VICTORIAN BAR

# ENTRANCE EXAM

# VICTORIAN BAR READERS' COURSE

# 29 OCTOBER 2015

***(Annotated with sample answers)***

1. This document is a reproduction of the Readers' Course Entrance Exam which candidates sat on 29 October 2015, with annotations included as a means of feedback. For each question requiring a written response (i.e. all questions bar the multi-choice questions), a sample of actual answers given by candidates in the examination immediately follows the question. For multi-choice questions, the correct answers are underlined.
2. Attention is drawn to the following **important points concerning this document**:
   - Each sample answer has been reproduced in type-written form verbatim, as it appeared in the candidate's actual examination script. Any errors and omissions contained in the candidate's original answer are therefore included. No attempt has been made in this document to correct such errors and omissions. Accordingly, **each sample answer is not to be regarded as perfect and necessarily exhaustive of all relevant issues disclosed by the particular question**.
   - In assessing each sample answer, an examiner has applied a combination of quantitative and qualitative criteria and taken into account any errors and omissions in the answer. The candidate has been awarded either the maximum or *near*-maximum possible marks attainable for that question. For example, in the case of a question worth 2 marks the sample answer scored 2 marks, and in the case of a question worth 4 marks the sample answer may have scored 3½ or 4 marks.
   - It is possible that other candidates' answers (not included in this document) obtained a similarly high mark for the same question but for different reasons. Accordingly, each sample answer represents only one way in which it was possible to score highly for a particular question.

**Jason Harkess**
Chief Examiner
9 December 2015

**INSTRUCTIONS TO CANDIDATES:**

1) During the exam, you must not be in possession of anything other than writing implements, this exam script and the hard copies of the Reading Guide and examinable excerpts of legislation that have been provided. You are not permitted to have in your possession any other paper, notes, books, electronic devices, mobile phones, pencil cases or any other items that have not been specifically authorised by the Chief Examiner and/or Invigilators of the exam. Any item on your person, on your chair, or on your desk are deemed to be in your possession.

2) Your Candidate Number (but not your name) appears at the top of this page. Your Candidate Number represents your unique identifier for the purposes of this exam. You have previously been advised in writing of the Candidate Number which has been assigned to you. Please ensure that the Candidate Number above matches the Candidate Number which has been assigned to you. You **must not write your name** on any page in this exam script.

3) This exam tests your knowledge and understanding of rules of **Civil Procedure**, **Criminal Procedure**, **Evidence** and **Legal Ethics**. The exam consists of two parts – Part A and Part B. You **must answer all questions (and sub-questions) in both Parts of the exam**. The total number of marks allocated to questions in the exam is 100, so that the maximum score attainable by any candidate is 100. A total mark of 75 or more is required to pass the exam.

4) **Part A** contains 18 questions (Questions 1 to 18) and is worth a total of 50 marks. Part A commences with a preliminary statement of facts giving rise to a hypothetical **criminal proceeding**. Questions 1 to 18 then follow. In answering Part A, you should assume that all questions are referrable to the preliminary statement of facts. Each question posed in Part A informs you of the following: (i) whether you are being tested on rule(s) of criminal procedure, evidence or legal ethics (but note paragraph 6 of these instructions below); and (ii) the total number of marks allocated to the question. The total number of marks allocated to each subject area in Part A is: Criminal Procedure (20 marks), Evidence (21 marks) and Legal Ethics (9 marks).

5) **Part B** contains 17 questions (Questions 19 to 34) and is worth a total of 50 marks. Part B commences with a preliminary statement of facts giving rise to a hypothetical **civil proceeding**. Questions 19 to 34 then follow. In answering Part B, you should assume that all questions are referrable to the preliminary statement of facts. Each question posed in Part B informs you of the following: (i) whether you are being tested on rule(s) of civil procedure, evidence or legal ethics (but note paragraph 6 of these instructions below); and (ii) the total number of marks

allocated to the question. The total number of marks allocated to each subject area in Part B is: Civil Procedure (21 marks), Evidence (18 marks) and Legal Ethics (11 marks).

6) Although each question is designated as either 'Criminal Procedure', 'Civil Procedure', 'Evidence' or 'Ethics', you may refer to legal rules and principles outside the designated subject area if you consider these to be relevant in answering the question. With some questions, it may be necessary to do so in order to completely answer the question.

7) You must write your answers in the writing space provided after each question. The reverse side of each page in this exam script contains further writing space if required. Further additional blank writing pages have been provided at the end of this exam script.

8) In the case of multi-choice questions, you must simply circle the answer(s) you consider to be correct. Some multi-choice questions are worth 1 mark where **only one answer** may be circled, and other multi-choice questions are worth 2 marks where **two answers** may be circled. If you circle more than one answer for a 1-mark multi-choice question, or more than two answers for a 2-mark multi-choice question, a score of **zero marks will be recorded** for that question. If you wish to change your answer(s) to a multi-choice question, you will not be penalised for doing so provided that the change is effected in such a manner that clearly indicates your intended final answer(s).

9) Your attention is also drawn to the following:

   i) If an application of state law is necessary in answering any question, you should assume that the law of Victoria applies.

   ii) In answering questions, you are not required to cite section numbers or case names unless the question specifically directs you to do so. You may restate principles of law or rules in your own words. A significant degree of latitude is given to you paraphrasing rules and principles.

   iii) The standard of expression, spelling, punctuation, grammar, conciseness and legibility of your writing will be taken into account in the assessment of your answers.

10) It is suggested that you allocate time spent on each question proportionate to the number of marks allocated. The table below is provided to assist you in planning time (calculated on the basis of 180 minutes total writing time).

**TABLE – SUGGESTED TIME SPENT ANSWERING QUESTION BASED ON MARKS ALLOCATED**

| **Marks** | **Time (approx.)** |
|---|---|
| 1 mark | no more than 2 minutes |
| 2 marks | 3½ minutes |
| 3 marks | 5½ minutes |
| 4 marks | 7 minutes |
| 5 marks | 9 minutes |
| 10 marks | 18 minutes |

11) You are **not permitted to remove this exam script** from the examination room.

## PART A (Questions 1 to 18) – Candidates are required to answer ALL questions in Part A.

**Assume the following prosecution summary of alleged facts relates to all questions in Part A.**

The Accused is Victor CAMBRIDGE and is 54 years old (born 02/02/1961). The Accused resides at 23 Winona Street, Canterbury, VIC 3126.

On 3 April 2015, the Accused applied for a job as Marketing Director at Jonas Michael Limited ('JML'), a publicly listed company based in Melbourne that operates a chain of upmarket retail outlets across Australia. The Accused submitted his application to JML's external recruitment consultant, Thatcher's Recruitment Limited ('Thatcher's Recruitment'). The Accused included in his formal application his résumé which included an employment summary. The employment summary stated that he had been employed as 'Senior Marketing Manager' at IPC Sport, Inc based in Mumbai, India for the period January 2011 to July 2014. The Accused's résumé also stated that he had graduated in 1999 from Harvard Business School in the United States obtaining the qualification of Master of Business Administration ('MBA').

The Accused was interviewed for the position by the director of Thatcher's Recruitment, Hailey Thatcher, on 10 April 2015. Ms Thatcher subsequently referred the Accused's job application to JML's Director of Human Resources for further consideration. On 21 April the Accused attended JML's Melbourne headquarters for a further interview. This interview was conducted by JML's Director of Human Resources (Alana Rodriguez), Director of Operations (James Green) and Chief Executive Officer (Olivia Schulz). During the interview, the Accused referred to having worked at IPC Sport in Mumbai from 2011 to 2014 and to having obtained an MBA from Harvard Business School in 1999.

On 1 May 2015 JML offered the Accused employment at JML's Melbourne offices as Director of Marketing. The Accused accepted the offer on the same day and signed a written employment contract. The Accused commenced his employment at JML on 13 May 2015. By the terms of his employment contract, his commencing salary was $550,000. Pursuant to the terms of the employment contract, JML also paid the Accused upfront the sum of $100,000 as a 'sign-on bonus' (this upfront payment was in addition to his commencing salary).

On 17 September 2015, as a result of receiving JML staff complaints about the Accused's ability to perform in his role and his personal behaviour generally, Ms Rodriguez conducted further inquiries

into the Accused's employment and education history. Ms Rodriguez contacted IPC Sport, Inc's offices in Mumbai by telephone and spoke with a number of personnel in its human resources department none of whom had ever heard of the Accused. Ms Rodriguez also contacted the academic registry office of Harvard Business School in Boston which advised that there is no record of a 'Victor Cambridge' having attended Harvard or having obtained an MBA from Harvard between the period 1995 and 2000.

On 18 September 2015 at approximately 10.30am Ms Rodriguez called the Accused to her office and stated her concerns that she was unable to verify the Accused's previous employment at IPC Sport, Inc and his Harvard MBA qualification. Ms Rodriguez requested that the Accused provide her with documentary evidence to support his employment history and educational qualification claims as contained in his résumé. The Accused stated that he would need to go home to retrieve the requested documentation. The Accused then left JML's Melbourne offices, indicating that he was going home to retrieve the requested documentation. However, he never returned. Ms Rodriguez attempted to contact the Accused on his mobile phone on numerous occasions on the afternoon of 18 September 2015. All her calls went unanswered. Ms Rodriguez left several voice-mail messages saying that it was imperative that the Accused return to JML's office by the end of the day with the requested documentation and that if he failed to do so his employment would be immediately terminated. As Mr Cambridge failed to return to work, JML terminated his employment on 18 September 2015. On 19 September 2015, Ms Rodriguez formally made a complaint to police on behalf of JML about the Accused having gained employment as a result of misrepresenting his employment history and educational qualifications. JML had paid the Accused a total of $283,350 by the terms of his employment contract before his employment was terminated.

As a result of further investigations, police confirmed that the Accused had never worked at IPC Sport, Inc's Mumbai office in any capacity and that he had never attended Harvard Business School.

**********

The Accused has been charged with obtaining financial advantage by deception under section 82 of the *Crimes Act 1958*, which provides:

> **82. Obtaining financial advantage by deception**
>
> (1) A person who by any deception dishonestly obtains for himself or another any financial advantage is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).
>
> (2) For purposes of this section ***deception*** has the same meaning as in section 81.

**Note:** Section 81(4) provides the definition of 'deception':

> **81. Obtaining property by deception**
>
> …
>
> (4) For the purposes of this section, "deception"—
>
> (a) means any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person; …

The Accused was arrested and interviewed on 1 October 2015 before being charged and released on bail. He was served personally with a copy of the charge-sheet and summons (**reproduced overleaf**). The Prosecution is putting its case on the basis that the 'deception' is constituted by his written and oral representations as to his previous employment at IPC Sport, Inc and his MBA qualification obtained from Harvard Business School, both of which were untrue.

