

**Examiner's Comments**  
**EQUITY**  
**September 2008**

**GENERAL**

When presenting themselves for this examination in this subject, students should bear in mind that they are warranting to the examiner that they possess sufficient knowledge and understanding of equitable doctrine and remedies to be accepted as a legal practitioner in New South Wales.

The questions in the exam paper were all directed to specific areas of the course which were covered expressly in the assigned textbook, and in lectures. If you have not prepared a topic thoroughly you should think very carefully about attempting an examination question on that topic.

Although there were some good papers, the general standard of papers written in this subject was extremely average. Most students who failed did so because they were unable to write useful answers to more than 3 questions; some such papers demonstrated that the student had made no genuine attempt to study the course materials at all.

Many students displayed poor technique.

1. Misallocation of time was particularly evident, as the quality of the last response was often significantly poorer than earlier responses in the paper.
2. Other students adopted a 'scatter-gun' approach of writing everything they knew or remembered about a subject in the hope that this would secure them a pass mark. Such an approach reflects inadequate critical preparation. The practice of law involves the application of doctrines to factual situations; you will not be an effective legal practitioner if you do no more than give your clients a digest of the relevant law in an area with no attempt to apply it.
3. Another technique was the 'bluff', whereby in response to a question they know nothing about, students write a logical but almost entirely irrelevant response on a subject-matter which they have studied (often contorting it to try to achieve a tenuous connection to the subject-matter). This technique is no substitute for proper preparation and does not work; a legal practitioner who engaged in the bluff in practice would quickly find themselves on the end of a professional negligence suit.

The discussion questions in Part A were in general handled very poorly. Critical engagement with the question was often entirely absent, students preferring to write a summary of what they remembered about the apparent subject matter rather than engaging in any critical analysis.

## PART A

### Question 1

This question threw up the debate addressed in paras 17.84 to 17.95 of the 2003 edition of the text book, *Equity & Trusts* with the additional factor of the High Court's judgment in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* which confirmed the status and authority of the High Court decision in *Consul Development Pty Ltd v DPC Estates Pty Ltd* in Australian law.

The points students should note are:

1. Austin J's attempt to reconcile *Royal Brunei* and *Consul* pre-dated the House of Lords decision in *Twinsectra v Yardley*.
2. The subjective interpretation of "dishonesty" preferred by the majority of the House of Lords in *Twinsectra v Yardley* makes it virtually impossible to reconcile *Royal Brunei* and *Consul* considering Gibbs J's view in *Consul* that a person with knowledge of all the facts (showing a dishonest and fraudulent design) could not be protected by their own moral obtuseness.
3. The confirmation of the authority of *Consul* by the High Court in *Farah v Say-Dee* rules out any convenient reconciliation of the time advanced by Austin J.

On the whole the standard of answers to this question was satisfactory. However, many students did not engage beyond a superficial comparison of "dishonesty" and "knowledge" tests, sometimes without betraying an understanding beyond these labels themselves.

The most common reason for achieving a poor mark for this question was failure either to adequately display an understanding of the principles in *Consul Developments* as affirmed in *Farah v. Say-Dee*, or mention it at all. Given that the field for debate was obvious from the citation from *Aequitas v. AEFC*, the view was taken that to discuss "knowledge" and "dishonesty" in general terms without reference to the decided cases was not sufficient to merit a pass mark. Another observation is that while many students recalled *Baden Delvaux*, a significant number of students appeared to be of the view that it preceded *Consul Developments* such that *Consul Developments* was an application of the categories of knowledge enunciated by Peter Gibson J. Some students also apparently believed that *Royal Brunei* was decided before *Consul Developments*. Where this occurred, serious doubts were held as to whether the student had engaged in anything more than peremptory reading of relevant excerpts of the textbook.

