LEVEL 6 - UNIT 15 – CIVIL LITIGATION
SUGGESTED ANSWERS – JANUARY 2018

Note to Candidates and Tutors:

The purpose of the suggested answers is to provide candidates and tutors with guidance as to the key points candidates should have included in their answers to the January 2018 examinations. 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 the points which candidates may have included in their responses to the questions. Candidates will have received credit, where applicable, for other points not addressed by the suggested answers.

Candidates and tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners' reports which provide feedback on candidate performance in the examination.

Question 1(a)

In order to progress this matter, the requirements of the Pre-Action Protocol for Personal Injury Claims should be complied with. Annex B1 provides a relevant template which may be followed and indicates the information which should be provided. Three examples of information which should be provided include a summary of facts as to the circumstances of the incident giving rise to a claim, the reasons why fault is alleged so that the recipient can consider the legal basis of the claim, a description of injuries sustained to indicate the severity of the claim and a description of losses incurred e.g. loss of earnings/other financial losses which will form part of the claim for special damages.

(b)

In order to respond to the defendant's points that the claim has been issued and served out of time, I would be sure to state clearly that it is incorrect to say that the claim has been brought out of time or served out of time. S.11 Limitation Act 1980 provides that a personal injury action shall not be brought after three years from the date on which the cause of action accrued or the date of knowledge (if later). However, the date of issue by the court is not the relevant date to determine whether or not proceedings have been brought in time. Proceedings are brought for the purposes of the Limitation Act 1980 when the court office receives the claim form (here 3 May) which was within the limitation period for this claim. It does not matter that the claim form is issued on a later date (here 8 May 2018) and service on the defendant is irrelevant for the purposes of deciding whether or not the claim has been issued in time and in any event, the claimant has four months from the date of issue to serve the claim form (here from 8 May 2018).

1(c)

Given what Anton has said, it would be sensible for us to ask the defendant for a voluntary interim payment in these circumstances. If the defendant is not willing voluntarily to make an interim payment, we could make an application for an interim payment (CPR Part 25). The court expects that certain conditions are made out (CPR 25.7) and may only make an order for interim payment if one of the conditions is satisfied. Here, we could satisfy the condition that liability has been admitted. This assists as it would not be necessary to show that client would obtain judgment for a substantial amount of money so it does not matter that quantum cannot yet be finalised as medical report not available.

The following additional information is needed in order to satisfy the relevant evidence requirements: a supporting witness statement, in which we would set out the sum of money for which final judgement is likely to be given (here £120,000) and the sum of money sought by the client. A reasonable sum might be £50,000 given that the claim cannot be finalised as yet and this sum would allow not just for the cost of the scooter/window cleaning/gardening but also assist the client, who will shortly be unemployed. Whilst a more substantial sum could be sought, the client must be advised that the court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment (this can be as much as 85% dependent on the circumstances). PD25B refers to the evidential requirements of the application. The application, which must be served 14 days before the hearing of the application to allow the defendant sufficient time to respond, should be supported by detailing the client's losses and expenses, other than those already given in the schedule of special damages and past and future loss, for example, the expense of window cleaning and gardening and the cost of the scooter. The application should be supported by documentary evidence and so the letter from the employer giving notice of termination of employment might be exhibited.

1(d)

The client must be informed that the defendant has made a Part 36 offer which must be very carefully considered as there are significant costs implications which are always a major consideration in litigation as the general rule under CPR 44.2(2)(a) is that, if the court decides to make an order about costs, the unsuccessful party is likely to be ordered to pay the costs of the successful party; but the court may make a different order. However, as this is a personal injury matter, the claimant has the benefit of some costs protection in the form of QOCS. This protection is weakened when a Part 36 offer is made as there is now a risk of paying costs should the client fail to beat the defendant's offer but recovers some damages at trial. In that event, a split costs order can be made.

A split costs order means that the client could be ordered to meet the defendant's costs from the date of expiry of the relevant period for acceptance of the Part 36 offer as well as being responsible for payment of his own costs. The defendant would be able to enforce the order for costs without permission but only to the extent that costs do not exceed the amount recovered by the client - this could potentially eliminate his damages. As this creates a risk for the client, the client should be advised as soon as possible to make his own Part 36 offer. This would then be a claimant offer which would put the defendant at risk of being penalised in the amount that is paid in both costs and damages should the claimant's offer not be accepted and the claimant recovers a sum equal to or more advantageous than his own offer. A CRU Certificate should be obtained so that the offer can be accurately set out.

Question 2(a)

In the particulars of claim at paragraph 4, Jules has alleged that Flair Garages made a representation that the car was roadworthy. This is the allegation which has been made. We are told that the defence does not deal at all with this allegation. CPR16.5(3) provides that a defendant who fails to deal with an allegation shall be taken to admit the allegation. However, we need to be careful here as the allegation in the particulars of claim relates to the representation and not the issue of roadworthiness. In the circumstances, Jules does not need to prove that Flair Garages made the representation that the car was roadworthy and Flair Garages will be taken to admit that as a fact but Jules will still have to establish as a fact that the car was not roadworthy.

(b)

In the County Court Money Claims Centre Claim No: BD17809

Mr Jules Bosworth (Claimant)

v

Flair Garages Ltd (Defendant)

Particulars of Claim

Consent Order

Upon reading letters from the claimant's and defendant's solicitors

BY CONSENT it is ordered that:

1. All further proceedings in this action shall be stayed upon the terms set out in the attached schedule except for the purpose of carrying those terms into effect.

2. Each party shall be at liberty to apply to the court if the other party does not give effect to the terms set out in the schedule.

3. The defendant shall pay the claimant's costs on the standard basis to be subject to detailed assessment, if not agreed.