**FORM 3**

Magistrates' Court Criminal Procedure Rules 2009

# Charge-Sheet and Summons

(Copy for the Accused)

| To the Accused | | | |
|---|---|---|---|
| | Victor CAMBRIDGE<br>23 Winona Street<br>Canterbury<br>VIC 3126 | ☑Male ☐ Female | Date of Birth<br>02/02/1961 |
| | You have been charged with an offence.<br>Read these pages to see what you must do. | Registration No. / State | |
| | | Licence No. / State | |

## DETAILS OF THE CHARGE AGAINST YOU

| | | | |
|---|---|---|---|
| What is the charge? (Description of offence) | 1 ***[TO BE COMPLETED – SEE QUESTION 1].*** | | |
| Under what law? | ☑State ☑ Act ☐ Other-specify<br>☐C'wealth ☐ Reg. | Act or Regulation No.<br>6231/58 | Section or Clause (Full Ref.)<br>82 |
| Are there more charges? | ☑No ☐ Yes – See Continuation of Charges attached | | |
| Request for Committal Proceedings | ☐No ☑ Yes | | |
| Type of offence | ☐ Summary Offence (You should go to Court) | ☑ Indictable offence (You must go to Court) | |
| Who filed the charge-sheet(s)? (informant) | Steven Knight | Email: sknight@police.vic.gov.au | |
| Agency and Address | St Kilda Road Police Station<br>412 St Kilda Road<br>Melbourne 3004 | Phone: (03) 9876 5432<br>Fax: (03) 1234 5678<br>Ref: ABC9732/21 | |
| Signature of Informant | Steven Knight | Date 1 October 2015 | |

| Charge filed at | | on | |
|---|---|---|---|
| | Melbourne<br>(Venue) | | 1 October 2015<br>(Date) |

## WHERE WILL THE CASE BE HEARD

| | | | | |
|---|---|---|---|---|
| Where you must go | The Magistrates' Court of Victoria at Melbourne | | | |
| Address | 233 William Street, Melbourne VIC 3000 | | Phone: (03) 9628 7777 | |
| When | Time<br>10.00am | Day<br>17TH | Month<br>November | Year<br>2015 |

## DETAILS ABOUT THIS SUMMONS

| | | |
|---|---|---|
| Issued at | St Kilda Road Police Station<br>412 St Kilda Road<br>Melbourne 3004 | Date: 1 October 2015 |
| Issued by (Signature) | Steven Knight | ☐ Registrar ☐ Magistrate ☐ Public Official<br>☑ Member of Police Force ☐ Prescribed Person |

**QUESTION 1**

**Criminal Procedure:** Refer to the charge-sheet and summons on the previous page. Complete the charge-sheet by drafting the charge. Provide your answer in the writing space below. **[2 marks]**

**Suggested Answer #1**: Charge sheet must comply with Schedule 1 of Criminal Procedure Act. Should state: the accused did between 10 April 2015 and 18 September 2015 in Melbourne obtain financial advantage by deception from Jonas Michael Limited in the sum of $283,350.

**Suggested Answer #2**: The charge sheet is deficient as it does not comply with Schedule 1 of the Criminal Procedure Act (CPA). It doesn't sufficiently particularise the date, place, victim and statutory requirements of the alleged offence. However failure to comply with Sch. 1 doesn't render charge invalid. Here the charge should read 'Between 13/5/15 – 18/9/15 the accused at Melbourne obtained financial advantage by deception, namely $283,350 from JML'.

**For the purposes of answering further questions in Part A, assume the following additional facts:**

The Accused intends to plead not guilty to the charge. He denies that he gained employment at JML by any 'deception'. He insists that he attended Harvard Business School and obtained an MBA in 1999 and that he worked for three years at IPL Sport, Inc as his resumé states.

**QUESTION 2**

**Ethics:** Assume you are Counsel and that you have been approached by the Accused to act for him in relation to this matter. In what circumstances are you able to act for the Defendant directly (i.e. without an instructing solicitor)? Explain whether you would you be able to do so in this case. **[3 marks]**

**Suggested Answer #1**: A barrister is not obliged to accept a direct access brief, r.21 BR. I may only accept the brief if I: (a) inform A in writing of the limits of my work, rr11 & 13, the fact that I may have to engage an instructor, to fact that A will be disadvantaged by not having an instructor (for example because I will not be able to prepare affidavits, file documents), and fair description of my experience as a barrister, r.22. A would need to sign a written acknowledgement of the foregoing. However due to rule 101(k) I would not accept the brief in this case because I have grounds to believe that without an instructor, I will not be able to fulfil my duty to A, as my client (that is because the case is complex, will likely be heard in trial in CC, and so requires instructor). If I did accept, I would need to comply with costs disclosure requirements under the uniform law.

**Suggested Answer #2**: Defence may accept a direct brief only if P has a real possibility, lack of a solicitor the barrister must have reasonable grounds to believe that, would as a real possibility tentatively prejudice the barrister's ability to advance and protect the client's interests in accordance with the case. The barrister need not accept any direct brief. In accepting a direct brief the barrister must disclose to the client the effect of rules 11 and 13 of the Barristers' Rules and certain other matters and must gain the client's written authorisation. In practice direct briefing is only practical or permitted in the Magistrates' Court on summary hearings. As this is likely to be entered and may lead to a trial the barrister should consider refusing.

## QUESTION 3

**Criminal Procedure:** Which of the follow propositions concerning obligations of proof is correct in this case?

*Your answer:*
***(circle ONE)***

**a) <u>The Prosecution must prove beyond reasonable doubt that the Accused did not work at IPL Sport, Inc and did not obtain an MBA from Harvard.</u>**

b) The Accused must adduce some evidence of having worked at IPL Sport, Inc and having obtained an MBA at Harvard.

c) The Prosecution must adduce some evidence showing that the Accused had not worked at IPL Sport, Inc and had not obtained an MBA at Harvard. At this point the Accused must prove the contrary on the balance of probabilities.

d) The Accused must prove on the balance of probabilities that he worked at IPL Sport, Inc and obtained an MBA from Harvard.

e) The Prosecution must prove beyond reasonable doubt the fact that the relevant statements were made by the Accused in his resume. At this point, the Accused must prove on the balance of probabilities that those statements were true.

f) The Accused must prove that it is reasonably open to conclude that he may have worked at IPL Sport, Inc and may have obtained an MBA at Harvard.

**[1 mark]**

**QUESTION 4**

**Criminal Procedure:** The Accused intends to make an application under section 30(1) of the *Criminal Procedure Act 2009*. Explain the Accused's rationale for making such an application and how the application is likely to be determined. **[4 marks]**

**Suggested Answer #1**: The accused intends to make an application to have the charge determined summarily. Indictable offences are normally heard in CC or SC. Summary matters are determined in Magistrates Court. The accused wants to have his indictable matter tried and determined in the Magistrates Court summarily. The benefits of this would be it streamlines the matter and Magistrate only has jurisdiction to impose max sentence of 2 years imprisonment, compared to a CC judge who could impose a max 10 years imprisonment. Application will be made in Form 32 (case direction notice) and heard at the committal hearing before a Magistrate. The Magistrate will consider s.29 of CPA including the seriousness of the offence (here very large amount of money), the complexity of the matter including whether it involved a series of events, any co-accused (here matter very complex, numerous witnesses will need to be called), and will consider the adequacy of sentences available to Magistrate if found guilty – having regards to any criminal record of accused. On facts no knowledge of criminal record of accused, however very serious and complex matter, plus 2 years imprisonment probably not adequate – unlikely accused will be successful in application.

**Suggested Answer #2**: The application is to have the matter heard and determined summarily by a Magistrate sitting alone in the MC. The accused's likely reason for making this application is the advantages offered by a summary hearing. The MC can impose a maximum sentence of 2 years for one offence, whereas the statutory maximum for this offence is 5-10 years. Further a summary hearing is faster, whereas an indictable offence must be heard by committal first in trial. If the accused has a summary hearing he also has an appeal as of right to CC.

The court will grant the application if factors in s.29 CPA are made out. This is an indictable offence that may be heard summarily so the MC must consider the seriousness of the offence, including how it was committed, the complexity of the proceeding required to hear the charge as well as the adequacy of sentences available to the court given the accused's criminal history, and whether there are any co-accused. Given the complexity of the evidence required to establish the offence, the large amount of $ involved and the likely large number of witnesses, it is unlikely that the application will succeed.

**QUESTION 5**

**Criminal Procedure:** Assume that a Magistrate has conducted a committal hearing and is now contemplating whether to commit the Accused to stand trial. Which **ONE** of the following is correct?

*Your answer:*
***(circle ONE)***

a) The Magistrate may refer the decision of whether to commit the Accused to stand trial to the Supreme Court if issues of fact or law in the case are so finely balanced that it would not be fair to the Accused for a Magistrate to decide whether to commit the Accused to stand trial.

b) The Magistrate has a residual discretion to dismiss a charge at the conclusion of the committal hearing if satisfied that the prosecution has not proved its case beyond reasonable doubt.

c) The Magistrate must take the Prosecution's case at its highest, meaning that the Magistrate must assume that all prosecution evidence is credible.

d) The Magistrate must commit the Accused to stand trial even if the Prosecution's case is extremely weak because it is possible that a jury could take a different view of the evidence.

e) The Magistrate must discharge the Accused in the event that the Accused has raised a real (but not remote) possibility that he may be innocent.

**[1 mark]**

**f) <u>The Magistrate must discharge the Accused if satisfied that that the Prosecution's evidence is too weak to sustain a conviction.</u>**

**QUESTION 6**

**Criminal Procedure:** Assume that the Magistrates' Court has made a decision to commit the Accused to stand trial. Which **ONE** of the following is correct?

*Your answer:*
***(circle ONE)***

a) The Accused has a right to have this decision reviewed by the Chief Magistrate.

b) The Accused has a right of appeal to the County Court against this decision.

c) The Accused must seek leave to appeal to the County Court against this decision.

d) The Accused has a right of appeal to the Supreme Court against this decision.

e) The Accused must seek leave to appeal to the Supreme Court against this decision.

**[1 mark]**

**f) <u>The Accused has no right of appeal against this decision.</u>**

**For the purposes of answering further questions in Part A, assume the following additional facts:**

The Accused has been committed to stand trial in the County Court and has been provided with a copy of the depositions and exhibits.

**QUESTION 7**

**Criminal Procedure:** Explain the concept of 'arraignment' and whether the Accused will be subject to arraignment in this case. **[2 marks]**

**Suggested Answer #1**: A will be subject to arraignment, either at directions hearing or at any other time. If he pleads not guilty, A must be arraigned in presence of jury panel (215, 217, 180 CPA). Arraignment is a process by which the court asks the A whether he is the person named in the indictment, and reads out the charge, and asks whether A pleads guilty or not guilty. It is the formal opportunity for A to plead, and for the court to accept plea. Jury must witness the arraignment of any accused person they try.

**Suggested Answer #2**: An arraignment is where the accused will have the charges on the indictment read out to him and he will be asked to enter a plea of guilty or not guilty. An arraignment is a necessary first step in the trial process. A trial commences upon an accused being empanelled before the jury panel. (Arraignment often takes place at directions hearing as well).

