

## EQUITY EXAMINER'S COMMENTS WINTER 2009

### GENERAL COMMENTS

Overall the exam was reasonably well done. Many students struggled with time management and were not able to complete the exam in time. A number of students also struggled with questions 3 and 4, particularly in relation to the assignments and dispositions parts of the questions.

### QUESTION 1:

Adrian and Bobby are brothers. Adrian is 12 years older than Bobby, and is generally regarded as the more intelligent, charismatic and successful of the pair. Bobby often looks to Adrian for advice in life, including in relation to financial matters.

Recently, Adrian suggested to Bobby that they 'go shares' in a dog grooming business. Under Adrian's proposal, Bobby would invest \$50,000 in the business, and Adrian would be responsible for managing the business on a day-to-day basis.

Bobby consulted the family solicitor about the deal. The solicitor also advises Adrian and other members of the family. Bobby's meeting with the solicitor was brief, and Bobby said very little. When the solicitor asked Bobby whether he understood the deal, Bobby said 'Yep'. When the solicitor asked Bobby if he wanted any further advice or information, Bobby said 'Nup'. Bobby then left the solicitor's office.

Bobby contributed \$50,000 to the business, and Adrian commenced operating a dog grooming parlour in Darlinghurst under the name "Glamour Pups Pty Limited". After a few months, Adrian realised that the business needed a more charismatic financial backer, as Bobby's appearance and generally lack of pizzazz were not going to help the business be a success.

Soon after, Adrian met Cameron at a dog groomer's convention, which he was attending as manager of Glamour Pups. Cameron had all the pizzazz and charisma that Bobby lacked. Without telling Bobby, Adrian established a new dog grooming business with Cameron just around the corner from Glamour Pups under the name "Pooches with Pizzazz Pty Limited". Glamour Pups's business declined rapidly, with the additional competition crippling its profitability. Soon, Glamour Pups was operating at a substantial loss, and went into receivership. However, Pooches with Pizzazz was highly successful, and soon dominated the Darlinghurst dog grooming market.

#### **1. Discuss whether Bobby could bring an action against Adrian in undue influence (10 marks).**

This question was generally answered well. However, many students failed to engage with the facts provided, and did not effectively apply the law to the factual scenario.

Good responses to this question examined:

- whether the relationship raised a presumption of influence;
- whether influence arose on the facts; and

- whether any defence was available.

In particular, students should have examined whether the 'independent advice' received by Bobby was adequate, drawing on *Bester v Perpetual Trustee Co Ltd* [1970] 3 NSW 30.

In answering this question, some students confused undue influence with unconscionable dealing.

**2. Discuss whether Bobby could bring an action against Adrian for breach of fiduciary duty (10 marks).**

This question was generally answered well. However, many students failed to engage with the facts provided, and did not effectively apply the law to the factual scenario.

In answering this question, students needed to analyse:

- a. whether there was a fiduciary duty. Good responses discussed the applicability of established categories (like partners, employer/employee), analogous relationships (like joint venturers), and whether a relationship arose on the facts;
- b. the scope of the fiduciary relationship;
- c. whether there was a breach of the fiduciary relationship; and
- d. whether any defence was available.

**3. Discuss:**

- a. **what remedy Bobby should seek against Adrian; and**
- b. **what remedy the court is likely to grant if Bobby is successful (5 marks).**

This question required students to analyse what remedy would be most beneficial for Bobby, and what remedy a court would regard as appropriate. This required a strong engagement with the facts of the question, and a discussion as to whether a remedy would be appropriate on the facts. It was not sufficient to merely list possible remedies.

## **QUESTION 2:**

Darren and Egan have been friends since they were children. One Friday, they met down at the local pub. Over a pint or two, Darren confessed to Egan that he had invented something that had the potential to change the world – an everlasting gobstopper! Egan excitedly asked Darren how he had made such an incredible invention. Darren said: “You won’t tell anyone, will you?” Egan replied: “Of course not, I’m your friend! Look, if you are that concerned, we can enter into business together to develop the gobstoppers. We can sign the papers next week.” Darren thought this sounded like a fair agreement. Darren and Egan drew closer on their bar stools, and Darren told Egan the secret formula to create an everlasting gobstopper.

Later that night, the two men went their separate ways after leaving the pub. Egan reflected that it was unlikely that any business with Darren involved would ever make any money at all. Therefore, it was up to Egan to make money from Darren’s invention.

Without Darren’s involvement, Egan started up a company – “Suck Forever Pty Limited” – and started producing everlasting gobstoppers to sell commercially. He also entered into a number of lucrative contracts to distribute the candy overseas.

A few months later, Darren saw an advertisement for his invention on television, and was dismayed to find that Egan had gone against his word.

