

GUERNSEY BAR EXAMINATION

9.30AM, 25 APRIL 2017

PAPER ONE

CIVIL PRACTICE AND PROCEDURE

THREE HOURS

**CANDIDATES ARE REQUIRED TO ANSWER ALL QUESTIONS
THE MARKS AVAILABLE FOR EACH QUESTION ARE SHOWN BELOW. NOT
ALL QUESTIONS CARRY EQUAL MARKS.**

- **QUESTION 1 - 20 MARKS**
- **QUESTION 2 - 10 MARKS**
- **QUESTION 3 - 15 MARKS**
- **QUESTION 4 - 15 MARKS**
- **QUESTION 5 - 40 MARKS**

**PLEASE WRITE LEGIBLY AND ENSURE THAT YOU ANSWER EACH
QUESTION ON A SEPARATE SHEET OF PAPER. PLEASE WRITE ON ONE
SIDE OF THE PAPER ONLY AND LABEL EACH SHEET CLEARLY WITH:**

- **NAME OF PAPER**
- **CANDIDATE LETTER**
- **QUESTION NUMBER**
- **PART NUMBER OF QUESTIONS (if applicable)**

MATERIALS PROVIDED:

1. **The Royal Court Civil Rules, 2007**
2. **The Evidence in Civil Proceedings (Guernsey and Alderney) Rules, 2011**

QUESTION 1

(total – 20 marks)

Your firm acts for Perelle Products Limited (“Perelle”) in respect of an action brought by it against one of its suppliers, Dehus Distributors Limited, for breach of contract. Pleadings were closed a couple of months ago and the parties’ Advocates were able to agree a timetable for the next steps at a case management conference. Disclosure and inspection took place in accordance with that timetable. You are slightly troubled that the disclosure provided by the defendant is incomplete, but your client is keen to progress matters in the most cost-efficient manner, so you have taken no further action yet.

Witness statements were due to be exchanged and lodged by 4pm last Thursday. When you contacted the Advocate acting for the defendant that afternoon to enquire if the statements could be exchanged imminently, there was no response. You heard nothing further that day, so sent a letter by e-mail after attending Court on another case on the Friday morning. You eventually heard from the Advocate at 3.43pm. He apologised profusely, and explained that his wife had unexpectedly gone into labour the previous lunchtime and his secretary was away on holiday. In the rush, he had overlooked asking anyone else to check his e-mail. He was too tired to do anything that day but promised to have something ready on Monday. After offering your congratulations to the Advocate on the birth of his child, you reluctantly agree, requesting that you be contacted no later than 10 am on Monday with an update.

You then heard nothing on Monday morning, despite telephoning and sending a further e-mail, in which you raise the possibility of applying for an unless order. When you hear nothing further for the remainder of the day, you seek instructions from the managing director of Perelle as to how to force the issue so the case can be kept on track for the trial listed for the summer. She asks for clarification on a number of fronts.

- 1.1 Explain to the managing director the procedure for seeking an unless order, and the consequences should such an order be granted.
- 1.2 Give your advice on the prospects of success for such an application.
- 1.3 What steps, if any, are available to the defendant to avoid any adverse consequences?
- 1.4 If, before the Court sitting at which such an application is made, witness statements are exchanged, what do you do?
- 1.5 What steps, if any, can sensibly be taken in relation to the apparent incomplete disclosure given by the defendant?
- 1.6 How would any such steps be taken and what are the prospects of success?

QUESTION 2

(total – 10 marks)

Much to your firm's delight, you represent the former trustee of the Hogwarts Trust, Dumbledore Fiduciaries (Guernsey) Limited ("Dumbledore"), which has been engaged in attritional litigation brought by the current trustee of that Trust, Umbridge Trust Co. SA ("Umbridge").