**For the purposes of answering further questions in Part A, assume the following additional facts:**

The depositions include the following sworn statements of witnesses who the Prosecution intends to call to give evidence at trial:

- **Hailey THATCHER** states: *'On 31 March 2015, I was requested by a long-standing client, Jonas Michael Limited, to place an advertisement online for the position of Director of Marketing. JML's Director of Human Resources, Alana Rodriguez, had requested that I evaluate all applications for the position and that I conduct interviews personally of potential candidates for the role before referring suitable candidates for interview by JML. On 5 April 2015, I placed the advertisement on www.seek.com.au* (**Exhibit 1**). *On 8 April 2015 I received an email from Victor Cambridge expressing interest in this position* (**Exhibit 2**) *attached to which was his résumé* **(Exhibit 3)**. *The résumé stated that Mr Cambridge had been employed as a Senior Marketing Manager at IPC Sport in Mumbai from 2011 to 2014. The résumé also stated that he had obtained an MBA from Harvard Business School in 1999. On 9 April 2015 I telephoned Mr Cambridge*

*and invited him into our Melbourne offices for an interview. He came in to our offices for an interview the following day. During the interview I asked Mr Cambridge about his experience at IPC Sport in Mumbai. He responded by giving details of a number of projects he had worked on and highlighted a number of achievements. I was impressed by Mr Cambridge's knowledge of IPC Sport and also his knowledge of the marketing industry. I also asked about Mr Cambridge's time at Harvard studying for his MBA. Again, he seemed quite knowledgeable about Harvard's MBA course and made a number of points about the benefits he had received from his Harvard education. Overall, Mr Cambridge was a very impressive candidate. After the interview I forwarded Mr Cambridge's résumé to Alana Rodriguez by email recommending that he be interviewed by JML* (**Exhibit 4**). *Ms Rodriguez telephoned me later that day and asked me to contact Mr Cambridge and ask him to attend JML's Melbourne offices for further interview on 21 April at 10am. I telephoned Mr Cambridge at about 3.30pm on 10 April and advised him of the interview date and time.'*

- **Alana RODRIGUEZ** will give evidence generally consistent with the evidence of Ms Thatcher and states further: '*Mr Cambridge attended JML's Melbourne headquarters on 21 April 2015. Olivia Schulz, James Green and I were on the interview panel. During the interview, Mr Cambridge made numerous references to his work at IPC Sport in Mumbai and also to his MBA obtained from Harvard. We were all very impressed by Mr Cambridge's apparent credentials. Mr Cambridge was offered the job of Director of Marketing at JML on the basis of these credentials which we all believed to be true. I prepared a contract which was signed by myself on behalf of JML and by Mr Cambridge on 1 May 2015* (**Exhibit 5**) *…. On 12 June 2015 I received a telephone call from Kevin Nixon, a senior manager in JML's marketing team who reported to Mr Cambridge. Mr Nixon stated that he had concerns about Mr Cambridge's competence and general behaviour in the work place. This prompted me to further investigate Mr Cambridge's credentials…"*
- **Olivia SCHULZ** and **James GREEN** will give evidence consistent with that of Ms Rodriguez in relation to the interview with the Accused on 21 April 2015.
- **Kevin NIXON** states: *'I have been working within the marketing division at JML for five years and currently occupy the role of senior manager. Victor Cambridge commenced working at JML on 13 May 2015 as Director of Marketing. As a senior manager within the marketing department, I would report directly to Mr Cambridge. After less than a week in his new job, I grew concerned that Mr Cambridge may not have been qualified to carry out the role. When discussing JML's current marketing projects with him, he did not seem particularly interested. He also did not seem to be familiar with basic marketing terminology. Mr Cambridge was more interested in talking*

*about football and taking the marketing team out for long, alcohol-fuelled lunches. In his first week in the role, he took the whole marketing team (about 20 staff) out for lunch on Wednesday. He kept ordering wine and we did not end up back at the office until 3pm. Mr Cambridge was very intoxicated. On 28 May 2015 I went into Mr Cambridge's office at about 11.00am to discuss marketing ideas in relation to JML's summer women's wear collection. Mr Cambridge was drinking brandy when I walked in. He offered me a glass which I politely declined. Mr Cambridge then started talking about a 'weekend orgy' that he had experienced over the weekend. He was very detailed in describing to me sexual activities he had with a number of women and men on the previous Saturday night. It was very awkward but I politely laughed at what he was telling me and pretended to be interested. On 29 May 2015, one of the marketing team secretaries approached me and was extremely upset. She told me that Mr Cambridge had pinched her buttocks and propositioned her for sex in the staff kitchen. On 12 June 2015 I was in Mr Cambridge's office to discuss another project when he asked if I would be interested in partaking in one of his 'orgies' on the weekend. I said that I wasn't interested and told him that the request was inappropriate. I then telephoned Alana Rodriguez in the HR department and relayed to her my concerns about Mr Cambridge's behaviour and general competence.'*

**QUESTION 8**

**Evidence:** Assume that Defence Counsel objects to the Prosecution tendering into evidence Exhibits 2 & 3 (email from Accused to Thatcher's Recruitment with attached résumé), Exhibit 4 (email from Hailey Thatcher to Alana Rodriguez with attached résumé) and Exhibit 5 (employment contract between JML and Accused). Defence Counsel asserts that '*all of these documents are hearsay and therefore inadmissible.*'

Consider the merit in Defence Counsel's objection in relation to each of these exhibits. **[5 marks]**

**Suggested Answer #1**: The content of Ex 2 and 3 are not hearsay, because they are admissible for the non-hearsay purpose of proving that A made claims to have been employed by IPC sport and educated at Harvard. They are not tendered as proof of the truth of that prior representation, and are therefore not caught by the hearsay rule. The situation of the metadata (sender/ recipient/ date etc) is different because pros is tendering the documents for the purpose of proving that it – as the Acc who sent them (ie the truth of a previous representation). However here is a specific hearsay exception for electronic communications (sender/ recipient/ date) and therefore these can be admitted. The claims that Acc was employed at IPC/ educated at Harvard are also admissions (ie statements of Acc adverse to his interests in the proceedings), if in fact Acc denies making such claims.

Exh 5, the employment contract is also potentially hearsay because it is a previous representation which may reasonably be supposed to assert a fact, namely that Acc was employed by JML. However it falls within the business records exception, because to the extent it is hearsay, the previous representation was made by someone with first-hand knowledge, ie Rodriguez, and forms part of the business records of JML.
Ex 4 is admissible under first-hand hearsay exception, because the representation is made by Thatcher, who had first-hand knowledge, and is available to give evidence.
Therefore, counsel's objections lack merit.

**Suggested Answer #2**: An act of counsel representation (including one in a document) will only be hearsay if it is admitted in order to prove the truth of an assertion it can be necessarily supposed the maker intended to assert. In this case exhibit 2 is not sought to be addressed to prove that A had worked at IPC and had gone to Harvard, but merely that he represented that he had done so. Likewise the resume (exhibit 3) is not to be adduced to prove its truth but to prove that it was provided by A to the recruiter. It is therefore not adduced for a hearsay purpose and is admissible under the provisions relating to documents. Exhibit 4 is intended to be adduced for proof of its truth ie that Thatcher recommended A be interviewed for the job. It is therefore hearsay but should be admissible under s.66 (as the maker is available to give evidence) or as a business record under s.69.
The contract (exhibit 5) is arguably not sought to be adduced to prove its truth (ie that A would carry out his employment under the terms and conditions) but in order to show that he promised to do so. In any event even it if does confirm hearsay material it should be able to be admitted under the business records exception.

## QUESTION 9

**Evidence:** On what ground(s) may Defence Counsel object to the admissibility of Mr Nixon's evidence? Explain. **[5 marks]**

**Suggested Answer #1**: Nixon's evidence is, in essence; (a) Nixon's opinion about the accused's ability to perform the job; (b) observation of Cambridge's work habits (ie long lunches and sexual harassment), and (c) information about Cambridge's sexual proclivities and advances (ie orgies comments). The issues in the notice are: (a0 whether Cambridge deceived in relation to the MBA and IPC and (b) did he obtain $283,500 of cash. Accordingly the first objection to take is that Nixon's evidence is not relevant. It does not affect the assessment of the probability of a fact in issue – ss.55 and 56. The next objection to take is that the statement that Cambridge did not appear qualified is opinion evidence and inadmissible – s.76. It is not necessary in my opinion so s.77 does not apply and counsel needs to argue that Nixon's opinion is not based on his skill, knowledge and experience – ie it is not admissible as expect opinion – s.78 does not apply.
The pinched buttocks comments need to be objected to as they are hearsay statements. P's exception would apply. Similarly he could object to the hearsay evidence of what Cambridge said to Nixon. However if adequate

notice of Prosecution's intention to adduce that evidence is given it ought to be admissible on first hand hearsay evidence under s.65(2) assuming the statement by Nixon was made shortly after the conversation happened.
Once the objection is made then should knock out nearly all the evidence. However and for good reason, counsel ought to object on the basis that the evidence has a very low if negligible probative value as demonstrated by it by either entirely irrelevant or at best tangentially relevant. In contrast it points the accused in a horrendous light in that it suggests he is unskilled, a lecherous way and incompetent. These are all things that may lead a jury to view him as not having obtained an MBA or IPC work and therefore results in unfair prejudice in excess of probative value. Therefore the evidence ought to be excluded under s.137. (Note not 135 as this is prosecution evidence and 137 is more specific and imposes a 'must' exclude threshold at a lower standard than 135's 'may' exclude threshold that requires 'substantially' outweighs condition.

**Suggested Answer #2**: First, Nixon's evidence does not appear to be relevant. It goes to the accused's ability to perform his role, which is not a fact in issue.
Secondly, Nixon's evidence contains statement of opinion, such as his intoxication and his qualification to perform the role. The reference to his intoxication is a statement of lay opinion which will probably be admissible, however if relevant the statements about his qualification to perform the role are more problematic. Such matters are the kind on which a qualified expert would be required to give evidence.
Thirdly, leaning to one side the relevance of the sexual adventures of the accused, the statement that an unnamed secretary told her that 'the accused had pinched her on the bum and propositioned her for sex' is a statement of hearsay evidence and is not admissible to prove the truth of that matter.
Fourthly, the evidence, if relevant, only appears to go the character of the accused. Such evidence is not admissible unless the accused has put his own good character into evidence and the court grants leave. The accused has not done so and there is no basis to admit the evidence.
Finally, the evidence is of the kind that ought to attract a judicial discretion to exclude the evidence.

## QUESTION 10

**Criminal Procedure:** Assume that the trial judge rules Mr Nixon's evidence to be inadmissible, in its entirety, prior to the trial commencing.

Explain whether the Prosecution is able to challenge this decision immediately and, if so, whether any such challenge is likely to succeed. **[3 marks]**

**Suggested Answer #1**: The Prosecution can seek leave to make an interlocutory appeal to the Court of Appeal. This requires the trial judge to certify that the ruling that the evidence is inadmissible either eliminates or substantially weakens the Prosecution case. Here it clearly does not so certification will not be given and Prosecution will need to seek review of the decision by the Court of Appeal. Again the Court of Appeal is

unlikely / will not alter that decision. However assuming it does (or the trial judge gave certification) then leave to appeal could be sought. The Court of Appeal would then consider whether it is 'in the interests of justice' to allow the appeal by considering whether allowing the appeal would either shorten or limit the trial, reduce probability of later appeals and must also take the view that the interests of justice in allowing an appeal to be made outweighs the disruption that will occur to the trial. In this case it is possible that leave could be granted if the disruption would be minor. If this was the case then the trial would be adjourned pending the appeal outcome.

