put up 'for sale' notices as prescribed by the Act. He thereafter secured a buyer at auction. The sale price included the value of the suite, his labour costs and the cost of storage. There was no surplus.

Two weeks ago to his surprise Mrs. Sheraton turned up at his workshop to collect her suite. She told him that she had to go abroad to earn some money as she had lost her job and that was the reason why he was unable to contact her. He then told her that he had sold the suite as permitted by law. She then left threatening to sue him.

Last week he received a letter from an attorney-at-law representing Mrs. Sheraton. The essence of the letter was that Chippendale was not entitled to sell the suite and that The Tradesman Lien Act did not apply to him as he had only expended skill on the suite. Further, even if it did, he had breached the Act with respect to the requirement to advertise in a newspaper.

The Tradesman Lien Act states as follows-

"Tradesman Lien Act

1. (1) Every person who does any work on a chattel by bestowing money, skill and materials upon it in the alteration or improvement of its properties or for the purpose of imparting additional value to it, so as thereby to be entitled to a lien upon the chattel for the amount of money or value of skill or materials bestowed, may, if the amount to which he is entitled remains unpaid, in addition to any other remedy, sell the chattel by public auction upon complying with this Act.

(2) At least one month before the sale a notice of sale, setting forth-

- (a) the name of the person for whom the work was done;
- (b) the amount of the lien;
- (c) a description of the chattel to be sold;
- (d) the time and place of sale; and
- (e) the name of the auctioneer,

shall be given by advertisement in a newspaper published within an area of ten miles from the place where the work was done, but, if no newspaper is so published, then by posting up the notice in at least five public places in that area.

(3) The notice of sale shall also be sent by registered mail to the person for whom the work was done or left at his residence, but if his address is not known it shall be left at his last know address.

(4) Out of the proceeds of the sale there shall be paid the amount of the lien and the costs of advertising and sale, and the remainder shall be paid to the person entitled thereto upon his application.”

Advise John Chippendale.

QUESTION 2

Your client, Big Smallman, was charged and found guilty of conspiracy to import cocaine. At his trial the Crown introduced several private communications which had been intercepted pursuant to various court authorizations. Several of these conversations had been intercepted by use of a listening device which had been surreptitiously planted in Smallman's apartment. None of the authorizations made reference to the manner of installing the listening device which is a radio transmitter, but the authorizations provided that all telecommunication and oral communication may be interrupted and referred to the use of "any electromagnetic, acoustic mechanical or other device".

The evidence presented to the court by the prosecution was as follows-

Between August 25, 2003, and November 15, 2004, the Anti-Narcotic Unit of the Police Force obtained a series of authorizations and renewals to

intercept the private communication of Big Smallman at Apartment 22, Lowdown Drive.

On October 2, 2003, four anti-narcotic police officers without permission entered Apartment 22 and installed a listening device. They were in the apartment for about an hour. The transmitter operated continuously thereafter and intercepted not only telephone communications but also all conversations in the apartment.

On November 4, 2004, three anti-narcotic police officers again without consent entered the apartment to change the batteries in the listening device. They stayed for about twenty minutes.

Section 78(1) of the Criminal Code states as follows-

"78(1) A private communication that has been intercepted is inadmissible as evidence against the originator of the communication or the person intended by the originator to receive it unless –

- (a) the interception was lawfully made; or
- (b) the originator thereof or the person intended by the originator to receive it has expressly consented to the admission thereof;

but evidence obtained directly or indirectly as a result of information required by interception of a private communication is not inadmissible by reason only that the private communication is itself inadmissible as evidence."

Smallman appealed his conviction to the Court of Appeal who by a majority of 2 to 1 upheld his conviction.

Mr. Justice Right for the majority said that the trespass did not vitiate the authorization. He also said that while any wrongful acts committed in the carrying out of the authorization could be the subject of criminal or civil proceedings such wrongful acts did not affect the admissibility of the evidence of private communications.

Mr. Justice Wong, however, was of the view that the authorization to intercept private communications could not and did not authorize a trespass. He went on to say –

“An authorization does not implicitly carry with it a right of entry to private premises. Equally a judge does not possess any authority to include a right of entry as a term of authorization. The question therefore to be resolved is whether the interceptions of private communications accomplished by means of the illegal entries were lawfully made within the meaning of Section 78(1) and hence admissible in evidence.

It seems manifest that Parliament intended any breach of the right of privacy to be lawful in the widest sense. In these circumstances it is not possible to separate the installation of the listening device from the process of listening to and recording conversations. This is an artificial and unrealistic distinction. That interception must go beyond mere listening and recording not only conforms with common sense it is a necessary consequence of the wording of section 78(1). The section demands that the interception be lawfully made. An interception accomplished by means of an unlawful entry cannot have been lawfully made.”

Smallman seeks your advice as to whether he should appeal this decision having regard to the minority judgment.

Advise Smallman.

