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Question 1

83/100

(A) Firstly, might try to obtain information from Onwine Pty Ltd. Following methods are open:

(1) Ask Onwine to disclose. Unlikely due to Privacy Act 1988.
(2) Equitable Bill of Discovery (see Norwich). Seek on basis that Onwine ‘mixed up’ in wrongful acts of Shiraz/Lola and Hugh. Does not matter that innocent participant. Generally, however, court will probably want Holliday to seek info from potential defendants before burdening third party.
(3) Discovery to identify right to obtain relief under O34A r 5. While reasonable to suspect Onwine has such info, would need to show made efforts to obtain by other means. The sort of privacy concerns canvassed in Sony may also tell against making order. Would seek similar orders against Lola and Hugh (L and H) as well as Shiraz.

Fact that L leaving jurisdiction puts new complexion on matters. May seek Anton Pillar order to prevent her from leaving jurisdiction with the evidence.

Would need to be mindful of Practice Direction 4 of 1994, especially that woman accompanying (if L is only person at home). Need very strong case.

Advise H about usual undertaking.

(B) Plaintiff will be Merlot. Question is who Merlot should join as defendants under O 19 r 5. Will deal with service and parties at same time. Service of orig. app must be personal (O 22 r 18A)

(1) Red and White. Individuals in ACT, may serve in accordance with O 4 r 1 – ie give it to them.
(2) Shiraz. Shiraz in p-ship. Have option of proceeding against name of p-ship (O 50 r 1) and serving in accordance with O 2 r 18D – easiest might be to serve on Guzzle in Dickson) or proceeding against individuals who make up p-ship. Should use procedure in O 50 r 1 to flush out any other partners.

(C) Because process server overseas, assume that successfully sought leave under O 12 on basis of nexus (residence or business in ACT).
Should now seek substituted service under O 10 r 12. Must show ‘practical impossibility’ of actual service (Porter). While courts may take strict approach (see Munkarra) probably can be shown here – esp if process server sent overseas.

Method of substituted service might request would be service on QW as person closely connected with Lola (Amos Removals).

If December 2003, problem is that more than 6 months since originating application filed – it will have gone stale (see O 2 r 23). It is a Klienwort Benson category 3 case. Would need to seek renewal under ss 59 and 60 of SC Act 1933 on basis that necessary to decide real issues, have made best efforts, or O 2 r 25.

(D) Would probably lodge conditional appearance under O 13 r 16A, seek to have service set aside.

Would then apply for summary judgment or for pleadings to be struck out and default judgment. Basis of application would be

(1) Jurisdiction. Despite cross-vesting legislation, Fed Court may have exclusive jurisdiction in some matters.
(2) The retailers must be using O 19 r 10 to support claim. Challenge on basis that ‘opt-in’.
(3) Check limitation period in Spam Act (if any).

Standard for summary judgment is high (see General Steel). Must show that no real question to be tried. Depending on quality of research, may be made out here.

(E) Respond by seeking to have action transferred to Fed Court under O 78, on basis that ‘more appropriate’ forum under s 5 of cross vesting legislation. Easy to show – ie federal law.

Advantage of this is can use Pt IVA (7 retailers – see s 33(1)(a)). Same source of damage (s 33(1)(b)-(c)) OK). Damages different but this may not be fatal (see Wong).

(F) Would move for order in inherent jurisdiction that action be stayed or permanently discontinued as abuse of process: Spautz. Dominant purpose must be improper. In this case, commercial advantage by lowering prices. However court did limit doctrine in Spautz. If immediate purpose is to obtain damages may be OK.
**Question 2**

(A) Carol will only be contractually obliged to attend if the mediation clause is enforceable.

In *Hooper*, Giles J recognised that despite unfavourable UK authority, agreement to conciliate (or mediate) may be enforceable.

Issue is whether agreement requires parties participation in mediation process ‘by conduct sufficiently certain for legal recognition of the agreement’.

In this case, the clause requires parties to submit to named mediation process (ie that conducted by CCDC). Also in *Scott v Avery* form. However I think several problems:

1. words ‘to endeavour’ and ‘in good faith’ introduce the type of ‘cumulative uncertainty’ Giles J found fatal in *Elizabeth Bay*;
2. In *Elizabeth Bay*, Giles J considered that ‘in good faith’ requirement itself makes contract unenforceable. But on this point cf *Aiton v Transfield*.
3. Does not spell out how costs to be dealt with: see *Aiton*.