**Suggested Answer #2**: The prosecution may seek leave to appeal the interlocutory decision. The judge must first clarify that the inadmissibility of the evidence would eliminate or substantially weaken the prosecution case (it doesn't, Nixon's evidence is peripheral and not probative), and that the matter was not reasonably able to be identified before trial a that the prosecution was not at fault (there is no reason to think why this couldn't have earlier been raised, but the defence may be at fault here). The judge is unlikely to do so. In any event, the court of appeal would not grant leave because there is no basis to say the matter would render the trial unnecessary, reduce its time, or reduce the chances of an appeal. Further the issue is not necessary for the proper conduct of the trial.

**For the purposes of answering further questions in Part A, assume the following additional facts:**

Shortly after Ms Thatcher made her formal statement to police, JML issued proceedings against Thatcher's Recruitment alleging negligence, breach of the contract of engagement between JML and Thatcher's Recruitment, and misleading and deceptive conduct. JML's statement of claim essentially alleges that Thatcher's Recruitment failed to carry out adequate checks into Mr Cambridge's employment history and qualifications and that this ineptitude led to JML hiring Mr Cambridge and causing JML specified and unspecified losses. Ms Thatcher has since made it clear to the informant that she wants nothing to do with the prosecution of Mr Cambridge.

**QUESTION 11**

**Evidence:** Does Ms Thatcher have to give evidence for the Prosecution? Explain. **[2 marks]**

**Suggested Answer #1**: Yes. The general rule is that any person who is competent to give evidence can be compelled (ie must) to give that evidence – s.12. Thatcher is most likely competent to give evidence about facts she has no apparent incapacity to understand questions or give answers – s.13. In my view she is presumed to have capacity – s.13(6).
There is no privilege or immunity that Thatcher can rely on to resist the application of this general rule either. Accordingly she must give evidence and if she continues to refuse, coercive pressure such as issuing a witness summons or subpoena need to be considered and displayed to secure her attendance.

**Suggested Answer #2**: Yes. Ms Thatcher's evidence is relevant to the central issue in the trial. She is compellable to give evidence for the prosecution. EA s.12. No relevant privilege appears to arise on these facts. She can be subpoenaed to give evidence by the prosecution.

**For the purposes of answering further questions in Part A, assume the following additional facts:**

Assume that Ms Thatcher is obliged to give evidence for the Prosecution and the following exchange takes place after she is sworn:

**Prosecutor:** Do you know the Accused, Victor Cambridge?

**Ms Thatcher:** No, I don't think so. No.

**Prosecutor:** You've never met him?

**Ms Thatcher:** I don't think so. It's possible, in my line of work. I meet so many people every day.

**Prosecutor:** Well do you or don't you recall having met this man?

**Ms Thatcher:** I can't quite remember.

**Prosecutor:** Do you recall receiving an email from Victor Cambridge on 8 April 2015?

**Defence Counsel:** I object to that question your Honour.

**QUESTION 12**

**Evidence:** Explain the likely basis for Defence Counsel's objection. **[2 marks**]

**Suggested Answer #1**: This is a leading question in that it assumes the existence of a fact in issue, and about which the witness has not yet given evidence about. Leading questions are not permitted in examination in chief s.37.

**Suggested Answer #2**: A leading question cannot be asked in examination in chief which is a question that suggests an answer or assumes the existence of a fact in issue. Here it is in issue whether Thatcher knows the accused given her previous answers. This question assumes that she knows Victor as if she is not sure if she knows who he is, she can't know if she received an email from him.

**QUESTION 13**

**Evidence:** Assuming Defence Counsel's objection to Prosecutor's question is upheld, explain the steps that the Prosecutor could take to elicit the desired evidence from Ms Thatcher without infringing any rules of evidence. **[4 marks**]

**Suggested Answer #1**: First, counsel needs to obtain leave to treat the witness as being unfavourable. This should be possible as Thatcher's evidence is not helpful to the prosecution and also is likely to be a non-genuine attempt to recall events and give evidence – s.38. Here the evidence of Thatcher goes against the body of other evidence such as the email and the JML witnesses. Therefore leave should be granted (see Tran's case which confirms that the prosecutor's case must 'seek the truth' but a prosecution witness can be unfavourable). Once this is done the prosecutor can then cross examine Thatcher and ask leading questions. The prosecutor then needs to put the allegations to Thatcher in detail so that she can deny them. Once this is done the prosecutor can then adduce other evidence to rebut these denials – see s.106 Evidence Act, or credibility evidence which can then be used or hearsay evidence under s.60 to prove the truth of those matters.

An alternative approach would be to seek leave to allow Thatcher to see the 2 April email to refresh her memory as well as any contemporaneous notes she may have made at the time she allegedly met Cambridge. However we have the facts as to the existence or extent, of the records plus it appears to be from the transcript that Thatcher is being deliberately evasive and unhelpful. Therefore I would not take this approach as it is unlikely to be fruitful.

**Suggested Answer #2**: P should do the following:

1 - Apply for leave for T to use a document to revive her memory, ie the email. The court will consider s.192 factors, as well as whether T will be able to recall the facts adequately without reference to documents. It is clear she cannot adequately recall, therefore leave would be given.

2 – If T denies the prior statements that she has made to police about the evidence she would give, P may seek leave under s.38 to XXN T on basis that she has made prior inconsistent statement.

3 – If leave granted, P may put the prior inconsistent statement to her for a credibility purpose, and in accordance with s.43 and s.103.

4 – If T still denies, P may adduce the document through the police member who took he formal statement, by s.106.

5 – Once in for a credibility purpose under s.106, P may use T's statement for their truth, as a hearing purpose, s.60.

**For the purposes of answering further questions in Part A, assume the following additional facts:**

The Accused has instructed Defence Counsel that he has managed to track down a friend, Leanne WIGGLESWORTH, who the Accused says attended Harvard Business School with him in 1998 and 1999. Defence Counsel has had a conference with Ms Wigglesworth who has confirmed the Accused's version of events: *'We both attended Harvard and we both graduated with an MBA in 1999'* she said. Ms Wigglesworth has indicated that she is prepared to give evidence for the Accused to this effect. The Accused has instructed Defence Counsel to call Ms Wigglesworth for this purpose. The Accused has also indicated that he wishes to give evidence in his own defence and tell the jury that he attended Harvard and obtained an MBA with Ms Wigglesworth, and that he worked at IPC Sport in Mumbai.

Defence Counsel has grave concerns about calling both the Accused and Ms Wigglesworth as witnesses, particularly for the following reasons:

- Defence Counsel asked both the Accused and Ms Wigglesworth (in separate conferences) if they could provide documentary evidence of their attendance at Harvard, including their academic transcripts and a copy of their MBA degrees. Both the Accused and Ms Wigglesworth told Defence Counsel they would look for this documentation and, despite repeated requests from Defence Counsel to produce the documentation, they have been unable to do so. When Defence Counsel asked the Accused if he could obtain his and Ms Wigglesworth's written authorisation to make direct contact with Harvard Business School to obtain a copy of the relevant documentation directly, the Accused became extremely angry and stated '*That's totally*

*unnecessary and pretty outrageous that you suggest it's needed?! Whose side are you on anyway? Mine or the police? Don't you believe me?'*

- Defence Counsel also asked the Accused for the names and contact details of persons with whom he and worked at IPC Sport, Inc in Mumbai. The Accused said that the people with whom he had a direct working relationship had all moved on, so it was going to be impossible to get these names.

Defence Counsel feels conflicted. On the one hand, he feels that he should call his client and Ms Wigglesworth to give evidence because that is what his client has told him to do. On the other hand, he personally does not believe either the Accused or Ms Wigglesworth – he thinks they have concocted a story about going to Harvard. Moreover, he thinks that their story is so unbelievable that the judge and the jurors will be laughing to themselves with incredulity when they hear this evidence, which could harm Defence Counsel's reputation as a competent barrister.

**QUESTION 14**

**Ethics:** Discuss the ethical implications of Defence Counsel's predicament with respect to the Accused's evidence and Ms Wigglesworth's evidence. Should he call these witnesses or refuse to do so? **[4 marks]**

**Suggested Answer #1**: Counsel's obligation is to fearlessly advance their client's interests within the bounds of the law and ethical rules. For that reason counsel must jettison the notion of protecting their reputation and continue to act. Counsel could argue the pressing the case and preserving their reputation represents a conflict of interest and justifies not acting (this would avoid the dilemma of having to call the witnesses), but that is not correct. Therefore the initial position is that counsel should call the witnesses as this would advance the client's interest and be consistent with their instructions. However under the Barristers' Rules counsel has a discretion to exercise their forensic judgment as they see best. Further, counsel must exercise this judgment independent of the client's wishes. Accordingly counsel can choose whether or not to call the witnesses. In this case counsel should call the witnesses as they provide evidence relevant to the matter which may have probative value even if the counsel believes that the evidence may lack credibility. In putting the evidence counsel must be mindful that the Barrister's Rules require counsel to refrain from commenting upon their personal views on the evidence.

**Suggested Answer #2**: Counsel is not being asked to mislead the court. The case is weak and counsel should not be involved in a case where allegations are made without a proper basis, but here the client has instructed counsel of certain matters which the client finds difficult to corroborate but there is no evidence the client is not telling the truth. Counsel may advise the client, in strong terms if necessary, that the case is weak and the client is unlikely to escape conviction. Unless there is some dishonesty or fraud involved, counsel's personal opinion as to whether he believes the accused is not an important factor. There is also no basis to disbelieve Ms Wigglesworth. As far as calling the witnesses, counsel may well advise that it is a better strategy not to call them if counsel thinks so, but if the client insists on the calling of these witnesses, there being no evidence that they will lie or that their evidence lacks a proper basis, counsel must follow client instructions. This assumes that counsel has formed a view that the assertions to be made to have a proper basis. Here there is only the client's word and the word of Ms Wigglesworth.

If counsel has an instructing solicitor, which he should have given the rule at 101(k), then counsel may rely on the opinion of that instructor as to the credibility of the material that gives the proper basis. Here as stated there is no actual material to look at, just the client's word. Rule 64 VBR appears to assume that there is a need for 'factual material' over and above the word of the client. Therefore there is likely no proper basis for the assertions counsel is being asked and despite what I have said earlier, counsel should not make the assertions despite the client's wishes and if the client insists on them being made counsel should cease to act ensuring he complies with s.249 CPA by seeking leave from the court and s.107 VBR and r.110 VBR by ensuring there is enough time for new counsel to take over.

**For the purposes of answering further questions in Part A, assume the following additional facts:**

Both the Accused and Ms Wigglesworth are called by Defence Counsel to give evidence. They both give evidence to the effect that they both attended Harvard Business School together in 1998 and 1999 and each obtained the qualification of MBA. The Accused also gave evidence that he worked at IPC Sport, Inc in Mumbai.

