

GUERNSEY BAR EXAMINATION

9.30AM, 11 MAY 2021

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 – 30 MARKS**
- **QUESTION 2 – 5 MARKS**
- **QUESTION 3 – 14 MARKS**
- **QUESTION 4 – 16 MARKS**
- **QUESTION 5 – 14 MARKS**
- **QUESTION 6 – 10 MARKS**
- **QUESTION 7 – 5 MARKS**
- **QUESTION 8 – 6 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**

QUESTION 1 (total 30 marks)

Puffin Bank Ltd v Wonder Software (Financial) Limited

Puffin Bank Ltd is a well-known local bank which has a registered office at 294 High Street, Saint Peter Port, Guernsey, and an address for service at 65 Royal Court Crescent, again in St Peter Port.

Puffin specialises in providing high paying interest-bearing deposit accounts to offshore savers. The deposits are long-term deposits usually for a period of 10 years.

As part of a recent drive for efficiency, Puffin entered into an agreement with Wonder Software (Financial) Limited ('Wonder'). Paul Wonder had just set up the company on Guernsey (with a registered office at La Belle House, Le Truchot, St Peter Port) having successfully provided (he says) software to South American banks for the last decade.

Having had a demonstration, which ran perfectly, Puffin paid Wonder £1,250,000 to be supplied with software to calculate interest on deposits made with Puffin. Puffin employed expert staff to run the programme and purchased additional hardware from another supplier for the programme to run on at £2,000,000.

Unfortunately, the software programme suffered, it would appear, from a fatal flaw. It calculated interest at too high a rate. As a result, Puffin overpaid its depositors in the total sum of £375,000. You can assume that Puffin cannot recover the money from its depositors and is looking to Wonder to cover the entire loss.

Puffin has asked for compensation from Wonder and has been rebuffed. In its letter of response Wonder said *'everyone knows this programme is state of the art. Anyway, the small print lets us off.'*

You have examined the contract. Clause 6 provides:

'Wonder agrees that the software supplied under this agreement is of satisfactory quality.' Satisfactory quality is further defined as including *'fit for the purpose for which the software was supplied.'*

There is a non-exclusive jurisdiction clause for Guernsey Courts and it is a Guernsey law contract. Your firm didn't draft the contract.

The managing director wants to commence proceedings as soon as possible as this has been highly embarrassing for Puffin as the over-payment of the interest was on the front page of the Guernsey Press.

1.1 Draft a letter before action on behalf of Puffin.

Wonder responds saying that it is disputing the claim and says it has a defence.

- 1.2 You are to draft the detailed Cause on behalf of Puffin. Full details of the loss will be set out in a Schedule. You do not need to draft a Schedule but you should refer to it in your pleading.

The managing director says that as your firm is not Puffin's usual firm of advocates, they want to instruct you on a no-win no-fee basis to 'try you out' in the same way that their English solicitors are instructed. He has also said he isn't worried about costs because Wonder will have to pay them but at the same time he has heard that Wonder is not in great financial shape.

- 1.3 In bullet point form draft a note of advice for the managing director in respect of these issues.

QUESTION 2 (total 5 marks)

New facts: Puffin Bank Ltd v Wonder Software (Financial) Limited

In response to the letter before action Wonder has indicated that it wishes to defend the action. Your client has a number of questions for you about the steps that Wonder might take.

Wonder has been served with the summons to appear this Friday at 9.30am.

- 2.1 If Wonder (nor any advocate on their behalf) does not attend at the Friday morning court, as the advocate appearing for Puffin, what application(s) could you make?
- 2.2 If Wonder's advocate appears on Friday and indicates that the matter is defended, what do you realistically expect to happen at the Friday morning court?
- 2.3 When should Puffin expect to receive a defence and what steps could Puffin take if none is received at that point?

QUESTION 3 (total 14 marks)

New facts: Puffin Bank Ltd v Wonder Software (Financial) Limited

Notwithstanding your previous answers, you are now to suppose that Wonder is in fact a Panamanian registered company with no presence on Guernsey at all. You are continuing to act for Puffin in its claim against Wonder.

Puffin has obtained permission to serve Wonder out of the jurisdiction in Panama. Wonder has been duly served but no defence has yet been served.

Wonder is proposing to serve a defence which will say '*it is denied that Guernsey is the most convenient forum for trial*', that the most appropriate forum for trial is Panama, and that there are proceedings related to alleged breaches by Wonder of a non-disclosure agreement that was put into place during the negotiations for the software contract being pursued by Puffin in Panama. This is the first that you have heard about it.

