

Equity
March 2013
Examiner Comments

Question 1

Part A (15 Marks)

On 30 August 2011, Humphrey entered into a deed with Bernard by which, for valuable consideration, he assigned to Bernard 'all dividends on my shares with Acme Investments Ltd that are to be paid to me on or before 30 September 2012'.

On 28 September 2012, Humphrey received a dividend cheque from Acme Investments Ltd in the sum of \$3,000. This was the first dividend that the company had declared since 2009. Humphrey deposited the funds into his account with Jubilee Banking Corporation Ltd on 29 September 2012.

On 1 October 2012 Humphrey telephoned Bernard and asked him what he wanted done with the money. In response to Humphrey's question Bernard said: 'I want you to hold the money on trust for Jim'. On the same day Humphrey telephoned Jim and said: 'As of now I hold all my shares in Acme Investments Ltd on trust for you'.

On 15 October 2012 Jim died. In his will Jim left his whole estate to Arnold.

Arnold seeks your advice as to what rights or interests, if any, he will inherit pursuant to Jim's will in relation to the shares in Acme Investments Ltd and the dividends received by Humphrey on 28 September 2012.

In relation to Humphrey's shares in Acme Investments, Humphrey is the owner and his statement to Jim is a declaration of trust over the shares. It is not, as many students suggested an assignment of his shares to Jim. The critical issue here is whether the declaration of trusts needs to be in writing pursuant to the provisions of s 23C(1) of the *Conveyancing Act 1919*. Section 23C(1)(b) does not apply as that subsection deals with land and not personal property. Nor does s 23C(1)(c) apply because Humphrey's statement is not a disposition of a subsisting equitable interest – it is the creation of one. Thus, the declaration of trust in favour of Jim is valid and Arnold inherits Jim's equitable interest in the shares.

As for the dividends the first matter is whether there is an effective assignment of the dividends in favour of Bernard. The dividends are future property and thus can only be assigned in equity for valuable consideration: *Holroyd v Marshall*. The assignment is thus effective and Humphrey automatically becomes a bare trustee of the dividends when received: *Holroyd v Marshall*. This when Bernard gives instructions to Humphrey about the money in the bank account, Bernard is disposing of a subsisting equitable interest by means of a direction to the trustee (Humphrey). For the direction to be effective the question of writing pursuant to s 23C(1)(c) arises. The direction here is of the type in *Grey v IRC* (not *Vandervell v IRC*) and therefore is ineffective. Jim, and therefore Arnold, therefore gets no interest in the money.

Part B (15 Marks)

Adolf, Bennito and Caesar are all parties to a deed which stipulates that Bennito is to paint Adolf's house and that in return Bennito will pay Caesar \$10,000.

In relation to this deed, what advice would you give in each of the following circumstances:

- (a) **Will Adolf be able to obtain an order for specific performance against Bennito if Bennito breaches his obligation to paint Adolf's house?**

This part raised the issue of whether specific performance would be refused on the discretionary grounds of either (a) that it would require constant court supervision: *Tito v Waddell (No 2)*, *Co-operative Insurance Society v Argyll Stores* and/or it was contract of personal services: *Giles v Morris*.

- (b) **Will Bennito, having painted Adolf's house, be able to obtain an order for specific performance against Adolf if Adolf refuses to pay Caesar?**

This part raised the issue of whether the nominal damages that Bennito would be likely to be awarded would be an adequate remedy. If they were then specific performance would be refused on jurisdictional grounds. However, cases such as *Beswick v Beswick* make it clear that, because the damages would be nominal they would also be inadequate and thus specific performance would be available.

- (c) **Will Caesar be able to obtain an order for specific performance against Adolf if, after Bennito has painted Adolf's house, Adolf refuses to pay Caesar?**

This part raised the principle that specific performance will be refused on jurisdictional grounds if a plaintiff – in this case Caesar - has not provided valuable consideration on the basis of the equitable maxim that 'equity does not assist a volunteer'. Simply because Caesar is a party to the deed does not cure the absence of valuable consideration.

Few students understood the relevant principles that applied to this part of question 1.

Part C (10 marks)

Alf is a solicitor who at all material times was instructed by the trustees of shares in Summer Bay Ltd. Alf attended general meetings of Summer Bay Ltd on behalf of his clients. As a result of attending these meetings Alf gained an intimate knowledge of the nature of the business operated by Summer Bay Ltd. Alf's knowledge of the business of Summer Bay Ltd convinced him that the company was in need to re-structuring in order to improve its profitability and hence the value of its shares. In a meeting with Sid and Colleen, the trustees of the shares, Alf discussed the possibility of the trust purchasing further shares to get control of the company and thereby undertake the necessary restructure. Sid thought it was a good, idea, but Colleen vigorously opposed it.