## QUESTION 15

**Evidence:** Explain what the Prosecutor will need to do in the course of cross-examination of these two witnesses in order to comply with the rule in *Browne v Dunn* and for the purposes of the Prosecutor's closing address. **[3 marks**]

**Suggested Answer #1**: The rule in Browne v Dunn means that a cross examiner must put to a witness so much of the cross examiner's case or is inconsistent with the witness's evidence. This is so that the witness can comment upon the inconsistency and act to prevent 'trial by ambush'. In this case for the prosecutor to close and state that the evidence expects a conclusion there, beyond reasonable doubt, the accused did not attend Harvard or work at IPC they will need to:

(a) put it to the accused that

(i) he did not attend Harvard and obtain an MBA in 1999, and

(ii) he did not work at IPC between 2011 and 2014.

(b) put it to Wigglesworth that the accused did not attend Harvard with her and if the prosecution intends to adduce evidence that Wigglesworth did not attend Harvard either, put that to her as well.

**Suggested Answer #2**: The rule in Browne v Dunn requires a cross examiner to put specifically to a witness the issue about which it is suggested the witness is lying/wrong and allow the witness to comment or deny it. Rule is about fairness and allowing the tribunal of fact (here the jury) to assess the competing evidence.

Prosecutor would have to put directly to accused that he did not attend Harvard Business School in 1998 and 1999 and he doesn't have a Harvard MBA qualification and allow the accused to comment on this. Must also put to accused that he never worked at IPC Sport Inc in Mumbai and allow him to comment on it.

Prosecutor must put directly to Ms Wigglesworth that she did not attend Harvard with the accused in 1998 and 1999 and didn't obtain a Harvard MBA qualification.

## QUESTION 16

**Ethics:** Assume that, at the conclusion of the Accused's case, the trial judge adjourns the proceeding until the following day for closing submissions. On his way back to chambers, Defence Counsel stops at a café to buy coffee. There is a woman in front of him talking on her phone at the cash register. Defence Counsel immediately recognises her as Ms Wigglesworth but does not want to get her attention while she is on the phone. Counsel overhears Ms Wigglesworth say on the phone: *'Yeah well what's a little white lie? Nobody's going to find out I didn't go to Harvard. I think the jury bought it. I even think Victor's lawyer bought it. Gotta go, my coffee's here. Bye.'* Ms Wigglesworth then took her coffee and turned around to see Defence Counsel.

What should Defence Counsel do at this point? **[2 marks**]

**Suggested Answer #1**: Defence counsel has an ethical dilemma. They have that the statement made was false and they have an obligation to correct the court as to the misleading statement. However they must not do this unless instructed to do so by the client as it conflicts with defence's duty to promote the accused's interests. Therefore defence must inform the accused of this, such permission to correct the statement and then either correct the statement if permission is granted, or withdraw if the permission is not granted.

**Suggested Answer #2**: Counsel under r.79 VBR must take no further part in the case unless VC authorises him to disclose to the court the lie told by Wigglesworth, but assuming VC does not so authorise and counsel does not take further part in the case, then counsel must not inform the court of the lie.

## QUESTION 17

**Criminal Procedure:** In the course the trial judge's summation to the jury, her Honour instructs the jury: "*...you can only return a verdict of guilty if you find the Accused guilty of the deception beyond reasonable doubt.'*

About one hour after the jury retires to consider its verdict, the jury foreperson advises the judge's tipstaff that the jurors have a question. The question is written on a piece of paper and handed to the judge. The question reads: *'How certain do we have to be of the deception? Can we be 90% sure or does it have to be 99%? What about 95% accuracy?'*

The trial judge reconvenes the court (in the absence of the jury) to discuss the jury's question with Counsel. The following exchange takes place:

> **Judge:** I'm a little bit disappointed that neither the Prosecution nor Defence requested a direction on the issue of reasonable doubt when they had the chance to do so earlier. And we're faced with the problem now. What do you propose that we do about this issue?
>
> **Prosecutor:** A difficult question your Honour. But I don't like the idea of the jury approaching their task using statistical probabilities.
>
> **Judge:** Neither do I. What does Counsel for the Accused say?
>
> **Defence Counsel:** I would submit that there is nothing wrong with a jury thinking about beyond reasonable doubt as being reducible to a probability score. But I would suggest that they be told that 99.9% sure is the threshold for finding guilt beyond reasonable doubt.

**Judge:** No. What I propose is to say nothing much at all. I will simply tell the jury that the issue of beyond reasonable doubt is a matter of common sense and a matter for them to work out for themselves. Is Counsel happy with that approach?

**Prosecutor:** Yes your Honour.

**Defence Counsel:** Yes your Honour.

Critique the exchange between the trial judge and Counsel above. Do you agree with what the trial judge is proposing to do? Explain. **[4 marks]**

**Suggested Answer #1**: Prosecution and defence not permitted to ask judge to give direction on meaning of BRD. Judge can only do so if jury has asked for explanation. Prosecution response is correct – task should not be approached using statistical probabilities. Defence counsel is improper in suggesting 99.9% sure as being the correct direction. Judge should direct the jury by referring to presumption of innocence and prosecutions obligation to prove A is guilty. Judge should say almost impossible to prove anything with absolute certainty and prosecution doesn't have to do this. Judge should add – jury cannot be satisfied A is guilty if jury has reasonable doubt – reasonable doubt is not imaginary or fanciful doubt.

**Suggested Answer #2**: First, as noted by the judge, it is the obligation of the counsel to inform the court of directions they seek regarding specific evidence and identification of matters. That obligation is made clear by the BDA and by the court in Xypolots. However direction regarding reasonable doubt and proof does not fall into the evidentiary obligation that counsel must inform the judge about. He is incorrect regarding this aspect. Further the trial judge may give a direction regarding proof beyond a reasonable doubt where the jury has asked a question directly or indirectly about the meaning of the phrase. In this case they have asked a question, the judge appears to have a direction as to what instruction to give. However simply saying it is a matter of common sense4 seems insufficient and may lead the jury into error, counsel should have referred judge to s.64 of the JDA and considering the questions note the obligation of P to prove beyond reasonable doubt, that they cannot consent on the basis that A likely did it and it is almost impossible to be absolutely certain regarding past events.

**QUESTION 18**

| | |
|---|---|
| **Criminal Procedure:** | Which **TWO** of the following general propositions concerning sentencing law in Victoria are correct? |
| *Your answer:*<br>*(**circle TWO**)* | a) The principle of proportionality obliges a court to select the least severe sentencing option which is open to achieve the purpose of punishment in the instant case.<br>b) The principle of parsimony obliges a court to impose a sentence that does not exceed that which can be justified having regard to the gravity of the crime.<br>**c) <u>The community as a whole benefits when an offender receives a sentence that involves a rehabilitative component.</u>**<br>d) The principle of 'just deserts' has no place in the exercise of sentencing discretion in Victoria.<br>e) Specific deterrence refers to the notion that a sentence can send a clear and specific message to others in the community that they will be punished if they too were to commit an offence similar to that committed by the offender in the instant case.<br>**f) <u>Sentencing is an imprecise exercise which requires the judge to assimilate a host of variables before arriving at a conclusion as to what exactly is the appropriate sentence, in the judge's mind, having regard to the circumstances of the particular case.</u>** |
| **[2 marks]** | |

***END OF PART A***

## PART B (Questions 19 to 34) – Candidates are required to answer ALL questions in Part B.

**Refer to the facts in Part A and assume the following further facts relate to all questions in Part B.**

Victor Cambridge was found guilty of the offence of obtaining financial advantage by deception. Mr Cambridge has since declared himself bankrupt and JML has no prospect of recovering any of their losses from him.

JML has issued proceedings against Thatcher's Recruitment alleging breach of contract, negligence, and misleading and deceptive conduct under the *Australian Consumer Law* ('ACL'). The essential factual allegations are as follows:

- JML and Thatcher's Recruitment entered into a contract on 19 October 2010 whereby Thatcher's Recruitment agreed to provide recruitment services to JML on a non-exclusive ongoing basis ('**Recruitment Contract'**) which included the following terms:

> 6. JML will pay commission to Thatcher's Recruitment calculated at the rate of 15% of the referred candidate's commencing annual salary at JML. Such commission is payable upon JML entering into an employment contract with the referred candidate.
>
> …
>
> 32. Thatcher's Recruitment undertakes to carry out adequate reference checks in relation to any referred candidate who is to be offered employment at JML for the purposes of verifying the authenticity of the referred candidate's claimed employment history, before an offer of employment is made by JML.
>
> 33. Thatcher's Recruitment undertakes to obtain written confirmation from relevant educational institutions and qualification authorities in relation to any referred candidate who is to be offered employment at JML for the purposes of verifying the authenticity of the referred candidate's claimed education and qualifications, before an offer of employment is made by JML.
>
> ….

- Thatcher's Recruitment failed to carry out reference checks in relation to Victor Cambridge for the purposes of verifying his previous employment at IPC Sport, Inc, breaching clause 32.
- Thatcher's Recruitment failed to obtain written confirmation from Harvard Business School verifying Victor Cambridge's MBA qualification, breaching clause 33.
- Thatcher's Recruitment breached its duty of care owed to JML in that it failed to carry out inquiries that might be expected of a reasonable recruitment consultant for the purposes of verifying Victor Cambridge's employment history and educational qualifications.

- Thatcher's Recruitment engaged in misleading and deceptive conduct by representing to JML that it had verified Victor Cambridge's employment history and educational qualifications before JML offered Victor Cambridge employment, but it had failed to do so.
- Victor Cambridge had not worked at IPC Sport, Inc and had not obtained an MBA from Harvard Business School as claimed.
- As a consequence of Thatcher's Recruitment's conduct, JML has suffered loss and damage, including:
    - $82,500 paid by JML to Thatcher's Recruitment pursuant to clause 6 of the Recruitment Contract in circumstances where JML would not have employed Victor Cambridge and commission pursuant to clause 6 would not have been payable;
    - $283,350 paid by JML to Victor Cambridge pursuant to his employment contract in circumstance where JML would have entered into that employment contract (being the sum of the $100,000 sign-up payment and $183,350 in fortnightly salary payments);
    - Unspecified losses in the nature of commercial and reputational damage suffered as a consequence of employing Victor Cambridge in a position of senior executive management at JML in circumstances where he was obviously not qualified to be in that position.

In its pleaded Defence, Thatcher's Recruitment admits that it did not carry out any reference checks or educational and qualification checks of Mr Cambridge's claimed history. However, it says that it did not do so because of specific instructions given by JML. In her written and signed witness statement prepared for the proceeding, Ms Thatcher states: *'After Mr Cambridge had his interview at JML's offices on 21 April 2015, Ms Rodriguez telephoned me to say how impressed they were and that they wanted to offer him the position as soon as possible. I advised her that I would still need to undertake reference checking and verify his qualifications and that this would take some time. Ms Rodriguez told me not to bother as they were so confident that Mr Cambridge was perfect for the position and that they needed Mr Cambridge to start as soon as possible. I asked her if she was sure and she said "Yes, don't worry about it."'*

Ms Rodriguez, in her witness statement, denies that she ever said to Ms Thatcher that the checks could be dispensed with. Ms Rodriguez states that she actually recalls Ms Thatcher telling her over the phone that all appropriate checks had been carried out, just before Mr Cambridge was offered the job. Critical factual issues at trial will therefore be whether:

- Ms Rodriguez communicated to Ms Thatcher that she did not need to undertake reference and qualification checks prior to Mr Cambridge being offered employment;

- Ms Thatcher communicated to Ms Rodriguez that reference and qualification checks had been carried out prior to Mr Cambridge being offered employment.