Several years ago, a foreign court entered judgment in relation to a claim brought against Umbridge by a Dutch Bank for repayment of a loan, the proceeds of which had been used to provide funds to a web of underlying companies within the trust structure. Umbridge immediately commenced proceedings against Dumbledore before the Royal Court of Guernsey alleging breach of trust, effectively seeking to pass the entire blame down to Dumbledore.

Umbridge also commenced separate proceedings in order to require Dumbledore to provide to it the remainder of the trust documentation said to be under its control. After many months of correspondence backwards and forwards, on the first day of the hearing of that action, the parties agreed a Consent Order by which Dumbledore agreed to interrogate its electronic database of documents pursuant to a schedule of agreed search terms.

Umbridge's breach of trust claim was determined one year later, following a two-week trial, in favour of Umbridge. Dumbledore has appealed to the Court of Appeal. However, pending determination of that appeal, Umbridge has issued fresh proceedings against Dumbledore alleging that its decision not to pursue a German supermarket chain for unpaid rent under a suite of leases during its trusteeship was in breach of its duties as trustee and resulted in a substantial loss, estimated at €17.1 million, which if available to the trustee would have enabled the trustee to negotiate the re-scheduling of the debt owed to the Dutch Bank. Those proceedings have been placed inscite and the time for tabling a defence extended until 2 June 2017 by agreement.

Just before Easter, Dumbledore has been served with a further application from Umbridge by which it seeks a further order requiring Dumbledore to interrogate the electronic database of information about the Trust it continues to hold by reference to a short list of search terms, none of which featured in the Consent Order.

The patience of those at Dumbledore instructing you has worn thin and you are asked to advise on what steps, if any, can properly now be taken to put an end to the proceedings before the Royal Court.

Advise Dumbledore.

QUESTION 3**(total – 15 marks)**

Her Majesty's Procureur has recently written to all firms of Advocates consulting them about whether there are any changes to the Petty Debts Court, eg, jurisdictional and/or procedural, that are considered desirable by the Guernsey Bar.

You have been tasked to prepare the first draft of your firm's response.

QUESTION 4

(total – 15 marks)

Your supervising partner has travelled urgently to England to see a client. In a rushed telephone conversation late yesterday evening, he explains the following to you:

Your firm's client is Greenvale Industries Limited. The sole owner of Greenvale Industries Limited lives in England. She is aged 82 and housebound, hence the need for your colleague to travel to England to see her.

The Development and Planning Authority of the States of Guernsey has very recently granted full planning permission to Blighty Developments Limited for the redevelopment of a vinery site in St Pierre du Bois for light industrial use. There had been no public hearing of the application. Greenvale Industries Limited had raised an objection to the planning application of Blighty Developments Limited. That objection had been prepared and submitted on behalf of Greenvale Industries Limited by a surveyor friend of the owner of the company. The objection pointed out that the application was arguably contrary to at least one of the policies in the Island Development Plan and it would in any event be incongruous with the surroundings. Of course, such light industrial use would potentially have an adverse financial impact on Greenvale Industries Limited's own industrial site just 400 metres away from the vinery site that Blighty Developments Limited now owns, which has benefited for many years from full occupancy and so a profitable return to the owner, although this had not been mentioned in the objection submitted. The owner of Greenvale Industries Limited is deeply upset that her surveyor friend had been unable to prevent planning permission being granted and wished she had instructed your firm to make the objection instead.

In those circumstances, your supervising partner asks you to prepare a note to him setting out your ideas about whether or not the decision of the Development and Planning Authority is susceptible to challenge and, if so, what needs to be done, when to act and also whether or not something can be done to stop the development permitted being carried out in the meantime.

QUESTION 5

(total – 40 marks)

Towards the end of last week, Archie Archenoul came to see you because he had not been listened to by the Royal Court and judgment for £43,256.73, interest and costs had been entered against him.

