LEVEL 6 - UNIT 15 – 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 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 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

Before giving Mr Turner any advice as much information about the contracts and the parties would need to ascertained. Any advice at this stage would be qualified advice.

The following would need to be clarified: name of company, registered office address, details of the contract for the supply of the air-conditioning units (TEL/ESL contract) including; contract documentation, relevant dates and the relevant terms of business (TEL's or ESL's) for this contract. The contract would need to be looked at in detail, to check, for example, whether any exclusion clauses applied. It would also be noted that £125,000 remains outstanding to ESL and it would be important to determine whether there is a right of set-off.

Having gained as much information as possible at this stage it would be possible to give Mr Turner qualified advice and a risk assessment but this would be subject to checking all the above.

Based on what Mr Turner has said;

- TEL's primary liability is to BCC. If the air-conditioning units are faulty then TEL may be in breach of the contract to BCC, and therefore under the terms of the 'main' contract TEL may have to replace the Units and undertake associated works to do this. TEL may be able to seek an indemnity from ESL but this will depend on two things – the terms of the contract with ESL - whether any exclusion clauses apply (which may limit the extent of ESL's liability) and whether ESL are financially viable and able to satisfy any judgment.

- If Mr Turner believes there are no relevant exclusion clauses in this contract that would limit ESL's liability but this would have to be checked from the contract document. If none do apply then TEL may be able to

seek an indemnity from ESL in respect of its liability to BCC. This will also be dependent on ESL's financial position and ability to satisfy any judgment.

• If TEL has a right of indemnity from ESL it will be important to also discuss ESL's ability to satisfy any judgment as if ESL cannot or do not pay then TEL will remain liable under the main contract with BCC.

• The cause of action that TEL may have against ESL would be for breach of contract. To establish such a claim there would need to be a valid contract – on the facts and subject to checking all the above a valid contract would appear to have been created with all the elements – offer, acceptance, consideration, intent and capacity. We do not know whether the contract is a written contract or oral but the likelihood is that it would have been a written contract with the terms agreed and on the terms of trading of one of the contracting parties applying.

Having established the existence of a valid contract there would then need to be proven a breach of the contract – this may be a breach of the express and/or the implied terms of the contract.

The express terms of the contract are likely to be the supply of the specified units, for the expressed purpose, at the agreed price and time for delivery. The implied terms would have been those incorporated into the contract by the Sales of Goods Act – that the goods were of satisfactory quality and fit for purpose.

On the facts there would appear to a breach of the specified purpose and a breach of the implied terms as to quality and purpose. Perhaps also breach of description.

To have a valid cause of action TEL would also need to show that there had been loss or losses that 'flowed' directly from the breach and which were not, 'too remote'.

The burden of proof would be TEL's on 'a balance of probability' and the remedy would be for damages 'to place the claimant in the position they would have been had the contract been performed'.

1(b)

If Mr Turner seeks to proceed quickly it would be necessary to explain the consequences of litigation commenced without reference to protocol practice. It would be important to advise him (TEL) that though his frustration was understandable hasty litigation now could have serious adverse consequences for TEL and may also create delays as the court would consider whether to stay the action to enable a period of appropriate negotiation and exchange of information and documents before proceeding further with the action.

This is important advice to give but ultimately, if Mr Turner did decide to proceed into litigation ('best practice' as advised by protocol is not compulsory) now he could do but it would be important to make a clear file note of the advice given and to follow this up in writing so that if the court subsequently imposed penalties or sanctions there is a clear file note and letter of advice urging against such precipitous action so the client cannot subsequently seek to 'blame' his legal advisers for the courts reaction.

The appropriate protocol to follow here would be the PDPAC.
The likely consequences/sanctions the court may impose upon TEL if they had unreasonably failed to comply with protocol practice could include a sanction in costs (the most likely sanction), but the court can also:

a. stay the proceedings pending compliance;
b. make a costs order against the non-complying party;
c. if a judgment order is obtained, refuse to award interest for a specified period and/or award interest at a lesser level than would have otherwise been awarded.

CPR (CPR 44) gives the court wide discretion on costs. It requires the court to have regard to the conduct of the parties, both before and during the proceedings. To encourage Mr Turner to consider protocol steps before issuing proceedings precipitously the following advice could be given;

- responses from ESL in protocol would probably:

a. allow TEL to appreciate the strengths and weaknesses in its case;
b. identify the strengths and weaknesses of ESL's case before issue;
c. clarify where further evidence is required, whether documentary, expert or witnesses of fact;
d. narrow the issues in dispute;
e. give time for ADR.