**QUESTION 19**

| | |
|---|---|
| **Civil Procedure:** | Which of the following **TWO** propositions are most likely to be correct in this case? |
| *Your answer:* *(**circle TWO**)* | a) The proceeding will be commenced by originating motion.<br>b) The proceeding will be commenced by *ex parte* application.<br>**c) <u>Counsel who drew and signed the statement of claim was satisfied that the allegations contained in it have a proper basis.</u>**<br>**d) <u>The Plaintiff's statement of claim will contain a summary of material (and not immaterial) facts on which it relies.</u>**<br>e) The statement of claim will be served on the Defendant before it is filed in court.<br>f) The Plaintiff will include an affidavit deposing to the alleged facts contained in the statement of claim when the proceeding is commenced. |
| **[2 marks]** | |

**QUESTION 20**

| | |
|---|---|
| **Ethics:** | Identify **TWO** situations in which Counsel **<u>must</u>** refuse to act for the Defendant in this matter? |
| *Your answers:* *(**circle TWO**)* | a) Counsel owns a small parcel of shares (worth approximately $3,000) in the Plaintiff.<br>**b) <u>Counsel's sister-in-law is Alana Rodriguez with whom he has briefly discussed the matter informally, though this discussion took place before proceedings were commenced.</u>**<br>c) Counsel believes on reasonable grounds that the time required for the brief will threaten his ability to continue acting on other matters and take on new briefs.<br>d) Counsel owns a small parcel of shares (worth approximately $15,000) in the Defendant.<br>**e) <u>Counsel was engaged by the Plaintiff in 2010 to draft the terms of the Recruitment Contract (when Counsel was a solicitor), and the construction of some of these terms and the reasons they were included are likely to be material issues at trial.</u>**<br>f) Counsel believes the Defendant may not be in a position to pay his fees. |
| **[2 marks]** | |

## QUESTION 21

**Ethics:** The Plaintiff in this case has decided to brief two senior and two junior counsel (4 barristers in total) to appear at trial. At least one senior and one junior will be appearing at all directions hearings and hearings of interlocutory applications. Having regard to the fact that the legal and factual issues in this proceeding are unlikely to be complex, and any damages award (if obtained) would be less than $1m, discuss the risks associated the Plaintiff engaging so many barristers with particular reference to the case of *Yara Australia Pty Ltd v Oswal* [2013] VSCA 337 **[5 marks]**

**Suggested Answer #1**: In view of the amount of money and complexity of the issues in dispute, it appears likely that it would be disproportionate in this case to the P to brief 2 QCs and 2 juniors and have one of each present at each directions hearing. Despite the client's clear wishes, it would be likely that the client, the solicitors and counsel could be held in breach of the overarching obligation to keep costs proportionate to the client if they are to occur. In the case of Yarra, the court initially expressed concern about the number of counsel appearing in an appeal for an order for security of costs, where the security sought was only around $135,000 and a vast number of counsel and law firms appeared at the hearing of the appeal. The court noted that there will be many cases that don't justify that level of representation and that the obligations imposed by the CP Act apply regardless of any express instructions from the client. However in that case the court was ultimately persuaded that as the overall litigation included sums amounting to $1M and the application for security was an integral point of the litigation, it was not disproportional in the circumstances to here that level of representation. This case is clearly different because the maximum sum in dispute is around $1M and the circumstances of the claim relate to a relatively straight forward contractual dispute between the parties. While it would probably be appropriate to have senior counsel for the trial, it would not be necessary to have 2 or to have one attend each directions hearing – particularly these dealing with non-contentious matters.

**Suggested Answer #2**: Yara makes clear that the courts are willing to inquire into potential breaches of the overarching obligations of their own motion. Here, as in Yara, the specific obligation that is relevant is the obligation to ensure that costs are proportionate to the issues in dispute. On its face, this case is not so complex as to warrant a team of four counsel.

Yara makes clear that the costs incurred must be considered in light of the issues in dispute in the particular interlocutory process. In the case of Yara, a significant piece of 'mega- litigation, it was appropriate for the parties to have senior and junior counsel appear at the specific interlocutory hearing in question. But for the plaintiff to say in the present case that 'one senior and one junior counsel will appear at all interlocutory applications' without knowing the specifics of each application may lead the plaintiff into error.

Yara is also authority for the proposition that the material plea must be proportionate to the issue in dispute.

In the present case, and with regard to the findings in Yara it would be unwise for the plaintiff to brief a team of four counsel. A team half that size may be appropriate. The question of the claim and the complexity of the issues do not warrant it.
A final point is that where costs are unreasonable, Yara demonstrates that consistent with the Civil Procedure Act, the court may impose an order that the solicitors effectively indemnify the clients for all or part of the fees incurred.

**For the purposes of answering further questions in Part B, assume the following additional facts:**

The Plaintiff has pleaded the following paragraph in its statement of claim:

> 6. On or about the 19 October 2010 the Plaintiff and Defendant entered into an agreement that was wholly in writing a true copy of which is attached to this statement of claim and marked "P-1", signed by the Chief Executive Officer of the Plaintiff and the Director of the Defendant.

The Defendant's solicitors have written to the Plaintiff's solicitors stating the following: *"We refer to paragraph 6 of the Plaintiff's statement of claim. It appears that you are having some difficulty understanding the difference between pleading material facts, particulars, and evidence… We invite you to cure the deficiencies in the statement of claim forthwith."*

**QUESTION 22**

**Civil Procedure:** What is meant by *'the difference between pleading material facts, particulars, and evidence"*? Explain whether the Defendant's solicitors are making a reasonable complaint and how the Plaintiff's legal representatives might appropriately respond. **[4 marks]**

**Suggested Answer #1**: Order 13 of the Rules requires that a pleading set out the material facts. By this it is meant that the pleading must set out every allegation which is an essential interest to the claim. Here the fact that the plaintiff and defendant entered into an agreement is a material fact without it the contract claim and ALC claim cannot be made.

The order also re quires that sufficient particulars are given of a material fee. Particulars are details that are necessary to allow the other side to understand the allegations and to plead a defence. The distinction between fact and particular can be fine. Here the particular is that the agreement was in writing and dated 19/10/10. It's the detail the defence needs to understand the agreement is pleaded as a fact. Finally pleadings must not contain

evidence. Here the actual annexure of the agreement of evidence. It is the document by which the agreement alleges to exist as particularised, is proven to exist.

The defendants can make a reasonable complaint in that the pleading does not comply with order 13. Perhaps they should not have written in such a rude manner but this is not the point. The letter should have invited the plaintiffs to amend these pleadings and informed the plaintiff that the defence would seek orders for amendment if this was not voluntarily done.

**Suggested Answer #2**: Under Rule 13.02 a statement of claim must contain a summary of all the material facts on which a party relies, but not the evidence by which those facts are to be produced. Under 13.03 the effect of any defences shall be pleaded as briefly as possible, and the precise words need not be used. It is also necessary to plead particulars of any allegation of misrepresentation.

In this case, there is a basis to the D's solicitors' complaint because although it has pleaded the effect of the contract, the P has:

a – not provided the relevant particulars of it that relate to the claim, and

b – has pleaded evidentiary matters, by setting out a copy of the contract as annexure.

This does not enable the D to understand the claim against it.

The correct way to plead the contract would have been to say something such as:

# The P and D entered into a contract on or about 19 October 2010 for the provision of recruitment services by the D to the P.

PARTICULARS

The contract was in writing and a copy of it may be inspected at the offices of the P's solicitors.

Any particular terms of the contract on which the P wished to rely should then here be set out in subsequent paragraphs eg,.

# It was a term of the agreement that the D would carry out adequate reference checks on any prospective candidate.

PARTICULARS

The term was in writing and was entered in paragraph 32.

The D's solicitors should therefore respond setting out a proper pleading of the contract and any particular terms on which they rely in their claim, along the lines set out above.

**QUESTION 23**

**Civil Procedure:** Refer to Question 22. Explain the options, and procedures associated with such options, available to the Defendant if the Plaintiff's solicitors ignore the complaint. **[2 marks]**

**Suggested Answer #1**: If the D writes to the P setting out its complaint and the P refuses to amend its claim to plead properly, then the D could seek to have the statement of claim or any part of it struck out on the basis that it does not disclose a c is scandalous, frivolous or vexatious or is an abuse of process under R23.02. However first it would be desirable to seek further and better particulars of the statement of claim, pursuant to rule 13.11. The court would expect the D to have requested such particulars by way of letter first.

**Suggested Answer #2**: If the plaintiff ignores the complaint, then the defendant may seek to strike out the pleading, or this particular part on the basis that it is embarrassing. Such an application must be made by application supported by affidavit. In this case the defendant is unlikely to succeed in having the entire pleading struck out, but it is likely that there will be an order requiring the plaintiff to amend the pleading.

**QUESTION 24**

**Civil Procedure:** In this proceeding, in what circumstances could: (i) the Plaintiff obtain a freezing order; and (ii) the Defendant obtain an order for security for costs? Explain why you consider that these orders are likely/unlikely to be obtained in this case on the given facts. **[4 marks]**

**Suggested Answer #1**: The P could seek a freezing order against the D if it were able to convince the court of a real danger that the D may frustrate or inhibit the courts processes by removing assets from Australia or disposing of them. The P would need to make an application pursuant to order 37A, supported by an affidavit setting out (a) the basis of the claim for substantive relief in the proceeding, the amount of the claim and (if the application was made ex parte) the D's knowledge of any defence the D may have to the claim; (b) the nature and value of the D's assets; (c) the circumstances said to constitute the danger that assets will be removed or disposed if the order isn't granted; (d) anyone else who may be affected by the freezing order. We have not been provided with any indication to suggest that the D is intending to – he's removed assets so on the material available it appears unlikely a freezing order would be imposed, given its draconian nature.

The D could potentially seek security for costs against the D under Order 62. This might potentially be possible as the P is a company - if the D were able to establish that there is reason to believe that the P has insufficient assets in Victoria to pay the costs of the D should it be unsuccessful in the claim.

Again we have not been provided with any information to indicate P has insufficient assets. It appears to be a sizable company that is still trading. It appears unlikely security to costs would be ordered.

**Suggested Answer #2**: Freezing order: the plaintiff could only obtain a freezing order if it satisfied the court that there was a risk that the judgment of the court may be frustrated because any judgment would be wholly unsatisfied. The court will only make such an order if it is satisfied that the defendant is removing assets from the jurisdiction or is otherwise dealing with assets in a manner that may diminish their value. In the present case there is no evidence that Thatcher Recruitment is removing assets from the jurisdiction or otherwise disposing of assets. Therefore there is no justification for such an order.

