

# LEGAL PROFESSION ADMISSION BOARD

SEPTEMBER 2009

## EQUITY

**Time: Three Hours**

This paper consists of **four** questions.

Candidates are required to attempt **all** questions.

All questions are of equal value.

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 Materials:**

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

## **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 Ltd". After a few months, Adrian realised that the business needed a more charismatic financial backer, as Bobby's appearance and general 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 Ltd". 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.

- (a) Discuss whether Bobby could bring an action against Adrian in undue influence.**

**(10 marks)**

- (b) Discuss whether Bobby could bring an action against Adrian for breach of fiduciary duty.**

**(10 marks)**

- (c) Discuss:**

- (i) What remedy Bobby should seek against Adrian; and**  
**(ii) What remedy the court is likely to grant if Bobby is successful.**

**(5 marks)**

**(25 marks)**

**(Question 2 follows)**

## 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 Ltd” – 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.

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

**(12.5 marks)**

- (b) Discuss whether Darren could bring an action against Egan in equitable estoppel. Include a discussion of:**
- (i) What remedy Darren should seek against Egan; and**
  - (ii) What remedy the court is likely to grant if Darren is successful.**

**(12.5 marks)**

**(25 marks)**

**(Question 3 follows)**

### 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.

**(Question 3 continues)**

**(Question 3 continued)**

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)**

**(b) The National Australia Bank Ltd account;**

**(5 marks)**

**(c) The \$4,000 received by Newman as dividends;**

**(5 marks)**

**(d) The Double Bay house; and**

**(5 marks)**

**(e) The shares in Acme Investments Ltd.**

**(5 marks)**

**(25 marks)**

**(Question 4 follows)**

#### 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 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:

- (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 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:

- (i) I give \$750,000 to Denise to hold on trust for the relief of my poor relatives;
- (ii) 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.

**(Question 4 continues)**

**(Question 4 continued)**

**Answer the following:**

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

**(5 marks)**

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

**(5 marks)**

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

**(5 marks)**

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

**(5 marks)**

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

**(5 marks)**

**(25 marks)**

**END OF PAPER**