As to an indication of the next steps that could be taken, subject to instructions being given, this could include;

a. Writing to ESL (ultimately a Letter before Claim)
b. Writing to BCC to inform of position and the steps being taken to resolve so as to 'engage' BCC with this as it was upon the advice of their agent that the Units have been installed in the theatres.
c. request documents to be provided and request money on account.
d. Take steps to ensure the financial viability of ESL to be able to satisfy any judgment obtained against them (as litigation against ESL if they could not satisfy the judgment would be pointless).

Question 1(c)

This question asks for a brief statement of the possible funding options that may be available to TEL. As TEL is a limited company trade union funding will not be available.

The most relevant funding options that may be available to TEL include;

Legal expenses insurance (BTE) may be available. Mr Turner should be advised to check on the existence of any company insurance policies that may have some legal advice cover and for the extent of this cover to be checked (by us). Sometime such policies do cover such actions but they may require the work to be undertaken by a solicitor on the insurance company's panel. Mr Turner should be advised if this is the case and he will then have the choice of using the nominated solicitors or not.

Private funding, which is probably the cheapest option for the company but one that may affect cash flow as interim bills will have to be settled as the case proceeds. This is the cheapest option as there is no 'uplift' on the solicitors normal charging rates as there would be with a CFA, nor any % claim on any

damages recovered as there would be with a DBA. The availability of either of these options would be dependent on the firm's risk assessment and whether they would be prepared to offer such a funding option and the terms of it. As there seems to be some doubt as to the financial status of ESL the firm may not be prepared to take on such a risk as they would carry with either a CFA or a DBA.

3rd party funding may be available from a commercial funder as the value of this claim is significant but on the facts (and the matters yet to be clarified) this may be prohibitively expensive.

Question 2(a)

The orders that the court may have made in this matter could have included:

Permission given to each party to rely upon the written evidence of one expert in the field of orthopaedics addressing the following issues:

Prognosis, the effect of the injury on the claimant at the time of the accident and in the future.

Permission that the claimant is permitted to adduce the report of Mr. XXX and the defendant is permitted to adduce the evidence of Mr xxxx.

The claimant's expert report shall be filed and served by the xx day of xxxx 2017 and the defendant's expert report shall be filed and served by the xx day of 2017.

Written questions may be put to the experts on their reports within 28 days of the report being served. The expert must respond to the questions in writing within 28 days of the questions being served on them.

The reports are to be agreed if possible but if not agreed the experts shall hold a without prejudice meeting for the purpose of identifying the issues, if any, between them and, where possible, reaching agreement on those issues. The experts shall by xxx date xxx prepare and file at court a statement showing;

- Those issues on which agreement has been reached, and
- Those issues on which they have not agreed, with a summary of the reasons why they disagreed.

The expert's reports, questions asked and their answers and any supplemental report shall form the evidence of that expert.

No party shall recover from any other party more than £x for the fees and expenses of that expert

Further directions may be made under the provisions of PD 35.11.1 and 35.11.2 concerning the giving of the evidence of expert evidence.

(The court may also have approved the admission of an experts report on matters relating to the claimant's psychological state (possible as an SJE or one for each party in this speciality – such an order would have included provisions as above but referring to a report in the field of psychology. If only as an SJE then there would be no order for the experts to meet or exchange reports but there would be provisions to raise questions of the expert for the purposes of clarification)

Note: In answering this question candidates were not expected to know all the terminology or way of wording of such a directions order (but they may do) and marks would not be lost if the content is right but the terminology not in the form of a court order.

Other sensible directions concerning experts (for example whether oral or written evidence is to be given) would also be given credit.

Question (2b)

The advice to give to the claimant now both medical reports have been received and noting that the one obtained by the defendants is unfavourable to the claimant would include;

Writing or telephoning the claimant with an appointment to come in and discuss the reports.

The letter may include some general advice about the status of medical reports in litigation especially if copies of both reports were included in the letter for the client to read before coming in to discuss the reports. The letter may include a note of specific matters to discuss at the appointment.

At the appointment the following would be discussed;

The differences of opinion expressed in the reports -The two experts do not agree on certain matters, notably the extent of the claimant's injury and prognosis for his recovery.

Mr Hugen-Brown gives a much more positive prognosis and indeed could be said to infer that the claimant may be suffering less than he describes.