Security for costs: a defendant may seek security for costs where there is a risk that the plaintiff will be unable to pay its costs, if the defendant is successful. The court will not make such an order against an impecunious plaintiff unless one of the factors in rule 62.02 is present. Here JML is a publicly listed company. Normally a security for costs will be awarded against a company. However JML is publicly listed and can presumably satisfy the court that it has assets to meet any adverse costs order. Therefore it is unlikely security will be provided.

Had it been ordered and not paid, security for costs would have led to a stay of the claim and a ground for dismissal of the claim.

## QUESTION 25

**Civil Procedure:** The Plaintiff is contemplating making an application for 'summary judgment'. What is 'summary judgment'? Explain the procedural steps that both the Plaintiff and Defendant would have to take in relation to such an application. Explain why you think an application for summary judgment is/is not a sensible course to take in this case. **[4 marks]**

**Suggested Answer #1**: Summary judgment is where the court determines a matter without going to trial. Instead the matter is determined on the pleadings and having regard to any affidavit material filed in support of the application. Under the Civil Procedure Act, summary judgment may be granted where a claim is has 'no real prospects of success'. This means there the claim may have some merit (ie need not be 'hopeless' or 'bound to fail') but is on the whole unmeritorious – see Lysaght's case.

Both plaintiff and defendant can make an application. If the plaintiff makes an application then they need to support it with affidavit material that verifies the facts that support the plaintiff's claim and that the defence has to seek prospects of success. The affidavit must also set out the basis on which it is alleged that the defendant has no real prosects of success in this defence. The defendant is thus required to 'show cause' and if the affidavit material in support to resist their claim. The plaintiff then has a final right of reply.

An application made by the defence is similar although they are not obliged to file affidavit material. Instead, they can file for application solely on the state of the pleadings. The plaintiff is then required to 'show cause'. Ultimately whether summary judgment is given is a matter of discretion and the court may choose not to if it overrides the issues require judicial determination. Here neither party should make an application, the facts indicate a real dispute as to the issues and live credibility matters. Accordingly it cannot be said that either

side's claim has 'no real prospects of success' that would enliven the court's ability to grant summary judgment.

**Suggested Answer #2**: Summary judgment allows a party to bring an application (in this case the plaintiff) that the matter be determined by the judge summarily on the grounds that the defendant's defence has no real prospects of success. The plaintiff must apply by summons on notice to the defendant with an affidavit in support setting out:

1 – verify its cause of action, the facts that give rise to its arguable claim;

2 – state the belief that the defendant's defence has no real prosects of success.

The defendant can then file an affidavit in response slowing course that there is a real question to be tried. The plaintiff can do an affidavit in reply, but it must point to actual facts that make the defendant's facts not sustainable. In this case, the course of action is not sensible. A court is highly unlikely to give summary judgment because there are facts in dispute which give rise to the defendant's defence, ie Ms Thatcher says Ms Rodriguez received her from her obligation to do the reference checks, which Mr Rodriguez denies. This issue will need to be determined at trial on witness evidence and objective documentary evidence (if there is any). While the new test under the Civil Procedure Act is more liberal than the old 'bound to fail' formulation the judge must still be satisfied that there is no real question to be tried which is not the case here.

**For the purposes of answering further questions in Part B, assume the following additional facts:**

- In accordance with court directions, the parties have exchanged lists of discoverable documents.
- In the course of reviewing relevant documents and preparing the Plaintiff's list of documents, a junior solicitor employed by the Plaintiff's solicitors, Milton McKenzie, comes across the following email exchange between her supervising litigation partner, Helen Hartnett, and the Chief Executive Office of the Plaintiff, Olivia Schulz (***start reading from the bottom of the exchange***):

> Subject: Re: FW: Thatcher's litigation
> From: helen.hartnett@miltonmckenzie.com.au to Olivia.Schulz@jonasmichael.com.au
> Date: 28 October 2015 8.19pm
>
> Hi Olivia,
>
> I'll call you first thing tomorrow morning to discuss.
>
> Regards,
>
> Helen Hartnett
> Partner
> Milton McKenzie Lawyers

Subject: FW: Thatcher's litigation
From: Olivia.Schulz@jonasmichael.com.au to helen.hartnett@miltonmckenzie.com.au
Date: 28 October 2015 2.04pm

Hi Helen,

See below. Any advice on what to do about this? I'm not sure how much this issue is going to affect our case.

Olivia Schulz
Chief Executive Office
Jonas Michael

> Subject: Thatcher's litigation
> From: James.Green@jonasmichael.com.au to Olivia.Schulz@jonasmichael.com.au
> Date: 28 October 2015, 1.54pm
>
> Olivia, I've just had a meeting with Alana. She's in a right state about this Victor Cambridge saga and the litigation with Thatcher's. She's telling me now that she can't remember whether she told Thatcher's to forget about doing the reference checks. To be honest, I suspect she may have given this instruction to Thatcher's. I'm aware that Alana has failed to reference check some of our current employees in my department (thank god they turned out fine!). But I think this could be an issue that the lawyers should know about. I'll leave it to you to discuss with them.
>
> James Green
> Director, Operations

## QUESTION 26

**Evidence:** Explain the relevance of the email exchange. **[2 marks]**

**Suggested Answer #1**: The email exchange is relevant in that it indicates that (a) Rodriguez may have told Thatcher not to bother with the reference checks – this is an admission against the P's interests; and (b) Rodriguez has a tendency to be lax with checking references in her own department. This could be relevant as tendency evidence, which might make it more likely Rodriguez did give the 'don't bother' instruction to Thatcher.

**Suggested Answer #2**: It is relevant as an admission by a representative of JML about tendency of Alana to fail to reference check.

It is not an admission per se by Alana (even though it is a PR that is adverse to JML's case, and made with authority re Alana/James are employees) but it is not first-hand hearsay (as required for admission) but may be adduced via s.60, ie remote hearsay but used as admission (very prejudicial and problematic).

## QUESTION 27

**Evidence:** Explain whether the Plaintiff is entitled to withhold production of the email correspondence from the Defendant. Given that any such purported right of the Plaintiff to withhold production of these documents would be exercised outside the courtroom, you should also explain in your answer whether the common law or certain provisions of the *Evidence Act 2008* governs the situation. **[4 marks]**

**Suggested Answer #1**: The email appears to have been created in the course of the litigation or in contemplation of it. Although the first email is between the employees at the P, it appears that its purpose was 'fact checking' for the purpose of provision of information to the P's lawyers for use in the litigation. Therefore it appears that it should satisfy the dominant purpose test and be subject to client professional privilege (litigation privilege). Although in general the Evidence Act relates to evidence given in court, the provisions relating to client professional privilege are extended by virtue of s.131A to cover preliminary court proceedings, such as discovery. Accordingly the P should be entitled to not produce the email in discovery. It would need to be included in the discovery under Sch 1 Part 2 (as a privileged document) but would not need to be produced to the D.

**Suggested Answer #2**: The plaintiff may assert a claim of legal professional privilege over the email correspondence on the basis that they are confidential communications prepared for the dominant purpose of the litigation. Although the first email is not to or from the lawyers, it is prepared for the purpose of the client being the plaintiff being provided with legal services relating to the proceeding, ie 'this is an issue the lawyers should know about', and asking the person to discuss with the lawyers. The remaining emails are directly between the lawyers seeking their services in reply. The plaintiff may claim privilege from disclosing by way of pre-trial disclosure (eg pursuant to discovery) as s.131A of the Evidence Act applies, requiring the court to determine any objection to disclose on the basis of LPP by applying the LPP provisions in the Evidence Act. Essentially the plaintiff must include the emails in their affidavit of documents listed as LPP and objecting to their disclosure. The trial judge may inspect the documents for the purpose of determining the objection.

## QUESTION 28

**Civil Procedure:** Could this matter be heard before a jury? Explain. **[2 marks]**

**Suggested Answer #1**: Yes, as the proceeding was commenced by writ and is founded on contract and tort (which relevantly in this case includes an action for damages for breach of statutory duty ie the consumer code). P in writ or D by notice in writing to P and prothonotary could signify desire and would need to pay the jury fees.

**Suggested Answer #2**: Under SCR O47, the plaintiff in the writ or the defendant within 10 days of the last appearance may request a jury where the claim is founded on tort or contract. Here there is also an ACL claim but it may be said that the proceeding is 'founded' on tort or contract. The requesting party must pay the relevant fee. However the court may order the proceeding proceed without a jury if satisfied that is appropriate.

**For the purposes of answering further questions in Part B, assume the following additional facts:**

The matter is set down to be tried before judge and jury.

Prior to trial, the case received significant media attention. As a result, two former clients of Thatcher's Recruitment approached the Plaintiff's solicitors and made written statements for the purposes of assisting the Plaintiff with its case:

- Pinnacle Enterprises Pty Ltd ('Pinnacle') engaged Thatcher's Recruitment in July 2014 for the purposes of recruiting a new Logistics Manager. The Director of Pinnacle, Minh NGUYEN, states: *'I interviewed Thatcher's candidate and thought he was a perfect fit for our company, but had my reservations about some inconsistencies in his work history contained in his CV. I contacted Hailey Thatcher and asked her to do reference checks. She got back to me the same day and said that she'd done all the checking and 'the guy was great' according to the people she'd spoken to. I still had my doubts because I thought she had done the checking far too quickly. So I made some of my own inquiries and discovered that the candidate hadn't worked at two of the places he said he had. Needless to say, I didn't hire him. I didn't use Thatcher's again.'*
- Andrew McMillan & Associates ('AMA') engaged Thatcher's Recruitment from February 2010 to June 2012. A director of AMA, Henry LANGDON, states: '*We are a marketing firm and used Thatcher's whenever vacancies arose. Hailey Thatcher was our primary contact there. The first three or so candidates she referred to us were all good. We hired them all. But things started to go downhill in 2011. In February, we were looking for a relatively senior marketing consultant. Hailey sent a guy to us called Ian Farrington for interview. I interviewed him. He clearly lacked the necessary experience and so we didn't hire him. I rang his referees personally and one didn't even know who he was. The other said he was a very 'mediocre' employee. I confronted Hailey about this and she said she'd telephoned the same referees and that they had given Ian a glowing report. Then later that year in August, Hailey sent us another job applicant for interview, Teresa Graham. I asked Hailey to check Ms Graham's employment history on her CV. She got back to me and said that 'it all checks out fine'. I was unsure about her checking, given what had happened earlier in the year with Ian Farrington, and so I went through all of Ms Graham's*

*previous employers listed on her CV and contacted them directly. Two out of the six she had listed said they had never heard of her. I confronted Hailey about this and asked her whether she had actually bothered checking as I had asked. She didn't answer my question directly and made up some excuse about having to go into a meeting. It was then that I terminated our relationship with Thatcher's permanently.'*

**QUESTION 29**

**Evidence:** Explain whether the Plaintiff may adduce the evidence of Ms Nguyen and Mr Langdon under ss 97 and/or 98 of the *Evidence Act 2008*. **[5 marks]**

**Suggested Answer #1**: The P may be able to use the evidence of Ms N and Mr L as tendency evidence under s.97, on the basis that it shows that the D (and Thatcher in particular) had tendency to not perform the necessary reference checks. In order to be admissible the P would need to establish that the evidence, either by itself or with other evidence, has significant probative value. Factors that the court would consider in assessing the probative value would include the value of circumstances, how far apart they are in time and whether there is any particular degree of specification in the repeat conduct. Notice should also be given of the intention to adduce the tendency evidence.