- 1. Discuss whether Darren could bring an action against Egan for unauthorised use of confidential information. Include a discussion of:
  - a. what remedy Darren should seek against Egan; and
  - b. what remedy the court is likely to grant if Darren is successful(12.5 marks).**

This question was generally answered well.

In answering this question, students needed to analyse:

- a. whether the information was confidential;
  - b. whether the information was received in confidential circumstances;
  - c. whether there was an actual or apprehended use of information that is unauthorised;
  - d. whether a defence is available; and
  - e. what would be an appropriate remedy (or remedies).
- 2. Discuss whether Darren could bring an action against Egan in equitable estoppel. Include a discussion of:
    - a. what remedy Darren should seek against Egan; and
    - b. what remedy the court is likely to grant if Darren is successful(12.5 marks).**

This question posed a number of challenges for students. Although the question specifically asked for an analysis of equitable estoppel, many students instead discussed proprietary estoppel, or provided a long-winded exposition of the

development of equitable estoppel. This was not necessary, and often led to students failing to spend enough time on actually analysing the problem.

Students needed to analyse the elements of equitable estoppel (as laid out in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387) and apply the elements to the facts. Many answers contained a good exposition of the law, but failed to apply the law to the facts.

### QUESTION 3

This question occurs in NSW. In 2005 Cosmo made a will in which he appointed Kramer as his executor. By clause 3 of the will Cosmo left his bank account with the Commonwealth Bank Ltd 'to Jerry Lewis on trust'. By clause 4 of the will Cosmo left his bank account with the National Australia Bank Ltd 'to my executor on trust to distribute as my executor shall in his absolute discretion deem fit amongst past and present officers and employees of any past or present government department of the government of the Commonwealth of Australia as well as the dependants of the said officers and employees'. By clause 5 of the will Cosmo left 'the residue of my estate to George Costanza'.

In late October 2006 Cosmo entered into a written contract with Newman by which Newman assigned to Cosmo 'all dividends on my shares with Acme Investments Ltd that are to be paid to me on or before 31 October 2007' in return for a price of \$2,500 to be paid by Cosmo within seven days of the execution of the agreement. Cosmo paid Newman the sum of \$2,500 two days after the agreement was executed.

On 1 October 2007 Cosmo spoke to Jerry about the will he had made in 2005 and told him exactly what clause 3 of the will said. Cosmo told Jerry that he wanted Jerry to hold the money in the account on trust for another person and that the details of the person for whom the account was to be held on trust were contained in an envelope which was held in safe custody by the bank. He gave Jerry a letter authorising the bank to release the letter to Jerry after his (Cosmo's) death.

On 29 October 2007 Newman telephoned Cosmo and told him that he (Newman) had just received and banked a dividend cheque from Acme Investments in the sum of \$4,000. This was the first dividend that the company had declared since 2005. Newman asked Jerry for instructions as to what to do with the funds. Cosmo told him to hold the money on trust for their mutual friend Elaine, who was experiencing financial difficulties.

On 30 October 2007 Cosmo executed a Memorandum of Transfer in relation to his Torrens title house in Double Bay transferring it by way of gift to his life-long friend Larry. He gave the transfer to Larry and told him that he could collect the certificate of title to the land from his (Cosmo's) solicitor.

On 31 October 2007 Newman telephoned Cosmo and told him that he (Newman) had just finalised all the necessary paperwork by which Newman declared himself to be a bare trustee for Cosmo of his shares in Acme Investments Ltd, explaining that he had done this as a token of appreciation for the kindness Cosmo had displayed towards Newman during their many years as friends. Cosmo expressed his appreciation for what Newman had done, but said he would rather that Elaine had the shares. He then instructed Newman to transfer the shares absolutely to Elaine. Newman said he would attend to all the necessary paperwork when he got back from holidays in the middle of November 2007.

On 1 November 2007, Larry attended the office of Cosmo's solicitor to collect the certificate of title to the Double Bay house. The solicitor told him that he was unable to release the title document without written instructions to that effect from Cosmo.

Larry then went to Cosmo's home to get the written instructions that the solicitor wanted. When he arrived at Cosmo's house he was greeted by Kramer with the news that Cosmo had died earlier that day after suffering a massive heart attack.

On 2 November 2007 Jerry collected the letter relating to the provisions of Clause 3 of Cosmo's will from the Commonwealth Bank. The letter stated that Jerry was to hold the account with the bank on trust for Susan. However, Susan had died the previous day, leaving a will in which she left her entire estate to Newman.

**Kramer, as executor of Cosmo's will, seeks your advice as to who is entitled to:**

**(a) the Commonwealth Bank Ltd account (5 marks);**

This is a secret trust question. The trust is fully secret as there is no mention of it in the will. To be binding the trust must satisfy the three requirements of intention, communication and acceptance: *Ledgerwood v Perpetual Trustee Co Ltd* (1997) 41 NSWLR 532 at 535, per Young J.

