

**LEVEL 6 - UNIT 15 – CIVIL LITIGATION  
SUGGESTED ANSWERS – JANUARY 2017**

**Note to Candidates and Tutors:**

The purpose of the suggested answers is to provide students and tutors with guidance as to the key points students should have included in their answers to the January 2017 examination. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. The suggested answers do not for all questions set out all points which students may have included in their responses to the questions. Students will have received credit, where applicable, for other points not addressed by the suggested answers.

Students and tutors should review the suggested answers in conjunction with the question papers and the Chief Examiner's reports which provide feedback on student performance in the examination.

**Question 1(a)**

See attached draft. The words for solicitor's service have been included because this is the original N1 and indicates to the court that the documents should be returned for solicitor service and not served by the Court.

**Question 1(b)**

Serve the claim form by taking the step required (which details methods of service) under CPR 7.5(1) within 4 months of issue of the claim form, as it is for service within England & Wales. The claim form will be deemed served on the defendant on the second business day after the 'step required' (CPR 6.14). Then file a Certificate of Service at Court within 21 days (CPR 6.17).

**Question 1(c)**

Apart from defending the claim brought by Eddie Meade, there is also the possibility of Natural Rock Ltd bringing Part 20 proceedings against Custodian Security Service, to whom it had outsourced all security and safety matters. Natural Rock should issue a Part 20 Additional Claim against Custodian Security Services Limited to claim an indemnity or contribution in respect of any damages Natural Rock has to pay Eddie in his claim. The Part 20 proceedings will be under CPR 20.7 as Custodian is a non-party. Natural Rock should draft and file its Part 20 Claim Form and pay the fee and should aim to do this before or at the same time as filing and serving the defence, otherwise the Court's permission will be required.

**Question 1(d)**

Costs are at the discretion of the Court. However, the general rule is that the loser in litigation pays the winner's costs – CPR 44.2(2)(a). As this is a claim for damages for personal injuries, qualified one way costs shifting will apply to

Eddie's case – CPR 44.13. The effect of this is that an order for costs made against a claimant may be enforced without the permission of the Court but only to the extent that the amount of the order does not exceed the aggregate amount of any order for damages made in favour of the claimant – CPR 44.14. Given the amount of Eddie's claim, this means that if Eddie loses his case he will not have to pay Natural Rock's costs unless it has made a Part 36 offer which he has failed to beat.

### **Question 2(a)**

Advise Yolanda to apply for an interim injunction under CPR 25.1(1)(a) to restrain Bedstone Council and its contractors from carrying on the building works in such a way as to cause her a nuisance. The application can be with or without notice and her lawyer will need to draft and issue the claim form, or give an undertaking to file the proceedings. The lawyer will prepare the application notice (Form N244) a witness statement in support from Yolanda, a draft order and pay the appropriate fees. In the circumstances there is no need to follow Protocol.

### **Question 2(b)**

The relevant legal test is contained in s.37 SCA/s.38 CCA and the guidelines set out in American Cyanamid v Ethicon [1975]. The House of Lords gave guidelines for the granting of an interim injunction by the lower courts and which should be followed when exercising their discretion to grant this equitable remedy.

Yolanda will have to demonstrate the following:

That there is a serious question to be tried – being a claim for noise nuisance which is having a serious effect on Yolanda's business – not a frivolous or vexatious claim.

That damages are not an adequate remedy for Yolanda – she in danger of losing her business and reputation, losing rare/irreplaceable fish stocks, and so her loss is not purely financial.

However, Yolanda will contend that damages are an adequate remedy for Bedstone Council - its only loss would be financial – being the cost of additional labour which may be needed if less powerful drills are used in order to conduct the work with less noise/vibration.

That Yolanda is in the financial position (as she has £18,500 in savings) to give the necessary undertaking in damages to ensure Bedstone Council is adequately compensated for loss suffered during the currency of an interim injunction, should it subsequently be determined it was wrongly granted.

Finally, that the balance of convenience favours the granting of the interim injunction – Yolanda accepts that Bedstone Council will incur some additional cost in order to complete the work without excessive noise/vibrations if the interim injunction is granted, but this is far outweighed by the harm Yolanda will suffer if the injunction is not granted – she is likely to lose rare fish and could lose her livelihood permanently.

It is in the interests of justice and necessary to give effect to the overriding objective that the injunction sought should be granted.

### **Question 3(a)**

On Tashwara's behalf the following evidence on liability must be obtained. Contact the appropriate police authority to obtain the police accident report. This should contain the contact details of the independent witness, Xia Ekam, if these have not already been obtained so that a statement can be taken from her. Check to see if any CCTV of the area would help. Prepare a first draft of Tashwara's witness statement.

Obtain details of Tashwara's medical treatment and condition from Bedford General Hospital. Then take steps under the Protocol to seek to agree a medical expert to prepare a report.

Obtain full details and supporting documentation for special damages: loss of pay £7,500, physiotherapy costs £500, travel £250, pain killers £50.

