

LEGAL PROFESSION ADMISSION BOARD

SEPTEMBER 2008

LAW OF ASSOCIATIONS

TIME: Three Hours.

The paper consists of **seven** questions.

Candidates are required to attempt any **five** questions.

No question is compulsory.

All questions are of equal value.

If a candidate answers more than the specified number of questions, **only** the first **five** questions attempted 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 materials 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.

Acme Data Pty Limited (the “**company**”) carries on business as a computer data service provider. There are four shareholders in the company who hold the following number of shares: Christine has six ordinary shares. Angela has three ordinary shares. Robert and Julian have one ordinary share each. At the time that each member acquired shares in the company it was understood that they would each be equally involved in the management of the company. Christine, Angela, Robert and Julian are also the company’s only directors.

Unfortunately from the time the company commenced operation, Christine began conducting the business of the company as if it were her own. Christine ignores the requests made by the other shareholder/directors and refuses to conduct meetings when requested and when meetings are eventually held Christine refuses to consider any proposed resolution by the other directors/shareholders. In addition, Christine pays herself a very high remuneration for consulting work she says she does for the company. The other director/shareholders regard this remuneration as excessive and not commensurate with the work she does or the skill that she possesses.

In addition, Christine refuses to approve the payment of dividends despite company profits being available to pay such dividends. This has had the effect that neither Angela, Robert and Julian have received any profit distribution from the company.

Advise Angela, Robert and Julian whether they can bring any personal action against Christine and, if so, what orders would you advise them to seek.

Question 2.

Mr and Mrs Windsor were the directors and only shareholders of Boot Straps Pty Ltd (“**Boot Straps**”). Mr Windsor was the managing director and had the de facto control of the conduct of Boot Strap's business. Boot Straps had one major asset, that being a home unit on the Gold Coast which was used by Mr and Mrs Windsor as their family home (the “**Property**”).

Subsequently Mr Windsor arranged a loan to himself from the Forward Bank (the “**Bank**”). As security for the loan, the Bank required a mortgage over the Property. In his discussions with the Bank, Mr Windsor indicated that the loan was for investment purposes and that Boot Straps was his investment company. The Bank did not know or make inquiries as to the connection between the loan and the business carried on by Boot Straps.

Mortgage documents were subsequently prepared by the Bank and were executed in two different places by Mr Windsor purporting to act on behalf of Boot Straps. On page seven of the mortgage document the common seal of Boot Straps was affixed together with the signature of Mr Windsor and the forged signature of Mrs Windsor. In addition, the signatures were not accompanied by any description of each person's role in Boot Straps. On page 15 of the mortgage document Mrs Windsor's signature was again forged by Mr Windsor together with the word "secretary" appearing under this forged signature. Searches conducted by the Bank had indicated that Mr and Mrs Windsor were both directors of Boot Straps but that Mrs Windsor was not recorded as the secretary of Boot Straps.

(Question 2 continues)

(Question 2 continued)

The loan funds were subsequently released and were used for Mr Windsor's personal affairs as well as the business dealings of Boot Straps. After default under the mortgage, the Bank sought possession of the Property. Mrs Windsor argued that as her signature on the mortgage was a forgery and that she was not secretary of Boot Straps, the mortgage was void and unenforceable.

Advise Mrs Windsor.

Question 3.

The Edge Marketing Company Pty Limited (in liq) (the “**company**”) was wound up in December 2007. Mr Burke and Mr McLeod were the company’s directors at the time the company was wound up. The liquidator now seeks to recover from Mr Burke and Mr McLeod the sum of five hundred thousand dollars being the amount which corresponds with the total of some debts incurred by the company between 2006 and 2007. The liquidator alleges that when each of the debts were incurred the company was insolvent and that there were reasonable grounds for suspecting that the company was then insolvent.

Both Mr Burke and Mr McLeod allege that they had reasonable grounds to expect that the company was solvent at the relevant time and that it would have remained solvent even if the company had incurred those debts and any other debts at that time. In support of this contention Mr Burke and Mr McLeod state that throughout the relevant period they were able to conduct the financial affairs of the company on the basis that most creditors would not have pressed for payment and that there was an understanding that creditors would not take recovery action against the company provided that the company paid within a reasonable time after thirty days.

Advise Mr Burke and Mr McLeod of their prospects of resisting the liquidator’s action.

Question 4.

Bob joins The Kangaroo Shooters’ Association, an unincorporated association (the “**association**”). He pays a joining fee of \$150.00 and an annual subscription fee of \$100.00. He is then given a copy of the constitution for the association.

The committee for the association comprises of three persons; Chuck, Ted and Bernie. The committee has just executed a lease “as committee persons for and on behalf of The Kangaroo Shooters’ Association” (the “**lease**”). The lease is for a hall in Nyngan where all the administrative activities of the association are conducted. The term of the lease is for 3 years.

(Question 4 continues)

(Question 4 continued)

One year after commencement of the lease, Quentin, Brendan and Patrick are appointed as committee members to the association replacing Chuck, Ted and Bernie. Brendan, who has an interest in Pig shooting, believes that there is no need to lease a hall. He convinces Patrick that the association ought to move out the existing leased premises. Patrick agrees. Quentin is unaware of Brendan and Patrick's actions. Shortly thereafter, Brendan and Patrick give notice of intention to quit to the landlord of the Nyngan premises.