He explained that he had always wanted a swimming pool at his house and that, when his mother died, he found he could afford one. A friend from his euchre team installed pools and related works, and so Archie asked him to carry out the works. All went smoothly enough, but his money-grabbing sister, who had not seen their mother for many years because the sister lives in Yorkshire and their mother had lived in the New Forest, had somehow persuaded a judge that she should get a one-third share of their mother's modest estate rather than just the £10,000 bequeathed to her. This meant he was short of funds to pay the builder's invoices. Anyway, shortly after the work had been completed, Archie found that the pool had cracked near the bottom and so would not hold water. In the end, he had to find another builder to repair the pool and that builder had advised that the simplest solution was to start again. Archie did not have any of the paperwork because it was so long ago, but he thought the extra cost had been close to £40,000.

After a couple of letters from the original builder asking for further payment to be made and threatening to take Archie to the Petty Debts Court, Archie heard nothing more. He assumed that his friend, who had also by then stopped playing euchre, had realised that he should not have been asking for any more money from Archie. Then out of the blue he had received a letter from an Advocate demanding payment of £43,256.73, plus interest calculated to be £1,081.42 annually, and suggesting that, if a rounded amount of £50,000 were not paid within seven days, proceedings would be commenced. Archie did nothing because he thought it was a joke and a bit of a "try-on" after all that time.

The next thing he knew, he was served with a Summons and so he had gone along and told the Bailiff he wanted to defend the case, especially as he had just lost his job. He was back at Court just two weeks later having received notice that the Plaintiff wanted judgment. He knew he had to write down what he wanted to say before the next hearing scheduled for 7 April, but had then been in hospital at the end of March. When he went to Court on 7 April he tried to explain this to the judge, but the judge was having none of it and simply listened to the Advocate against him and found Archie liable to pay the whole lot. He asks what you can do to help him sort out this mess.

You immediately took steps to obtain a transcript of the judgment, which arrived yesterday and is in the form attached. You have also reviewed the Cause, which is a straightforward breach of contract debt claim pleaded in short form. The Affidavit in support of the application for summary judgment sets out that the work was

carried out in the autumn of 2010, exhibits the invoices rendered, which were monthly in arrears for work carried out and materials purchased and the last of which, also for the final balance said to be due, was dated simply "February 2011". The photographs exhibited appear to show nothing unusual except for the enormous lit-up Christmas tree in the foreground.

- 5.1 Advise Archie about the prospects of challenging the decision of the Lieutenant-Bailiff and the means by which this could be done. Explain the procedure(s) to him. Explain to him what will happen if he manages successfully to challenge the decision.
- 5.2 Settle in draft the substantive grounds to be inserted into any document you will need to prepare to mount the challenge.
- 5.3 Explain to Archie how the judgment against him could be enforced and set out for his benefit the steps, if any, you can take on his behalf to delay the judgment being enforced against him.

FRIDAY 7TH APRIL 2017

IN THE INTERLOCUTORY COURT OF GUERNSEY

(COURT 4)

Before

David Andrew Frederick Traynor Herbert, Esquire
Lieutenant Bailiff

PAUL'S POOLS LIMITED

-v-

ARCHIBALD ARTHUR ARCHENOUL

Present: Advocate R. Welch for Paul's Pools Limited
The Defendant was not represented

DECISION ON APPLICATION FOR SUMMARY JUDGMENT

1. Applications made under Part IV of the 2007 Rules are meant to be dealt with summarily. This is why I refused the Defendant's request for an adjournment of today's hearing. It was his own fault that he apparently did not understand that if he failed to lodge and serve his affidavit showing cause against the application by the deadline set, he would be unable to offer any explanation contradicting the Plaintiff's straightforward and compelling case. I repeat what I said at the time: I am unimpressed by his contrived excuses that he has been depressed because he lost his job earlier this year and then was in hospital for a week. It strikes me he had ample time on his hands and simply chose not to comply with this Court's order. Courts are busy places where time is precious and such disobedience is simply not to be tolerated.
2. I take the view that there is no need for me to recite the principles found in the various over-long judgments of the Deputy Bailiff to which the Advocate for the Plaintiff has referred me. There is apparently no binding guidance and so, although I can confirm I have those principles, all of which are common sense and come from that "Air" case in England, whatever it is called, at the forefront of my mind, what it all comes down to is whether it would be a waste of everyone's time and money for this claim to be allowed to proceed to be

defended at trial. In this type of case, it is obviously kinder to the Defendant to draw a line in the sand now.