QUESTION 3

A testator, Rocky Prince, by his Will (which he had made himself), having appointed his executors and provided for his debts and testamentary expenses to be paid, provided as follows-

“to divide equally between my four children seventy-five percent (75%) of all my personal belongings and money that may be left in the bank and the other twenty-five percent (25%) of all my belongings to go to my wife Leslie and I further state that my Dwelling House is not be sold until after the death of my wife, the said Leslie Prince. Only should in case of she getting married again, then the house shall be sold and the money divided as above.”

The Will was then dated May 1, 1999, and properly executed.

The testator died in July 2004. In 2000 he sold the house he had lived in for many years in the city. He then leased a house on a yearly tenancy and purchased a large agricultural property with a house thereon. This house he occupied for about three days each week when he visited the property to inspect it and to obtain produce which he sold in a shop which he operated in the city. He also owned a commercial building out of which he carried on his business activities.

Since the testator's death, a dispute has arisen between the beneficiaries and the executors as to the interpretation to be given to the Will.

By a fixed date claim form/originating summons issued by the executors, they seek answers to the following questions –

- (1) Does the expression "75% of all my personal belongings and money that may be left in the Bank" mean -
 - (a) 75% of all real and personal estate of which the deceased was legal or equitable owner of at the time of his death; or
 - (b) 75% of only the personal chattels and effects and money in the bank of the deceased?

- (2) Does the expression "25% of all my belongings to go to my wife" mean -
 - (a) 25% of all real and personal estate of which the deceased was legal or equitable owner at the date of his death; or
 - (b) 25% of all the personal estate of the deceased; or
 - (c) 25% of only the personal chattels and effects of the deceased and moneys in the bank of which the deceased died possessed; or
 - (d) 25% of only the personal chattels and effects of the deceased?

- (3) Does the term "dwelling house" used in the Will mean the agricultural property with the home thereon?

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

QUESTION 4

Joseph and Isabell Joyman were married in April 1982 and separated by agreement about mid-June 1998. There was one child, Jill, who was born in May 1989.

Joseph and Isabell had lived apart for several years prior to their separation and certainly there had been a permanent breakdown of the marriage by 1998.

Joseph now wants to marry someone else with whom he has been acquainted for several years. Isabell claims that he has been persistently cruel to her over the years and that as a husband and father he was never better than a failure.

However, Isabell is thinking of opposing the dissolution of the marriage on the ground that it will prejudicially affect the making of reasonable arrangements for maintenance of Jill as well as Isabell herself. Under the terms of the agreement Jill was to remain with Isabell, and Joseph was to pay for their joint maintenance and support while the marriage subsisted. With a divorce they would both lose this financial support and in the case of Jill this would be devastating since she hopes to go to university when she leaves school.

The relevant provisions of the Divorce Act provides as follows-

“child of the marriage” means a child of two spouses or former spouses who at the material time,

- (a) is under the age of sixteen and who has not withdrawn from their charge, or
- (b) is sixteen or over and under their charge but unable by reason of illness, disability or other cause to withdraw from their charge or to obtain the necessaries of life;”

“support order” means a child support order of a spousal support order;”

“15(1) A court of competent jurisdiction may on application by either or both spouses make an order requiring a spouse to pay for the support of any child of the marriage.”

“16(1) A court of competent jurisdiction may on application by either or both spouses make an order requiring a spouse to pay, or to secure and pay, such lump sum or periodic sums as the court thinks reasonable for the support of the other spouse.

(2) An order made under subsection (1) that provides for the support of a spouse shall-

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage; and
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage.”

Isabell now comes to see you for your advice.

Advise Isabell.

QUESTION 5

The Secretary of Easy Money Credit Union has written to you as follows:

“Dear Attorney,

A problem has arisen involving different interpretations of rule 42 of our new rules. This rule states as follows:

‘The Board of Directors is vested with the power and authority to purchase, lease, or otherwise acquire real and personal property and to borrow money for that purpose upon the favourable vote of at least three-fourths of all the Directors.’

Some of the Directors are of the view that this provision means that decisions of this nature must be by a majority vote of at least three-

fourths of the total membership of the Board. This has meant, on a number of occasions, that an otherwise properly constituted meeting of the Board has been unable to make a decision on an urgent matter to do with the acquisition of property. This was so because there were less than twelve Directors present at a meeting (the Board consists of fifteen Directors) or that less than twelve persons, although constituting the required majority of the Directors present, voted in favour of a proposal.

Other Directors, however, are of the view that when the rule speaks of the "favourable vote of at least three-fourths of all the Directors", it is saying that the decision requires a three-fourths, or more, majority of the Directors who are present at a duly constituted meeting of the Board and that this would mean the favourable vote of less than twelve Directors, if the attendance was less than full.

Rules 43 and 44 seem to support this view by providing that –

"43. The Directors shall meet together for the dispatch of business at least once in every three months, and subject thereto they may adjourn and otherwise regulate their meetings as they think fit.

Questions arising at any meeting shall be decided by majority vote. In case of any equality of votes the Chairman shall have a second or casting vote.

44. The quorum necessary for the transaction of the business of the Directors shall be a bare majority of the Directors."

This is our current dilemma and we would appreciate your opinion at your earliest convenience as this is a matter of great urgency.”

What is your advice? Give reasons.

