

## Primary Examination for the Bachelor of Laws

### Semester 1, 2014

### Feedback

*Notes: Please read this feedback document before reviewing your exam paper, and note the suggestions it makes in addition to feedback on your answer. This feedback document does not address every issue you could have raised. You will have received credit for additional relevant points you made. Feedback is interspersed through the document in italic text.*

In December 2012 a research team at the University of Adelaide is successful in obtaining funding for a 3 year investigative research project.

The Avian Delivery System for Letters (ADSL) has three goals:

1. To “future proof” the university against internet outages by providing an alternative means of delivering important communications;
2. To increase biodiversity in the Adelaide CBD; and
3. To humanize working conditions by encouraging employees away from their computers and into the open air on a regular basis.

The project entails the use of trained birds to deliver messages from staff around the University.

The University contracts with Black Tower Pty Ltd to provide the avian resources required for the project. The following summarises relevant terms of the contract, which is dated 30 January 2013:

- 1) Black Tower Pty Ltd is to provide to University of Adelaide 100 trained birds.
- 2) The birds are to be trained in the delivery of messages around campus.
- 3) The birds are to be trained, housed, and fed off University premises.
- 4) The birds are to operate between the hours of 10 am and 2 pm each week day.
- 5) The birds are to be native to Australia.
- 6) The birds are to be treated in accordance with the avian welfare standards for working birds approved by the Royal Society for the Protection of Birds.

- 7) In return for these services the University of Adelaide will pay \$150,000.00 to Black Tower Pty Ltd in March 2013 and March 2014.

After the signing of the contract with Black Tower Pty Ltd the head of the University research team, Professor Theo Greyjoy, visits the secret training facility operated by Black Tower. He specifies that he would like ravens to be provided because they are reliable, honest, and don't make too much mess. He specifies that a "dignified" bird is essential to maintain the University's cherished Group of 8 status. Black Tower's chief bird trainer, who is also a director of the company, Sam Tarley, agrees to provide 100 ravens, commenting that they are best suited to the lengthy letters that University staff are likely to deliver to each other.

The project commences in March 2013. It is an extraordinary success. University staff are thrilled to be able to send messages to each other by opening windows and waving for a bird, students are captivated by the increased bird life in the area, and the world's attention is turned, however briefly, to humble Adelaide, with catchy headlines such as "University all a flutter following new message delivery system" and "Twitter – sphere takes on whole new meaning at Adelaide Uni".

All goes well for a couple of months, but then things start to go terribly wrong. There is a high raven attrition rate - as winter approaches many of the birds disappear in favour of warmer climates, some taking important messages with them. Several ravens delivering messages to offices in North Terrace never reached their destination, and were reported to instead have taken up residence at a rival university to whom they had delivered confidential messages meant only for the eyes of University of Adelaide senior management. In addition, several alert staff noticed that messages were being delivered not by ravens but by common pigeons, that had been dyed black to resemble ravens. The pigeons did an excellent job at delivering messages, and never got lost, but pooped everywhere resulting in increased campus cleaning costs. Large numbers of pigeons start nesting in the eaves of the Bonython and Elder Halls, leading other GO8 universities to begin mocking Adelaide University, and resulting in the cancellation of many prestigious performances and events.

Staff began to suffer stress and minor shocks at the unexpected tapping on the window of ravens and pigeons delivering messages, with one staff member having to take sick leave after mistaking a tatty raven for a vulture and falling down the stairs. Another staff member believed he WAS a raven and attempted to fly out of a second story window in Napier Building.

The last straw is when several staff are diagnosed with bird flu, many strains of which are carried solely by pigeons. All of these staff members were avid users of ADSL and had coincidentally reported concerns that the ravens were smaller, fluffier, and indeed, looked quite a lot like pigeons.

The University seeks legal advice from their solicitor Winter Fell and Partners Solicitors. The lawyers are briefed by the University's in-house lawyer, Kate Starke.