- 3.1 Advise Puffin about the steps you would expect Wonder to take if properly advised? Include any test that Wonder would have to satisfy to be successful.

The MD of Puffin has now told you that the cause contains commercially sensitive information, as does the affidavit that was filed in support of the application for leave to serve out of the jurisdiction, and as will potentially any witness evidence, and that it would be embarrassing for Puffin if the matter is heard in open court.

- 3.2 Advise the managing director as to any steps you may be able to take to address his concerns, explaining what would happen both as a result of the steps you might take and how others might respond.

QUESTION 4 (total 16 marks)

New facts: Puffin Bank Ltd v Wonder Software (Financial) Limited

You are continuing to act for Puffin in its claim against Wonder. Regardless of your previous answers you are to assume that the case is proceeding in Guernsey in the Royal Court.

Wonder has served a defence and counterclaim. The essence of the defence is that any problems arising from the software are due to operator error.

In its counterclaim, Wonder claims damages from Puffin. The basis of this is that Wonder has received a demand from its own bankers, Skua Bank ('Skua'), requiring the immediate repayment by Wonder of a loan which was not due for repayment. Wonder says that Puffin wrongfully induced Skua to demand repayment and so induced Skua to commit a breach of contract.

It is the case that Skua has demanded that Wonder repay the loan. On the face of it the demand by Skua is premature. In any event the managing director of Puffin has told you that Puffin has had no contact at all with Skua.

Puffin wishes to dispose of the counterclaim as it is factually unfounded. You are asked to advise:

- 4.1 What application(s) may Puffin make?
- 4.2 Upon what basis will the application(s) proceed? Set out the rule(s) and how they are applied.
- 4.3 What evidential requirements must be fulfilled?
- 4.4 If Puffin decides to pursue the application(s) but is unsuccessful, advise Puffin about the prospects (in bullet point form) of challenging the decision on the application(s) and the means by which this could be done including any time limits.

QUESTION 5 (total 14 marks)

New facts: Puffin Bank Ltd v Wonder Software (Financial) Limited

You are continuing to act for Puffin in its claim against Wonder. Directions have been given. Disclosure and inspection have taken place. You take the view that this case will stand or fall on the evidence in relation to the extent and nature of the alleged flaws Puffin says there were in the software. Puffin wishes to rely on an IT expert to show that the programme was fatally flawed due to mistakes in the algorithms.

5.1 What do you need to do for Puffin to be able to rely on the expert in the trial?

Having reviewed all the documents, Puffin has concluded that Wonder has failed to disclose a document which ought to have been included in Wonder's list of documents. You write and ask for the position to be corrected. You receive a response indicating that your request has been denied.

There is also a reference in Wonder's expert's report to the letter of instruction and you think that it might be very useful to see this letter as the report has revealed some information about other similar software systems which had not previously been an issue in the case.

5.2 What steps should Puffin take against Wonder in relation to the document which it has refused to disclose and the expert's letter of instruction? Set out the relevant tests in the form of a skeleton argument.

QUESTION 6 (total 10 marks)

New facts: Puffin Bank Ltd v Wonder Software (Financial) Limited

As this case is ongoing, your firm is asked how to bring the rules as to e-disclosure up to date to cope with the proliferation of electronic documents. You are asked for your view.

- 6.1 Describe the current Guernsey practice relating to e-disclosure, along with any additional suggestions which you might have to improve the process, which might be incorporated into a rule or practice direction and any amendments to the current rules or practice directions that might be needed.

QUESTION 7 (total 5 marks)

New facts: Puffin Bank Ltd v Wonder Software (Financial) Limited

You are continuing to act for Puffin in its case against Wonder. Despite any advice that you may previously given, the case has now reached the trial preparation stage.

Puffin has a witness, Mr Jones, who will say that he heard Wonder's managing director say '*this I.T. programme is terrible. No one can get it to work.*'

- 7.1 What is a hearsay statement? Set out the law in brief.
- 7.2 How, if at all, can Puffin put before the court Mr Jones' evidence about what he overheard?

QUESTION 8 (total 6 marks)

New facts: Puffin Bank Ltd v Wonder Software (Financial) Limited

Puffin obtains judgment in the Royal Court against Wonder. Despite Wonder's boast about its success in South America, it has not paid its judgment debt. The only assets it has are in Guernsey. Wonder owns its own building and you know it banks with Havelet Bank as Wonder's banking details were provided to Puffin when it purchased the software.

8.1 What methods of enforcement could be used? Describe briefly how the processes work.

END OF PAPER