

GUERNSEY BAR EXAMINATION

09:30AM, 22 May 2023

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 – 18 MARKS**
- **QUESTION 3 – 8 MARKS**
- **QUESTION 4 – 10 MARKS**
- **QUESTION 5 – 10 MARKS**
- **QUESTION 6 – 23 MARKS**
- **QUESTION 7 – 11 MARKS**
- **QUESTION 8 – 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**

Dramatis personae

Miracle Electric Classics Limited retrofits electric engines into classic cars. Its registered office is at 9 Port Place, St Peter Port, Guernsey. It has a factory at 45 Airport Industrial Estate, Forest, Guernsey.

Sunlight (Portfolio) Investment Co Ltd of St James' Street, London is an investment fund which, in 2010, bought 20 classic Mercedes. In order to maintain the liquidity of its investment, it has decided to have its collection retrofitted with electric powered engines.

Forest Batteries (Guernsey) Limited manufactures specialist electric engines. Each engine includes a battery which contains a lithium compound. This company manufactures the batteries at 32 Airport Trading Estate, Forest, Guernsey. This is also its registered office address.

Dublin Rare Earth Ltd has its registered office at 27 Merrion Square, Dublin, Ireland. This company imports lithium to Ireland. It renders the lithium and then exports it across Europe.

Dr Alan Pulk: expert for Miracle Electric Classics Ltd.

Dr Julie Kirchsén: expert for Forest Batteries (Guernsey) Ltd.

The facts

Forest Batteries (Guernsey) Limited (FBL) has expertise in developing and manufacturing batteries which can be used for particular prestige marques. Unfortunately, FBL can only produce batteries in relatively modest numbers. FBL, therefore, cannot hope to mass-produce batteries for new electric vehicles. However, FBL has succeeded in creating a range of batteries which can be fitted to classic cars, manufactured between 1955 and 1990, when these cars are retrofitted with electric engines.

Since 2021, FBL has been buying the 'rendered' lithium from Dublin Rare Earth Ltd ('DRE') and using it in the manufacture of rechargeable batteries for electric vehicles. This means that each of these batteries has a lithium 'core' with the lithium supplied by DRE.

Miracle Electric Classics Limited ('MEC') is a leading European specialist in the conversion of classic cars from diesel motors to electric motors. Classic car collectors enter into a contract with MEC for it to carry out the conversion work to a particular vehicle. MEC is able to charge each of its customers £50,000 per conversion process. This sum includes the cost of a battery. MEC makes a profit of £10,000 for each car that it converts.

In 2022, MEC entered into a contract with Sunlight (Portfolio) Investment Co Ltd ('Sunlight') to convert 20 Mercedes ('the vehicles') into electric powered vehicles. The

vehicles were shipped to Guernsey on 1st January 2023 and the conversion work started on the 2nd January 2023.

By mid-March 2023, the conversion work was progressing well and MEC looked to acquire 20 high quality rechargeable batteries to complete the conversion process for the vehicles. MEC was under time pressure to complete its conversion contract. So it was looking for a supplier that could respond with quick delivery.

On 17th March 2023, MEC entered into a written contract with FBL. MEC agreed to buy 20 rechargeable batteries from FBL. FBL knew that MEC was under pressure from Sunlight to complete its conversion contract. The contract between MEC and FBL was signed in Guernsey. The law of Guernsey applied to the contract.

The purchase price was £20,000 per battery. The total payable under the contract was £400,000. The batteries were guaranteed for delivery on 2nd April 2023.

It was an express term of the contract between MEC and FBL that each battery would be of satisfactory quality and fit for the purpose for which it had been supplied; namely, for use in powering an electric motor.

It was also an express term of the contract that each battery would last for 60,000 miles or for six years, whichever point arrived sooner.

It was a further express term of the contract that each battery would, once fully charged, enable the vehicle in which it was fitted to travel 250 miles before that battery required recharging.

MEC paid the full purchase price to FBL on delivery of the batteries.

Having fitted the batteries to the various converted vehicles, MEC has now discovered that:

- (a) ten of the batteries overheat when charging.

During the charging period, the batteries have to be periodically switched off, in order to allow them to cool down. As a result of this, the process of recharging each battery in this category takes at least 48 hours.
- (b) the other ten batteries only run for 125 miles before the battery is fully discharged and needs recharging.

Neither the overheating nor early discharge problems can be solved. In order to resolve the issue, MEC has had to purchase 20 new batteries from a European supplier at a total cost of £600,000. MEC has therefore paid for two sets of batteries. It wishes to recover the cost of the European batteries from FBL.