Kate writes the following letter to Winter Fell and Partners:

Dear Winter Fell and Partners,

The University seeks advice on the damage to property and reputation and the illnesses suffered by staff as a consequence of breach of contract by Black Tower Pty Ltd. The University entered in to a contract with Black Tower on 30 January 2013. A copy of the contract is annexed.<sup>1</sup>

There was express agreement between University and Black Tower that the birds provided would be ravens, species native to Australia. Instead BT provided some Australian ravens and a large number of pigeons, which are not native to Australia, dyed black to resemble ravens.

There was implied agreement that the birds would not pose a hazard to University staff or students.

The birds provided were not adequately trained (they delivering messages to the wrong people and many ran away) and were not housed off-site, as evidenced by large number of pigeons nesting in the University of Adelaide buildings.

The University seeks your advice on the prospects of suing Black Tower for breach of contract, for damages for clean-up costs, the cost of medical treatment and personal injury of staff suffering bird flu, hire of alternative venues for prestigious events, and the loss of reputation arising from the pigeon situation.

In any event, the University has decided that this initiative has run its course, and sees these events as an opportunity to achieve this end.

We look forward to receiving your advice on this matter.

Kind regards,

*K Starke*

Lawyer, The University of Adelaide

You are a solicitor at Winter Fell and Partners and have been asked to respond to this request. In order to find out more you contact a prominent physician with expertise in avian diseases, Dr Pycelle, who writes to you stating that the symptoms described by the sick staff members are consistent with type B Northern Bird Flu which is only found in pigeons resident in the Northern Hemisphere. Dr Pycelle states that the birds with which the staff members came into contact must have either come from the Northern Hemisphere or been in physical contact with birds imported from the northern hemisphere. She also states the local police have been investigating reports of a number of Great Northern Ice pigeons alleged to have been smuggled into Australia through the Northern Territory by boat for use by competitive pigeon racers.

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<sup>1</sup> The annexure contains the contractual terms outlined above.

Dr Pycelle also informs you that the Athelstone Pigeon Owners Club (APOC) has recently featured in the papers for its amazing success in pigeon racing, with an allegedly “super breed” of pigeons. APOC keeps extensive records of the purchase, provenance, and sale of pigeons amongst its members.

A researcher at the Australian Infections Diseases Authority (AIDA) (a Commonwealth Government Agency part of the Department of Health) informs you that AIDA is investigating the illegal importation of pigeons from the Northern Hemisphere. However, no further information about this can be provided to you because of the Federal Government’s blanket ban on commenting on operations at sea for national security reasons.

### QUESTION ONE:

**The University requests you find out more about this importation to assist it to decide whether to commence proceedings. Advise the University what PRE-TRIAL procedures are available against Black Tower to gather and evaluate information in AIDA’s possession. In your answer identify:**

1. the evidence you seek,
2. the process to obtain it,
3. the test that applies to obtaining leave to obtain it,
4. the likely objections that would be made by AIDA, and
5. evaluate the likelihood of success in the application.

**20 MARKS**

**FOI application** A FOI application can be made against a Government agency.

#### **SC procedure**

It is clear from the question that no action has yet commenced, so **pre-action disclosure: SCR 32** is appropriate. Use AFD (**SCR 131**) and affidavit establishing why this information is required to establish a cause of action or identify a wrongdoer (refer **Modbury Hospital, Norwich Pharmaceutical**).

#### What should they ask for?

Identify specific information you are seeking and explain why that is relevant to your case according to the SCR 32 criteria.

Note that relevance, not direct relevance, is the test under R32.

AIDA may object that the material is hard to locate, costly, etc, in which case you may have to compensate them. AIDA may also object on the basis of **Public Interest Immunity**. Consider and apply criteria for PII to the facts: **R v Young**. If PII applies there is no power to waive it: **Sankey v Whitlam; Adelaide Brighton Cement v SA**.

Discuss likelihood of pigeons impounded at sea being a national security risk with

reference to ongoing investigations etc.

Consider issuing a subpoena for AIDA to produce the documents to court: **SCR 172(b)**. Subpoena needs to specify the document or thing to be produced (**SCR 173(4)(a)**) or could be argued to be fishing: **Moss v Frontier Holdings**.

