

Examiners Comments

Practice and Procedure March 2014 Examination

As a general comment, communication as a lawyer is still a very important aspect of practice, and this involves correct spelling:

judgment is not spelt *judgement*, simply look at UCPR Part 16

affidavit is not spelt *affadavit*, refer UCPR part 35

receive is not spelt *recieve*

These are quite frequent errors in answers.

Question 1

A high proportion of answers, this semester, were quite satisfactory. However still a significant number of answers failed to address fundamental issues, particularly in drafting affidavits.

Rule 43.2 (3) has certain specific matters that must be included in an affidavit in support (not in the notice of motion document). If these matters are not included in an affidavit, an applicant cannot obtain an interpleader order.

The order is available to a stakeholder – here an estate agent. The fact of agency and the relationship with the vendor and purchaser should be proved essentially by annexing a copy of the agency agreement and annexing (or exhibiting, if it is bulky) a copy of the contract of sale.

In terms of admissible evidence, the affidavit should not have the contents of an e-mail, letter, set out in the body of the affidavit – the document speaks for itself, simply it should be annexed. Any telephone conversations or other conversations should be in direct speech.

One extra point, is that Rule 35.4 (c) requires the paragraphs to be numbered – it is very easy to comply with this requirement.

Question 2

The majority of answers were satisfactory. A fundamental decision that must be discussed in terms of a number of principles which the High Court raised is

AON Risk Services Australia Ltd v Australia National University (2009) 23 CLR 175. A limited number of answers simply ignored this decision or simply discussed JLHoldings Pty Ltd as the one authority to be relied upon (refer qualification at page 59 NSW Civil Procedure Handbook 2013).

Question 3

Most answers were satisfactory. However, as has been commented upon in the past, a number of answers do little more than recite the theoretical advantages /disadvantages of ADR, with a scant application to the facts. The client is in a difficult financial position, mediation offers some prospects – what possible advantage/disadvantage if there for him if the courts themselves are deprived of the opportunity of developing precedent.

In terms of enforcement of any agreement, there is provision in PN SC Eq 7 Para 20 and 21 to have the matter listed before a judge for approval very quickly, and the registrar at the mediation can make orders (if approval by a judge is not required). It is important to obtain court orders quickly once agreement is reached.

Question 4

It was an openbook exam and the question does ask for a brief discussion. Most answers were satisfactory, but a number of answers merely listed rule number and then in a couple of words what the rule provided. In several instances this type of answer is incorrect, for example:

- service in accordance with the agreement, rule 10.6 - rule 10.6 (1A) provides that on a claim for possession of land the agreement etc must be made after the originating process was filed and before it is served
- except as a service by a solicitor, rule 10.13, if a solicitor notes on a copy of the statement of claim that he or she accept service, the document is taken to have been duly served on that person.

Question 5

This question was answered, generally satisfactorily. The enforcement of /information process in the Supreme Court does include an order for

examination under section 108, and in the Supreme Court it is not necessary at first attempt to proceed by an examination notice (rule 38.2 (2)).

Section 106 (1)(c) CPA authorises enforcement by a charging order, the general procedural rules are at Part 39 Division 5 UCPR.

In addition rule 40.2 provides, in the Supreme Court only, the enforcement of a judgment for payment of money by:

- (a) appointment of a receiver of income
- (b) sequestration of property.