### **Question 3(b)**

As the claim is worth just over £25,000, the pre-action protocol for personal injury claims should be largely followed. Write an early letter to the opponent explaining for whom you are acting and start the process for attempting to agree a medical expert to prepare a report. In due course write a letter of claim to Octavio Brindisi. In the letter of claim set out a claim for damages for personal injuries arising out of the accident in Bedford High Street on 14/05/2016 when Brindisi's Citroen C4 Cactus collided with the Suzuki Splash driven by Tashwara Khan. Allege that the collision was Octavio Brindisi's fault and was caused by his negligence in pulling out of a side street without looking or giving way to Tashwara's vehicle. Tashwara received treatment at Bedford General Hospital for her fractured pelvis from which she has made a slow and incomplete recovery and she has also suffered various financial losses. A copy of this letter will be sent to Octavio Brindisi to his insurers.

### **Question 3(c)**

The case would have to be issued in the county court (CCMCC) as the likely damages are in the region of £28,000 and personal injury claims can only be issued in the High Court if the damages exceed £50,000 - PD 7A 2.2. Part 7 money claims are issued in the CCMCC - PD 7A 4A1. The value of the claim make it likely to be allocated to the multi-track once a defence is filed unless both parties and the Court agree that it should be allocated to the fast track.

### **Question 3(d)**

Send a Part 36 offer to settle on Tashwara's behalf for £20,000. The offer must meet all the requirements of CPR 36.5.

If Tashwara's offer is accepted within 21 days, Brindisi's insurers will pay the £20,000 offered to settle her claim and in addition will pay Tashwara's legal costs.

If Tashwara's offer is not accepted, she will have to continue with her legal proceedings. In that event, if, as looks likely, Tashwara recovers in excess of £20,000 - CPR 36.17 will apply. The effect of this is that Tashwara may be awarded interest on her damages at up to 10% above base rate from the end of the relevant period (i.e. 21 days after her Part 36 offer was made), and an additional amount of 10% of damages awarded. She can also claim costs on the

indemnity basis for the same period and interest on those costs at up to 10% the above base rate.

#### **Question 4(a)**

Sean can give factual evidence concerning the sub-standard and poor performance of Cavendish's website. If Sean's evidence is oral evidence there will have to be a direction order permitting it. Generally, opinion evidence is inadmissible unless the witness (here, Sean) is an expert, which he is not.

Sean can give evidence of poor quality if it is based on relevant facts personally perceived (s.3(2) CEA 1972) – e.g. specific and substantiated problems with the website.

If Sean refuses to give evidence, Quentin can issue a witness summons to compel him to attend Court to give evidence. He must offer travelling expenses and compensation for Sean's loss of time and serve the summons at least 7 days before the hearing.

Alternatively, Quentin can tell the Court what Sean said. This will be hearsay evidence as the statement is being presented to Court in order to prove that it is true. It should be admissible if the evidence would have been admissible if given by Sean (see above). The notice requirements in CPR 33 should be followed - here, by including this evidence in Quentin's witness statement to be disclosed in accordance with the Court directions for exchange of factual evidence.

#### **Question 4(b)**

On behalf of Cavendish, write to 3WP's solicitors and state that the minutes should be part of its client's standard disclosure. The minutes are not protected by any privilege and Cavendish is therefore entitled to inspect them. Give 3WP's solicitors a reasonable period (say, 7 days) to reply, also saying if an application to the Court is required Cavendish will be seeking indemnity costs. If there is no reply or a refusal to disclose, make an application to court for specific disclosure of the minutes under CPR 31.12.

Seek an order for costs of the application against 3WP as the minutes should have been included in 3WP's standard disclosure. Any costs awarded will be payable within 14 days.

#### **Question 4(c)**

Given the value and facts of the case, it is most likely to have been allocated to the fast track so it would be a one day trial. There may be settlement discussions prior to the actual start of the trial.

If these were unsuccessful, the following will take place:

The parties' opening, if allowed by the judge.

The parties' witness statements will stand as evidence in chief followed by cross examination and then re-examination of the Claimant's and then the Defendant's witnesses.

The Defendant will then make closing submissions on the evidence followed by the Claimant's closing submissions.

Judgment will then be delivered, possibly after a short break, plus summary assessment of costs by the judge.

**Question 4(d)**

Serve a statutory demand on behalf of Cavendish against 3WP and then issue a winding up petition against the company if it does not pay. Enforcement by this means would have a severe effect on this solvent company. The obvious downside would be the costs of the winding up petition issue fee and deposit for the Official Receiver. Alternatively, issue a warrant of control to take control of the computer equipment, which could be seized and then sold. There will presumably be a bank account for the purposes of a third party debt order, but there is no information as to its balance. It is known that 3WP's business premises are rented so a charging order cannot be sought. As 3WP is a company there can be no attachment of earnings order against it. There is no further information about any other assets.