Note SCR 172 provides it applies “**in any proceeding**”. If you considered application of this provision you **MUST** have considered if a pre-action interlocutory application can constitute a proceeding: **SCR 4**.

Third Party Disclosure under **SCR 146** was not available as proceedings have not been commenced. Interrogation (**SCR 150**) and notices to admit facts (**SCR 156**) are also not available pre-action and cannot in any event be used against a non-party.

Many students overlooked that this was a **PRE ACTION** question and discussed third party disclosure processes. Marks were awarded for accurate discussion of R 146 even though it was not the correct option pre action.

A number of black birds with messages still attached to their legs were trapped in the Adelaide CBD and have been temporarily housed at the Save the Pigeon (STP) headquarters in Lonsdale SA. These birds are likely to be rehabilitated and released into the wild within the next four weeks. The STP is a militant avian rights group that you know will vigorously resist handing the birds over to you.

## **QUESTION TWO:**

**Advise the University if there are any processes that could be used to obtain access to these birds to conduct medical and other tests on them?**

**In your answer:**

- 1. identify the relevant process**
- 2. the test that applies, and**
- 3. evaluate whether such an application would be likely to succeed.**
- 4. Also consider if you would be required to give STP or Black Tower notice of the application and your ethical obligations if you don't notify them.**

**15 MARKS**

*It is not clear if this is pre or post action commencing, so this question can be considered from either perspective. All of the below processes can be used pre action as well as after action is commenced.*

*Consider application for production of evidentiary material (birds): **SCR 32** followed by application to take custody of them and test them for bird flu (**SCR 147**).*

*Or apply to the court for an order under **SCR 147** for gathering evidentiary material – either **(a)** taking samples or **(d)** carrying out tests. Evidentiary material is defined in **SCR 4**.*

*The testing procedures under **SCR 147** can apply to “proposed proceedings”.*

*Releasing the birds = destroying the evidential material for the purposes of this trial. Consider and apply rules re **SCR 148** search order re 'evidentiary material' NOT just documents. NB SCR 148 can apply 'in anticipation of any proceeding' so the litigation does not need to have commenced.*

*Applications could be made **ex parte** if you have a genuine belief of that the STP will hide the birds. If the application was brought ex parte you have an ethical duty to inform the Court of any matters that are relevant to the application that they might raise if they were there (**Conduct Rule 19.4**). You have no obligation to Black Tower; this application has nothing to do with them.*

*Process for making application provided in **SCR 131** supported by affidavit.*

*Medical testing applies to persons and parties, not birds.*

On behalf of the University you commence proceedings against Black Tower for breach of contract and seeking compensatory damages in the amount of \$2,500,000.00 for damages for University cleanup costs, medical treatment and personal injury for staff suffering bird flu, and the loss of reputation.

In their Defence Black Tower allege, among other things:

16. Black Tower denies that it was an express term of the contract that the birds supplied would be ravens. Professor Greyjoy requested ravens be supplied by Black Tower in a site visit conducted after the contract was entered into, but that did not constitute a term of the contract.

17. In addition, the Defendant pleads that Professor Greyjoy is a notorious liar, having twice been disciplined for plagiarism and breach of intellectual property rights of fellow academics in 2012, and that any statements he makes regarding the terms of or formation of the contract cannot be believed.

18. The Defendant denies that the birds were not adequately trained. All reasonable efforts were made to train the birds.

### **QUESTION THREE:**

**Advise the University what, if any, action should be taken in relation to these pleadings. In your answer:**

- 1. identify the possible alternative actions,**
- 2. the arguments that you would make,**
- 3. evaluate the likely outcome/s of each course of action.**

**20 MARKS**

*Uni should consider filing a reply to allow them to bring evidence against these allegations: **SCR 101**. At this stage there is no reason to amend their Statement of Claim which is not the correct response to a Defence.*

**Para 16** – Relevant pleading that presents an alternative version of the agreement. Uni should file a reply in response to this to either admit it, or assert a different version. There is no reason to apply to strike this out, it is a legitimate pleading, although you could seek further particulars if you could demonstrate substantial prejudice.

