Examiners Comments – Practice and Procedure

Examination September 2013

As a general comment judgment is spelt "judgment" – refer the CPA and the UCPR, and it is "receive" and "believe". No marks were deducted for spelling errors etc. However, in practice it is still necessary to spell correctly.

Question one

A significant number of answers failed to address a single issue – if the words spoken have any significance (and the question of a defence of no concluded agreement is significant), the paragraph in the affidavit should be:

I said: "I can just enquiring about my company selling to you, but I would like to see your normal terms and conditions first. Can you please send me a copy of your normal quotation which sets this out"

X said: "I will send our usual form out to you today, probably by fax."

A few answers spent a considerable effort on discussing the rules and how they apply to the question. No marks were given for this type of response to the question. The relevant evidence contained in the affidavits needed to address each of the three main aspects raised in *Grimshaw v Dunbar*.

Question Two

This was answered, generally, in a satisfactory manner. For the second part, ie. exercise of inherent jurisdiction, some answers did raise the general matters to be considered in exercising a discretion, but did not mention the need for special circumstances to exist for an individual, as raised in *Welzel's* case and *Rajski's* case.

As a general comment for future practice, the UCPR on security for costs, the rules 21.26 and 42.13A etcwere amended in August 2013 and it maybe (with case law to be developed) that these specific rules may now work as an alternative for an applicant seeking to have the court exercise inherent jurisdiction, and also case law on discretionary factors is detailed more specifically in the rules.

Question Three

Most answers were satisfactory. Some answers set out the principles to be extracted from the cases but did not apply these principles with any degree of specificity to the factual circumstances in each of (1), (2), (3) and (4).

It is the examiner's view that categories (1) and (2) should be set aside in their entirety but (3) and (4) should stand. If some answers adopted a different view, and were argued properly, the answers were still considered acceptable.

Question Four

Most answers dealt with (1) and (2) satisfactorily. Some answers to (3) did not deal with a writ for possession (s 104 CPA) – the mortgagee wants possession and then it will decide what to do with the land. It does not want the land sold and in fact there is no power under a judgment for possession for a sale to occur.Section 106 CPA is for enforcement of the judgment for payment of money.

In terms of service, the answer should have dealt with personal service, limited service by agreement, substituted service (rule 10.14 and 10.15) and service of the notice on occupiers (rule 6.8 and 6.8 (2)).

Stage 2 ought to have raised rule 16.3 (2, rule 16.4 (including 30 days notice under Residential Tenancies Act), and the requirements, if necessary of rule 36.8, especially 36.8 (a) (i) or (ii).

Stage 3 involved section 104 CPA, and then a writ, requiring leave, with supporting affidavit (rule 39.3 (2) and (2A)) and also information for the sheriff – rule 39.3 A.

Question Five

Some answers included general discussion on the procedure and reasons why the answer was expressed in a particular way this was not asked in the question.

Under the rules is not necessary to the offer to use terms laid out in a prescribed form (there is none) but it is fundamental to conform to the specific requirements of the rules.

In practice, absolutely precise formulation in accordance with the requirements of the rules is most important – an offer of compromise which, if it worked

would result in say $100,000 extra costs payable by the other party, may be opposed by other party, if at all possible, on the basis it was not a valid offer of compromise under the rules.

Essentially, the offer must specify that is made on the whole of the plaintiff's claim, and the whole of the defence to the cross-claim. As well, the offer must specify what judgment or order is to be made.

If the other party is to pay no costs if the offer is accepted, and the client is to pay nothing for costs

"2. No order for costs on the plaintiff's claim

3. No order for costs on the cross-claim"

Any specific mention of costs is only available to the defendant.