

# **GUERNSEY BAR EXAMINATION**

**9.30AM, 17 MAY 2022**

## **PAPER ONE**

### **CIVIL PRACTICE AND PROCEDURES**

**THREE HOURS**

**CANDIDATES ARE REQUIRED TO ANSWER ALL QUESTIONS. THE MARKS AVAILABLE FOR EACH QUESTION ARE SHOWN BELOW.**

- **QUESTION 1 – 10 MARKS**
- **QUESTION 2 – 7 MARKS**
- **QUESTION 3 – 6 MARKS**
- **QUESTION 4 – 10 MARKS**
- **QUESTION 5 – 15 MARKS**
- **QUESTION 6 – 10 MARKS**
- **QUESTION 7 – 9 MARKS**
- **QUESTION 8 – 7 MARKS**
- **QUESTION 9 – 6 MARKS**
- **QUESTION 10 – 10 MARKS**
- **QUESTION 11 – 10 MARKS**

**MARKS WILL BE GIVEN FOR REFERENCES TO APPLICABLE LEGISLATION AND CASE LAW.**

**PLEASE ENSURE THAT THE FOLLOWING IS CLEARLY MARKED ON EACH PAGE OF YOUR ANSWER SCRIPT:**

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

**MATERIALS PROVIDED:**

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

*Questions 1 -3 concerns Puffin Bank (London) Plc and its claim to recover £750,000.*

*Questions 4-11 concern Granite (Guernsey) Limited v Lille Ignée SARL. This concerns a dispute over a stone cutting machine which malfunctioned causing Granite (Guernsey) Limited loss.*

### **QUESTON 1 (total 10 marks)**

#### **FACTS: New instructions from Puffin Bank (London) Plc - the missing £750,000.00**

You are acting on behalf of Puffin Bank (London) Plc ("Puffin Bank").

Your instructions are that for the last five years, Robert Michaelo has been the director in charge of private wealth services at Puffin Bank in London. You have been told that Puffin Bank has just discovered that Mr Michaelo has failed to report for work and his whereabouts are currently unknown although he does own a property in Fort George. On enquiries being made, it has been discovered that, on Mr Michaelo's orders, the sum of £750,000 has been transferred from Puffin Bank's general account without any proper authority having been given. The money has been sent to an account numbered 59683455 held at the Roget Bank in Guernsey reference: Michaelo Offshore Services (Guernsey) Limited.

Today, Puffin Bank is ready to commence proceedings against Robert Michaelo for breach of fiduciary duty and against Michaelo Offshore Services (Guernsey) Limited for knowing receipt or, alternatively, for restitution.

Puffin Bank is considering applying for an ex parte freezing order and ancillary disclosure orders.

- 1.1** What documentation would you need to make such an application?
- 1.2** If Puffin Bank was to apply for an ex parte freezing order, under what duties to the court would it be when making that application?
- 1.3** What is the test(s) that the court would apply in considering whether to make a freezing order?

## **QUESTION 2 (total 7 marks)**

### **MORE FACTS: Puffin Bank (London) Plc - the missing £750,000.00**

Puffin Bank commenced proceedings against Robert Michaelo for breach of fiduciary duty and against Michaelo Offshore Services (Guernsey) Limited for knowing receipt or, alternatively, for restitution. Defences have been filed including extensive exceptions de forme. Puffin Bank now wishes to amend the cause to include further breaches of contract against Mr Michaelo.

- 2.1** Write a bullet point note to your client Puffin Bank advising on what the reference to 'exceptions de forme' means and the process to deal with them. Also advise Puffin Bank on amending pleadings at this stage and what the test(s) is(are) that the court would apply if an application came before it to amend the pleadings.

