

**LEGAL PROFESSION ADMISSION BOARD**

**SEPTEMBER 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.

Bill Petri, the manager of Petri Pty Ltd, comes to your office on 1/7/2013, as his company's solicitor, and tells you that he was served that morning with an examination order, requiring him to appear as a director to be examined on 20/9/2013 in the Supreme Court of New South Wales as to the financial affairs of Petri Pty Ltd. He tells you that he was not aware of any judgment entered against his company by the plaintiff, Smith Enterprises Pty Ltd.

On 2/7/2013 you write to the solicitors for the plaintiff asking for a copy of the statement of claim and a copy of the affidavit of service of the statement of claim. On 20/7/2013 you receive a reply from the plaintiff's solicitors advising you to make your own enquiries at the Supreme Court registry – they intend to proceed with enforcement procedures.

On 28/7/2013 you obtain a copy of the plaintiff's statement of claim from the Supreme Court registry. From the court file you note that it was served by prepaid post at the registered office of the defendant being 10 Smith Street, Auburn, on 6/4/2013, and that default judgment was obtained as no defence was filed on 20/5/2013. The plaintiff's claim was for goods sold and delivered in December 2012.

On 29/7/2013 you get your client into the office and take instructions to draft the necessary affidavits to apply by notice of motion to have the default judgment set aside under rule 36.16 (2)(a) UCPR.

As to service, Bill Petri tells you that his company had a registered office at 10 Smith Street, Auburn until 20/3/2013, but had vacated that office on 21/3/2013 and moved into premises at 16 High Street, Auburn on 21/3/2013. He had assumed that his accountant Bob Grove had lodged the necessary form of change of registered office on 21/3/2013 – 10 Smith Street was just a vacant building once they left on 21/3/2013 and no mail had ever been forwarded to his company from 10 Smith Street.

You do a company search which discloses that the change of registered office had been lodged only on 1/5/2013.

You speak to Bob Grove by telephone during the conference with your client. He tells you that he had instructions from Bill Petri on 21/3/2013 to lodge a change of registered office effective from that date but he had overlooked his instructions and only lodged on 1/5/2013 when he realised his oversight.

**(Question 1 continues)**

**(Question 1 continued)**

As to the plaintiff's claim, Bill Petri says he did have oral negotiations with the plaintiff's sales manager on 1/12/2012 and had indicated his company required a written quotation from the plaintiff. On 10/12/2012 he received a written quotation but it was not in conformity with the discussions of 1/12/2012. On 11/12/2012 the plaintiff had delivered goods to the defendant premises but on that day he, Bill Petri, had spoken by telephone with the plaintiff's sales manager, Phillipa Williams, and told her it was never a concluded agreement, Petri Pty Ltd did not want the goods and he (Bill Petri) was having them returned. Bill believed this had been done and he had heard nothing more from the plaintiff until this examination process.

This is a matter he wishes to defend strongly on the basis of these facts. If judgment is set aside Petri Pty Ltd wants you to file a defence.

**Draft the orders you will be seeking in the notice of motion and the necessary affidavit(s) in support. Your client would like an order that it have 35 days to file a defence if judgment is set aside.**

**Question 2**

In circumstances outlined in section 1335 Corporations Act 2001 (Cth) the Supreme Court may make an order that the plaintiff provide security for costs. However, even if the facts support such an order the Court is still subject to the need to exercise its discretion and to consider a range of matters other than the mere fact of insolvency (even if the defendant establishes this on the affidavits).

Whilst rule 42.21 UCPR contains specific provisions under which an order for security for costs can be made there is no express provision enabling such an order simply on the basis that the plaintiff is an individual who is impecunious, and unlikely to be able to meet the costs of the defendant if it is finally successful. In such circumstances the defendant must persuade the court to make such an order in the exercise of the Supreme Court's inherent jurisdiction to order the plaintiff to provide security for costs.

**Outline the principles the Supreme Court will apply in exercising its discretion to:**

- (a) make an order for security for costs under section 1335 Corporations Act in relation to a corporation; and**
- (b) make an order for security for costs in relation to a plaintiff, who is an individual, in the exercise of its inherent jurisdiction.**

**(Question 3 follows)**

### Question 3

Plaintiff BG Pty Ltd has commenced proceedings in the Supreme Court of New South Wales Common Law Division against the defendant, Merritt Pty Ltd, for goods sold and delivered by it to the defendant during the period 1/6/2011 to 30/7/2011, for a total price of \$800,000. The defendant has filed a defence alleging the goods were not in accordance with the specifications and were of no value to the defendant.

The plaintiff had served a subpoena to produce documents on your client, Elle Distributors Pty Ltd ("Elle") who is not a party to the proceedings. This subpoena has been served, with conduct money, in accordance with the UCPR. The documents which the plaintiff seeks to have produced by Elle are described at the end of this question.

Bob Elle, the managing director of Elle Distributors Pty Ltd, comes to see you as the company's solicitor to try and have this subpoena to produce set aside either in full or in part.

He tells you that Elle is a major distributor of electrical components, such as pumps, switchboards and motors throughout Australasia and the Pacific Islands. Over the years, the company has had a number of major suppliers of such products and places orders with them totalling about \$100 million annually. Occasionally, the company purchases some components from smaller suppliers but never more than about \$1 million a year. Since 1990 Elle has placed the occasional order with the defendant, Merritt Pty Ltd, but never for more than \$50,000 worth of stock. He has not yet looked for any documents which might have passed between Merritt Pty Ltd and his company. (He considers it is possible that Elle did purchase a small number of items from the defendant in July 2011). Throughout the trade he has heard that Merritt Pty Ltd is in financial difficulties so he thinks it is possible that Merritt Pty Ltd did onsell the plaintiff's product and is just buying time by defending the claim.

