

LEGAL PROFESSION ADMISSION BOARD

SEPTEMBER 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 Materials:

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

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

On 1/1/2008 the defendant sought a written quote from the plaintiff for the supply of some mining plant, in accordance with specific drawings and specifications made available by the defendant.

On 1/2/2008 the plaintiff furnished a quotation to supply the plant for a price of \$900,000. The quote incorporated the terms and conditions for the plaintiff to supply the item. One of the terms was that the defendant furnish a deposit of 10% on confirmation of its acceptance of the quote, the balance payable within 28 days after the plant was made available to the defendant.

On 15/2/2008 the plaintiff received the deposit sum of \$90,000 by cheque drawn on the defendant's bank account.

The plant was supplied to the defendant on 15/4/2008 together with an invoice for \$810,000.

Over the next three months, the plaintiff forwarded monthly statements to the defendant. The plaintiff's credit manager left three telephone calls asking to speak to the defendant's manager but received no response.

On 20/10/2008 the plaintiff sued the defendant for the money owing by statement of claim in the Supreme Court of NSW, a sealed copy being served on the defendant on 28/10/2008.

- (a) No defence was filed within the 28 day period. The plaintiff then applies for default judgment.**

Outline the procedure to be followed by the plaintiff to obtain default judgment. Detail the matters, relevant to the facts, which must be dealt with by affidavit.

- (b) Assume the defendant does file a defence within time. The defence simply denies all allegations.**

Briefly discuss, on the given facts, the merits or otherwise of the plaintiff making an application for summary judgment under Part 13 UCPR.

(Question 2 follows)

Question 2

The CPA imposes an obligation that there be a just, quick and cheap disposal of the proceedings.

Especially in relation to commercial (and other) matters under NSW Supreme Court Practice Note SC Eq 3 (Commercial List & Technology & Construction List) the Court has undertaken a quite distinctive approach to try and ensure that this objective is best achieved.

Briefly discuss the provisions in the Practice Note which are designed to achieve this purpose under the CPA. Your answer should include a discussion of:

- (a) the procedures directed to defining the issues;**
- (b) the overall supervision by the Court of the progress of the case;**
- (c) the emphasis on attempting to resolve the matter prior to hearing;**
- (d) briefly, the procedure designed to reduce actual hearing time.**

Question 3

Any reference to a Calderbank letter is a without prejudice save as to costs offer as referred to in *Calderbank v Calderbank*.

Offer of compromise is an offer made in accordance with Part 20 UCPR.

Your client, Henry Smith, is a manufacturer of specialised electrical equipment. He has some negotiations with Peter Hay who says he is the purchasing officer for Havelock. On 1/6/2008, Henry Smith receives a purchase order entitled "Havelock Pty Ltd ACN 106700".

Henry Smith supplied the equipment and invoiced Havelock Pty Ltd but received no payment.

Mr Smith instructs you to bring proceedings in the Supreme Court for the \$800,000 outstanding.

You carry out company searches which disclose there is no registered company called Havelock Pty Ltd and the quoted ACN does not seem to exist. Other searches show Havelock Holdings Pty Ltd and Havelock (Sales) Pty Ltd are registered and each has the same sole director and shareholder, Peter Reed.

(Question 3 continues)

(Question 3 continued)

You write to each company demanding payment but receive no reply. You then commence proceedings naming Havelock Holdings Pty Ltd as the first defendant and Havelock (Sales) Pty Ltd as second defendant. In the pleading you allege “the plaintiff being uncertain as to which is the correct defendant sues the first and second defendant in the alternative”.

At the time of service of the statement of claim you also serve a Calderbank letter on each of the defendants offering to accept \$400,000 with no costs payable. Each defendant files a defence denying all allegations made against it in the statement of claim. You never receive any response to the Calderbank letter.

You have discovery and inspection of documents in relation to each defendant, but each defendant’s records are in complete shambles. There is some material that suggests that the second defendant is mainly a sales vehicle while the first is for administration. Other documents show that a Peter Hay is an employee of the second defendant.

On 1/4/2009 you serve an offer of compromise on the second defendant in the sum of \$600,000 but receive no response. You also serve on the same day, a Calderbank letter on the first defendant offering to have the proceedings dismissed against the first defendant provided the first defendant pay the plaintiff’s costs of \$10,000.

No response is received from either the first or second defendant.

At the final hearing the Court gives judgment for the plaintiff against the second defendant for \$800,000, but gives a verdict in favour of the first defendant. In the course of his judgment His Honour details the inability of Peter Reed to answer any question without evasion.

The matter is stood over for a week so that the parties can argue the question of costs.

