LEGAL PROFESSION ADMISSION BOARD

MARCH 2014

PRACTICE & PROCEDURE

Time: Three Hours

This paper consists of **five** questions.

Candidates are required to attempt **all** questions from **Part A**, and **one** question only from **Part B**.

If a candidate answers more than the specified number of questions in Part B, only the **first** question attempted will be marked.

All references in this examination paper are to the Civil Procedure Act (NSW) 2005, as amended, (CPA), and the Uniform Civil Procedure Rules 2005, as amended, (UCPR).

All questions are of equal value.

All questions may be answered in one examination booklet.

Each page of each answer must be numbered with the appropriate question number.

Candidates must indicate which questions they have answered on the front cover of the first examination booklet.

Candidates must write their answers clearly. Lack of legibility may lead to a delay in the candidate's results being given and could, in some circumstances, result in the candidate receiving a fail grade.

This examination is worth 80% of the total marks in this subject.

Permitted Materials: **This is an open book examination. Candidates may refer to any books and any printed or handwritten material they have brought into the examination room.**

As some instances of cheating, plagiarism and of bringing unauthorised material into the examination room have come to the attention of the Admission Board, candidates are warned that such conduct may result in instant expulsion from the examination and may result in exclusion from all further examinations.

This examination should not be relied on as a guide to the form or content of future examinations in this subject.

PART A

Question 1

This question requires the drafting of a notice of motion and any necessary affidavit (s) in support.

Omit all formal parts.

You are a solicitor instructed by Phyllis Isle to act on her behalf in Supreme Court proceedings. Her instructions given in conference on 15/2/2014 are: –

She has been and is a licensed real estate agent. On 1/4/2013 she was engaged by Peter Jones to sell his property at Randwick by auction. On 1/4/2013 Peter Jones signed a written real estate agency agreement for the sale of the property by' auction, the agency fee being 2% plus GST. The agreement was standard form and quite valid. The vendor's solicitors were Carroll & Hill.

On 1/6/2013 by public auction, Robert Hall agreed to purchase the property for a price of $1.8 million and signed a standard form of contract of sale at the auction site and handed over a personal cheque for $180,000 by way of deposit on the purchase.

On 3/6/2013 Phyllis deposited the cheque in her trust account and waited for a normal four-day clearance period. On 5/6/2013 the purchaser personally attended her office and explained that the cheque was drawn on an account with insufficient funds. He presented Phyllis with a bank cheque for $180,000 and asked would she accept this. Whilst the purchaser, Robert Hall, was at her office she phoned the vendor Peter Jones and asked would he accept this and go ahead with the contract. Peter Jones said that he would, provided the bank cheque was deposited in Phyllis's trust account that morning – this she did and the bank cheque was cleared.

Phyllis checked with the vendor on 1/7/2013 that the sale was proceeding okay. She was aware that the purchaser had solicitors Smith and Co. acting, Frank Bell of that firm was handling the matter.

On 2/8/2013 Phyllis received an e-mail from the vendors solicitors, Carroll & Hill, saying the purchasers had not complied with the contract time for completion and attaching a copy of a notice to complete served that day on the purchaser. On 1/9/2013 the vendor's solicitor, Tom Carroll phoned Phyllis and said the vendor had that day terminated the contract and under the contract the purchaser had forfeited the deposit – she (Phyllis) was not to refund the deposit to the purchaser. Phyllis gave that undertaking until she was informed further what was to happen with the deposit.

(Question 1 continues)

(Question 1 continued)

On 20/9/2013 Phyllis received a letter from the purchaser's solicitor, Frank Bell, demanding the return of the deposit to his office on behalf of the purchaser.

On 20/9/2013 she phoned the vendor's solicitor, Tom Carroll, and told him about the purchasers demand. Tom Carroll told Phyllis that her obligation was to pay the money to the vendor because the contract for sale had been terminated on 1/9/2013 by reason of the purchasers default. That afternoon, Phyllis received a demand letter from Tom Carroll for payment of the deposit monies to the vendor.

Phyllis was careful not to pay the deposit monies to either party until the vendor and purchaser sorted out the dispute between himself and herself. As it was clear the contract was terminated, she made no claim to payment of the selling commission. On 28/9/2013 she sent an e-mail to this effect to each of the solicitors for the vendors and the purchaser respectively.

On 1/2/2014 Phyllis was served with a Statement of Claim filed on 1/12/2013 in the Supreme Court of New South Wales with Peter Jones as plaintiff, the purchaser, Robert Hall, as first defendant and herself as second defendant. The claim against the first defendant was for damages and a declaration that the first defendant was in breach of the contract of sale, and against Phyllis, as the second defendant, the claim was for judgment in the sum of $180,000 plus interest plus costs.