It would be important to highlight that although Mr Hugen-Brown's comments are somewhat damning there are significant factors in his report that could be used to lessen the impact that the report may have on the claimant's claim and the effect the report could have on the level of damages awarded. The aim also being to make Mr Hugen-Brown's report to be the one the court chose **not** to rely. In this respect the following comments can be made about the report:

There are certain factors about the content and form of the report that can be raised with the aim of reducing the credibility of Mr Hugen-Brown and his report and which may encourage the court to prefer the evidence of the claimant's own medical expert. These include, for example, the fact that Mr Hugen-Brown has not had sight of any of the claimant's x-rays, or all the hospital notes. He also provides an opinion on matters that it is not clear that he is qualified to give – the claimant's psychological state since the accident.

The report is also not in the required form in some respects - for example, Mr Hugen-Brown has failed to provide a full curriculum vitae setting out his qualification and he does not provide a bibliography of sources he has used to form his opinion, additionally, his statement of truth is not in the proper form. These are very import aspects of form and could lead a court to doubt his credibility. Mr Hugen-Brown is a retired consultant orthopaedic surgeon so he might not be as up to date about these procedural issues or current medical thinking.

The court will almost certainly have made a direction that parties may ask questions (for the purpose of clarification) on the content of the report and that Mr Hugen-Brown must answer those questions within 28 days. Therefore that direction could be used to raise questions. However as this is the defendant's medical report it may not be in the claimant's best interests to raise questions that may have the effect of the report being presented in the correct or improved form.

But if questions were to be asked those would be discussed with the claimant at the appointment.

The court will also most probably have made a direction that the two experts should meet to discuss any differences of opinion they have and to file a supplemental report to explain the possible reasons for their differences. Both these steps – asking questions of the report and waiting for the expert's supplemental report - may result in a change, or amendment, of the opinions expressed in the reports.

If the court has given an order that the expert's give oral evidence at the hearing this will give the opportunity to cross-examine Mr Hugen-Brown at the hearing. If there is not such an order it would be worth discussing with the claimant whether to make an application for such an order.

It would be important to seek to re-assure the claimant that though this is not the best result for him the court will not necessarily accept all of Mr Hugen-Brown's finding – the court will have both reports and there are important points to be made as above. However the inferred allegation that the claimant is exaggerating his symptoms is one that if found to be true could have serious consequences for the claimant – in a significant reduction in any award made and it may remove the costs protection of Qualified One Way Costs Shifting such that the claimant could be ordered to pay the defendant's costs. It may be an appropriate time to discuss making a CPR Part 36 offer to settle.

This is an important step in the progress of the case and therefore it is important for the client to face all the good, and perhaps not so good, issues that arise.

Question 2(c)

Proceeding on quantum only – means that the case on liability has been won or admitted and at the assessment of damages hearing no liability issues need be raised.

'Liable for the actions of its employee' – is referring to the issue of vicarious liability. Prestor's, the employer, is accepting that it is liable for the actions of Julie Lake, its employee, acting 'in the course of her employment.

Question 3(a)

From the information available from the documents the assessed value of this claim is probably less than £5,000 and does not exceed £25,000. As a consequence the case would be commenced in the Portal under the Low Value, Employer's Liability, and Public Liability Claims procedure. Employer liability claims (as this is). This would be by completing a Claims Notification Form electronically to the defendant's insurer who would have 1 day to acknowledge the claim and a further period of 30 days (as an employer liability claim) before a formal response should be filed. As the defendant is denying liability the claim would exit the Portal at Stage 1 and continue under the personal Injury Protocol.

The CNF would stand in place of the Letter of Claim. This process is designed to speedily resolve matters where liability is admitted and this is not the case here. Unless liability is admitted the case could therefore then be commenced in the County Court and issued from the CCMCC. The case, with an assessed value in excess of £1000 but not exceeding £25,000 is most likely to be allocated to the fast track.

Question 3(b)

The important thing to note in commenting on the draft witness statement is that Ms Djork should not include all the information that is presently included in the draft and some elements are missing. This includes the following;

Paragraph 8: Ms Djork cannot include comments in her witness statement concerning the legal issues arising ("If the claimant was injured on this day, which I deny could have happened, she did so through her own fault and failure to obey the required rules and in those circumstances I allege that she would be 'the instrument of her own misfortune'") as she is not qualified to do so and in any event liability issues are for the court to decide.

Paragraph 10: Ms Djork should not include comments about the value of, or cause, of the injuries as she is not qualified to give this opinion evidence ("The claimant is saying that she injured her leg and wrist when she fell, in my opinion such a fall as she describes could not have resulted in the injuries she describes as the processing through the Dark House is very slow.").

Documents: Documents (for example the accident report book) and CCTV footage is referred to in the statement but not annexed. It would also be helpful to include photographs to support some of the statements she makes and to show the layout or signs.