**Para 17** – vexatious/scandalous/irrelevant should be struck out. Unethical to plead this both Supreme Court Rules and conduct rules (alleging fraud without basis).

**Para 18** – ‘adequately trained’ and ‘reasonable efforts’ are vague and potentially do not give fair notice. Responses include applying to court for further particulars be provided under **SCR 102**. Test for when such an order will be made is provided for in **SCR 102(3)**: pleadings do not give **fair notice** of the party’s case AND further particulars are required to **avoid substantial prejudice: Starmaker**. Apply cases such as **Marini v MLH Insurance Brokers Pty Ltd, Morgan v Roberts , Jones v Nuske and Prolift**. Consider whether it is better to seek particulars OR say nothing and trust that BT will be limited to matters pleaded at trial.

There is no basis for a **strike out** of the whole defence as there is no evidence that the Defence, whilst deficient in some respects, does not make out a response to the Statement of Claim.

The matter progresses and you begin to speak to the University about gathering directly relevant documents for disclosure. At this stage the University’s in-house legal advisor, Kate Starke, informs you that before referring this matter to Winter Fell, she organized tests to be performed on sick University staff members. The test results were ambivalent – whilst two of the staff members had Type B Northern bird flu, seven others had an unidentifiable strain of Bird Flu and further testing was prevented by budget cuts. The samples from which further testing could be undertaken remain in the possession of the University. The University asserts that this is private information about staff and must be treated as confidential.

#### **QUESTION FOUR:**

**Advise the University:**

- 1. what information you need from Kate to be able to accurately advise the University if it is obliged to disclose and produce these documents and samples,**
- 2. your preliminary opinion regarding disclosure and production with reference to applicable rules and cases, and**
- 3. what further actions you advise the University that they should take now.**
- 4. In this situation what options would you have if your client did not take your advice?**

**15 MARKS**

#### **Test results:**

*Are the documents (SCR 4) ? Directly relevant (yes, they seem to prove Uni case).*

Consider dominant purpose for creation of the test results: **Esso v Commissions for Taxation**. If these documents are privileged they do not need to be produced (**SCR 140(7)**) but should be disclosed (**SCR 136(7)**) with an explanation of the kind of privilege claimed.

In order to determine whether the test results might be covered by LPP you need to know more about:

- When the tests were ordered and if litigation was reasonably anticipated at that time – **ACCC v Safeway**
- The role in which Kate was acting when the tests were ordered (was she acting as a solicitor and did she have sufficient independence in that role for professional privilege to attach). Privilege cannot attach if Kate was acting in any capacity other than legal advisor- **Waterford v Cth**.
- WHY she ordered these tests. If the dominant purpose for the gathering of the samples and the testing is not a privileged purpose then privilege will not attach – **Esso**.

**Samples:** The court may also make orders for the custody and control of evidentiary material **SCR 149**. There is no specific test. The interests of justice (usefulness for case, relevance to issues in dispute, save time in trial, etc) are applicable. Consider and apply test on facts. Samples will not be subject to privilege, which only applies to documents.

**Confidentiality:** Consider application under **SCR 144: Mobil Oil**. Alternatively rely on the implied undertaking restricting the use of disclosed documents: **Liberty Funding v Phoenix Capital**. Or consider masking documents to remove confidential material.

**If client did not take advice that documents should be disclosed:** Court has specific power to enforce disclosure/production obligations: **SCR 145**. Party could face costs consequences for failure to comply: **SCR 13**. Is also a possibility solicitor could be penalized with personal costs if the court believes the irregularity is their fault: **SCR 13(2)**. While the solicitor owes a duty to the client to follow their proper instructions (**ASCR 8**) they also owe a paramount duty to the court and the administration of justice (**ASCR 3**) which knowing failure to comply with disclosure obligations would breach. Discuss how these principles would be reconciled in practice. If client proposes concealing discoverable documents, you will counsel them to the contrary, and withdraw from representation rather than breach court rules and ethical obligations.