Phyllis tells you she has always been prepared to pay the deposit monies out but to whom? She does not want to get involved in an expensive court case and she makes no claim on the deposit sum and will deal with these monies in any manner that the court decides.

On 14/2/2014 you speak by telephone to the plaintiff's solicitors suggesting that they discontinue the proceedings against the second defendant. The solicitors for the plaintiff say it is plain that the plaintiff is entitled to the deposit monies and she should have paid over the deposit to his client. You explain that the purchaser (the first defendant) claims that the contract was breached by the plaintiff and claims the deposit monies. The conversation then ends.

On 15/2/2014 you draft a notice of motion seeking an order on behalf of the second defendant for an order under UCPR 43.1.

Draft the appropriate orders to be sought in the notice of motion and also draft any supporting affidavit (s) that you consider necessary for the court to grant the relief that your client is seeking. You can accept that Phyllis also anticipates that the first defendant will shortly file a cross-claim against her seeking the deposit sum.

(Question 2 follows)

Question 2

On 1/2/2012 the plaintiff RK P/L commenced proceedings in the Supreme Court of New South Wales by Statement of Claim against A Coulson as first defendant and Coke P/L as second defendant. It alleged that each had been negligent in carrying out the construction of a large retaining wall, which had collapsed shortly after completion. The plaintiff alleged that it had contracted with the first defendant to do the work but it appeared that the first defendant had then sub contracted the work to the second defendant.

Each defendant filed a defence denying the allegations and each filed and served a cross-claim on each other claiming contribution or indemnity from the other as a joint tortfeasor pursuant to the Law Reform (Miscellaneous Provisions) Act 1946 (NSW)).

The matter was listed over a number of directions hearings during 2012 and was then listed for final directions hearing on 11/4/2013.

On 1/3/2013 the plaintiff filed a notice of motion seeking leave to amend the Statement of Claim, as against the first defendant only, to allege it was responsible for the design, as well as the construction of the retaining wall and was negligent on both aspects.

On 1/4/2013 the notice of motion was heard, after both defendants opposed the proposed amendment. The court did grant leave to the plaintiff, as no hearing date had yet been allocated. Directions were also made for amended defences and amended cross claims and also for the service of all experts' reports by 21/1/2014. The court also ordered all evidence to be by way of affidavits to be served by 21/1/2014. The matter was listed to come back before the judge on 1/2/2014 to then obtains a hearing date mid-2014.

As the plaintiff had amended its Statement of Claim, in its cross-claim, the first defendant amended its cross-claim to allege that the second defendant had subcontracted to do both the design and construction of the wall and again claim contribution or indemnity as a joint tortfeasor.

The plaintiff and the first defendant served their respective affidavits and expert's reports by 21/1/2014. The second defendant served its affidavits in time but not its expert's reports. The matter came before the court on 1/2/2014. The judge criticised the second defendant but as the matter had taken so long, a hearing date over seven days was given, commencing 1/5/2014, and an order made for the second defendant to serve its expert's reports by 1/3/2014. The second defendant's expert's reports were served on 10/3/2014.

(Question 2 continues)

(Question 2 continued)

On 20/4/2014 the plaintiff filed a notice of motion for leave to amend its statement of claim against:

- The first defendant, by adding an allegation that the first defendant had subcontracted the work to the second defendant, when it well knew that the second defendant had no experience in this field of work, and was accordingly negligent in doing so;
- The second defendant, by adding a new allegation that the second defendant had responsibility for the design, as well as the construction of the wall.

The plaintiff's solicitor deposed to an affidavit, stating that he only became aware of the need to amend after receiving the second defendant's expert report on 10/3/2014, and that he had then obtained counsel's urgent advice on any need to amend on 7/4/2014.

At the hearing of the notice of motion on 27/4/2014, the first defendant opposes the further amendment proposed against it on the basis that this was something that the plaintiff, by reason of enquiry in the industry, or from experts, could have ascertained earlier the proceedings. There was nothing in any affidavit or expert's report that raised it. If the amendments were allowed it would need to substantially amend its cross-claim against the second defendant to allege misrepresentation, and possible breaches of the Competition and Consumer Act. The matter could not proceed to hearing on the date allocated.

The second defendant opposes the amendment against it. Its position is that this is a matter that the plaintiff should have appreciated much earlier in the proceedings when the amended cross-claim relied upon by the first defendant, amended after the first amended statement of claim in mid-2013 raised this allegation. If the amendment were allowed, it would need to have the matter adjourned.

