

**LEVEL 3 – UNIT 9 – CIVIL LITIGATION
SUGGESTED ANSWERS – JUNE 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 June 2017 examinations. The suggested answers do not for all questions set out all the 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 Examiners' reports which provide feedback on student performance in the examination.

Question 1

- (a) There are a number of advantages in the parties using arbitration rather than going to court. Firstly, arbitration is considerably quicker than going to court. In the present case it is also likely to be considerably cheaper as the arbitration scheme is run by a trade body and it is likely that any fees associated with the process will be less than those required by the court. Another advantage is that the arbitrator will have a degree of expertise in the matter.
- (b) (i) The Statement of Truth for the witness statement should read:
- I believe that the facts stated in this witness statement are true.
- Signed: Rachel Armstrong
Dated: Date of Exam
- (ii) The Statement of Truth underscores the importance of telling the truth at court. Once the document has been signed the witness is effectively confirming that the contents of the document are true. Where a statement is found to be untrue, the maker can be held in contempt of court and subsequently committal proceedings may take place. In respect of the case itself, the court may exercise any of its powers under the rules and can for example, decide to impose cost sanctions or strike out the Statement of Case.
- (c) This is a Fast Track case and, consequently, it is likely that Standard Directions will be adopted. The directions will deal with disclosure and inspection, the use of experts, the exchange of witness statements and preparation for the trial, which will include the Pre-Trial Checklist and setting down for trial.

- (d) If one of the parties fails to comply with a direction the other party is at liberty to apply for an order to enforce compliance, or for a sanction to be imposed. Such a failure will not lead to postponement of the trial unless the circumstances of the case are exceptional. Any postponement or adjournment would be ordered as a last resort. The sanctions that the Court can impose may deprive a party of the right to raise or contest an issue, or to rely on evidence to which the direction relates. Where an issue cannot be dealt with at the trial, the Court may order a later trial with costs to be paid by the party in default.
- (e) A Part 36 Offer may have cost consequences if it is refused. The matter will be dealt with after judgment is given. The usual rule is costs in the cause, so where a party wins the case the losing party will pay their own and the winner's costs.

The Defendant's offer effectively reverses the normal costs position from the date the offer should have been accepted. Where the Defendant has made an effective Part 36 Offer, the Claimant gets costs up to the end of the relevant period, the court making a Split Costs Order.

Question 2

- (a) The amount involved (£11,000) makes it suitable for the Fast Track and therefore the claim would go through the Pre-Action Protocol for Low Value Personal Injury (Employers Liability and Public Liability).

There are three stages to the procedure, with fixed costs being payable at each stage. Should the claim fall out of the protocol, the fixed costs regime will still be used.

Stage 1 is concerned with submitting the claim and the Defendant's liability response. At Stage 2 the parties exchange evidence and is limited to quantum only. Stage 3 is concerned with court assessment of damages or the approval of a settlement.

- (b) The Defendant will have 14 days in which to file a Defence. If an Acknowledgment of Service is filed, 28 days in total will be allowed to file the Defence.
- (c) The Claimant should make a Part 18 Request for Further Information. This is a formal request made directly to the Defendant in this case in the form of a letter. The receiving party should reply answering the points raised by the other party. Both the letter and the reply should identify themselves as a Part 18 Request or Reply. The Reply should only deal with matters raised in the Request and it may take the form of an answer or an objection. If the responses are not satisfactory, or there is no reply, then an application for a court order can be made without the need for a court hearing.
- (d) Costs are always at the discretion of the Court, there is no right to costs even if you win. In most cases costs will follow the event and, therefore, costs will be granted to the winning party. As this is a Fast Track case, the trial judge will usually summarily assess the costs at the conclusion of the trial. Fast track costs are controlled through the proportionality test.

Question 3

- (a) An application for summary judgment requires an Application Notice together with a statement in support. The statement may be a witness statement or the Statements of Case could be relied on. This must be served at least 14 days before the summary judgment hearing on the Claimant who can, if they wish, produce a statement which should be received no less than 7 days before the hearing. The Applicant can serve a further statement if they wish, 3 days before the hearing. The hearing is before a District Judge.
- (b) The Listing Questionnaire, which is also known as a Pre-Trial Checklist, includes a number of elements, including ensuring that all directions have been complied with. The form is also used to check the availability of parties/witnesses, as well as providing information about experts and legal representation. The trial itself is also considered, with a trial date being set, and the documents and fee checklist completed.
- (c) As this is a Multi Track case, budgets would have been exchanged and filed by all the parties within 28 days of the date specified in the court notice, or no later than 7 days before the case management conference. The budget will detail costs already incurred and estimate future costs by stage and type of work. Reasonable and proportionate budgets should be agreed by the parties. The Court can make a costs management order which would mean the Court thereafter controls the budget in respect of recoverable costs.

Question 4

- (a) Deborah Surtees could pay privately on a retainer basis. Qualified one-way costs shifting (QOCS) will alleviate the issue of having to pay the Defendants costs should the claim fail. She could also enter into a Conditional Fee Arrangement (CFA), although Kempstons would then bear the risk of the costs if she was unsuccessful in the claim. However, Kempstons would be able to include a success fee if she was successful in the claim.

Other alternatives could be, for example, a Damages Based Agreement (DBA), which is a privately funded arrangement between a representative and a client where the representative's agreed fee is 'contingent' upon the case being successful, hence they are also known as contingency fees. Ms Surtees may have some form of Before the Event insurance, however this is unlikely in the circumstances.

- (b) Once the Letter of Claim has been received by the Defendant, they are required to reply with their insurance details within 21 days and there will then be a three month investigation period. At the conclusion of the three months, the Defendant will reply stating whether liability is denied by giving reasons for the denial. This will include providing documentation which is material to the issues.

As soon as is practically possible the Claimant will send to the Defendant a schedule of special damages and supporting documentation. The rehabilitation requirements of the Claimant should also be considered. If possible a joint medical expert should be agreed. Throughout the period the parties should be involved in alternative dispute resolution (ADR).

(c) The use of experts is regulated by Part 35 CPR. The first duty of the expert witness is to the Court. No party can call an expert witness without the permission of the Court and, in this case as it is a Fast Track case, a joint expert would be appointed. The expert will write a report and the parties will be entitled ask questions in writing to clarify any matters.

(d) Various methods of enforcement can be used in the alternative scenarios:

(i) The Defendant owns his own house

In relation to the house, an application would be made for a Charging Order. Applications are processed at County Court Money Claims Centre and are paper based for the most part. A court officer will may make an interim order. Once an interim order is made the parties have 28 days between service and referral to a judge to object to the making of the final charging order. Subsequently, the Judgment Creditor can apply for an Order for Sale of the property.

(ii) The Defendant has equipment and stock in the shop

The stock and equipment are classified as goods and therefore the appropriate method of enforcement would be an application for a Writ of Control. The Writ will command a High Court Enforcement Officer (HCEO) to take control of the items and sell them at auction. The proceeds from the auction are used to satisfy the money judgment.

(iii) The Defendant has substantial savings at his bank

This would indicate that the Defendant has got a deposit account, therefore, a Third Party Order would be an appropriate way of enforcing the Judgment. An Interim Third Party Order will be served on the bank without notice to the Judgment Debtor. The Order will be made Final and the Third Party will be required to transfer the funds from the deposit account of the Judgment Debtor.