

LEGAL PROFESSION ADMISSION BOARD

MARCH 2013

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.

Your client's instructions are simple, just start proceedings urgently to recover a debt and work out the detail later.

You commence proceedings in the Supreme Court of NSW Common Law Division by Statement of Claim for a sum of \$800,000 for goods sold and delivered on 1/5/2012. You name the defendant as Hablett P/L.

Hablett P/L files a defence specifically denying it placed any order for goods, nor had it received any goods.

In January 2013 you have a conference with your client and matters appear to be a little different from his initial instructions. Your client did have business dealings with Hablett P/L for a number of years, the last in June 2011. On each occasion your client had been paid.

Your client produces an order he received dated 1/4/2012 for the goods the subject of the claim. It is a written order form entitled:

“Ideal Holdings P/L trading as Habletts Exports ABN 006 007 008” (it is not signed).

You do a company search for Hablett P/L which shows its ABN is 106 400 612. You do a business names search which fails to disclose any trade or business name “Habletts Exports”. You also do a company search for Ideal Holdings P/L and also ABN 006 007 008 and the searches fail to disclose any such company or ABN being registered.

Your client sheepishly tells you that when he received the order dated 1/4/2012 he did not really take notice of the details or do any credit checks. The goods were collected from his premises by a contract delivery driver on 1/5/2012 along with his Tax Invoice addressed to Hablett P/L.

The one piece of information he has is that when he was previously accepting orders from Hablett P/L a Sally Pearson, Office Manager at Hablett P/L, had always phoned him to confirm delivery details. In April 2012 Sally Pearson had also phoned him simply to confirm that the goods would be collected from your client's factory on 1/5/2012. Your client still has her personal mobile number in his records.

(Part A Question 1 continues)

(Part A Question 1 continued)

On 1/2/2013 you phone Sally Pearson and have a conversation wherein she says that she was laid off by Hablett's P/L in late 2011 when it shut down the area where she was working. In about February 2012 she was contacted by an accountant, Peter Frend, who asked her would she do some work similar to what she had been doing at Hablett P/L. She started on 1/3/2012 at his office at level 2, 100 Victoria Street, Chatswood. She became aware of the order form dated 1/4/2012 sent by "Ideal Holdings" when Peter Frend asked her to phone up your client to arrange the pickup of the goods. This she did on 10/4/2012 but a week later Peter Frend paid her cash and told her she need not turn up at the office in future.

You write to the accountant Peter Frend on 11/2/2013 and on 1/3/2013 but receive no reply. On 21/4/2013 you send an investigator Alan Bates to the premises. He reports to you by telephone that he spoke to a man there and said that he (the investigator) wanted to speak to Peter Frend. The other man said that Peter Frend was in Perth for the next few months and he (the man) could not help with any enquiries.

The investigator then said to the man that he thought he was really Peter Frend. This man then ordered the investigator to get out of the office (which Alan Bates did).

You now seek to obtain an order under UCPR Rule 5.2 for Peter Frend to be orally examined as to the identity of the entity that ordered and received the goods on 1/5/2012 and to give discovery of documents.

Draft the Notice of Motion and the affidavit(s) in support, including details of the type of documents which you consider may exist and may assist, and for which you seek orders that Peter Frend make available by way of discovery.

(Part A Question 2 follows)

Question 2

Your client is a defendant/cross-claimant in proceedings brought by the plaintiff/cross-defendant in the Supreme Court of NSW.

The plaintiff brought proceedings against your client in relation to a franchising agreement between it and the defendant, the plaintiff alleging that it validly terminated the agreement for breach, that \$800,000 is owing as payments due to it, to the date of termination and claiming general damages by reason of the defendant's breach thereafter.

Your client's defence denies any breach and that any moneys are outstanding and payable under the licence agreement. By way of cross-claim against the plaintiff, your client claims that in entering into the franchise agreement it relied on misleading representations under the Competition and Consumer Act made to it by the plaintiff, and it has suffered substantial damages.