It takes an extra two weeks to refit Sunlight's vehicles. Sunlight therefore charges MEC a late delivery sum of £10,000. This reduces MEC's overall profit on the Sunlight contract by that amount.

You are acting for MEC against FBL. MEC want to sue FBL for its losses.

You have noted that FBL owns its premises at 32 Airport Trading Estate, Forest, Guernsey. You have undertaken a search at the Greffe and there appears to be equity in these premises.

Question 1

1.1 Provide in bullet point form what pre-action steps you advise your client to take and why. Advise your client on costs in relation to the prospective proceedings (bullet point form).

1.2 Advise MEC on any steps that it could take at an early stage to secure its position pending judgment.

TOTAL FOR QUESTION 1 = 10 MARKS

Question 2**Facts**

You are continuing to act for MEC in its claim against FBL.

You are instructed to draft a Cause in the proceedings to be brought by MEC against FBL. MEC wishes to recover all of its losses.

Draft a cause on behalf of MEC.

TOTAL FOR QUESTION 2 = 18 MARKS

Question 3

Facts

You are continuing to act for MEC in its claim against FBL. The defences have been served, you turn your mind to the question of getting the case ready for trial. You have commissioned a report for MEC from Dr Alan Pulk.

Dr Pulk is the leading lithium expert. His findings are as follows:

- (a) *the ten batteries which overheat ('the overheating problem').*

Dr Pulk has traced the difficulty to the stabilisation agent (called *agent X*) which was used by FBL to mix and hold together all the chemical elements in the battery core. *Agent X* becomes unstable when the battery is being charged. That instability creates the overheating problem. Dr Pulk says that FBL should not have used *agent X*.

- (b) *the ten batteries which run flat too quickly ('the discharge problem').*

Dr Pulk says that the lithium used in each battery has been 'fried' because of an unexpected degrading of the lithium. This has occurred at the battery's core. As a result, the lithium can only store a charge for a short period of operation. Dr Pulk cannot say what exactly is causing the problem. He has however offered to change his report to positively support your client's case.

3.1 What does MEC need to do in order to get Dr Pulk's report before the Royal Court and what will the Royal Court consider? What is the extent of Dr Pulk's duty to the court?

TOTAL FOR QUESTION 3 = 8 MARKS

Question 4**Facts**

You are continuing to act for MEC in its claim against FBL. Regardless of your previous answers you are now to assume that your application to the court for the appointment of Dr Pulk has been granted and that there are no barriers to calling Dr Pulk.

You have discovered that FBL is unhappy with the case management directions given in respect of expert evidence and wishes to appeal. It also wishes to appeal a costs decision that has been made.

4.1 What is the position in relation to permission to appeal for case management directions and costs decisions? How will the Court of Appeal deal with these appeals?

TOTAL FOR QUESTION 4 = 10 MARKS

Question 5

Facts

You are continuing to act for MEC in its claim against FBL.

You are now to assume that having paid for two sets of batteries MEC is now under financial pressure. It had to arrange bank funding for the purchase of the European batteries. FBL has heard that MEC is financially stretched and has sent an email requesting security for costs of £100,000. MEC has rebuffed the request for security on the following basis:

- (a) MEC has a genuinely strong claim and will win at trial;
- (b) there can be no question about the factual basis underlying the claim. The claim has not been invented by MEC. The expert evidence shows that something is wrong with FBL's batteries;
- (c) MEC's business model is a strong one; it is making an operating profit; it has plenty of easily sold assets;
- (d) any financial pressure that MEC is facing is short term, and is caused by FBL having provided low quality batteries;
- (e) FBL's security for costs claim is designed to smother MEC's claim for damages. If FBL had genuinely been concerned about security for costs, it could have made the application at an earlier point in time;
- (f) the security for costs request is grossly overstated.

FBL has now issued a security for costs application based on the impecunious company ground. MEC has responded by putting in detailed evidence verifying its financial position.

5.1 What will FBL need to demonstrate in order to obtain an order for security for costs. How is MEC's position concerning security likely to affect FBL's application?

TOTAL FOR QUESTION 5 = 10 MARKS

Question 6

Facts

You are continuing to act for MEC in its claim against FBL.

You can now also assume that the Royal Court decided that it would assist all parties if preliminary experts' reports were served before disclosure. You have now received FBL's expert report. It is written by Dr Julie Kirchsen.

Report says as follows:

(a) the overheating problem;

Dr Kirchsen agrees that the batteries are overheating when charging. She says that she does not agree that FBL used the wrong stabilisation agent. Dr Kirchsen says that no battery manufacturer has previously encountered difficulty when using agent X with lithium.