In this case the type of conduct alleged does not have a striking similarity, given that it is part of the recruiter's role to check references. However given that there are a few episodes of similar conduct (one from Mr N, 2 with Mr L) and they relate to conduct between 2011-2014, it appears likely that overall there is sufficient probative value to the evidence, in contribution with the evidence that A's references were falsified (which should have been apparent if checked) to justify allowing the evidence in as tendency evidence.

**Suggested Answer #2**: Evidence of these witnesses may be either tendency or coincidence evidence. Tendency is the more likely course but the following considerations will apply if the evidence is coincidence evidence. Under s.97 the evidence of both of these parties can only be used to show that Thatcher has a tendency to not do background checks on referred candidates if notice is given by the plaintiff (there is no evidence this has been done, though if the plaintiff only just became aware of this, it might seek dispensation from notice under r.100) and the evidence has significant probative value. In assessing probative value the court is looking for similarities that show a pattern of conduct or modus operandi (Velkoski). There the level of probative value is simply not strong enough because

– Nguyen's evidence revolves around how quickly the checking was done;

- Langdon in fact refers to several candidates who worked well;

– Langdon's evidence is also as to a confrontation with Thatcher in which she gave a different account of what a referee had said.

Overall there are only three instances, all with slightly different versions of what happened and evidence of instances where the alleged tendency did not occur. The probative value is therefore not significant and the evidence will not pass the test of either s.97 or s.98.

**For the purposes of answering further questions in Part B, assume the following additional facts:**

The trial judge has ruled that the evidence is admissible under ss 97 and 98 of the *Evidence Act 2008*. The following exchange between the trial judge and Counsel for the Defendant then immediately takes place:

> **Counsel for Defendant:** If your Honour is minded to make that ruling, in the alternative I seek to exclude the evidence under section 135 or 137.
>
> **Judge:** On what basis?
>
> **Counsel for Defendant:** The evidence is unfairly prejudicial your Honour.
>
> **Judge:** What do you mean it's unfairly prejudicial? In what way?

## QUESTION 30

**Evidence:** Explain what is meant by the expressions 'unfairly prejudicial' and 'unfair prejudice' and how the evidence Ms Nguyen and Mr Langdon might be accurately characterised in this way **[3 marks]**

**Suggested Answer #1**: Evidence is unfairly prejudicial if it may cause the fact finder to commit errors in assuming the facts. The two most common forms are 'reasoning prejudice' and 'moral prejudice'. Reasoning prejudice where evidence may cause the fact finder to give undue weight to certain aspect of the evidence. Here the fact finder might put great weight on Thatcher's conduct without fairly assessing whether the other evidence (that she was instructed not to check) is probative or to be given weight. Moral prejudice is where the evidence may cause the fact finder to be prejudiced against a person – and to give less weight to the evidence because of a bias against them, as for other reasons. Here the fact finder may be less likely to accept the truth of Thatcher's evidence because she is incompetent or careless.
The evidence of each witness may be characterised in this way, but the exclusion should not apply because of the significant probative value. Further s.137 is applicable only in a criminal matter.

**Suggested Answer #2**: A matter is unfairly prejudicial if it is prejudicial not only because it makes it more likely that an accused is guilty, or in a civil case that the fact in issue occurred. For example, evidence may be dangerously emotive to a jury, or cause a trier of fact to consider that a person is generally disreputable. This can result in the evidence being given too much weight. Here the evidence could have prejudicial effect in presenting Ms Thatcher as someone who is not good at her job, and who is willing to lie to clients about whether she has conducted necessary background checks. The prejudicial effect of the evidence could be tempered by also admitting the part of Langdon's statement about his prior positive experiences, so evidence is seen in context.

## QUESTION 31

**Evidence:**

*Your answer:*
*(**circle ONE**)*

**[1 mark]**

Which **ONE** of the following general propositions about sections 135 and 137 of the *Evidence Act 2008* is correct:

a) In a criminal proceeding, an application to exclude evidence can be made under s 137 but not s 135, the latter provision being applicable only in civil proceedings.

**b) <u>The concepts of 'unfairly prejudicial' under s 135 and 'danger of unfair prejudice' under s 137 are practically the same in that they typically require the court to consider the extent to which a jury might give the evidence in question too much weight.</u>**

c) Assuming that both ss 135 and 137 can be invoked by a party in a proceeding, there is no practical difference in how these two provisions operate to exclude evidence.

d) Section 135 is concerned with the probative value of evidence whereas section 137 is concerned with the prejudicial effect of the evidence.

e) A critical question in the application of both s 135 and s 137 is whether the evidence proposed to be adduced could, if it were accepted, rationally affect the probability of the existence of a fact in issue.

f) Both ss 135 and 137 presuppose that evidence cannot be both 'probative' and 'prejudicial' (evidence can only be one but not the other).

**QUESTION 32**

**Evidence:** The trial judge required that the issues in relation to the admissibility of Ms Ngyuen and Mr Langdon '*be resolved by way of a voir dire'*. Explain the concept 'voir dire' and how the voir dire process would be applied in relation to this evidence. **[3 marks]**.

**Suggested Answer #1**: A voir dire is a trial within a trial. It is a hearing where the competency of a juror/witness is determined or the admissibility of evidence is determined. Where there is a jury it's to be conducted in the absence of a jury. Here the admissibility of the tendency evidence in relation to Thatcher could be resolved by way of voir dire. Judge could hear submission on the admissibility of the tendency / coincidence evidence and the two former clients could be called as witnesses in relation to the matter.

**Suggested Answer #2**: A voir dire is the determination of a preliminary question in a proceeding ie regarding the admissibility of evidence that is heard and determined in the absence of the jury. So in this case the jury would leave the court while the court heard legal argument re the admissibility of the evidence. Evidence heard in absence of jury is not admissible in the trial proper, so the judge might call Ms L and Ms N to give evidence to help determine the probative value of the evidence and the extent of any prejudice it might cause to the accused.

**For the purposes of answering further questions in Part B, assume the following additional facts:**

Ms Rodriguez is called by the Plaintiff to give evidence. She is then cross-examined by Counsel for the Defendant. In the course of cross-examination, the following exchange between Counsel for the Defendant and Ms Rodriguez takes place:

**Counsel for Defendant:** Do you understand what it means to tell the truth?

**Ms Rodriguez:** Of course.

**Counsel for Defendant:** But you didn't tell the truth about foregoing the reference checking did you?

**Ms Rodriguez:** That's not correct. I did.

**Counsel for Defendant:** Do you have a propensity to lie Ms Rodriguez?

**Ms Rodriguez:** No.

**Counsel for Defendant:** Are you seeing anyone about your lying problem Ms Rodriguez?

**Ms Rodriguez:** No.

**Counsel for Defendant:** But you are seeing a psychiatrist about your life problems generally, aren't you?

**Ms Rodriguez:** What are you talking about? What's that got to do with anything?

## QUESTION 33

**Ethics:** Discuss the ethical implications of this line of questioning and consider the objections that Counsel for the Plaintiff could make in relation to it. **[4 marks]**

**Suggested Answer #1**: The question relates to R's honesty and her credibility. In itself this is ok as one of the purposes of cross examination is to allow adducing credibility evidence – s.103. This can include asking questions that are uncomfortable or accuse a person of lying or being misleading. However under the Barrister's Rules these kinds of allegations should not be made unless there is proper basis on the materials available to counsel to make the claim. Here we do not know if these materials were available. Plaintiff could object to some of the initial questions as they are unduly harassing, in particular the questions are somewhat repetitive. In the course of the cross examination the defence counsel needs to observe the rule in Browne v Dunn and should put to R the facts supporting the allegations (eg seeing a psychologist etc) that hasn't been done and suggest that there is no proper basis for this questioning. Again this would support the plaintiff's objections as the questioning progresses it being clearly more harassing and aggressive as the defence is like a dog with a bone and cannot accept the witness' response and insists there is material to get to their intended point. By the last question the plaintiff should object on relevance. First it is unclear how life problems can be discussed /alluded to and it is also unclear how seeing a psychologist affects R's credibility.

**Suggested Answer #2**: Counsel for the defendant should have a proper basis for making the allegation that R is lying. It is a serious allegation of dishonesty and as such counsel should first have confirmed client instructions to make the allegation and advised of the serious consequences of the allegation. This goes to the allegation of a 'propensity' to lie also. The reference to seeing a psychiatrist about life problems may also be improper if there are no reasonable grounds to think it can affect credit. Counsel should also ensure that he is not needlessly belittling or insulting the witness.

Counsel for the plaintiff can object to the last two questions on the ground of relevance as they do not appear to affect any fact in issue. Counsel could object on the question about propensity as it attempts to adduce tendency evidence and, I assume, no notice has been given, and there is no significant probative value.

Finally counsel may object under s.41 to the last three questions as they seem only to insult, intimidate etc. the witness and might seek a direction that these questions be disallowed and the responses not received by the court.

**For the purposes of answering further questions in Part B, assume the following additional facts:**

The jury has returned a verdict in favour of the Plaintiff and awarded the sum of $82,500.

Two weeks after the Defendant was served with the Plaintiff's statement of claim, the Defendant's solicitors wrote a letter to the Plaintiff's solicitors marked '*without prejudice save as to costs'*, stating:

- The Defendant offered to pay $125,000 to the Plaintiff in full and final settlement of its claim;
- The offer was open to be accepted for 21 days from the date of the letter;
- If the offer was accepted by the Plaintiff, the Defendant would pay the sum of $125,000 within 30 days from the date of acceptance.

**QUESTION 34**

**Civil Procedure:** Explain the significance of the Defendant's letter with reference to the *Supreme Court (Civil Procedure) Rules 2005*. **[3 marks]**

**Suggested Answer #1**: This is either an order 26 offer, or a Calderbank offer. If the former, then r.26.08(3) applies, because D made the offer, which P refused, and P has now obtained judgment on terms less favourable than those in offer. Thus P will be entitled to costs from D on standard basis up until the second business day after service of offer; and D would be entitled to costs from P for costs thereafter. If Calderbank, then the court will take the offer into account in exercising its discretion as to costs.

**Suggested Answer #2**: Apart from the fact that it doesn't state that it is an offer pursuant to order 26, it looks like a formal offer (and the judge is likely to consider it this way) because sets out clearly and is open for enough time. The significance are the costs consequences. The plaintiff is worse off on judgment than it would have been had it accepted the defendant's offer – which raises a strong presumption that the defendant should have to pay the plaintiff's costs up to the day of offer, and the plaintiff should have to pay the defendant's costs hereafter, if the plaintiff 'unreasonably failed' to accept the defendant's offer. In order to rebut the presumption that the plaintiff should have to pay the defendant's costs after the date of the offer it must satisfy the court that it did not unreasonably fail to accept the offer, such as a by arguing that the matter turned out differently at trial for some unexpected reason, such as it was not allowed to rely on some important evidence.

***END OF PART B***

# *End of examination*