

LEGAL PROFESSION ADMISSION BOARD

SEPTEMBER 2008

PRACTICE AND PROCEDURE

TIME: Three Hours.

The paper consists of six questions

Candidates are required to attempt **all six** questions.

All references are to the Civil Procedure Act (NSW) 2005 (CPA) and the Uniform Civil Procedure Rules 2005 (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 have been answered on the 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 Materials:

This is an open book exam. Candidates may refer to any books and any printed or handwritten materials they have brought into the exam room.

As some instances of cheating and 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 required to draft a notice of motion and affidavit(s) in support (but omitting all formal parts) based on the following:-

You are the Solicitor for the plaintiff who has commenced proceedings in the Supreme Court of New South Wales seeking possession of premises at 10 Smith Street, Manly.

The plaintiff's statement of claim alleges that there was a written agreement for mortgage dated 1 June 2006 between your client as mortgagee and the defendant as mortgagor, that the property at 10 Smith Street owned by the defendant was subject to the mortgage, that it was a term of the mortgage agreement that the loan sum of \$1,000,000 together with interest at 15% was to be repaid in one full payment on 1 July 2008, and that it was also a term of the mortgage that if the monies in full were not paid by 1 July 2008, the mortgagee could exercise its power of sale. The pleading also alleges that in breach of the agreement the defendant only paid the capital sum of \$1,000,000 but no other amount. The plaintiff seeks judgment for possession (no claim is made in these proceedings for the underpayment) of 10 Smith Street, Manly.

The defence filed and served by the defendant does not admit there was a mortgage agreement and denies all other allegations. It alleges that if there was any agreement, which is not admitted, it only required payment in full of the amount of money lent and no interest was payable.

Your client instructs you that there is ample evidence to establish its claim sufficient for summary judgment pursuant to Part 13.1 of the UCPR and instructs you to proceed to file a notice of motion and any affidavits in support straight away.

It seems unlikely that the defendant will appear on the notice of motion. You consider it prudent, as your client actually wants you to get judgment for possession at the hearing of the notice of motion, that you also need to have evidence before the Court as required under Part 36 Rule 8.

(Question 2 follows)

Question 2.

This question involves amendment in the Supreme Court of New South Wales pursuant to the CPA and UCPR.

Proceedings were commenced on 1 January 2007 in the Supreme Court of New South Wales by Statement of Claim whereby the plaintiff was seeking injunctions restraining two defendants, D1 and D2 respectively.

On 1 October 2007, the proceedings were listed before Justice Simms for a final hearing for 3 days starting 1 May 2008.

On 1 May 2008, D1 applied for an adjournment on the grounds of ill health and inability to give evidence at the hearing due to commence that day. The plaintiff and D2 opposed the adjournment but Mr Justice Simms adjourned the hearing to 2 October 2008. The Judge emphasized that the parties should expect that the matter would proceed to hearing on 2 October 2008 and only exceptional reasons would be considered if it were to be further adjourned.

On 1 July 2008, the plaintiff by notice of motion sought leave to amend its Statement of Claim so as to claim damages, in addition to the injunctions, as against D1 and D2.

At the hearing of the notice of motion both D1 and D2 oppose the amendment. Part of their opposition is that if the amendments are allowed then each of D1 and D2 would need to file and serve cross claims against entities not presently parties. These cross defendants would be entitled to have time to prepare their respective cases and this would require a lengthy adjournment.

By reason of the need for the delay, arising from the plaintiff seeking to amend its Statement of Claim at this late stage, each of D1 and D2 would suffer emotional and psychological distress from the matter hanging over their heads. This is especially so for D1 who is still quite ill.

Applying the facts, discuss the principles which will guide the Court in exercising its discretion whether or not to allow the plaintiff to amend its Statement of Claim. Include in your discussion any consideration by the Court of the impact of any resulting delay, if the amendment is allowed, on the mental and physical health of the respective defendants.

(Question 3 follows)

Question 3.

(a) Compare and contrast the procedures available to a plaintiff to obtain default judgment for:

- (i) a liquidated sum;
- (ii) unliquidated damages,

under part 16 UCPR. Include in your answer a discussion of the nature of the evidence that needs to put before the Court and also the type of orders that the Court can make under the relevant rules for each.

(b) Discuss the principles that the Court needs to consider and apply in exercising a discretion to set aside a default judgment under Part 36 Rule 16(2)(a) of the UCPR.

Question 4.