There is no controversy that a trust was intended. Further circumstantial evidence could be led if necessary to prove intention on the balance of probabilities: *Voges v Monaghan* (1954) 94 CLR 231.

A problem might arise in relation to communication and acceptance, given that Jerry did not read the instructions until after Cosmo's death. However, it is of no relevance that the terms of the trust were not communicated until after death as long as the obligation is accepted: *Re Boyes* (1884) 26 Ch D 531.

Jerry appears to have accepted the trust through his behaviour. Express acceptance of the obligations are not necessary: *Ottaway v Norman* [1972] Ch 698; [1971] 3 All ER 1325. A valid secret trust has therefore been created.

The secret trust is not part of the will and arise prior to it: *Re Snowden (dec'd)* [1979] Ch 528 The beneficial interest therefore exists in Susan so her death does not effect the trust. Newman will get the account as her beneficiary.

This question was generally answered well. Students generally had a good understanding of the requirements for secret trusts. However, there was some confusion as to the implications of Susan's death for the validity of the trust.

**(b) the National Australia Bank Ltd account (5 marks);**

This is a mere special power of appointment rather than a trust as there is no obligation to exercise the power – 'at his absolute discretion'. Such a power in a will would have offended the rule against delegation of testamentary power (*Tatham v Huxtable*) but is now saved by the Succession Act, s 44. The question is whether it is certain under *McPhail*. It appears to satisfy criterion certainty but it may have some difficulties with administrative workability and be struck down on that basis.

This question was generally dealt with well.

**(c) the \$4,000 received by Newman as dividends (5 marks);**

The contract between Cosmo and Newman to transfer Newman's right to future dividends was valid under the rule in *Holroyd v Marshall* as it was supported by consideration. Newman held the money as a debt to Cosmo. Cosmo's instructions were for a trust to be created. There was no need for writing as this was a declaration of trust of personalty. Section 23 C was not relevant. Elaine's is the beneficial owner.

Most students identified that the right to future dividends was future property. However, few students realised that s 23C may be an issue, and even fewer applied the section correctly.

**(d) the Double Bay house (5 marks); and**

The house was a voluntary gift of legal property. It need to satisfy *Milroy v Lord*. It has not. The CT was never provided as per *Corin v Patton* and as such not everything necessary to be done by Cosmo was done. The house does not go to Larry but ill pass to Newman through the will.

This question was answered well. Students generally have a good understanding of *Milroy v Lord*.

**(e) the shares in Acme Investments Ltd (5 marks).**

Cosmo's interest in the shares is a subsisting equitable interest. However his direction was to pass both the legal and the equitable estate to Elaine. This is not the transfer of a subsisting equitable interest and is not captured by s 23C.

This is not like *Grey v Inland Revenue Commissioners* [1960] AC 1, where only the equitable interest was transferred but rather like *Vandervell v IRC* [1967] 2 AC 291 where the transfer via direction was for the entire estate.

As writing was not required Cosmo's direction was sufficient to pass the interest. Unfortunately, in *Parker & Parker v Ledsham* [1988] WAR 32, at 37, Rowland J held that in such circumstances the direction to the trustee would be revoked by the death of the person making the direction. The transfer therefore fails and the shares will pass to Newman.

This question posed more issues for students than any other on the paper. Few identified that s 23C was an issue, and even fewer identified *Vandervell v IRC* [1967] 2 AC 291 as being the relevant precedent.

#### **QUESTION 4**

This question occurs in NSW. Peter was a wealthy businessman who spent his time investing in small businesses and helping them to turn a profit. He was in a long term

de facto relationship with Denise. Peter also has a son named Cameron, who was of school age. Cameron was not Denise's son but had been the product of Peter's earlier marriage to Lisa. Cameron lived with Lisa.

When they had decided to live together Denise and Peter and bought a house at 25 Waterloo Rd, North Ryde. Peter didn't want to put the house in his name (to avoid problems with child maintenance to Lisa) so while Peter paid 60% of the purchase price out of his own funds, the property was put 100% in Denise's name on the Torrens register. Denise paid for her 40% by getting a mortgage in her name. She also paid \$20,000 for the legal fees and stamp duty. After they bought the house neither Peter nor Denise did any improvements.

In an effort to save for Cameron's future, Peter opened a bank account in Cameron's name and made regular contributions to it. Peter also bought an investment property in his and Cameron's names in Penrith. They were registered as joint tenants.

Peter was asked to invest in a small business called 'Hay-Ted Corporation' run by his friend Lawrence. Lawrence had got the company to declare a dividend to its shareholders but had found the company without the cash to pay the dividend. Peter agreed to loan the money to Lawrence and set out the conditions of the loan in a letter which stated:

This sum is lent to you on the following conditions:

- (a) It is repayable on demand,
- (b) It will bear interest until repayment of 10% per annum, and,
- (c) It is to be used only for the purposes of paying the outstanding dividends owed to shareholders.

