

FROSTY FREEZE ATTENDANCE NOTE: EXEMPLAR

ATTENDANCE NOTE

Name: George Upperton

Address: Frosty Freeze, High Street, Tetherton TT 25 7HF

Telephone: 01659 569086

Matter: Damage to freezers and frozen food

Date: Today's date

Fee earner reference: OSCE /1

This reference is included for illustrative purposes. In the assessment do not insert your own details here.

Time: Preparation 10 minutes; Interview 25 minutes; attendance note 25 minutes.

FUNDING

You may be asked to advise the client on funding payment of your fees. Outcome C2 refers to advising on funding (and C2 and D5 both refer to advising on costs, benefits and risks of action). You would demonstrate this competency by recording your advice on funding here in your attendance note.

In the sample question you were told not to deal with this issue.

KEY FACTS

Client is a sole trader, trading as Frosty Freeze. One shop selling frozen food to retail customers.

Six months ago - purchased three new display freezers from Cold Store Ltd. Manufacturer of freezers was Frost Fast Fittings Ltd. No contract direct with Frost Fast Ltd.

One month ago – the freezers failed. All food stock thawed out and had to be thrown away.

Freezers could not be restarted and are beyond repair. Client obtained independent electrical engineer's report which confirms failure caused by manufacturing defect (copy not yet seen but to be provided).

Shop has been unable to trade since failure of the freezers. Client has lost business profits and anticipates further losses in period until freezers can be replaced.

Liquid from failed freezers also damaged the shop floor which had to be replaced.

Client does not have any insurance to cover this loss and damage.

Original supplier, Cold Store Ltd has gone into liquidation and had allowed insurance to lapse. So, no prospect of recovering losses from Cold Store.

Client has contacted the manufacturer, Frost Fast Fittings Ltd but managing director has declined to meet his loss and damage.

Loss and damage suffered:

Original cost of three freezers and installation:	£35,000
Freezer contents – damaged when thawed, so thrown away: - Purchase cost £15,000 - Loss of profit on sales £4,500	£19,500
Cost paid to replace damaged flooring:	£20,000
Estimated loss of net business profits caused by shop closure due to inability to re-stock / use failed freezers: - From freezer failure to present (1 month) £5,000 - Estimated future until shop re-opens (two months) £10,000	£15,000

For outcome D5, a key objective for the interview assessment is to obtain all relevant information. You would demonstrate this by recording all relevant facts here in your attendance note.

CLIENT CONCERNS AND OBJECTIVES

Client is keen to recover all of his losses from Frost Fast Fittings Ltd. I advised him that this may not be possible given that there is no contract between the client and Frost Fast and a claim in tort would meet with issues of pure economic loss. See further below.

Client was very keen to issue proceedings against Frost Fast Fittings Ltd immediately. He has threatened them with issue of proceedings and was keen for this threat to be carried out. However, he is keen to avoid any possibility of paying

costs to Frost Fast should he lose. I advised him on the requirements of the Practice Direction on Pre-Action Conduct and Protocols and the potential costs consequences of failure to comply. See further below.

For outcome D5, a key objective for the interview assessment is to obtain a full understanding of the client's concerns. You would demonstrate this by recording those concerns, and how you have addressed them, here in your attendance note.

*Outcome D5 also requires that your advice to the client should take into account the client's objectives, priorities and constraints. So, you would also record those matters here. This would also be relevant to satisfying **Outcome D8** Ability to recognise clients' financial, commercial and personal priorities and constraints.*

*In this section of the attendance note you would also record how you were able to manage the client's expectations on likely outcomes and timescales, as required by outcome D5. This would also be relevant to satisfying **Outcome D9** Ability to exercise effective client relationship management skills.*

PROFESSIONAL CONDUCT ISSUES

The client was considering a suggestion that he should modify some of the documentary evidence so as to increase the value of his claim. He suggested that, if recovered, some of that increased value might be shared with us.

I advised him very clearly that he should not modify the evidence as suggested. I explained my duty of integrity as a solicitor. I told him that this means that I could not be a party to this in any way, and moreover, I would not be able to continue to act for him unless I were certain that he would present the original unmodified evidence truthfully. The client confirmed that he would accept this advice.

*The assessment criteria for outcome D5 refer to professional conduct issues arising during the interview. So, you would demonstrate this by recording those issues here and how they were dealt with. This would also be relevant to satisfying **Outcome F** Professional values, behaviours, attitudes and ethics.*

RELEVANT LAW AND PROCEDURE

Legal issues: From the evidence so far (which remains to be confirmed) it appears that Frost Fast Fittings Ltd produced freezers which had a manufacturing defect which caused them to fail. As a matter of fact, such failure has led to the client's losses. However, the client has no contract with Frost Fast Fittings Ltd. Therefore, any claim would need to be in tort.