Conclusion – probably not enforceable. May proceed to litigate directly.

(B) Freddy has made 3 admissions which may prejudice him in subsequent litigation.

On the one hand, these could be seen as getting at the heart of the dispute (ie personal grievance) and achieving purpose of mediation. On other hand, may be causing power imbalance b/c Freddy emotional. It is said that mediators should guard against this.

I would suggest intervention along following lines:

1. speak to Freddy in absence of other party. Determine whether too emotional to participate fairly in mediation;
2. If decide that mediation should go ahead, consider whether to change format, so parties not ‘face to face’ ie shuttle mediation.

(C) Plaintiff would be Builder Pty Ltd (ignore business name – not legal entity). Defendant would be Anton.

Proceedings would be commenced by lodging and filing originating application (O 2 r 1). Must comply with O 4 r 2 and Form 1.2. ACT SC has jurisdiction to hear contractual dispute of this nature (s 20 *Sup Court Act 1933*).
Would not need to attach statement of claim (actions in contract) but could do so if wanted (O 2 r 10). Might also consider TPA claim re oral representation. This could also proceed in ACT SC under cross vesting legislation.

**Case Management**

This case would probably not go on master list (b/c not death or bodily injury) – may be debt.

If it is characterised as claim for debt, pre-trial hearing will be held, try to get parties to settle (see Practice Direction No 1 of 1990).

Most likely that classified as claim in contract. In this case, will be subject to automatic listing hearing after appearance filed (Notice to Practitioner, 22/8/1997).

I doubt that claim sufficiently complex to warrant use of docket system.

(D) The pleading for both defence and counter-claim are defective. Builder should seek to have them struck out under O 29 r 4 on basis that ‘disclose no reasonable cause of action’ or under O 23 r 28 on basis that unnecessary and scandalous. Would then seek judgment in default of pleadings under O 31.

The defence clearly makes out no defence and is unrelated to the matters in dispute. Also contains surplusage.

Allegation that Freddy CIA operative and ‘a useless builder’ are scandals and can be struck out on that basis: see *Brooking*.

The Counterclaim appears to plead matters of law – should state facts only (*Creedon v Meary*).

The case for having the counter claim struck out is not so strong as for the defence. Should therefore consider filing defence to counterclaim (within 14 days – O 27 r 3(3)) or A could get default judgment on it.

(E) The letters of complaint should be listed in the list of documents if they are ‘discoverable documents’ for purposes of O 34 r 3(1).
They clearly relate to ‘matter in issue in the action’ in wide sense envisaged in *Peruvian Guano*. They bear on counterclaim, may contain admissions relating to whether ‘workmanlike’.

Anton seems to be requesting the copies produced by F rather than the originals.

If docs are listed, questions of privilege arise. In particular

(1) Def of privileged doc in O 34 r 2 refers to s 131(1) Evidence Act, which privileges docs and communication made in connection with attempt to negotiate. The first 2 admissions (as to wife and affair) made during mediation. May also be inadmissible under Mediation Act 1995 s 9.

Perhaps a question arises as to whether they were ‘reasonably incidental’ to negotiation – see *Field*. As discussed above, may be seen as getting at heart of dispute and therefore contributing to mediation process.

In relation to the document copies produced by F at mediation, must consider privilege against self incrimination (O 34 r 2); reflects wide test in *Reid v Howard*. This is because some threaten to report to police.

Court should inspect to determine whether threats to report are credible – ie do docs actually record potential criminal conduct by F?

(2) Docs may also be ‘copies’ prepared for litigation: see *Propend*.

**Conclusion**

Docs should go on list but as should state privilege claimed (see O 34 r 6). There are no longer ‘schedules’ (see O 34 r 6).

**Claim for trees**

Because of consent judgment, res judicata operates. Generally, this means that cannot plead same cause of action in subsequent pleadings to get damages for trees.

Alternative causes of action might be in tort (negligence etc). However must consider operation of issue estoppel – see *Arnold*. 
Alternatively may plead special circs, seek to depart from res judicata on basis that damage was latent.