- (a) Disregarding an offers of compromise or Calderbank offers, discuss the general principles as to the usual imposition of costs on the various parties.**
- (b) For each respective Calderbank offer and each offer of compromise, discuss whether the relevant offer will have any effect in relation to costs, and if so, what effect it will have, and if it has no impact, why not.**
- (c) Assume that the Court does order that the plaintiff pay the successful first defendant’s costs, briefly outline the submissions that the plaintiff can make that a Bullock order (*Bullock v London General Omnibus Co (1907) 1 KB 264*) should be made in the matter for the benefit of the plaintiff.**

(Question 4 follows)

Question 4

On 1/4/2005 Peter Able contracted with Les Yeo, a qualified architect, to design and supervise the construction of an elaborate factory building. As part of this one agreement, Les Yeo also undertook to order and arrange the supply of the very specialized metal framework for the building.

As it turned out Les Yeo's wife was the sole Director and shareholder of Frames Pty Ltd which manufactured and supplied the metal frames for the building. The building was never completed because of substantial defects in the manufacture of these metal frames.

On 1/7/2008 Peter Able commenced proceedings against Les Yeo in the Supreme Court of NSW by statement of claim alleging negligence against Les Yeo. Les Yeo filed a defence denying liability and also cross claimed for contribution or indemnity against Frames Pty Ltd both in contract and negligence. A defence to the cross claim was filed by Frames Pty Ltd.

Over the period from 1/7/2008 to 31/3/2009, each party had mutual discovery and inspection, exchanged experts reports (which had to be served by 20/3/2009) and underwent an unsuccessful informal settlement conference at the plaintiff's solicitor's office.

The matter came before the Court for general directions on 2 occasions and then at a directions hearing on 1/4/2009 the matter was listed for final hearing before Mr Justice Sails for a 14 day hearing commencing 7/9/2009.

Because of the plaintiff's difficulty in getting some funds together, the plaintiff's solicitor would not brief counsel, but finally did so on 31/8/2009. That afternoon the counsel advised the plaintiff's solicitor that:

- (i) quite independent of any amendments, the plaintiff should now serve the expert report by a costs estimator (going to damages) which report had been obtained in early 2009 but apparently the plaintiff's solicitor had simply overlooked service of this report in accordance with prior directions; and
- (ii) the statement of claim has to be amended so as to -
 - (a) add an additional claim in contract against Les Yeo; and
 - (b) add Frames Pty Ltd as second defendant to the statement of claim, alleging negligence on its part.

On 3/9/2009, by notice of motion before Justice Sails, the plaintiff sought these orders as suggested by his counsel. The defendant and cross defendant:

- (i) firstly, opposed the late service of any late report; and
- (ii) secondly, opposed any amendment to the statement of claim, essentially as both the defendant and cross defendant had fully prepared their cases and it would be difficult to obtain another 14 day period until late 2010, and it may be difficult to get witnesses from overseas again.

(Question 4 continues)

(Question 4 continued)

Applying the facts as given, for each of the proposed applications in the notice of motion, discuss the relevant principles which the Court needs to consider in coming to a decision for each application (there are no limitation difficulties).

Question 5

You are required to draft a Notice of Motion and affidavit(s) in support based on the following.

(OMIT FORMAL PARTS)

Assume the facts set forth in question 4 above apply. You act for the plaintiff in that matter. The following additional facts are relevant to this question.

After receiving counsel's advice on 31/8/2009, you immediately telephoned the solicitor for the defendant, Helen Mays, and told her that you would be seeking to amend the statement of claim to achieve the suggestions made by counsel, and would also be serving, late, another expert's report. She asked that you send across urgently a draft of the proposed amendments and also a copy of the expert's report.

The next day you forward by fax, to both the defendant's solicitor and to Peter May, the cross-defendant's solicitor, a letter asking would they consent to both matters.

The same afternoon you receive an email from Helen Mays advising that her client would oppose any late service of the report or amendments, and would seek indemnity costs for costs thrown away if any application to do so was successful. You also receive a telephone call from Peter May advising that his client would also oppose any such application.

You are to draft the orders that you would actually seek by way of the Notice of Motion to try and achieve what counsel has suggested, and also any affidavit(s) in support.

(Question 6 follows)

Question 6

For the purposes of this question adopt the same facts as set out in questions 4 and 5. Also assume for the purposes of this question, that Justice Sails allows all the amendments as sought and adjourns the matter for a hearing date to be fixed. He also orders the plaintiff to pay the costs of the defendant and cross defendant occasioned by the adjournment on an indemnity basis. His Honour also indicates when he makes these orders that he would re-list the matter on 14/9/2009 to hear submissions from all parties why should he not order all parties to undergo compulsory mediation to be conducted within the next 2 weeks.

You act for the defendant and your instructions are to oppose any order for mediation whereas the plaintiff and the cross defendant/potential second defendant will consent to the order.

Draft the submissions you would make in opposing referral of the matter for mediation, taking into account what you believe will be the submissions of the other parties in supporting the referral of the matter for mediation.

END OF PAPER