Advise the owner of the Nyngan premises whether they have a cause of action and, if so, against whom.

Question 5.

Peter and Jason are musicians. Peter is a guitarist. Jason plays drums. In the period 2001 to 2005, they were both members of a band known as "*Thunderstruck – The Band*" which was a band emulating AC/DC. The band also included Stephen Springstein and David Dylan.

"*Thunderstruck – The Band*" performed at venues in various parts of Sydney, principally hotels and clubs in the western parts of the metropolitan area. The profits were split evenly between the four band members. Each of the band members contributed \$50,000.00 to the purchase of musical and sound equipment as well as a bus that they used for touring between venues. Stephen Springstein was the lead vocalist and also the spokesman for the band but it was agreed that all decisions relating to the band and its management had to be made jointly.

In March 2005 Peter and Jason agreed with Big Band Entertainments that "*Thunderstruck – The Band*" would perform in the Domain as the lead support act for "*Met al icca*", a Spanish rock band. It was a requirement stipulated by Big Band Entertainments that "*Thunderstruck – The Band*" should use the latest and best musical instruments and sound equipment which gave the highest quality sound and volume. It was a requirement stipulated by Big Band Entertainments that all publicity involving this particular concert be approved by Big Band Entertainments. As a consequence Peter and Jason bought new musical instruments and acoustic gear on credit from a musical supplier. The cost of such instruments was \$100,000.00. Stephen Springstein and David Dylan were unaware of these purchases.

Unfortunately the Domain concert was cancelled due to lack of interest. **The musical supplier seeks your advice as to whom it can sue for breach of contract. Give reasons for your answers.**

(Question 6 follows)

Question 6.

Mitchell and Andrew are the two Directors of Kids' Books Ltd, a company which publishes children's books. Of the 6000 issued shares in Kids' Books Ltd, Mitchell and Andrew each hold 1,500 of the company's shares whilst another 2,000 shares are held by Ace Publishing Ltd and the remaining 1,000 shares are widely held.

The constitution of Kids' Books Ltd empowers the Directors to issue further shares. Relying on this power, the Directors decided during a board meeting to allot 2,000 shares to World Children's Literature Ltd, a company which hitherto had not held any shares in Kids' Books Ltd. Mitchell and Andrew were the major shareholders in World Children's Literature Ltd – a factor they never disclosed to representatives of Ace Publishing Ltd or to the other shareholders of Kids' Books Ltd.

Ace Publishing Ltd has now commenced proceedings in the Supreme Court seeking declarations that Mitchell and Andrew have breached numerous duties owed to Kids' Books Ltd including their duty of care and diligence and their duty to act honestly. They also allege there has been improper use of position, a conflict of interest and that Mitchell and Andrew have not acted for a proper purpose.

Ace Publishing Ltd argues that the real purpose of the allotment was to prevent it from obtaining control of Kids' Books Ltd. In reply, Mitchell and Andrew assert that their decision was based upon the best interests of the company and that the additional capital will give the company access to greater funds. They also argue that Ace Publishing Ltd has no standing to commence proceedings alleging such breaches of duty.

Discuss the merits of these arguments and whether any defences are available to Mitchell and Andrew.

(Question 7 follows)

Question 7.

Renee, a director and shareholder of National Network Pty Ltd ("**National Network**"), wants to seek leave of the Court pursuant to section 237(1) of *Corporations Act* to bring proceedings against Marcos in the name of National Network. Marcos was a former director of National Network and the former husband of Renee. Renee alleges that in 2007, prior to her divorce to Marcos, Marcos, while a director of National Network, procured a payment of \$400,000.00 from the settlement of a sale of property in which National Network was the registered owner (the "**Property**"). Marcos then transferred the money to other companies in which he and Renee were both directors and shareholders.

Renee alleges that this payment was in breach of Marcos' duties as a director of National Network. Renee acknowledged that her signature as a director of National Network was on the memorandum of transfer for the sale of the Property but stated that she was unaware of the money being transferred to the other companies in which Renee and Marcos were both directors and shareholders. She alleges that she merely signed the memorandum of transfer at the request of Marcos without question.

Paul, the brother of Renee, and the other director and shareholder of National Network, objects to National Network bringing an action against Marcos. Paul says that the payment by National Network of \$400,000.00 and the subsequent transfer of the moneys to companies associated with Marcos and Renee was made as part of and pursuant to complicated family arrangements that were made in 2006 between Marcos and Renee and Renee's parents, who were the original directors of National Network. Paul also says that the payment for the sale of property was taken into account in the subsequent divorce proceedings between Marcos and Renee. Renee and Marcos were divorced in July 2007.

It should be noted that Family law settlements can be reopened if the settlement failed to take into account all of the financial matters of the marriage.

Advise Renee on her prospects of being granted leave pursuant to section 237 of the *Corporations Act* to bring an action against Marcos.

- END OF PAPER -