3. I had read all the papers in advance and really did not need the Plaintiff's Advocate to address me in any detail but I chose to listen to her most eloquent submissions as much as anything for the Defendant's benefit, so that he would realise the hopelessness of his position. Had he seen fit to consult a lawyer, even one who is not particularly bright, he would have been advised either not to have appeared when the case first came before the Court or to have turned up and consented to judgment. Instead, he foolishly indicated his wish to defend the action forcing the application I now have to determine being made. It has properly been made at the first opportunity and without waiting to see what defence the Defendant might conceivably dream up.
4. The Defendant's efforts today to explain his position are, as I have already pointed out, lacking any evidential foundation. He seems to be saying that the workmanship of the Plaintiff, a building company then run and owned by a Mr Paul, which was engaged by him some seven years ago to put up a conservatory, dig a swimming pool and construct a pool house, was unsatisfactory. He had to have the pool sorted out by other tradesmen and he thinks that is sufficient for him to refuse to pay the Plaintiff's invoices.
5. As the Plaintiff sets out in its claim and in the supporting Affidavit from its current director, the first two invoices were settled on time but the four subsequent ones issued to the Defendant have remained unpaid. It is acknowledged that there was a delay in the Plaintiff commencing proceedings. This is said to be attributable to the former managing director of the company first commencing another business and choosing to put the Plaintiff into "mothballs" for a couple of years. The former managing director and sole shareholder was then terminally ill for some months before dying. Mr Paul's heir, his daughter, has picked up the reins and is trying to recover all the debts not pursued previously. £43,256.73 is the balance due by the Defendant.
6. To the extent that I understood him, the Defendant said that an inheritance on which he had been relying to fund the works had been wiped out because his sister, who lives in England, had won her claim for a larger share of their late mother's estate than was provided to her in the will. This led to the Defendant's share being reduced. In any event, his offer to pay the Plaintiff the derisory sum of £35 each week to clear this debt is plainly unrealistic and frankly laughable. However, I regard that offer, made approximately 12 months ago in open correspondence, as evidence that the Defendant acknowledges the debt in full. I have also had regard to the photographs exhibited by the Plaintiff from which it is as plain as a pike staff that the building works were carried out appropriately.

7. In all these circumstances, I am sure that the right outcome is to enter judgment in the Plaintiff's favour for the full amount. This is a claim that the Defendant will never succeed in resisting. There is nothing he can do to persuade me it will ever be fit for trial. I do not need to see what I am sure will be an inadequate pleading if he were to prepare and file a written defence. It would, I strongly suspect, be as incoherent as his oral submissions have been today.
8. I enquired whether the Plaintiff wished to amend its Cause to seek pre-judgment interest because I would have been prepared to award it. The Plaintiff's Advocate declined to seek leave to make such an amendment, citing her concern that much of the fault for the delay in commencing this action lay with her client. I would have liked to press her further, but time does not permit that. So the only interest will be on the judgment amount under the 1985 Law.
9. I was initially minded to award the Plaintiff indemnity costs because the Defendant has behaved appallingly and wasted everybody's time, but I fear that would only add salt to the wounds and might even result in the Defendant considering throwing good money after bad by appealing. Indeed, I have no desire to hear anything further from the Defendant. Accordingly, the costs order will be that the Defendant pay the Plaintiff's costs on the standard basis.

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I, Sven Ole Graf, hereby certify the foregoing to be a correct and complete extract, prepared to the best of my skill and ability from the audio recording of the proceedings in this case.

Sven Ole Graf
Friday 21st April 2017