The matter has been proceeding for 9 months and there have been considerable delays in trying to have the parties give proper discovery under UCPR Part 21. The matter is listed before a judge on 1/4/2013 and His Honour tells the parties that the matter cannot just drift along. He does suggest that the parties might undertake a court ordered mediation. He stands it over for a week so the parties can consider their position in relation to mediation. He also orders the parties' respective solicitors to serve on their own clients, on each other and to have ready to hand up to the court a short affidavit by each side as to the costs incurred to date and an estimate of cost yet to be incurred to completion of the hearing, including experts' fees.

These affidavits are completed and for each party the costs are:

- | | |
|-------------------------------|-----------|
| (i) costs to present | \$60,000 |
| (ii) estimated future costs | \$140,000 |
| (iii) estimated experts' fees | \$35,000 |

After the first appearance before His Honour you have a conference with your client. During the course of the conference you advise the client that, in your view, the plaintiff will fairly readily be able to establish that the unpaid franchise fees are payable and the amount, that your client's defence to the plaintiff's claim that it validly terminated the franchise agreement is a technical one, and at best you would put your client's prospects of success at 50%. In respect of the client's cross-claim, it relies on your client's evidence being accepted as to a number of oral discussions, none supported by documents. The plaintiff denies these conversations ever took place so it will be a question whether the judge prefers your client's evidence or the plaintiff's.

You have been paid \$30,000 for costs to date. If the matter does not settle at mediation, when it comes back for further directions in about a month or so the judge will most likely order intensive preparation, service of experts' reports, witness statements and complete discovery, so the client will have to put \$30,000 in trust just for this next interlocutory stage (in addition to the \$30,000 due to date and unpaid). You do tell your client that if mediation goes ahead, your advice is to brief counsel to advise and appear at the mediation and you will need \$8,000 in trust.

(Part A Question 2 continues)

(Part A Question 2 continued)

Your client's finances are precarious because of the low sales with the franchise business.

Your client will face significant problems even providing funds for the next stage of the proceedings. However, he is reluctant to undergo mediation because, in his opinion, the plaintiff will be difficult and unlikely to concede very much at all. Your client's view of the plaintiff is that he is obnoxious, overly aggressive and convinced he is always right. He is unlikely, your client believes, to even listen to his lawyers unless they agree with him. In your view of the plaintiff's solicitors, you consider that they conduct litigation in an aggressive manner but they are competent and experienced, and will give the plaintiff practical advice. It should, in your view, be apparent to them that if your client loses the case, with a costs order against him, the chances of recovering the judgment and costs from the defendant will be marginal.

In the context of these specific factual circumstances, advise your client of the benefits and disadvantages of his undertaking mediation. You also furnish him with your opinion that, on balance, he should undertake mediation. Give your reasons why you so advise him.

(Part A Question 3 follows)

Question 3

You are an employed solicitor acting for a plaintiff who has commenced proceedings in the Supreme Court of NSW, Common Law Division on 1/11/2011, claiming damages for personal injuries when the plaintiff tripped on uneven paving in a common public area at a shopping mall in Sydney (PN SCCL5 applies).

You have sued "Mall Holdings P/L" as defendant. The defendant files a defence on 14/12/2011, denying all allegations, including that it had the care and control of the area at the relevant time.

At the first directions hearing before the Registrar on 12/2/2012 you ask can the matter be adjourned further to 20/3/2012 as you need to consider an application for discovery to be given by the defendant in the light of UCPR Rule 21.8. This is done and it is relisted by the Registrar to 20/4/2012. As at 20/4/2012 you still have not filed a notice of motion for discovery and on 20/4/2012 the Registrar gives you a warning about delay and threatens to list the matter for a final hearing, but adjourns it for 2 weeks to 4/5/2012.

On 4/5/2012 you still have not filed a notice of motion and the Registrar refers you the same day before a judge. The judge directs you to file any notice of motion within 3 days and orders the plaintiff to pay the defendant's costs of 4/5/2012 appearances.