His objection to complying with the subpoena is trying to work out what documents the plaintiff is asking for together with a very high cost and expense in having staff go into the vast records and computer entries to try to comply with the terms of the subpoena. He also does not want to give the plaintiff or the defendant the opportunity of obtaining any significant information about his suppliers and customers.

Bob Elle asks your advice as to his company's prospects of success in having the plaintiff's subpoena to produce documents set aside under rule 33.4 UCPR, either in its entirety or in part.

The terms of the subpoena in its description of documents required are:

"Elle Distributors Pty Ltd is hereunder referred to as "Elle"

1. All originals and copies of order forms, tax invoices, letters, faxes, e-mails and all other documents passing between Elle and the defendant during the period 1/1/2004 to date.
2. All tax invoices furnished by Elle to each and every one of its customers concerning the sale by Elle of any product purchased by Elle from the defendant during the period 1/4/2011 to date.

**(Part A Question 3 continues)**

**(Part A Question 3 continued)**

3. All tax invoices furnished by the defendant to Elle during the period 1/6/2011 to date.
4. All records of payments made by Elle to the defendant for all goods sold by the defendant to Elle during the period 1/1/2011 to date.”

**Dealing with each of the categories of documents as set out in the subpoena above outline your advice as to whether Elle will likely be able to have the entire subpoena set aside, or at least as to any particular category or categories. Include in your outline a discussion of your reasons for your advice.**

**(Part B follows)**

## **PART B**

**Attempt ONE question only in this Part.**

### **Question 4**

**The answer to this question requires consideration of various provisions in the CPA and UCPR (NSW) only – it does not require any discussion of the provisions of the Supreme Court Practice Note for possession matters.**

Your instructions from Able Mortgages Pty Ltd is to bring a claim in the Supreme Court of NSW to obtain possession of the premises at 10 Level Street, Manly, as the mortgagor has failed to meet the required monthly repayment of the mortgage for 9 months. Any requisite notices under the Real Property Act (NSW) have been complied with. You are a partner in the law firm and wish to involve a newly admitted solicitor in undertaking simple possession matters in the Supreme Court of New South Wales. This will be her first possession matter. You prepare an outline of the various steps (but not you do not need to refer to any relevant practice note) required under CPA and UCPR to achieve each of the following stages in the overall process.

As a preliminary step you are always careful to take into account that there is the possibility that a person, other than the named defendant, may also be in occupation of the subject premises, even if it is not known as a fact.

In this particular case, you are certain that the defendant will not file a defence, and that the matter will proceed to a default judgment and then it will be a matter of enforcing the judgment. Your client is not interested in including a claim for any monies outstanding, it just wants vacant possession of the mortgaged property.

**The steps to be outlined are: –**

**Stage 1 - The achieving of valid service of the originating process on the defendant, together with any notices to the defendant required under the CPA and UCPR, and any notices to ensure that possession can be obtained against not only the defendant but also any occupier of the premises.**

**Stage 2 - Procedure to be followed to obtain a default judgment for possession against the defendant, and assuming that no notices are received from any occupier, to ensure such judgment will be effective against any person, other than the defendant, who may be in occupation of the premises.**

**Stage 3 - A brief outline as to the procedure to be followed under the CPA and UCPR for enforcement of the judgment for possession by way of a writ for the possession of the land, as referred to in rule 39.1 (d) UCPR.**

**(Part B Question 5 follows)**

## Question 5

This question concerns Offers of Compromise under rule 20.26 UCPR, as amended in mid-2013. You can accept that for each of the following offers, the offer is in writing and bears a notation: "This Offer of Compromise is made pursuant to UCPR 20.26" (so it does conform to the requirements at least of subrules 20.26 (1) and 20.26(2)(d) UCPR).

For each of the following Offers of Compromise, you are required to set out the terms of the offer you would make as an Offer of Compromise:

(a) The plaintiff has served the defendant with a statement of claim for goods sold and delivered at a price of \$900,000. The defendant has filed a defence and also a statement of cross-claim against the plaintiff/cross defendant claiming general damages by reason of the goods not being reasonably fit for purpose.

You, as solicitor for the plaintiff/cross defendant want to get rid of the whole of the proceedings. Your client will accept \$600,000 but also wants a judgment in its favour on the cross-claim where it is the cross defendant. Your client also wants the offer to be on the basis that each party will pay its own costs of the cross-claim.

The offer is to be open for 30 days.

(b) The plaintiff has commenced proceedings by summons seeking an order (as the purchaser) for the specific performance of a contract of sale of land. The defendant (the vendor) has filed a cross summons under rule 9 (2) (b) seeking a declaration that the plaintiff was in breach of the agreement; the agreement had been validly terminated by the defendant; and that the amount of the deposit should be paid to the defendant.

The defendant wishes to make an offer that the plaintiff's summons and defendant's cross summons each be dismissed, and that the plaintiff pay the defendant \$10,000 'for costs on the plaintiff's claim and there be no order for costs on the cross summons.

The offer is to be open for 28 days.

(c) The plaintiff has sued the defendant on 2 separate causes of action:

- An agreement dated 1/4/2012 for goods sold and delivered for \$800,000, the \$800,000 not having been paid
- A claim for damages under the Competition and Consumer Act (Cth) for damages relating to the agreement dated 1/7/2012. The damage claim is a general damage claim.

The plaintiff wishes to make an offer to settle the claim based on the agreement dated 1/4/2012 for \$400,000, in effect inclusive of costs, but keep the Competition and Consumer Act claim based on the agreement of 1/7/2012 going.

The offer is to be open for 28 days.

**END OF PAPER**