QUESTION 6

Dennis Nerd, a recent graduate of the Law School and winner of the drafting prize, has recently joined the drafting department of the government service. The department is currently redrafting some of the old legislation and has instructed Dennis to redraft the Quarantine Act, 1845.

The original Act is as follows-

“Quarantine Act

1. All boats, ships and vessels coming into the Port of St. Johns or into the Harbour of Bridgetown which shall have at the time of their said arrival or shall have had during their passage from the places where they respectively cleared, any person on board labouring under Asiatic cholera, fever, smallpox, scarlatina or measles or other infectious and dangerous disease, or on board of which any person shall have died during such passage, or which being of less tonnage than seven hundred tons measurement, shall have on board thirteen or more steerage passengers, or which, being of greater tonnage than seven hundred tons measurement, shall have on board fifty or more steerage passengers, or which shall have come from some infected port, shall make their quarantine in the said harbours respectively on board such vessels

or at such place on shore and in such manner as directed by the Inspecting Physicians of the said harbours respectively and there remain and continue until such ship or vessels shall be discharged from such quarantine, by such licence or passport, and discharge given without fee or emolument of any kind, as shall be directed or permitted by such order or orders as shall be made by the Governor, and until the said ships and vessels shall respectively have performed such quarantine and shall be discharged therefrom by such licence or passport and discharge as aforesaid, persons, goods, or merchandise, which shall be on board such boats, ships or vessels, shall not come or be brought on shore, or go or be put on board of any other ship or vessel except at such place indicated as aforesaid when duly required by competent authority.”

Dennis' redraft is as follows-

“Quarantine Act

1. In this Act –
“suspected vessel” means a vessel coming into the Port of St. Johns or into the Harbour of Bridgetown that-
 - (a) has at the time of its arrival or has had during its passage from the places where it was cleared, any person on board labouring under Asiatic cholera, fever, small-pox, scarlatina or measles or other infectious and dangerous disease,
 - (b) being of less tonnage than seven hundred tons measurement, has on board thirteen or more steerage passengers, or, being of greater tonnage than seven hundred tons measurement, has on board fifty or more steerage passengers, or

- (c) has come from some infected port, or on board of which any person has died during such passage.
2. Every suspected vessel shall make quarantine in the harbour at which it arrives, and every person on board the vessel shall remain in quarantine, on board the vessel or at such place on shore and in such manner as the inspecting physician at the harbour where the vessel arrives may direct, until the vessel is discharged from quarantine by a licence or passport issued by the inspecting physician in such form as the Minister directs.
3. Until a vessel has performed its quarantine and is discharged therefrom, persons, goods or merchandise that are on board the vessel shall not
- (a) come or be brought onto shore, or
 - (b) go or be put on board of any other vessel,
- except at the place indicated by the Inspecting physician when required by him.”

Comment on the adequacy or otherwise of Dennis' draft.

QUESTION 7

Your client, Will Lean, was appointed an attorney under the following power of attorney –

"POWER OF ATTORNEY

BY THIS POWER OF ATTORNEY given on the 5th day of December Two Thousand and Four **WE JOE AND JUNE BLOGGS** of 99 S.W. Street, Apartment 5, San Juan, Puerto Rico in the Commonwealth of Puerto Rico, Restaurateur and Hotelier respectively, appoint **WILL LEAN** of "Sunbeam Cottage", Swan Street, Bayview, Businessman, 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 him under the 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.

Will Lean now seeks your advice with respect to a number of things he proposes to do under the power. He 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 him to operate the restaurant;
- (ii) he has identified a purchaser for both motor cars and wishes to sell them to him by private sale;
- (iii) he has identified a lessee for the apartment but has nowhere to store the furniture and therefore proposes selling the furniture.
- (iv) he wishes to operate their bank account at First Bank.

What is your advice? Give reasons.

QUESTION 8

In January 2004, Mr. Bigmouth, the Managing Director of the weekly newspaper “Say It Loud”, libelled the Minister of Irrigation, Mr. Hope. In March 2004, Hope

commenced an action against Bigmouth. In October 2004, judgment was entered for Hope with costs. The judgment against Bigmouth has remained unsatisfied.

In July 2004, however, the Newspaper Act was amended by the insertion of a new section as section 5A. That section states as follows –

“5.A. (1) Where a person against whom judgment is recovered in a civil action for libel published in a book or newspaper is a body corporate, the judgment shall, subject to the provisions of subsections (2) and (3) be enforceable jointly and severally against the body corporate and every person who was a director or an officer at the time of the publication.

(2) Execution for the enforcement of the judgment shall not issue against any such director or officer save with the leave of the Court.

(3) Leave to issue such execution shall be granted if it appears to the court that the assets of the body corporate are insufficient to satisfy the judgment, unless the director or officer satisfies the court that the libel was published without his knowledge and that he exercised all due diligence to prevent the commission thereof and to mitigate (by way of suitable public apology or otherwise) any damage or prejudice caused or likely to be caused to the person libelled as a result of the libel”.

Mr. Hope now seeks an order from you (a judge in chambers) to issue execution against nine defendants personally, who were directors of the newspaper, in accordance with section 5A of the Act.

What is your order? Give reasons.