The sum of money was deposited in an account to which Lawrence was a signatory. The account was called the 'Hay-Ted Corporation creditor a/c'.

Peter died from a melanoma. His will made the following disposition:

1. I give \$750,000 to Denise to hold on trust for the relief of my poor relatives;
2. I give my interest in the house of 25 Waterloo Rd to Cameron.

Apart from those dispositions, Peter left all his property to Denise. At the time of his death Denise was a millionairess and Lisa and Cameron lived a modest life. Peter was also survived by a second cousin, Bryan, who was destitute. Denise detested him. To make matters worse Hay-Ted Corporation went into liquidation, but the money for shareholders was still being held in the account.

### **Answer the following**

- (a) **Does Denise have the right to claim the monies in the bank account? (5 marks);**

No she doesn't. This is a resulting trust question. Resulting trusts can be applied to bank accounts: *Russell v Scott*. Even though Cameron made no contributions there is a presumption of advancement which counteracts the presumption of resulting trust in Colin's favour: *Scott v Pauly* (1917) 24 CLR 274. As such Cameron gets to keep the half in his name.

He may also get to keep the other half if the account was held in a joint tenancy (due to the right of survivorship). But in absence of knowledge it would be presumed to be held in tenancy in common as per s 26 of the Conveyancing Act.

This question was generally answered well.

**(b) Does Denise have the right to claim on the investment property at Penrith? (5 marks);**

No she doesn't. This is a resulting trust question like the previous one except it relates to land. The rules are the same: *Napier v Public Trustee (WA)* Advancement applies. Here they are definitely registered as joint tenants so Cameron would keep the property.

This question was generally answered well. However, there was some confusion regarding the differences between joint tenants and tenants in common.

**(b) Can Denise try to get control of the funds in the Hay-Ted Corporation creditor a/c? (5 marks);**

This is a Quistclose trust question. This question is obviously based on Quistclose and deals with the debt-trust distinction. The loan has an initial purpose which fails hence the initial trust for the creditors fails. A secondary trust is created with the funds being held on trust for Colin. The bank holds this money on trust and the funds should not be made available to the trustee in bankruptcy.

Interestingly the courts have not found that the primary trust gives the right to the creditors. If the Quistclose trust is meant to be an express trust with two limbs then why don't the creditors get it? Lord Millet's solution in *Twinsectra* is to call the trust a resulting trust but this has been rejected by the NSW Court of Appeal in *Salvo v New Tel Ltd* - they call it an express trust for a purpose which reverts back on failure of the purpose.

This question was generally very well answered. Most students understood the nature and operation of a Quistclose trust. However, some students failed to analyse the facts of the question, merely reciting the law instead.

**(c) Can Denise challenge the validity of the gift to Peter's poor relatives? (5 marks)**

This gift could be attacked as an express trust because it lacks certainty. Its not clear who the relatives are. Its possible that the courts could find that there is enough

evidence to satisfy criterion certainty as per *McPhail v Doulton* where 'relatives' was found to be certain.

Alternatively it could be viewed as a charitable trust for the relief of poverty. There is no need for certainty of object as long as there is a general charitable purpose. Charitable trusts for poverty are not subject to the Compton test of public benefit: *Dingle v Turner* [1972] AC 601. Trusts for poor relations were said to be charitable in *Re Scarisbrick's Will Trusts* [1951] 1 Ch 622.

The main difficulty in such situations is determining whether the trust is a charitable trust or an express trust for identifiable beneficiaries. The determination rests on the intention of the testator as evidenced in the wording of the trust: *Re Segelman (dec'd)* [1996] Ch 17; [1995] 3 All ER 676.

Students generally answered only one half of this question – they either analysed the trust as a charitable trust or as an express trust, but not both. However, students generally dealt well with the half they chose to answer.

**(e) Does Denise get to keep the house at 25 Waterloo Rd, given that it is held in her name? (5 marks)**

No – she gets to keep her proportionate share. This is a resulting trust based on unequal contribution to purchase price which is not recognised in the legal title: *Neilson v Letch (No 2)* [2006] NSWCA 254. There is no presumption of advancement as they are in a de facto relationship: *Calverly v Green*. Additionally there is no presumption of joint tenancy as they are not married. Married partners will be presumed to be sharing their matrimonial abode as joint tenants: *Trustees of the Property of Cummins (a bankrupt) v Cummins* [2006] HCA 6; *Perpetual Trustees Victoria Limited v Peter Van den Heuvel No 2* [2009] NSWSC 483.

As for the split Denise's contribution from mortgage liability is recognised: *Ku v You* [2008] NSWSC 712, as will be her other contributions to costs of acquiring the property.

This question was generally very well answered.