However, Dr Kirchsen goes on to say that she has traced the cause of the overheating to the fact that the lithium, used by FBL as the core of the battery, is only 75% pure. The industry standard for the use of lithium in manufacturing batteries, is that it must be at least 98% pure. Further, it is standard practice in the industry for the supplier of the lithium to give a certificate on delivery certifying that the lithium delivered is at least 98% pure. However, as FBL received the relevant purity certificate from its supplier, it has done all that it could.

(b) the discharge problem;

Dr Kirchsen agrees that the lithium used in each battery has been 'fried' because an unexpected degrading in the lithium which has occurred at the battery's core. Dr Kirchsen says that the degrading can be traced to the low quality of the lithium used in the battery's core.

Based upon the report of Dr Kirchsen, FBL has now said that it wishes to join DRE as the third party to the action. MEC has no objection to this.

You are aware that FBL will need to make an application to the Royal Court for permission to serve out of the jurisdiction.

FBL's importation contract with DRE was made in Guernsey and is subject to Guernsey law. The obligation was to deliver goods to FBL in Guernsey.

6.1 What will FBL have to establish in order to gain permission to serve DRE in Ireland (you do not need to deal with the method of service)?

(5 marks)

Facts

You are to assume that DRE has been served with the third party proceedings and that a defence by DRE has been served in response. A copy of the DRE's defence reaches you. This document is very poorly drafted. Parts of it are incoherent and make no sense; parts of it consist of bare denials without showing what defence is relied upon; and where a defence is set out clearly, it would not, if true, amount to a defence at law. You think it likely that FBL will apply for summary judgment or strike out the application.

6.2 On what basis will FBL's application be made? What is the procedure for making these two applications? What matters will the court have to consider in deciding whether or not to grant summary judgment or strike out DRE's defence? (answers can be given in bullet point form).

(12 marks)

To head off the summary judgment/strike out application DRE has sought to amend its pleadings. FBL has not agreed to these amendments.

6.3 When it is dealing with DRE's application to amend, what factors will the Royal Court consider? You are to cite relevant factors only.

(6 marks)

TOTAL FOR QUESTION 6= 23 MARKS

Question 7

Facts

You are now to assume that the proceedings between FBL and DRE have been resolved. DRE has provided FBL with a full indemnity against any judgment that MEC may achieve.

The proceedings between MEC and FBL continue. You review the electronic disclosure and inspection provided by FBL.

Having looked at all of the documents, you ask FBL's advocate to provide an affidavit verifying the list of documents. This affidavit is provided.

The affidavit mentions as 'privileged' several documents passing between FBL and DRE relating to the disputed lithium ('the lithium contract documents'). You can see that any contemporaneous legal advice about the lithium contract would be privileged. But you are satisfied that the lithium contract documents themselves are not privileged. You wish the court to go behind the affidavit of verification to consider them. You think that if the court looks at the lithium contract documents, then it will quickly conclude that they are not subject to any kind of privilege. You are satisfied that the claim to privilege has simply been made by mistake.

7.1 What application do you need to make? What matters will the court take into consideration in considering MEC's invitation to go behind the verifying affidavit? What particular hurdles will MEC face?

MEC want to the use some of the disclosure which they have received from FBL in other proceedings which MEC has against DRE in Ireland.

7.2 What is your advice to them about using these documents? (Use bullet point form)

TOTAL FOR QUESTION 7 = 11 MARKS

Question 8

Facts

You are continuing to act for MEC in its claim against FBL.

You are now to assume that MEC's case came before the Royal Court and that judgment was given in favour of MEC. The case was tried by the Bailiff and Jurats.

8.1 How is the responsibility at the trial divided up between the Bailiff and the Jurats? What obligations are there to provide a reasoned judgment?

Facts

Despite the indemnity from DRE, FBL has made unsatisfactory progress in paying off the judgment debt. After some partial payments, the judgment debt now stands at £100,000 including interest. A search reveals that a bond is secured against land owned by FBL in favour of Puffin Bank (Guernsey) Limited registered with the maximum indebtedness of £25,000 (plus interest). You are to assume that MEC have taken no previous steps in relation to FBL's real property.

Your valuer tells you that FBL's land is worth £250,000. MEC wishes to proceed to enforcement. So far as is possible, MEC will want to be in control of the enforcement process. It also appears to own several rather expensive vehicles which the director of MEC has seen parked next to FBL's site.

8.2 How can MEC enforce the judgment against FBL's property? Give MEC a bullet point description of the process(es).

TOTAL FOR QUESTION 8 = 10 MARKS