### Question 2

This question could have been dealt with in a variety of ways, many of them acceptable. Students were expected to attempt some explanation or definition of the word "unconscionability" and the expression "unconscionable conduct", and this was best done by reference to decided cases from differing fields of equitable doctrine, the obvious ones being: equitable estoppel (*Waltons v. Maher*), unconscionable transactions or catching bargains (*Blomley v. Ryan* and *Amadio*) and *Muschinski v. Dodds et seq*,

On the whole the standard of answers to this question was very unsatisfactory. The discussion style of the question was in general handled very poorly indeed. The best answers demonstrated an understanding of the application of the concepts in a wide range of fields of equitable relief, and discussed the statement which formed part of the question. However, many (if not most) students failed to engage with the question at all beyond writing everything they knew or could remember about the subject of unconscionable transactions (catching bargains), or setting out long digests of the principal cases which they could recall.

It is to be observed that that a number of students sought to support their answers with reference to authority of *Barnes v. Addy*, *Consul Developments v. DPC Estates* and *Farah Constructions v. Say-Dee*, or by reference to the duties of trustees and fiduciaries generally. In general when this was done, it did not adequately expose any relevant nexus to the topic of unconscionability beyond assertion that the liability of such a trustee or fiduciary is based upon unconscionability, which is not the case (except in the loosest of senses).

## PART B

### Question 3

This question dealt with assignments in equity – the subject of Ch 3 of the text. Students were expected correctly to apply the rule in *Milroy v Lord* should be applied – has the donor done everything which, according to the nature of the property comprised in the settlement is necessary to be done to effect the transfer and to render it binding on him and put it beyond recall. Students ought to have referred to *Corin v. Patton* and *Costin v. Costin*, both of which were summarized in the text. A number of students did not refer to *Corin v. Patton* at all, in which case serious doubts were entertained as to their knowledge of the subject-matter.

1. Bushacre is Torrens title land. The transaction is a voluntary assignment of legal property assignable at law. In this case, as the certificate of title is still under the control of the donor's agent, and that agent's authority to deal with the title deed has been revoked by the death of the donor the donor has not placed the assignment beyond his recall and the assignment is not effective in equity.
2. Beachacre is similar to Bushacre, but a different story. The donor has handed over a signed memorandum of transfer. The title deed is with a third party, the bank as mortgagee. This takes up a point noted in the discussion of *Corin v Patton* in para 3.20 of the text – a point of which surprisingly few students seemed aware.
3. The NAB shares raised the question whether, on the facts, the donor has "equipped" the donee with the means of completing the title at law and, as part of that question, whether he has rendered the settlement binding upon himself by placing it beyond his recall. On the facts Lois must receive the shares on behalf of Katy, not the donor, so the answers to those questions are in the affirmative.

Almost every student attempted this question, and the standard was in general satisfactory, even though there were few "stand-out" responses. Most students did not adequately grapple with the second assignment of "Beachacre", and those who did were clearly at the top of the cohort.

One observation is that a large number of students were unable to distinguish between the case of Bushacre (where Edward's death revoked the authority of his solicitors to act on his instructions) and the case of the NAB shares (where there was no relevant authority yet to be acted on which was revoked by death). This suggests that only a superficial preparation of this topic had been undertaken.

### Question 4

This question dealt with intention to create a trust, both in the context of express trusts and resulting/constructive trusts.

The question was generally poorly answered. Very few students were able to identify, analyse and apply the law as it relates to both excerpted paragraphs from the 1988 affidavit. On a proper analysis:

1. Whether or not a resulting or constructive trust in favour of Albert as to 80% existed at the time the property was purchased depended upon whether the presumption of advancement was rebutted by evidence of contrary intention, or whether there was sufficient evidence of common intention that that should be the result.
2. Whether or not it was concluded that such a resulting or constructive trust did arise, it was still necessary to consider the three certainties applicable to an express trust, to determine whether there was sufficient certainty of intention to conclude that Derek

- held either the whole property or the 20% he held beneficially on trust for Albert and Doris (*Joliffe, Hyhonie*).
3. Students were expected to consider all the factual integers (prior will, conduct of the parties, lack of manifestation of ownership by Albert & Doris) and make a reasoned argument as to whether intention was established.

