

LEGAL PROFESSION ADMISSION BOARD

MARCH 2009

EQUITY

TIME: Three Hours

This paper is in two parts: **PART A** and **PART B**.

Candidates are required to attempt **FOUR** questions in total, **ONE** question from **Part A** and **THREE** questions from **Part B**.

No question is compulsory.

All questions are of equal value.

If a candidate answers more than the specified number of questions, only the **first** question attempted from **Part A** and the first **three** questions attempted from **Part B** will be marked.

All questions may be answered in one examination booklet.

Each page of each answer must be numbered with the appropriate question number.

Candidates must indicate which questions they have answered on the front cover of the first examination booklet.

Candidates must write their answers clearly. Lack of legibility may lead to a delay in the candidate's results being given.

Permitted Material:

This is an open book exam. Candidates may refer to any books and any printed or handwritten material they have brought with them.

As some instances of cheating and of bringing unauthorised material into the examination room have come to the attention of the Admission Board, candidates are warned that such conduct will result in instant expulsion from the examination and may result in exclusion from all further examinations.

This examination should not be relied on as a guide to the form or content of future examinations in this subject.

Part A

Candidates must attempt ONE question from this Part.

Question 1

In his dissenting judgment in *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10 Mason P stated at [224]:

Courts have traditionally been bold in such areas, equity particularly so. Equity has always claimed to have the capacity to fashion and mould its remedies to meet the needs of the case. Within its auxiliary jurisdiction, equity intervenes because of the deficiencies and inadequacies of the common law. Why should equity turn coy in its exclusive jurisdiction? Equity is usually noted for its flexibility and boldness, not its timidity. If it is accepted, as I think it must, that the stripping of profits will (on occasions) represent an inadequate means of enforcing common decency, why should equity stand proudly apart from the common law in withholding the discretionary remedy of exemplary damages in an otherwise appropriate case? (references omitted)

Do you think that Equity should be able to expand its remedial range by including common law remedies like exemplary damages? Discuss with reference to caselaw.

(25 marks)

Question 2

- (a) Discuss the effects of the judgment of the High Court in *Farah Constructions Pty Limited v Say-Dee Pty Limited* [2007] HCA 22, and its effects on the operation of the rule in *Barnes v Addy* (1874) LR 9 Ch App 244 in the Torrens system of land ownership.
- (b) To what extent did the decision in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* effect the UK courts approaches to knowing receipt as exemplified in case like *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 and *Twinsectra Ltd v Yardley* [2002] 2 AC 164?

(Question 3 Part B follows)

PART B

Candidates must attempt THREE questions from this Part.

Question 3

The facts of this question are set in NSW. Dawn was a wealthy industrialist that made her money from inventing castor wheels. Her two main assets were the royalties from two companies (Northcoate Enterprises and Southcoate Industries) that she received for her inventions and a bank account worth \$25 million at the Universal Bank.

Dawn discovered she had motor neurone disease and had a very short life expectancy. She decided to make a gift of her royalties from the two companies in a voluntary deed. The gifts read:

‘My contractual right to receive royalties from Northcoate Enterprises I give to my husband Maxwell. Half of the future royalties from Southcoate Industries to go to my brother Ted.’

When Dawn died her will set out that all her assets should be held on trust by Maxwell for three discretionary beneficiaries. They were her children Christopher (aged 25), Andrew (aged 21), and Kerrie (aged 17). The Trust provided that Maxwell would have the discretion to pay income each year to the beneficiaries from the interest earned on the account. Maxwell was obliged in the trust deed to distribute all the income every year but he could choose to whom it was distributed. The Trust also gave Maxwell the widest powers to invest the money as he saw fit to get the best return.

After a short time the children became unhappy with Maxwell’s management of the trust. This dispute began when Maxwell took some of the money from the account to reimburse himself for costs spent in getting advice about how to invest the trust funds properly.

The children were also angry at Maxwell’s decision to leave the money with the Universal Bank. The beneficiaries objected to this, as the Universal Bank was responsible for environmental degradation in Western Australia. The beneficiaries preferred the funds to be invested with the Environmental Bank (which has strict environmental policies), even though this would mean that there would be less return on the investment.

Maxwell was worried that the beneficiaries were going to call on him to distribute all the funds and terminate the trust. He was unsure of whether the beneficiaries had the power to make that decision. He was also worried that they were going to sue him for the reimbursement monies or force him to invest in the Environmental Bank.

(Question 3 Part B continues)

(Question 3 Part B continued)

- (a) Were the gifts in the voluntary deed effective?
(7 marks)**
- (b) Did Maxwell breach trust reimbursing himself from the funds?
(6 marks)**
- (c) Can the beneficiaries force him to change investment strategies?
(6 marks)**
- (d) Can the beneficiaries terminate the trust?
(6 marks)**

(25 marks)

Question 4

The facts in this question occur in NSW. David and Anthony were brothers. They purchased a house together with each providing 50% of the purchase price but David did not want the house to be in his name because he wanted to later access a government scheme for ex-servicemen where they could borrow money off the government for their first house at a cheap rate. David had fought in the Vietnam War with the 6th Battalion. The house was registered in Anthony's name.

David later won the lottery and with the money decided that he would like to provide for his family and friends. He wrote a will which contained the following clauses:

I give \$500,000 to my brother Anthony, on conditions of which he will be made aware.