In tort a manufacturer can incur liability for damage caused by a defective product. Such claim would be in the tort of negligence. However, such claim would be

severely limited by the fact that, in the tort of negligence, pure economic loss is not recoverable.

On the facts of this case, the following are **not** pure economic loss:

- Damage to stock which thawed out and had to be thrown away (both original purchase cost and lost profit on sales).
- Damage to flooring - cost paid to replace.

However, the following would all be classed as pure economic loss and would not be recoverable in tort:

- Cost of the freezers themselves, and the installation costs
- Loss of business profits resulting from inability to use the freezers

So, any claim in negligence would be limited to the freezer contents and damaged floor. The elements of such claim would be; duty of care; breach of duty and causation of damage. The duty of care owed by a manufacturer of a defective product is an established one. Breach requires that the manufacturer fell below a reasonable standard of care. We need to assess the evidence further on this. If breach can be established, it does appear to have caused the loss in question.

Procedural issues: Although the client is keen to issue proceedings immediately, the Practice Direction on Pre-Action Conduct and Protocols should be complied with. This requires that the substance of the claim be notified to the potential defendant in a letter of claim, and the defendant should be allowed time to respond. Failure to comply can be taken into account by the court if proceedings are issued and there may be adverse costs consequences.

For outcome D5, you are required to provide an analysis of legal issues arising in the matter. Outcome C2 requires competency in: analysing factual material, identifying the relevant cause of action and its elements, and assessing evidence.

You would demonstrate your competence in both of these outcomes by recording your analysis of the legal issues here in your attendance note.

Outcome C2 also requires understanding of dispute resolution methods and procedural steps. So, you would demonstrate this by recording here any relevant procedural issues arising in the matter on which you are advising.

Outcome D5 requires that your advice be legally correct and legally comprehensive. So, you should ensure that you demonstrate this here in your attendance note.

PRELIMINARY ADVICE

I have advised the client that he is unlikely to recover all of his losses in an action against Frost Fast Fittings Ltd. We may consider a claim in the tort of negligence to

recover some of those losses. We need to review the evidence to see whether it establishes that there was a manufacturing defect in the freezers and that such defect resulted from a failure by Frost Fast to exercise reasonable care. This may be difficult to prove and obtaining the necessary evidence could be time consuming and expensive.

I have advised the client that proceedings should not be commenced against Frost Fast immediately. Even if a claim in negligence can be established for some of his losses, we should first comply with the Practice Direction on Pre-Action Conduct and Protocols. Failure to do so could lead to costs consequences so would not be in the client's interest.

For outcome D5, you are not required to give detailed advice in the interview. However, you should give sufficient preliminary advice to win the client's trust. You would demonstrate this by recording your preliminary advice here in your attendance note.

Outcome D5 requires that your interview and advice should be client focussed. So, you should demonstrate this here by noting how your advice has taken account of your client's concerns and objectives (which you noted above).

ACTION & NEXT STEPS

We agreed that proceedings will not be commenced against Frost Fast at this stage.

We agreed that the client will provide me with the report which he obtained from the independent electrical engineer. I will review this and consider whether we are likely to be able to establish a breach of duty by Frost Fast to support a claim in negligence. I will then write to the client setting out my advice.

If a negligence claim looks possible on the evidence, we will write to Frost Fast in accordance with the Practice Direction on Pre-Action Conduct and Protocols.

The client will also provide the documentation in support of the claim for the damaged floor and freezer contents. (The client will ensure that only the original truthful documentation for the freezer contents is supplied).

Both outcome D5 and C2 require that you can identify the different possible courses of action which your client might be advised to take (including the legal and non-legal consequences, costs, benefits and risks). You would demonstrate this by recording those matters here.

For outcome D5, you are required to identify the next steps to be taken by the client and the solicitor, so you would demonstrate this by recording them here in your attendance note.

Outcome D5 also requires you to be able to identify circumstances in which you would need to take instructions or seek advice from a supervising solicitor. So, if such circumstances arose, you would record them here and note this as one of the next steps for you to take.

Outcome D5 requires that your interview should have clear outcomes, so you should use this section of your attendance note to demonstrate this. This is likely to form the conclusion to your attendance note covering:

- The course of action which your client decided to take*
- Necessary next steps to further that course of action*