

LEGAL PROFESSION ADMISSION BOARD

MARCH 2009

PRACTICE & PROCEDURE

TIME: Three Hours

This paper consists of six questions.

Candidates are required to attempt all six questions.

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.

Permitted Material:

This is an open book exam. Candidates may refer to any books and any printed or handwritten material they have brought with them.

As some instances of cheating and of bringing unauthorised material into the examination room have come to the attention of the Admission Board, candidates are warned that such conduct will 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.

Question 1

You are the solicitor for the defendant in Supreme Court proceedings.

Your client was served with a Statement of Claim on 1/8/2008 and on 10/8/2008 you wrote to the plaintiff's solicitor seeking answers to further and better particulars of the Statement of Claim. You also sought confirmation that a defence need not be filed until after you received the particulars requested. However, on 14/8/2008 the plaintiff's solicitor wrote advising that the defendant was required to file a defence prior to any consideration of the request for particulars.

On 17/8/2008 you filed the defence and served a sealed copy by post on the plaintiff's solicitor, also containing a request that answers to the request for particulars be furnished with 28 days.

You did not follow this up until 10/12/2008 when you telephoned the plaintiff's solicitor and asked whether the plaintiff would consent to an order for discovery, pursuant to Part 21.2 UCPR in relation to the plaintiff's bank statements, showing deposits made for the last three years. You also mentioned the outstanding particulars. The plaintiff's solicitor simply said that he would get instructions.

You received no response and you sent a fax to the plaintiff's solicitors on 20/1/2009, asking consent to discovery and also requesting the particulars. You also make a telephone call on 27/1/2009 and the plaintiff's solicitor says that he is still awaiting instructions.

As at 1/2/2009 you still have no response so your client instructs you to apply by Notice of Motion.

Omitting all formal parts, you are required to draft the Notice of Motion for Orders for answers to the request for particulars, and for discovery pursuant to Part 21.2, and affidavit (or affidavits) in support.

(Question 2 follows)

Question 2

On 1/4/2004 the plaintiff suffered personal injuries when she slipped on mud located on a public footpath immediately adjacent to a residence at 10 Smith Street, Manly. The mud had escaped from some garden works inside the property at 10 Smith Street.

Believing that Phillipa Jones was the owner and occupier of 10 Smith Street, Manly the plaintiff commenced proceedings alleging negligence against this Phillipa Jones by filing a Statement of Claim in the Supreme Court of New South Wales on 1/3/2007 and serving her on 10/3/2007.

The claim came before the Registrar of the Court on 1/12/2007 for usual directions as to future conduct. The claim was reviewed by the Registrar on 1/3/2008 and again on 1/7/2008, this latter date with the intention of the Court allocating a hearing date in early 2009. However, on 1/7/2008 the plaintiff's solicitor informed the Court that he had discovered only recently that in fact Mr Tony Jones was the sole registered proprietor of 10 Smith Street, Manly as at the date of the accident. He also indicated that the plaintiff wanted to amend the Statement of Claim to add Tony Jones as a second defendant.

The Registrar criticised the plaintiff for the delay but stood the matter over for further mention on 1/12/2008. On 30/11/2008 the plaintiff filed a Notice of Motion seeking leave to amend the Statement of Claim and was given a date for hearing of the Motion on 17/12/2008. The mention date of 1/12/2008 was adjourned, by consent, to 17/12/2008.

The plaintiff's Notice of Motion seeks orders adding Tony Jones as a second defendant, the cause of action against him being based on negligence, he being the owner and occupier of the premises and responsible for the escape of the mud on the day of the accident.

The limitation period to commence proceedings in negligence against Tony Jones, if separate proceedings were commenced against him, would be outside the limitation period (as at 1/3/2007 when the Statement of Claim was filed the limitation period had not yet expired).

As counsel for the plaintiff, detail your submissions why leave to amend the Statement of Claim to add a second defendant should be ordered by the Court; firstly, under s.65(2)(b) CPA and secondly, under s.64 CPA (for the purpose of discussing s.64, assume that the Court will allow the amendment under s.65(2)(b)).

(Question 3 follows)

Question 3

Orders for discovery of documents are available in specified circumstances under Part 5.3 and Part 21.2 UCPR.

Compare and contrast the procedures for an order for discovery under 5.3 and 21.2, respectively.

You should include in your answer a discussion as to the circumstances when the respective orders can be obtained, the procedures to be followed to obtain the relevant order and the procedures by which the entity required to give discovery complies with its obligations under the respective rules.

Question 4

On 1/7/2007 Guy Folkes (an architect) through his solicitor sent a letter of demand to Harry Old claiming \$800,000 for unpaid fees for designing work.

On 15/7/2007 Harry Old replied by letter, headed "without prejudice", stating that any debt was a company debt and not his personal debt; that it was denied the company owed any money; and in any event he would pay personally \$50,000 as a commercial compromise. He also stated that if proceedings were commenced against him personally he would seek indemnity costs.

On 1/1/2008 Guy Folkes commenced proceedings in the Supreme Court for \$800,000 for unpaid fees, naming Harry Old as first defendant and H Old Developments Pty Ltd as second defendant.