I give another \$2,000,000 to Anthony which should be used by him for the absolute benefit of the surviving members of D Company 6th Battalion, Royal Australian Regiment, with whom I served in the Vietnam War, their families and their dependents.

I give the residue of my estate to my sister Tracey who may, at her absolute discretion, give such residue to anyone she thinks fit, barring herself, and Anthony. If Tracey fails to dispose of the residue in her lifetime, it shall become the property of my nephews, Kye, Mitchell and Jordan.

Three days after writing the will David gave a letter to Anthony and asked him to follow the instructions in the letter, but only after he died. Anthony agreed with a wink and wry smile.

David died three months later in a motorcycle accident. Anthony opened the letter and found that it instructed him to track down his illegitimate son, Tom, who was born in Vietnam during David's service, and give the \$500,000 gift to him.

(Question 4 Part B continues)

(Question 4 Part B continued)

- (a) Does David's estate have a claim on the house?
(5 marks)**
- (b) Is the disposition to the members of D Company, their families and dependants effective?
(5 marks)**
- (c) Of what kind is the disposition to Tracey and is it effective?
(5 marks)**
- (d) Will the gift to Tom be effective?
(5 marks)**

(25 marks)

Question 5

Rowena is a prominent real estate agent in Campbelltown. Silvester is a developer who has plans approved by the local council to build a block of four town-houses on one of the few parcels of land in Campbelltown zoned for such purposes. Due to a cash-flow problem, Silvester decided to sell two of the town-houses "off the plan" before construction had commenced. Silvester engaged Rowena to find buyers for these two town-houses. After discussions between Rowena and Silvester on the question of a sale price, a figure of \$150,000 per town-house was agreed.

Rowena advertised the sale in the local press and was approached by Zelda. Zelda, who had only \$150,000 to invest, was interested in purchasing one town-house, but only if the town-house was likely to appreciate by at least 25% by the time it was actually built. Zelda instructed Rowena to make enquiries along these lines. Rowena discovered that once completed, the town-houses would each fetch \$225,000. She further discovered that \$170,000 each was the then current market value of the proposed town-houses. Rowena advised Zelda of the results of her enquiries, and Zelda immediately contracted to buy one town-house for \$150,000.

Rowena, with Zelda's consent, also contacted an old friend Walter. Walter is a retired politician who was seeking to invest his superannuation payout. He had asked Rowena to keep an eye open for a "good deal" if one came along. Rowena told Walter:

'I have a town-house for sale "off the plan" for \$150,000, which by the time it is built will fetch \$225,000 on the open market.'

Walter immediately contracted to purchase the second town-house from Silvester.

(Question 5 Part B continues)

(Question 5 Part B continued)

Rowena did not at any time inform Silvester of the information she discovered as a result of the enquiries pursued on behalf of Zelda.

Contracts for both sales were completed a few days after Silvester completed the building of the town-houses. Silvester has now discovered everything that happened and feels terribly cheated.

- (a) Define what a 'fiduciary relationship' is.
(7 marks)**
- (b) Who owes fiduciary relationships in this question and to whom? Why?
(6 marks)**
- (c) Has Silvester any claim and/or remedy in equity for what Rowena has done?
(12 marks)**

(25 marks)

Question 6

The facts in this question occur in NSW. Colin was a busy industrialist who was involved in refinancing of small to medium sized businesses. He was in a de facto relationship with Belinda, who also ran her own finance business. They had bought a house together 5 years ago but the house had been put into Belinda's name solely as Colin was worried about what would happen if he ever went bankrupt. Colin had provided 50% of the purchase price. Colin and Belinda never made any capital contributions and were able to buy the house without borrowing, so there was no mortgage to pay off.

Colin also had a son named Roger, who was of school age. Roger's mum, Loane, had been a former girlfriend of Colin's but they were no longer romantically involved. Belinda did not know that Roger was Colin's son.

In an effort to save for Roger's future, Colin opened a joint bank account in his and Roger's names and made regular contributions to it. Belinda did not know about the account.

(Question 6 Part B continues)

(Question 6 Part B continued)

Colin died on the 1 January 2005, from a recurring cancer that he fought for many years. One month before he died he made a loan of \$100,000 to Gilbert, a newsagent who ran a newsagency at Windang. The purpose of the loan was set out in a letter to Gilbert which read:

This sum is lent to you on the following conditions:

- (i) It is repayable on demand,
- (ii) It will bear interest until repayment of 10% per annum, and,
- (iii) It is to be used only for the purposes of discharging your indebtedness to your two largest creditors.

The sum of money was deposited in an account to which Gilbert was a signatory. The account was called the 'Gilbert creditor trust a/c'.

When Colin died his will appointed Don (his best mate who knew about Roger) as executor and trustee. The will stated that Colin's share in the house should go to Roger. It left everything else to Belinda. When Belinda confronted Don about the will, Don told her about Colin being Roger's father. She was extremely upset. She became enraged when she discovered the bank account Colin had set up for Roger's future.

- (a) Does Belinda have the right to inherit the entire Bank account in Colin's and Roger's names?
(8 marks)**
- (b) Did Colin have any interest in the house and can Belinda challenge the disposition of Colin's share in the house to Roger?
(7 marks)**
- (c) After Colin's death Gilbert was bankrupted. The funds were still in the bank account. Will Belinda (as the beneficiary of Colin's will), Gilbert's two largest creditors, or Gilbert's trustee in bankruptcy get the money?
(10 marks)**

(25 marks)

END OF PAPER