

LEGAL PROFESSION ADMISSION BOARD

SEPTEMBER 2008

EQUITY

TIME: Three Hours.

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

Candidates are required to attempt FOUR questions: Candidates must attempt ONE question from Part A and THREE questions from Part B for a total of **four** questions.

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.

No question is compulsory.

All questions are of equal value.

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

Candidates must indicate which questions they have answered on the 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 a closed book exam. No materials are permitted in the examination room.

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.

(25 Marks)

Although various Australian courts have applied the *Royal Brunei Airlines* case (for example, *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1; *Humphris v Jenshol* (1998) 160 ALR 107; *Duke Group Ltd v Pilmer* (1999) 73 SASR 64), the High Court of Australia has not yet had the opportunity to consider it. However, in my opinion those principles are generally consistent with the High Court's judgment in the *Consul Development* case. Indeed, the Privy Council in *Royal Brunei Airlines* treated the *Consul Development* case as broadly in line with the dishonesty test which their Lordships enunciated (at 388). The singular contribution of the *Royal Brunei Airlines* case to the development of law is that their Lordships treat the accessory's liability as dependent on dishonesty rather than knowledge, and therefore consign to legal history the numerous cases that had identified increasingly refined sub-categories of actual and constructive knowledge. The High Court did not take that step in *Consul Development*, but by adopting a narrow view of 'knowledge', the practical effect of which is similar to a test of dishonesty, they paved the way for that step to be taken. It is therefore clear, in my opinion, that the *Royal Brunei Airlines* case is a statement of the modern Australian law.

Aequitas v AEFC [2001] NSWSC 14 at [392] (9 April 2001) Austin J

Discuss this statement of principle.

Can the approach taken by the appellate courts in England on the question of the liability of third parties for knowing assistance still be reconciled with the law in Australia?

Question 2.

(25 Marks)

Unconscionability or unconscionable conduct provide the basis for equitable intervention in a wide range of cases. But there is no concise judicial statement of what amounts to "unconscionability".

Discuss this statement.

With reference to decided cases attempt to explain what is meant by the expressions "unconscionability" and "unconscionable conduct".

(PART B follows)

PART B

Candidates must attempt THREE questions from this Part.

Question 3.

(25 Marks)

Edward Edsel, having reached the age of 81, decided to give away some of his assets, while he still had capacity to do so.

Edward was the registered proprietor of "Bushacre", a block a vacant rural land about 30 km south of Oberon. Edward decided to give Bushacre to his nephew, Frank Dull. Edward went to see his solicitor, George Garish, in Bathurst. He told George what he wanted to do with Bushacre. George prepared a document entitled "Authority and Direction" which Edward signed. The document said, "I, Edward Edsel, hereby authorise and direct George Garish to do all things necessary to effect the transfer of Bushacre to my nephew Frank Dull".

George also prepared a transfer of Bushacre which Edward signed. Bushacre was unencumbered and George held the duplicate certificate of title on Edward's behalf.

George contacted Frank Dull and asked him if he had a solicitor. Frank said his solicitor was Harry Hasty, of Hasty, Hasty & FASTER of Parramatta. George sent the transfer signed by Edward to Harry Hasty. George then sent the duplicate certificate of title to his Sydney Agent, Ian Single, of Single & Restless, solicitors whose office was in Sydney, with a covering letter instructing Single to hand the title deed to a representative of Hasty, Hasty & FASTER for registration of the transfer in favour of Frank Dull.

Edward was also registered proprietor of "Beachacre", a unit at Ocean Shores on the New South Wales north coast. Beachacre was subject to a mortgage in favour of FatBank Limited which, of course, held the duplicate certificate of title. Beachacre was managed as a holiday rental unit by Ocean Realty Pty Limited and the rental applied to pay the moneys due on the mortgage.

Edward decided to give Beachacre to his niece Janis Juniper. He told George Garish about this and asked George to prepare a transfer to Janis. When the transfer was ready, George phoned Edward and told him. Edward then collected the transfer from George, signing it first and having his signature witnessed by George. He then took it with him and gave it to Janis when he visited her at her home on the Gold Coast two days later.