Discuss the principles the court will apply to these facts in determining whether to grant leave to the plaintiff to further amend its amended statement of claim, firstly, as against the first defendant, and secondly, as against the second defendant. Express your view as to the likely result and give your reasons.

(Question 3 follows)

Question 3

You are the solicitor for a plaintiff, who has commenced proceedings in the Supreme C of New South Wales Equity division, in relation to a family provision claim under t Succession Act. Such a claim falls within Practice Note SCEq7.

It has been referred to mediation before a Registrar of the Court, and the usual order for mediation has been made (annexure 2 of the Practice Note). The Court has also made a further direction that the plaintiff is to include in the bundle of documents delivered to the mediator details of the estimated costs of the whole proceedings if the matter is not resolved at the mediation.

The facts that are raised in the material presented to the mediator are:

- The brothers are estranged, but until about 10 years ago they had a good relationship
- The deceased was the mother of both the plaintiff and defendant
- By her will made 1/12/2012 she left the whole of her estate to the defendant and also appointed him executor. In her previous will made 10/6/1996 she had divided the estate equally between the plaintiff and the defendant
- The value of the estate, after paying debts is approximately $480,000
- The deceased died on 1/11/2013. In her will made 1/12/2012 she said that the defendant had been a good and loving son who cared for her in her illness. She did not mention the plaintiff
- Your client lives in rented premises, has assets of $5000, is aged 60, has high blood pressure and is divorced. He is a bus driver, hopes to continue until at least 70 but a medical certificate put into evidence is to the effect that he may need heart surgery in the next two years
- The plaintiff's estimated legal costs are:
    - To completion of mediation $20,000
    - From mediation to hearing $30,000
- The defendant's estimated legal costs are:
    - To completion of mediation $35,000
    - From mediation to hearing $55,000

(Question 3 continues)

(Question 3 continued)

You are aware of paragraph 24 of PN SC Eq 7:-

" 24. Orders may be made capping the costs that may be recovered by a party in circumstances, including, but not limited to, cases in which the value of the estate is less than $500,000."

The affidavits filed by each party are lengthy, mainly raising factual disputes as to when that party visited the deceased, shopped for her and had her over for birthdays and other special occasions. The matter could easily take two days. The Judge is unlikely to be happy and the plaintiff, even if successful, may recover only, say $15,000 costs under paragraph 24 of the Practice Note.

Your view is that the plaintiff has prospects of obtaining some provision, possibly in the order of $120,000, ordered out of the mother's estate, but success depends so much on how each witness goes in the witness box. You advise your client his prospects of success at a final hearing to be within a range of 45% to 60%. If he loses he will have to pay your costs and if the matter is listed for hearing on two days with counsel involved, the plaintiff will have to put $10,000 in your trust account at least 14 days before the hearing date, to ensure that counsel is paid.

Explain to your client, in the particular circumstances of his case, the advantages/disadvantages to him that arise from his having to undertake the mediation (the mediator, being a Registrar, does not charge fees).

(Part B follows)

PART B

Question 4

A Statement of Claim filed in the Supreme Court of New South Wales must be served personally, pursuant to UCPR 10.20(2)(a), on the defendant. However the UCPR and the Corporations Act 2001 (Cth) contain various provisions, which permit alternative methods of effective service of such originating process, either on a specific type of defendant or in defined circumstances.

Discussed, briefly each of these alternative procedures for affecting valid service of the Statement of Claim on a defendant.

Question 5

Your client has obtained judgment for $1.4 million for money lent but not repaid against the defendant, pursuant to proceedings in the Supreme Court of New South Wales, on 11/8/2013. The judgment was a default judgment obtained under UCPR 16.6.

On becoming aware of the judgment by default, the judgment debtor filed a notice of motion on 11/9/2013, which is heard by the court on 11/10/2013. Assume that the Statement of Claim was validly served, what principles will the court apply in determining whether to exercise its discretion to set aside the default judgment.

Assume that the defendant fails on the application and your client wishes to enforce the judgment debt.

Your client is not interested in a writ of execution on goods or land nor any form of garnishee order. He also does not want to follow the bankruptcy path (the debtor is an individual).

Outline, briefly for your client, any other remedies available under the CPA or UCPR which may assist in determining what available assets and also liabilities the debtor does have, but also any other procedures, available under the CPA and UCPR (other than writs of execution and garnishee orders) for the enforcement of this simple judgment debt.

(Separate marks are not allocated to each part of this question)

END OF PAPER