### **QUESTION 3 (total 6 marks)**

#### **MORE FACTS: Puffin Bank (London) Plc - the missing £750,000.00**

You are now to assume that Puffin Bank's claims against Robert Michaelo and Michaelo Offshore Services (Guernsey) Limited have gone to trial in the Royal Court. Throughout the entire course of the litigation, the defendants have failed to comply with orders (resulting in you applying for unless orders on your client's behalf), made multiple unnecessary applications, unsuccessfully appealed on interlocutory issues and put everything in issue at trial, even when the judge had urged that it would be sensible to admit some facts. Puffin Bank's costs are substantial.

The action is successful, and judgment is entered against Robert Michaelo and Michaelo Offshore Services (Guernsey) Limited for the full amount claimed and interest.

Puffin Bank now applies for indemnity costs.

- 3.1** On what basis can the court award indemnity basis costs following a trial?
- 3.2** Puffin Bank would like an interim payment of costs, on what basis could the court order this?

#### **QUESTION 4 (total 10 marks)**

##### **FACTS: New Instructions from Granite (Guernsey) Limited**

You have been instructed by Granite (Guernsey) Limited ('Granite') whose headquarters is at Granite Yard, Sampson Lane, St Peter Port, and whose registered office is at Granite House, 44 Marie Road, St Peter Port, Guernsey. Granite is a Guernsey based company which cuts, trims and supplies Guernsey granite for projects in the Channel Islands and Northern France.

Granite won a contract to supply granite for the restoration of the town walls in St Malo, France. The contract was entered into on 1 May 2020.

The contract was to supply stone to the value of £450,000.00. The stone was to be cut, shaped and trimmed on Guernsey and then shipped to St Malo. Granite's contract with the restoration authorities provides that:

- (a) the granite supplied should be cut and shaped into two sizes:
  - (i) 100mm x 440mm x 215 mm ('large size'), or
  - (ii) 100mm x 220mm x 215 mm ('small size');
- (b) the small size granite stones should form 66% of the total delivery to St Malo;
- (c) the small and large size granite stones should be trimmed to a tolerance of 0.5 mm on the specified size;
- (d) the entire delivery of granite should be made to St Malo by 1 September 2020.

In order to do the work for this new contract, Granite bought a Napoleon granite cutter (the 'Napoleon') from Lille Ignée SARL ('Lille Ignée') of Rue de Barter, Lille, 59001, France. It was sold as 'the most accurate cutting machine in France'. The purchase price of the Napoleon was £50,000.00. The contract was made on 1 May 2020. The place of delivery was Granite Yard, Sampson Lane, St Peter Port, Guernsey. The contract (which was not drafted by your firm) contained no jurisdiction or governing law clause. Payment was made on delivery.

Granite's contract with Lille Ignée's specified that the Napoleon stonecutter must:

- (a) be capable of cutting granite into large sizes (100mm x 440mm x 215 mm) and small sizes (100mm x 220mm x 215 mm); and
- (b) be capable of producing stone pieces with a tolerance of 0.5 mm on the specified size.

As well as the Managing Director of Granite going to visit the factory to see the Napoleon at work, Granite's chief stonemason Mr de Croze had a try of the Napoleon in the factory and said that any half decent stonemason would find it easy to use. Lille Ignée knew the reason why Granite was purchasing the Napoleon.

Unfortunately, the Napoleon granite-cutter did not operate as expected, in that it was only capable of cutting stone to the large size and only to a tolerance of 10mm. Due to the short delivery times for the St Malo contract, it was not possible for Granite to modify the Napoleon so that it performed correctly. As a result:

- (a) every stone required to be of the large size required further trimming by handheld machines to produce a stone with the correct tolerance;
- (b) every stone required to be of the small size had to be cut from a large stone and then trimmed to produce the correct tolerance. Cutting and trimming had to be carried out by handheld machine.

In addition to the extra production time required, the steps taken to produce the small size stones resulted in a great deal of wasted stone.

Granite has calculated that the loss in terms of extra staff time required was £40,000.00 and that the wasted stone would have had a value of £30,000.00

After its successful completion of the St Malo contract, Granite had the cutting machine modified to perform correctly. The modification cost was £10,000.00.