Edward also owned a parcel of 20,000 shares in National Australia Bank Limited (NAB). He decided to give those shares to his niece Katy Kat. Edward held the share certificate for the NAB shares. The share certificate had a form of transfer printed on the reverse side. Edward filled that out with the details of the shares and the transfer and signed it. Edward then posted the share certificate to his sister, Lois Kat, Katy's mother, with a covering letter saying, "Here are some shares that I want Katy to have. Please give this certificate to her when she returns from overseas". Lois Kat received the letter five days later.

(Question 3 continues)

(Question 3 continued)

Two days later, during which time nothing further happened than has been described on each of these transactions, Edward was killed in a car accident while driving back from the Gold Coast. Edward's widow, Maureen, is named as executor of Edward's will.

Advise Maureen as to whether Bushacre, Beachacre and/or the 20,000 NAB shares form part of Edward's estate.

Question 4.

(25 Marks)

Derek Steak died on 30 May 2008. In his will dated 30 June 2002 Derek appointed his widow, his second wife, Erica Steak as his executor. Derek left the whole of his estate in equal shares to his two daughters, Frieda Cutlet and Giselle Shank. In Derek's papers Erica Steak came across documents from Derek's divorce proceedings including an affidavit sworn by Derek in June 1988 in Family Court property proceedings. In that affidavit Derek stated as follows:

- "4. The unit at 4/110 Butcher Street, Ashfield which is in my name is held on trust by me for my parents, Albert Steak and Doris Steak.
7. The unit at 4/110 Butcher Street, Ashfield was purchased, as 80% of the purchase cost, with money provided to me by my father, Albert Steak, and, as to the balance, by me."

Searches show that the Butcher Street unit was purchased in 1977 in the name of Derek Steak for \$55,000. There was no mortgage on the property. Derek's mother and father, Albert Steak and Doris Steak lived in the unit from shortly after it was purchased. Albert Steak died in 1982. There is no record of him leaving a will nor is there any record of any grant of probate or letters of administration of his estate.

Doris Steak continued to live in the unit until 1995 when she moved out to live, at first, with Derek's sister, Hannah Rib. In 2000 Doris Steak was diagnosed with dementia. She moved into a nursing home in 2002 and died in 2004. Hannah Rib says that in that time Doris never said anything to suggest she believed she had any interest in or ownership of the Butcher Street unit. Doris Steak did not leave a will nor did she leave any property apart from personal possessions.

After Doris Steak moved out of the Butcher Street unit the unit was rented and all of the rent was paid to Derek.

Derek suffered a mild stroke in 1999. Following that Derek sold his business and retired from work (he had carried on a business as a butcher operating 3 shops in western Sydney). Shortly after that Derek sold the Butcher Street unit (in late 1999) as well as his own home at Parramatta and moved to the Central Coast. Derek kept all the proceeds of sale of the Butcher Street unit, investing some of the money in a new home at Terrigal.

(Question 4 continues)

(Question 4 continued)

Derek had made an earlier will, in 1993, in which he left the residue of his estate to his two daughters, Frieda and Giselle, in equal shares. However, in that will Derek gave a direction to his nominated executor, in that case the Public Trustee, that his mother Doris Steak was to be permitted to continue to live in the Butcher Street unit during her lifetime or for so long as she desired to live there.

Derek's brother, Stanley Steak has learnt about Derek's Family Law papers. A solicitor has written to Erica Steak, as executor of Derek's estate, advising that he acts for Stanley Steak and that his client proposes to apply for letters of administration of the Estate of Doris Steak and to bring a claim to enforce the trust stated in Derek's affidavit of 1988, unless Erica agrees otherwise to recognize and uphold that trust. (In the event that such a trust was upheld the beneficiaries would be Doris Steak's next of kin - Stanley Steak, as to one third, Hannah Rib, as to one third and Frieda and Giselle as to one sixth each).

Erica Steak seeks your advice as to whether the trust referred to in Derek's 1988 affidavit is valid and enforceable.

