

**LEGAL PROFESSION ADMISSION BOARD**

**MARCH 2014**

**EQUITY**

**EXAMINER'S COMMENTS**

**Note:** References to 'Textbook' relate to Radan & Stewart, *Principles of Australian Equity & Trusts*, 2nd ed, LexisNexis, 2013.

**Question 1**

(i) The issue here related to half secret trusts. The requirement for such trusts are set out in *Ledgerwood v Perpetual Trustees* and needed to be stated and applied. Critical points here were whether there had been communication and acceptance of the terms of the trust (see Textbook at pp 368-371. If the elements of a secret trust are present a further issue related to the fact that Edward (the beneficiary of the secret trust), witnessed the will. If a secret trust is a testamentary trust then as a witness to the will he is not entitled to take the beneficial interest, in which case it would go to the residuary beneficiary under the will. But if, as the weight of authority suggests, the secret trust is non-testamentary then Edward takes as beneficiary of the secret trust, in which case a further issue arises as to whether writing is required, given that the trust property is land. Authority suggests that writing is not required as there is a constructive trust (see Textbook at pp 371-373).

If a secret trust is established the property is held on trust for Edward. If not it is held on trust for George, the residuary beneficiary under the will - it cannot pass to Frank as it is clear that he is a trustee only.

The most, indeed very, common failure in answers to this question was the failure to discuss whether witnessing the will had any effect on the secret trust and whether writing was required for the validity of the trust, given that it involved land.

(ii) The issue here is whether the disposition, by means of a direction to a trustee is required to be evidenced in writing pursuant to s 23C(1)(c) of the *Conveyancing Act*. *Vandervell v IRC* is the key case and states that because the direction deals with both the legal and equitable interest in the painting writing is not required. A further issue is whether, the direction is effective, given that nothing has been done to carry out the direction at the time of Andrew's death. On this the cases express a difference of opinion (see Textbook at p 103).

If there is a successful disposition then the painting belongs to Frank as it was disposed of before Andrew died. If there is no disposition then Andrew's equitable interest in the painting passes to George as the residuary beneficiary.

A reasonable number of students mistakenly addressed this part of the question as one of assignment of an equitable interest and then compounded the mistake by applying the principles in *Milroy v Lord*.

(iii) The issue deals with assignment of a debt. It has not been assigned at law, as s 12 of the *Conveyancing Act* requires notice to be given to the debtor (Donald) and this has not occurred. Whether it has been assigned in equity depends upon whether the two limbs of *Milroy v Lord* (see Textbook at pp 91-95) have been met.

If there was an equitable assignment of the debt to Andrew, which is highly likely, then Donald will be required to pay the debt to George as, the residuary beneficiary. If there has been no equitable assignment then Donald owes the money to Colin.

The most common failure in this question was that, after discussing the lack of compliance with s 12, to go on and see if the debt was assigned in equity.

### Question 2

(i) The issue here was whether Banjo could bring a claim based upon equitable (proprietary) estoppel. The elements for such a claim are set out in *Waltons (Stores) v Maher* (see textbook at pp 272-282)

(ii) If the estoppel claim is established the likely order is that the executor will be required to transfer the property to Banjo. This is particular so because the charity, which would 'miss out' on getting the property, is a volunteer. A *Giumelli v Giumelli* type order or monetary compensation to reflect the value of the property is unlikely in this case.

### Question 3

(i) This question raised the issue of mutual wills (see Textbook at pp 660-662). A critical aspect of mutual wills is that there is clear evidence of an agreement not to revoke the wills. Whether this aspect is established on the facts is arguable. A key case here is *Birmingham v Renfrew*. If the elements of a mutual will are satisfied the question then arises as to whether leaving his share of the house to Jerry is an act designed to defeat the mutual wills agreement. If it is then Jerry will hold on constructive trust for George. If not then Jerry will be entitled to the share of the house. The issue of defeating the mutual wills agreement is mentioned in *Birmingham v Renfrew* and was the central issue in *Healey v Brown*.

(ii) The question here is based upon the case of *Liberty Trust v Charities Commission* (see Textbook at p 420). The issue is whether the gift to The Festivus Lending Trust is a valid charitable trust for the advancement of religion. In *Liberty Trust v Charities Commission* it was, on similar facts, held to be for a valid charitable purpose. On the issue of profits being made

see Textbook at pp 411-415, and, in particular, the High Court decision in *Commissioner of Taxation v Word Investments*.

(iii) Trusts for animal welfare are generally charitable under the fourth category of *Pemsel's* case, eg *Re Wedgewood* a trust for the protection of animals (see Textbook at p 427). Note: they are charitable because of the benefit to mankind – not because they benefit animals: *Re Grove-Grady*. Being a fourth category case, public benefit must be established and this may involve weighing up the benefit against any cost to the public if the purpose were to be held to be charitable (see Textbook at p 407). The issue here is whether this benefit outweighs the benefit of the highway widening.

#### Question 4

##### Part A

The issue here is the question of the rights of a third party to a voluntary deed designed to create a trust in favour of the third party. The facts are based upon those of *Re Pryce* and deal with the issue of whether there is a trust of a promise that is created by the deed that would enable enforcement action to be taken by the third party (see Textbook at pp 366-367).

Very few students correctly recognised what this question was about and treated it as a question on the assignment of future property.

##### Part B

The first possible claim that could be made by the Council is for a breach of fiduciary duty relying on cases such as *UDC v Brian P/L* (see Textbook at 208-211). The broader issue here is the extent to which equity will intervene by way of imposing fiduciary obligations in the context of parties engaged in commercial activities. In a very similar case on its facts such a claim failed in *Streetscape Projects (Australia) Pty Ltd v City of Sydney* which was discussed in the Up-dates to the Textbook.

The second possible claim is that EPL breached its obligations to the Council in relation to confidential information, the essential elements of which are found in *Coco v A N Clark (Engineers)* (see Textbook at pp 151 ff). (In the *Streetscape Case* the Court of Appeal ruled that the confidential information claim by the Council had to be re-heard by the trial judge.)

#### Question 5

##### Part A

(i) This part raises the issue of whether specific performance would be refused on the discretionary ground that it would require constant court supervision: *Tito v Waddell*

(No 2), *Co-operative Insurance Society v Argyll Stores* (see Textbook at pp 565-566) on the grounds that it is a contract for personal services (see Textbook at pp. 563-565).

- (ii) This part raises the issue of whether damages would be an adequate remedy and thus specific performance would be refused on jurisdictional grounds: *Beswick v Beswick* (see Textbook at pp 561-563).
- (iii) This part raises the principle that specific performance will be refused on jurisdictional grounds if a plaintiff has not provided consideration on the basis of the equitable maxim that 'equity does not assist a volunteer' (see Textbook at pp 34 & 556).

This question was generally very well done.

### **Part B**

The extent to which an exclusion clause can exclude a trustee's liability is discussed in the Textbook at p 534. This question was, on the whole, very poorly answered, with many students not even attempting an answer.