As to form: The witness statement as drafted is not compliant with CPR 32 - there is no statement of truth and this must be included before it can be used as evidence in litigation.
A new paragraph 1 is needed – Ms Djork needs to include a statement who she files the witness statement for and that she is authorised to make the statement: e.g: I make this statement on behalf of the Defendant company and am duly authorised to do so by it. I make this statement from my own knowledge and belief.

Question 3(c)

The letter that has been drafted is not a Part 36 letter because it includes a provision for costs so it will not carry with it the automatic cost consequences of a Part 36 letter if the claimant fails to beat the offer at trial.

The letter is however a valid offer to settle so it is by its nature 'without prejudice' and cannot be referred to in the proceedings until the case has been concluded. It may then be raised when the court is considering costs.

The purpose of the letter is to settle the action without going to a hearing and to save costs because it is unlikely (because of the value of the claim and the probable impecuniosity of the claimant) that the defendant would succeed in a costs recovery order. It is a pragmatic commercial decision on the part of the defendant.

If the action went to trial and the defendant was successful in defeating the claim the offer letter can be referred to in the defendant's application for costs under the provisions of CPR 44.2 and CPR 44.4(3) However Qualified One-Way Costs shifting (QOCS) applies in this case and as the offer is not Part 36 compliant the claimant does not automatically lose the protection of QOCS if she fails to beat the offer made although the court does have a wide discretion on costs under CPR 44. The claimant may also lose the costs protection she has under QOCS if the court makes a finding of fundamental dishonesty in her claim.

Question 4(a)

As this is a debt claim it is likely that the Claim Form N1 will have the Particulars of Claim endorsed on the back of it. The court will be sent two copies of the N1, one will be retained for the court file but the 2nd will be returned to the claimant's legal representative as the claimants want to arrange personal service. As that is the case the legal representatives need to inform the court that they are instructed to serve the pleadings (and will mark the 'original' N1 form 'For solicitor Service') otherwise the court will automatically serve the document on the defendant by 1st class post. Instead the court will return the N1 to the claimant's legal representatives together with the Response Pack which will be served with the Particulars of Claim. The claimant's solicitors will then arrange service in the manner agreed with the claimant.

The fee for issue will also need to be sent together with a copy of the invoice as this will have been referred to in the Particulars of Claim.

If the Claim Form was not an endorsed claim form the Particulars of Claim may be sent as a separate document but it is not *a necessary* document to actually issue the claim.

The claimant will need to serve the N1 Claim Form on the Defendant within 4 months of issue and to serve the Particulars of Claim and the Response pack on the defendant within 14 days of serving the Claim Form if it was not served at the same time as the Claim Form.

The claimant's legal representatives must then file a Certificate of Service within 21 days.

Question 4(b)

As the defendant has failed to file a defence or the acknowledgment of service within 14 days of the deemed date of service the claimant may request Judgment in default under CPR 12.2 by filing a request in form N225.

Question 4(c)

If Mrs Green wishes to now defend the action against her after default judgment has been made she will need to make an interim application to the court under the provisions of CPR 13 seeking to set aside the default judgment and to grant her permission to defend the claim.

As the default judgment obtained by the claimant appears to be a 'regular' judgment she will have to apply under the provisions of CPR 13.3. Under this provision she has no automatic right to have the default judgment set aside. The court *may* set the default judgment aside if it considers that she has met the criteria under the provisions of CPR 13.3.

The criteria she will have to establish to succeed in her application includes:

That she has prospects of success – this could be done by attaching a draft defence or witness statement supporting her application which sets out the nature of her defence and which shows that the defence 'has prospects' (of succeeding). There is no information given to determine whether the defendant does have 'prospects' of successfully defending the claim against her so it cannot be said whether she could meet this criteria.

If she cannot show 'prospects of a successful defence' she will need to show what 'other good reasons' there are for setting aside the default judgment (CPR 13.3.1(b).

This could include her reasons for being unable to respond because she was in hospital and that it would not be 'fair' or 'just' to deny her the right to defend.

In respect of either of the above she will also have to show that she has acted 'promptly' in making her application to set aside.

If Mrs Green can establish the above grounds to satisfy CPR 13.3 she will need to file form N244 application notice, the accompanying fee and her witness statement setting out the grounds of her application (possibly with a draft defence attached) at court. The application notice will include a time estimate of the hearing (which she should seek to agree with her opponent) and once it is returned with a hearing date (which will be by way of a telephone conference hearing) she will serve the application and copy witness statement on the opponent.

Before proceedings with the application she should first ask if the claimant is willing to agree to set aside – they may be prepared to do this if it seems clear that she can establish grounds under CPR 13.3 and the court is likely to grant her application. An unreasonable refusal may result in the claimant having to pay the costs of the application. .