On 1/7/2008 Guy Folkes, as first defendant, made an Offer of Compromise under Part 20.26 to compromise the matter on the basis that there be a verdict for the first defendant, each party to pay his own costs, the offer open for 28 days after the offer was made. The plaintiff did not respond.

The matter came on for hearing against both defendants on 2/2/2009. On the first day of the hearing the plaintiff made a written offer to the first defendant to accept \$100,000 to compromise the claim and a separate written offer to the second defendant to accept \$100,000 to compromise the claim. Neither of the offers contained a statement in accordance with Part 20.26(3)(a) UCPR. Each offer was expressed to be open for acceptance for three hours on that first day of hearing only.

The matter proceeded over two days and the Court found in favour of the first defendant, and for the plaintiff against the second defendant in the sum of \$150,000.

Discuss the aspect of costs of the proceedings under CPA, the UCPR and general principles. Include in your discussion the position with respect to costs (assuming no offers were made) as they would normally flow. You should also discuss each offer made by and to the respective parties and whether or not the relevant offer would have any impact otherwise on the order for costs.

(Question 5 follows)

Question 5

NOTE: Answer only two (2) parts.

Section 106(1) CPA provides, in relation to the Supreme Court, for enforcement of a judgment debt by a range of procedures, which include:

- (a) A writ for the levy of property - for the purposes of this question, enforcement of a writ against land;
- (b) A garnishee order (for present purposes, for debts owing to the debtor);
- (c) A charging order.

Select any two (2) of the above only

Discuss the procedure to be followed by a judgment creditor to obtain the relevant writ or order, and also outline the effect or operation of the relevant writ or order.

Question 6

You are employed as a junior solicitor by Equality Lawyers ("Firm"). You work with and are supervised by John, a senior partner. The Firm acts for Pinot Noir ("Pinot"). You are assisting John with the conduct of proceedings which are currently pending in the Common Law Division of the Supreme Court. The proceedings were commenced by Pinot against Doctor Perfect and against his professional indemnity insurer which has refused to indemnify him.

John asks you to prepare a detailed memorandum (including reasons) in support of your recommendation whether or not to seek an order for referral of the matter to mediation when it is next before the Court in 2 weeks.

From your perusal of Pinot's file you note the following facts regarding Pinot:

- is a 28 year old transgender female.
- receives appropriate feminizing hormone therapy (commenced 5 years ago).
- is waiting for her psychiatrist to approve her sex reassignment surgery.
- started working as a topless dancer 4 years ago, was very popular and loved her job.
- earned at least \$3500 "cash" per week but her tax returns do not disclose her true income.
- she had been saving up for her sex reassignment surgery.
- her boss suggested that she could earn more money if she had larger breasts.
- she consulted Dr Perfect, Plastic Surgeon, 2 years ago about breast implants.

(Question 6 continues)

(Question 6 continued)

- she specifically told him that because she scarred easily, all incisions must be made under her arms and NOT on her chest.
- she specifically asked him whether there could be any complications in the procedure because of her transgender status.
- he reassured her that he had performed implant surgery many times before on transgender females in similar circumstances, with no complications or complaints.
- because of his reassurance and expertise she left the choice of the size and type of implant to him.
- she paid him \$10,000 in cash and two weeks later, he performed the surgery.
- she was in a lot of pain and had many problems after the surgery and saw Dr Perfect at least 15 times over the next 6 months.
- he attempted to fix the problems (free of charge) including removal of and changing the implants 3 times, via incisions in her chest which have left terrible scars.
- Pinot then consulted Dr Boyle for a second opinion.
- Dr Boyle said that the size of the implant was too large for her male musculature and was surprised at the type of implant used as it had a high risk of complications.
- Dr Boyle removed the implants (without complications) and recommended no further implants for at least 2 years.
- Pinot is being treated for depression because of what has happened.
- because of her depression, her psychiatrist will not approve her sex reassignment surgery and is unlikely to approve it while the current proceedings are pending.
- Pinot is very keen to undergo her sex reassignment surgery as soon as possible.
- as a result of the complications, she was unable to work for approximately 18 months and subsequently lost her job as a topless dancer.
- she now works from time to time, behind the bar, filling in.
- she is not entitled to Social Security benefits and has been living off her savings.
- she has paid \$25,000 in legal fees and disbursements to date and owes \$10,000.
- her estimated future legal costs are between \$80,000 to \$100,000 to the conclusion of the final hearing.

From your perusal of the file you note the following facts regarding the proceedings:

- proceedings were commenced 12 months ago.
- Pinot is the plaintiff.
- Dr Perfect is the first defendant.
- No Worries Insurance, Dr Perfect's professional indemnity insurer, is the second defendant.

(Question 6 continues)

(Question 6 continued)

- Dr Perfect contends that Pinot did not disclose relevant information; that he warned her about the risks; that she did not follow his post-operative instructions and she missed 2 crucial post-operative appointments.
- medical reports have been exchanged and the various experts are in dispute.
- no offers of compromise or Calderbank offers have been made by any party.
- the final hearing is estimated to take 4 days.
- it is unlikely that the matter will be listed for a final hearing before August 2010.

Prepare the detailed memorandum as requested.

END OF PAPER