Granite wants to sue Lille Ignée. The firm prides itself on never having been involved in litigation before.

**4.1** Draft an initial advice for Granite concerning the conduct of this litigation.

**QUESTION 5 (total 15 marks)**

**MORE FACTS: Granite (Guernsey) Limited v Lille Ignée SARL**

You are continuing to act for Granite in this claim.

You are instructed to draft the cause so that proceedings for breach of contract can be commenced in the Royal Court.

**5.1** Draft a cause on behalf of Granite.

**QUESTION 6 (total 10 marks)**

**MORE FACTS: Granite (Guernsey) Limited v Lille Ignée SARL**

You are ready to commence proceedings. You are now to assume that on behalf of Granite you need to apply for leave from the Royal Court to serve Lille Ignée in France.

- 6.1** What documents should you prepare to make this application? (give a brief description of each document but you do not need to provide detail of the contents).

Your application is successful, but Lille Ignée has applied for the leave to be set aside.

- 6.2** What test(s) will the Royal Court apply in considering the defendant's application?

For **6.3** and **6.4** only, assume that just before you made your application for leave to serve the cause out of the jurisdiction you hear that Lille Ignée carries on business in Guernsey.

- 6.3** What is your next step?

- 6.4** If Lille Ignée challenges jurisdiction in these circumstances, how will the test(s) the court applies differ from 6 (a) above if at all?



## **QUESTION 7 (total 9 marks)**

### **MORE FACTS: Granite (Guernsey) Limited v Lille Ignée SARL**

Acting on behalf of Granite you are now to assume that jurisdiction is no longer an issue and Lille Ignée have now filed substantive defences. The defences deny any liability on the basis that the Napoleon was not at fault, and it was user error on the part of Granite. Any difficulties with cutting stone to size or producing the required tolerances arose from Granite's stonemasons failing to operate the Napoleon properly.

You have received notice of an application by Lille Ignée for summary judgment or in the alternative to strike out the cause on the basis that the Plaintiff has no real prospect of succeeding on the claim and/or the cause shows no reasonable ground for bringing the claim.

**7.1** What are the rules and legal tests that the court will apply in considering these applications?

## **QUESTION 8 (total 7 marks)**

### **MORE FACTS: Granite (Guernsey) Limited v Lille Ignée SARL**

The case continues. Notwithstanding any advice that you may have given, you are now to assume that Granite was successful in having the applications for strike out and summary judgment dismissed.

Subsequent to this, you have received a letter from Lille Ignée's advocates that Lille Ignée want to apply to amend its defences. For the first time Lille Ignée wishes to deny that there were express terms relating to the capability of the Napoleon stonecutter. In particular, Lille Ignée says that it received no notice of the required size or tolerance of the granite which the Napoleon stonecutter was going to cut. Granite is outraged.

You oppose the application to amend but are unsuccessful. The Royal Court gives leave to Lille Ignée to amend its defences. Because the amendments are so significant, Granite wishes to appeal.

- 8.1** Advise Granite as to whether leave to appeal will be required (and if so why), the appropriate test(s) if it is required and any time limits.
- 8.2** Have the recent changes to the law governing the Court of Appeal in Guernsey made any difference to the appeal process?

## **QUESTION 9 (total 6 marks)**

### **MORE FACTS: Granite (Guernsey) Limited v Lille Ignée SARL**

You are continuing with the case. Granite decides not to appeal the amendment decision.

When you are discussing other aspects of the case, one of the directors of Granite says that he had heard rumours through his French contacts that Anne-Marie Varda who is the factory supervisor at the Lille Ignée factory is notoriously lazy and that Lille Ignée are aware of her shortcomings because it has received complaints from customers as well as her work colleagues. She is the person in overall charge of quality checking the products prior to them leaving the factory. This would include ensuring that the required size or tolerance was correctly programmed into the factory settings of Napoleon's in-built computer.

