

Practice and Procedure

March 2013

Examiners Comments

Question 1

This was a question directly on UCPR 5.2. In addition to the specific evidence required by the rule, to convince the Court to exercise its direction common law principles require there to be evidence presented to demonstrate a *prima facie* case against the intended defendant. Some answers did not address this aspect. As well, the evidence must show the actual enquiries carried out- it adds nothing for the deponent of the affidavit to say that the enquiries were reasonable (that is for submissions) as well a substantial number of answers did not put evidence of conversations in admissible form.

Question 2

This was a question on mediation. Some answers did not address the quite specific facts but rather approached the answer more on a theoretical basis, however, but generally it was answered satisfactorily. The essential aspect is one of costs and the question, if the matter doesn't settle, is how can the client carry on with the litigation. Even if he appears in person, without legal representation, how can he pay for the experts. As well at mediation there may be other solutions- carry on the franchise, have time to pay backpayments, rewrite the agreement.

Question 3

The essential questions for application 1 arises from the facts. The matter has been going a year, substantial delays by the plaintiff (section 58 (2) (b) (ii)) but S 64(2) does import real issues to be addressed. The matter has not been listed for hearing. In relation to application 2 there is a need to consider the delay as for above application 1, and then the further delay and finally the lateness of the application. AON Risk Services Australia Ltd v ANU (2009) 239 CLR 175 needs to be discussed- as to the rights of other litigants, general approach by the Court and a need for explanation (see summary 2.250 Boniface, Kumar & Legg).

Question 4

This was answered satisfactorily. There are many aspects but the most significant one is the proceedings will be managed by Directions Hearings conducted by a Judge or Registrar – ie the court controls this process. Another significant aspect is at paragraphs 28 to 31 – this in effect forces the plaintiff and the defendant , to address the evidence and real issues at an early stage rather than down the track. Another important aspect is the control in effect of the costs and time, experienced in the past, resulting from extensive expert evidence, especially in personal injury cases.

Question 5

A number of answers simply referred to the specific rule and the affidavits and notices. This question specifically asked about the steps. The rules don't spell these out, answers needed to address what has to be done so, say, an affidavit, under UCPR 39.21. of necessity can only be sworn and filed if the steps referred to in the rule have already been taken .

As well as UCPR 39 Division 2, mention should also have been made of SS 112-116.