A plaintiff has commenced proceedings in the Supreme Court of New South Wales and is conducting the proceedings by himself. The Statement of Claim alleges breach of a contract which was entered into on 1 July 2006 between himself and the defendant.

As part of the normal preparation of the case the defendant was ordered to give discovery of documents and accordingly served its list of documents on the plaintiff. The plaintiff did not complain about any inadequacy of discovery by the defendant nor did he seek further discovery by the defendant.

At a directions hearing on 1 April 2008 the Registrar gave the parties a specific date for the return of subpoenas for the production of documents, being 1 July 2008, with the matter listed for final hearing on 1 October 2008.

The plaintiff who had no experience in court procedure prepared a subpoena to produce documents addressed to the defendant and properly served it on the defendant. The subpoena ran for 24 pages and contained 138 separate categories of documents, some going back to 1975.

The defendant, by notice of motion, has sought orders setting aside the subpoena.

Counsel for the defendant considers that the subpoena is oppressive, is too general, is in the nature of discovery, and in many instances the documents sought have no relevance to the issues raised by the pleadings.

Discuss the principles which are relevant to an application seeking an order setting aside a subpoena. Your discussion should deal with each of the grounds which the defendant's Counsel has raised as a basis to argue that the subpoena should be set aside. Your answer should also refer to decided cases.

(Question 5 follows)

Question 5.

The plaintiff suffered personal injuries in a fight which occurred just outside a pub. There had been an altercation inside the pub between the plaintiff and another patron and both had been ejected by pub bouncers at the same time onto the footpath. Once outside, and shortly after being ejected, the other patron “king hit” the plaintiff causing serious head injuries.

The plaintiff commenced proceedings on 1 July 2007 in the Supreme Court of New South Wales against 3 separate defendants:- D1, the hotel owner as first defendant; D2, the publican and holder of the liquor license as second defendant; and D3, the security company who supplied the bouncers as third defendant. Defences were filed by each defendant.

On 1 December 2007, D1 served an offer pursuant to *Calderbank v Calderbank* on the plaintiff offering to settle the plaintiff’s claim against D1 on the basis that there be a verdict for D1 with each party to pay its/his own costs. The plaintiff ‘s solicitor responded the next day advising that the plaintiff was not interested in any settlement that compromised the real value of his claim which was worth \$1.5 million.

On 1 April 2008, D3 served an offer of compromise on the plaintiff pursuant to Part 20.26 UCPR, offering to settle on the basis that there would be judgment for D3 as against the plaintiff, with the plaintiff and D3 to pay his/its own costs. The offer was open for 28 days from date of service but the plaintiff never responded to this offer from D3.

On 1 June 2008 the plaintiff served an offer of compromise on D3 pursuant to Part 20.26 UCPR offering to settle the claim against D3 for \$1.1 million. D3 rejected the offer.

No offer was ever made as between D2 and the plaintiff.

At the hearing on 1 September 2008 the Court entered a verdict for D1 and D2, respectively, against the plaintiff. As against D3, the Court found for the plaintiff and awarded the plaintiff damages in the sum of \$1.2 million. The case was listed to a further date for the parties to make submissions as to costs.

Discuss, giving your reasons, what in your view are the most appropriate costs orders which ought to be made in the action between the plaintiff and:

- (a) the first defendant, D1;**
- (b) the second defendant, D2;**
- (c) the third defendant, D3.**

Your answer should include a consideration of the consequences, if any, of each of the relevant offers of compromise and/or Calderbank letters outlined above.

(Question 6 follows)

Question 6.

This question is concerned with alternative dispute resolution.

Assume the same facts as set out in question 5 above, other than that the matter has not yet reached the stage for final hearing. The matter comes before the Trial Judge on 15 July 2008 for pre trial directions to ensure that the parties are ready to proceed to the final hearing on 1 September 2008.

At the directions hearing, the Judge indicates that she considers it an appropriate case for the parties to participate in mediation as it will be a 7 day hearing. She asks the various parties' lawyers to step outside and obtain their respective client's views on whether a mediation would be appropriate.

You are Counsel for the plaintiff. You are aware that a very recent Court of Appeal decision will make it difficult for your client to succeed against D1 and D2, especially as the injury was suffered on a public street and not within the pub premises. You explain to your client how mediation can be utilized to help resolve disputes.

Outline your explanation to the plaintiff of the arguments for and against him agreeing to participate in mediation with the final hearing coming on in the near future.

You need to raise the specific facts and details of his claim, as they relate, respectively, to each of D1, D2 and D3, and the relevant provisions of the CPA and UCPR.

- END OF PAPER -