On the facts, it is likely that no trust would be found to exist.

Many students failed to address both aspects of the question satisfactorily or at all. A response which only mentioned the resulting/constructive trust cases without identifying the issue of intention was unsatisfactory; there were a significant number of such responses.

### Question 5

This question dealt with charitable trusts and, in particular, whether each of these four gifts is charitable. It was important that in answering this question students emphasise that to be recognized a charitable a trust must be for a purpose that is charitable, in the sense that it is for a purpose that falls within the list of purposes in the preamble to 43 Eliz 1 c.4, or for some purpose that falls within the spirit and intendment of that statute AND that the gift is for the benefit of a requisite section of the public.

1. Clause 6 is clearly charitable, being the benefit of the “aged”, the first purpose listed in the Elizabethan preamble. It is also a gift to assist the aged in addressing the maladies that arise from advanced age. There was a further issue in this of initial impracticability or impossibility, and students were required to discuss the issue of the application of this gift cy-près.
2. Clause 7 raises the question of sport as a charitable purpose, which is addressed in the text. On the authority of *Re Nottage* sport per se is not a valid charitable purpose unless it forms part of the curriculum of some established educational institution (e.g. *Kearins v Kearins*). That older view is under some challenge when sport is considered in the context of public health and welfare. In this respect students could have referred to *IRC v McMullen* in which a gift for training in football (soccer) was upheld as being for the broader education of the young or the inclusion in the Elizabethan preamble of the assistance of “tradesmen” and “handicraftsmen” and point to the growing professionalism of sport and the argument that it may provide vocational training leading to a career for those or some of those involved.
3. Clause 8 raised the chestnut of gifts for the maintenance of graves, which are usually struck down as private trusts. However, here, the gift is to the local council for the maintenance of a public cemetery and thus, strongly arguably, a matter of public works consistent with other purposes listed in the preamble.
4. Clause 9 was intended to draw from the student an acknowledgement that matters of national defence and security are purposes that fall directly within the preamble and that this purpose, being for the improvement of the military skills of members of the armed forces clearly falls within the Elizabethan statute.

Most papers displayed an understanding of the legal principles to be applied at a general level; the differentiator was in the ability to apply those principles. The two bequests which caused the biggest problems to students were Clause 7 and Clause 9. In relation to the Netball Association gift, many students were drawn into a sometimes very lengthy discussion of the principles affecting gifts to unincorporated associations, and neglected to address the question of whether sport is a charitable purpose. Much of the discussion in which students engaged was somewhat beside the point, but some credit was given for it in appropriate cases. In relation to the gift to the military, most students seemed unaware that matters of defence and security fall directly within the preamble to 43 Eliz 1 c.4, and the majority of students

regarded this bequest as raising the question of gifts for political purposes of the kind discussed in *Southwell*. Why this was so was a mystery. Nonetheless, given the number of students who took this approach, some minimal credit was given on account of students' understanding of that aspect of the law. A significant number of students also sought to analyse Clause 6 and Clause 8 in terms of a gift to religion, which was not really open on the facts.

### **Question 6**

The facts of this question are essentially the same as those of *Gatsios Pty Ltd v NK Holdings Pty Ltd (in liq)* which is discussed in Ch 19 of the text.

Students were expected to recognise this and to apply the principles to the facts here, preferably with reference to the decision of the Victorian Court of Appeal in *Re Nolan; Collie v Merlaw* which was critical of the NSWCA decision in *Gatsios*. Given how straightforward this question was, it was not possible to obtain a pass mark without mentioning *Gatsios* (either expressly or implicitly) at all.

Responses to this question fell into two broad groups, (1) competent (even very good) answers and (2) answers which were not even meaningful efforts, or which entirely missed the point of the question. It is disappointing to record that almost ½ of all students who attempted it failed this question, and that indeed ¼ of students who nominally selected this question scored a mark of zero.