Both Granite and Lille Ignée have already given standard disclosure, but Granite has not received documentation dealing with the supervision of the quality checking in the factory before the Napoleon left the factory. Granite demands that you obtain this information on its behalf. Granite also wants details of any complaints made by any other customers against Lille Ignée as well as internal investigations and complaints into any failures in the quality-check process. You have written to Lille Ignée's advocates requesting the documentation. Lille Ignée refuses to provide the documentation saying it is irrelevant and/or disproportionate and/or the requests are much too wide. Lille Ignée's advocates say the material relating to any internal investigations is privileged.

Granite now wishes to ask the Royal Court to order Lille Ignée to give disclosure.

**9.1** What application will Granite need to make to the court and what test(s) will the court apply?

## **QUESTION 10 (total 10 marks)**

### **MORE FACTS: Granite (Guernsey) Limited v Lille Ignée SARL**

The case continues. You are now to assume that Lille Ignée has given court ordered disclosure of the quality checking documentation on Napoleons from 1 May 2019 up to and including the Granite/Lille Ignée contract as well as any internal and external complaints dealing with the quality checking on the Napoleon.

On the plus side for Granite, you can now see that Anne-Marie Varda was aware of the required specification concerning two sizes of granite and the expected tolerance in respect of each. On the negative side, the rest of the forms which are completed as part of the quality control process are in technical language such that neither you nor Granite understand the details with which the machine was programmed.

For some time, Lille Ignée has been suggesting that an expert report would be of assistance to the Court which Granite has resisted. You are now inclined to agree. Granite is still reluctant particularly as the costs of the litigation are increasing rapidly so Granite has some general questions for you concerning expert evidence which you need to answer in bullet point form.

- 10.1** What are the steps that the parties need to take to introduce expert evidence to the case?
- 10.2** When is expert evidence said to be admissible?
- 10.3** What are the duties of an expert to the Court?
- 10.4** Are the parties obliged to provide their letters of instruction to the other side?

## **QUESTION 11 (total 10 marks)**

### **MORE FACTS: Granite (Guernsey) Limited v Lille Ignée SARL**

The case continues. You have now received your expert report, but it is more equivocal than you had hoped that it would be. The expert says that when a sample Napoleon stonecutter was programmed with Anne-Marie Varda's figures, in 25% of cases it was able to cut granite to the required size and tolerance. This, says the expert, suggests that Granite's stonemasons were at fault in those cases where the machine was in fact operating correctly.

You have now received notice from Lille Ignée's advocates that Anne-Marie Varda, who was due to attend the trial, has died after a very short illness. You have already been served with Varda's witness statement.

On hearing your advice, Granite expresses concern about how it will be unable to contradict what Anne-Marie Varda has said as it will be unable to cross-examine her. You inform Granite that the court does not have to take Anne-Marie Varda's evidence at face value but, rather, there are a number of factors which the court will take into account in weighing her evidence.

In particular, the disclosure which you have received shows that, over the year prior to the sale of the Napoleon stonecutter machine to Granite, there were complaints about Anne-Marie Varda's work in 75 out of 80 cases where she had programmed a machine. Disclosure also revealed that Lille Ignée had started disciplinary proceedings against Anne-Marie Varda. Your careful consideration of the evidence and the chronology reveals that her witness statement was produced when she was under threat of dismissal.

In her witness statement, Anne-Marie Varda claimed that she had never received a valid complaint about the quality of any of her work prior to the sale of the Napoleon to Granite. She said that this showed that it was unlikely that she had made a mistake in the programming of the Napoleon stonecutter sold to Granite.

- 11.1** What is hearsay evidence and does Anne-Marie Varda's witness statement fall within the definition of hearsay?
- 11.2** What factors ought the Royal Court to consider when deciding what weight to place upon Anne-Marie Varda's evidence?

**END OF PAPER**