On 5/5/2012 you do file the notice of motion for discovery and leave is granted for the defendant to give discovery of documents relating to who had "occupation of and responsibility for" the area on the day of the accident. The defendant furnishes copies of the documents to you on 20/6/2012 and you then realise that the plaintiff needs to amend the Statement of Claim to substitute Mall Enterprises P/L for Mall Holdings P/L as defendant.

On 14/7/2012 you write to Mall Holdings and to Mall Enterprises asking were there any objections to the proposed amendment, and you send a draft of the proposed Amended Statement of Claim. On 20/8/2012 they each reply to the effect that they oppose the proposed amendment as it has now been nearly a year since the matter was commenced.

On 31/9/2012 you file a notice of motion for leave pursuant to section 64 CPA to amend the Statement of Claim so as to substitute Mall Enterprises P/L for the existing defendant. It is listed for hearing on 1/10/2012 and is opposed by the existing and proposed defendant. This is **Application 1**.

Assume leave is granted and an Amended Statement of Claim is served on 14/12/2012, the substituted defendant filing a defence on 28/12/2012.

On 1/2/2013 the matter is set down for a final hearing for 5 days beginning Monday, 8 April 2013.

(Part A Question 3 continues)

(Part A Question 3 continued)

On 10/2/2013 you served a number of subpoenas to produce documents, one of them on a maintenance company, Mall Maintenance P/L, which you did see mentioned in the documents discovered by Mall Holdings P/L on 20/6/2012. The documents are produced to the Court on 1/3/2013 and you inspect them on 20/3/2013. You observe from the documents made available by Mall Maintenance P/L that it appears to have had responsibilities for the upkeep of the mall common areas at the time of the accident.

You have other urgent court cases that take your time, but on Friday 5 April 2013 you obtain leave from a Registrar for a notice of motion returnable on the first day of the hearing before the judge for leave to further amend the Statement of Claim pursuant to section 64 CPA so as to add Mall Maintenance P/L as a second defendant. You serve the notice of motion and the affidavit on the two other entities on the same day.

On 8 April the judge hears the notice of motion – both the existing defendant and the one proposed to be added oppose leave being granted. You say that the defendants are entitled to an adjournment and the plaintiff will pay the costs thrown away. The other side strongly opposes any application for leave to amend at such a late stage. This is **Application 2**.

Any delay in any of the steps is, you accept, your fault because of the pressure of work.

COMPARE AND CONTRAST the principles the Court will apply in determining whether the Court will grant the leave pursuant to section 64 CPA for the plaintiff to amend the Statement of Claim in relation to Application 1 and Application 2. What factors will the court take into account in relation to each of Application 1 and to Application 2 in coming to its decision?

(Part B follows)

PART B

Attempt one question only in this Part.

Question 4

Section 56 CPA provides that the overriding purpose of the Act and Rules is to facilitate the just, quick and cheap resolution of the real issues in the proceeding. Section 57 details the objects of case management and section 59 provides that the practice and procedure of the Court should be implemented with the object of eliminating any lapse of time between the commencement and finalisation of proceedings.

Outline how the provisions contained in Practice Note SC CL5 endeavour to achieve the aims referred to in the sections of the CPA referred to above.

Question 5

Your client has obtained a default judgment in the Supreme Court of NSW against a debtor, Tony Hill, in the sum of \$900,000.

Property searches disclosed that Tony Hill owns land at Sydney, which is free of any mortgage or other encumbrance, valued at about \$600,000. Your client instructs you to attempt to enforce the judgment by way of a writ for the levy of property under section 106(1)(a) CPA in relation to the land.

You are aware that before you can have the land sold you must seek to enforce the judgment debt against the goods of the debtor. You initiate this process and receive advice from the Sheriff to the effect that the Sheriff cannot obtain satisfaction of the writ by proceeding further against the goods of the judgment debtor.

Detail the steps that now need to be followed under a writ for the levy of property for the land to be sold. Include in your answer the duties and obligations imposed under the CPA and UPCR on the Sheriff in attempting to achieve a sale of the land and make the proceeds available to your client.

END OF PAPER