Kate Starke, the University's in-house legal advisor, asks you whether it would be advisable for the University to file a formal offer of settlement with the court. She suggests offering to settle for \$50,000 less than the full \$2,500,000.00 claim.

#### **QUESTION FIVE:**

**Inform the University of the consequences of making a formal offer of**



**settlement, and advise them whether you think this offer is likely to be strategically useful.**

**15 MARKS**

*Discuss rules re formal offers of settlement as set out in **SCR 187** and **188**. What are the costs implications for both parties of filing formal offer.*

*Note: must be genuine attempt to settle: **Prestige Residential Marketing Pty Ltd v Deptune Pty Ltd (No2)**. Consider if this offer appears genuine. If there is any doubt then note **SCR 188(6)** - costs consequences are “subject to the Court’s order to the contrary.”*

*If you think that the Uni is attempting to manipulate the system by filing an offer that is not a genuine attempt to settle could this constitute an abuse of process: **Flower and Hart v White Industries**. Unlikely. it is not a very attractive offer, but that does not make it abuse of process in the sense that was discussed in *F v H*.*

*Discuss if this is a strong strategic move. May show confidence in case. Or, may minimize prospect of serious response. Given the size of the claim and the risks of litigation, it is not a very effective offer.*

Approximately 3 weeks before the scheduled trial date, and after a Certificate of Readiness has been filed (no Litigation Plan was created in this proceeding) a senior partner suggests that you read the judgments in previous proceedings against Black Tower. You discover that in 2012 Black Tower was sued by the City of Adelaide in relation to a contract for supply of raptors (birds of prey) to work in the CBD to control pigeon numbers.

In that case the judge concluded, among other things, that “Black Tower bought illegally imported pigeons from the Northern Hemisphere which were infected with Northern Bird Flu Type B. Those pigeons were used in the training of the raptors, but because of their weakened condition, that training was not adequate for the raptors to perform the tasks required for the City of Adelaide. As a consequence of the failures in training, Black Tower has breached their contract.”

In its Defence to the University’s claim Black Tower is continuing to deny that any of the birds it supplied could have been infected with Northern Bird Flu, Type B.

**QUESTION SIX:**

**Advise the University what, if any, affect this previous judgment has on the defence that Black Towers plan to run. Also inform your client what they should do now that this information has come to light and the likely costs consequences of any action.**

**15 MARKS**

*Is this relevant? Has this case got anything to do with present dispute? Not necessarily – could be different birds, etc, no indication that they are linked. Need to determine relevance before proceeding.*

*Don't assume that this prior case "proves" anything, it was a different year, possibly different pigeons. A finding of fact that some pigeons in 2012 had bird flu doesn't prove anything in this case and is not binding.*

*However, if you decide it is relevant and you need to do something:*

*Note consequences of certificate of readiness for court processes: **SCR 120** and fact solicitor may face personal costs for late applications: **SCR 13**.*

*Investigate any connection between the past case events and this case – is there any information arising from that case that relates to this one in which case should you seek disclosure etc? Investigations needed to establish link?*

*Consider informal options ie contact with BT re the evidence led in 2012 case and likely consequences for success in this trial. Communication relevant to costs: **SCR 264(1)**. Consider if **SCR 136** disclosure obligations fulfilled by BT, can be pursued under SCR 145, notices to admit, interrogatories etc.*

*Could also consider using this fact to make an informal offer "without prejudice, except as to costs": **Calderbank v Calderbank. Rule 263(3)** - offers to settle may be taken into consideration by a Court when exercising its discretion as to costs: **Morris v McEwen**. If they have something to hide, they may be responsive.*

*Alternatively, has Black Tower unreasonably failed to admit a fact they knew to be true? If so – costs consequences: **SCR 263(2)(e)**.*

*Also consider whether Black Tower is estopped from maintaining its current defence. Consider **Res judicata/issue estoppel**. These doctrines only apply between the same parties, so would not apply here. Res judicata and Issue Estoppel do not apply. Anshun Estoppel does not apply.*