Dated....

We consent to the making of an order in the above terms

Signed:

Claimant's solicitors Defendant's solicitors

Schedule

1. The defendant shall pay to the claimant the sum of £33,000 in full and final settlement of all claims arising in this action inclusive of interest.

2. The settlement payment is payable by 3 equal instalments of £11,000 per month. The first payment is to be made on 28 April 2018 and thereafter on the 28th day of each month.

3. In the event that the whole or part of any instalment remains unpaid upon the due date, the whole of the remaining balance will become payable with interest at 8% from the due date and

4. The stay shall be removed and the claimant shall be free to enforce payment of the sums outstanding plus interest.

2(c)

As the defendant has defaulted upon the settlement agreement and the terms of the consent order, the client should be advised to seek to enforce the judgment. There is no need to return to the court for permission as this is provided for in the consent order because the stay will be lifted. Jules can enforce payment of the full amount of the sum owed i.e. £33,000. He can also claim judgment rate interest at 8% on the debt. Jules can consider various options for enforcement including options for enforcement in either the High Court or County Court as the judgment sum is over £5,000. In order to determine the best method of enforcement, a Part 71 hearing might be useful to find out more about the defendant's financial position.

Question 3(a)

In the circumstances described, an application is not immediately necessary as there is still time before the timetabled date to serve the client's statement even though Felix Shotton's statement cannot be served. We should explain the situation to the defendant's solicitors and ask them for their agreement to vary the date for exchange of witness statements so that Felix Shotton's statement can be served at a later date. An application is not needed if the parties agree as the parties are permitted to vary the timetabled dates provided the trial date/trial window is not affected (CPR 2.11). If the defendant's solicitors will not agree to vary the date which has been scheduled for next week, an application will be necessary which would be made on notice.

We would need to make the application before the timetabled date for exchange if at all possible and the court can be asked to vary the date for exchange of statements. If iot is not possible for the application to be heard until after the timetabled date for service, an application for relief from sanction for non-compliance with the court order will be necessary (CPR 3.9). This is because, if the statement is not served within the time specified by the court, then the witness may not be called to give oral evidence unless the court gives permission (CPR 32.10). A sanction is inbuilt into the rules for service of witness statements if the court's direction is not complied with and we would therefore be in breach of the relevant rule and would need to apply for relief form sanction.

In the circumstances, full explanation will be required as to why the application was not made before the timetabled date and we would need to explain when it was known that the date for exchange could not be complied with and when it

was known that the witness was on holiday in the hope that we could obtain relief from sanction and have permission of the court to rely on Felix Shotton's statement. Although we could serve Felix Shotton's draft statement unsigned, this would be a risk as it may be changed by the witness and therefore differ from the draft statement served

3(b)

We would need to exercise great caution in responding to Hana' request. If we did as we were asked, our actions would be contrary to the SRA Code of Conduct. We should therefore refuse to do as asked. To do otherwise would risk breaching the SRA Principles. In this instances, the following Principles are most relevant: (1) to uphold the rule of law and the proper administration of justice; (2) to act with integrity; (3) to not allow your independence to be compromised; (6) to behave in a way that maintains the trust the public places in you and in the provision of legal services.

Furthermore, Chapter 5 Outcome 5.8 provides that you do not make or offer to make payments to witnesses dependent upon their evidence or the outcome of the case. In doing what Hana has asked, and given the content of her email, there is a risk of being complicit in another person deceiving or misleading the court (O(5.2)). We would also fail to demonstrate the Outcomes through our behaviour which is too close to the Indicative Behaviours. Again referring to Hana's email, we would risk being complicit in calling a witness whose evidence you know is untrue (IB5.9) and attempting to influence a witness, when taking a statement from that witness, with regard to the contents of their statement (IB5.10) and tampering with evidence or seeking to persuade a witness to change their evidence (IB5.11).

Question 4(a)

The client must be asked to provide the surveyor's report. This is because it must be disclosed as it falls within the requirements for standard disclosure. Specifically, it is a document which is within the client's control and fits the description of a document which adversely affects the client's own case and/or may support the claimants' case on the issue of flooding. There is no legitimate reason for it to be withheld from inspection as it does not attract litigation privilege as it was not brought into being whist litigation was pending or in contemplation.

(b)

Given the substance of the surveyor's report, if it is disclosed to the claimant, the claimant is likely to make an application for summary judgment under Part 24. This is because the claimant can argue that our client does not have a real prospect of successfully defending the case given that the surveyor suggests that there was a risk of flooding of which Peter was aware but the buyer was not.

The court will balance the evidence but there is a risk that the court will decide that a summary disposal before trial bests achieves the overriding objective in saving time and costs.

However, we may be able to argue that there is a compelling reason why the case should be disposed of at trial. We could submit on Peter's behalf that the reason for the flooding was the very wet winter and that the buyer should have exercised caution and made their own enquires before purchasing the property.

Both are arguably issues which should be determined at trial. It is also arguable that the issue of flooding may be best dealt with by way of expert evidence and that a single joint expert should be instructed. However, explanation will be required as to why the need for expert evidence was not identified sooner.

4(c)

If Peter successfully argues against summary judgment and the claim is allowed to proceed, the court may decide to order costs in the case. However, if the claimant were to be successful on the application then the claim has been disposed of and the court may order that Peter should pay the claimant's costs following the general rule that the loser pays the winner’s costs.

At the hearing, the court may deal with the costs of the whole claim (PD44 para 9.) by way of a summary assessment of costs rather than detailed assessment unless there is good reason not to do so. Therefore it is important that the costs schedule, which should be served not less than 24 hours before the time fixed for the hearing, should be presented in anticipation that the court may assess the costs of the whole claim.