(In answering this question students are not required to consider any equitable defences such as laches and acquiescence.)

(Question 5 follows)

Question 5.**(25 Marks)**

Brian Bean died on 10 May 2008 leaving a will made in June 1998 that included the following specific bequests:

6. I GIVE my house "Wattle Trees" at Bowral to Catholic Care, the Catholic Church care organization, for use as a home for the aged.
7. I GIVE the sum of \$100,000 to the St George District Netball Association for the promotion of the sport of netball in that District.
8. I GIVE the sum of \$100,000 to the Blue Mountains City Council to assist in the maintenance and improvement of the Wentworth Falls Cemetery, including the restoration and maintenance of the many historic graves there.
9. I GIVE the sum of \$300,000 to the Commander in Chief of the Australian Armed Forces for the purpose of training members of the Australian Army in marksmanship and sniping and for the purpose of a prize, of \$10,000, for an annual competition in sniping and marksmanship open to members of the Australian Armed Forces and to Australian citizens generally.

Bean left the residue of his estate to his nephew, Russell Sprout. Bean appointed his solicitor, Chester Carrot as his executor.

An officer of Catholic Care has advised that "Wattle Trees" is not suitable for use as a home for the aged because it does not meet Commonwealth standards for such homes in a number of respects and the cost of renovations to the property to satisfy accreditation standards could not be justified. The same officer has also advised that Catholic Care operates another home for the aged in the Southern Highlands, the Holy St Therese Home for the Perpetually Perplexed at Moss Vale which does meet Commonwealth accreditation requirements.

The St George District Netball Association is an unincorporated association that administers netball in the St George District including managing a club competition with teams from ages 10 to open adult in competition.

In accordance with his wishes expressed elsewhere in his will Barry Bean was buried in the Wentworth Falls cemetery, the resting place of his maternal grandparents.

To "snipe" is defined in the Australian Concise Oxford Dictionary as "to fire shots from hiding at long range into an enemy camp or at individuals" and "sniper" is defined as "marksman who snipes at enemy troops".

Russell Sprout has notified Chester Carrot that he considers these four gifts in his uncle's will to be challengeable.

Chester Carrot seeks your advice as to the validity of these gifts. In that advice you should also give any advice you consider may be necessary as to how these gifts might be brought into effect.

(Question 6 follows)

Question 6.

(25 Marks)

Ron Renault and Pete Peugeot carried on a business selling packaged home loan and insurance products. They carried this business on through a company, OneStop Pty Limited. The shares in OneStop were held, as to 50% by RenO Pty Limited and, as to the other 50% by PeugO Pty Limited.

RenO Pty Limited was the trustee of the Renault Family Trust, a discretionary trust of which the objects were, effectively, members of Ron Renault's family. The directors of OneStop Pty Limited were Ron Renault and Pete Peugeot. The sole director of RenO Pty Limited was Ron Renault.

Renault and Peugeot, in conducting the OneStop business, offered franchises in which franchisees were permitted to offer the OneStop range of products.

In December 2007 a group of franchisees obtained judgment in the sum of \$1,800,000, plus costs, against OneStop Pty Limited, Ron Renault, Pete Peugeot, RenO Pty Limited and PeugO Pty Limited for misleading and deceptive conduct in breach of s 52 of the Trade Practices Act on the grounds that misleading representations had been made as to:

- (a) the likely volume of business for franchisees;
- (b) the margins that could be obtained on the sale of OneStop products;
- (c) the geographical areas which would be preserved for each franchisee.

While the judge found there was misleading and deceptive conduct, he did not find that there was any fraud.

After judgment was handed down Ron Renault, exercising his power as appointor of the Renault Family Trust, removed RenO Pty Limited as Trustee and appointed DeepMerde Pty Limited as Trustee. The assets of the Renault Family Trust include Greenacre and Blueacre, two factory premises at Tempe.

Since then both Ron Renault and Pete Peugeot have gone into bankruptcy.

Your advice has been sought by the franchisees as to whether any action might be available to recover the damages awarded in the Trade Practices action from those assets: Greenacre and Blueacre.

- END OF PAPER -