Two weeks after the meeting with Sid and Colleen, Alf and Irene, one of the beneficiaries under the trust, purchased sufficient shares in Summer Bay Ltd to acquire a controlling interest in the company. Over the following few months Alf and Irene were able to restructure Summer Bay Ltd and improve its profitability, so much so that the value of its shares doubled.

Colleen seeks your advice as to the basis of any action that the trustees may have against Alf and Irene in relation to the latter's purchase of shares in Summer Bay Ltd.

This question raises the issue of breach of fiduciary obligations by Alf and Irene and was based on the facts of *Phipps v Boardman*. Few students raise the issue of whether Irene would be liable for breach of fiduciary obligations. In *Phipps v Boardman* the liability of Tom Phipps (the equivalent of Irene) was not contested as Phipps conceded that he was liable along with Boardman). If Irene is to be liable it is not on the basis of some presumed fiduciary relationship. It would need to be established on the facts.

Question 2 (Answer all parts of this question) (20 Marks)

The facts of this question are set in NSW. Simon, a successful industrialist and founder of Izone Corporation, died on the 1 January 2012. His will contained two trusts with a residuary beneficiary.

The first trust was for \$10 million to be held for 'the education of employees of Izone, their children and dependants.'

The second trust was worded as follows:

I give my property at Sommersby on trust to my sister Henrietta for my children for life, and then to any of my grandchildren that marry, on the condition that the grandchildren not marry a Catholic.'

The property at Sommersby was a large cattle station in western NSW worth \$100 million held in the Torrens system as freehold. At the time of Simon's death, Simon's children were Leto (aged 50), Iago (aged 32) and Diego (aged 28). At the time of his death Simon had one grandchild, Formia, who was unmarried but had been dating Butchie from Scotland.

The residuary beneficiary in the will was Claudina, Simon's estranged wife. Claudina sought to challenge the validity of the Izone trust.

At the same time Henrietta, who had possession of the certificate of title, saw an opportunity to become very rich, very fast. Before the sons could collapse the trust and get possession of the title deeds she entered into a contract for sale of the property with Joseph. It was common knowledge that the property was held by Simon's family in a trust for the sons. Joseph realized that the circumstances were suspicious but he decided that the best thing to do was basic title searching and settle the transaction as soon as possible. Joseph became the registered owner on 1 June 2012 and Henrietta then disappeared.

Answer each of the following

- (a) **Can Claudina have the Izone trust struck down and, if so, on what basis? Presuming that the trust fails what trust mechanism could be used to bring the funds back to the estate and into Claudina's possession (8 marks).**

This question was concerned with charitable trusts and express trusts. The charitable issues was concerned with whether the trust can pass the *Compton test*. The facts are based on *Oppenheim*. The second aspects is whether the trust can survive as an express trust, in particular whether the trust satisfies certainty of beneficiary. Finally if the trust fails the property is held on automatic resulting trust

- (b) **Discuss the wording of the second disposition and whether it offends the rule against perpetuities and/or public policy (6 marks).**

The example is that of the fertile octogenarian. It breaches the rule but can be saved by the Act. The partial restraint on marriage is valid.

- (c) **Can Sommersby be recovered by the sons? (6 marks).**

This is a tracing question. But also a constructive trust issue based on *Barnes v Addy*. Joseph's suspicion is not enough for it to constitute fraud under the Torrens system. The question required students to discuss *Farah Constructions* and the cases leading up to it.

Question 3

This question occurs in NSW. Patrick ran and owned a car trailer building business in Seal Rocks called Seal Rocks Car Trailers. He was a sole trader meaning that the business was not a separate entity to him. Patrick's business was struggling and he owed large sums to its major creditor, Allcoast Metal Ltd.

Luke was an industrialist who had was in the business of money short term business loans. He lent a large sum to Patrick on the condition that Patrick would use the funds to pay out the debts to Allcoast Metal. The agreement required the sums to be paid into a special account at the Central Coast Bank called 'Seal Rocks Car Trailers Creditor Account'. The agreement stated that if the money was not paid to Allcoast Metal and Patrick became insolvent, the money should be returned to Luke.

Patrick also told Luke of an investment opportunity that they could share in a joint venture. A large block of land was for sale at 15 Scenic Rd, Phegan's Bay which Patrick believed could be developed into a resort. The title was Torrens title. They agreed to each provide equal funds and share the profits equally. Patrick and Luke each provided 50% of the funds but the land was put into Patrick's name only, as Luke had previously had poor relationships with the Council and it was thought that his name on the title might adversely affect the chance for development approval.

Patrick also owned a house with his wife Nerida at Little Beach in the Torrens system. When they bought the house Patrick provided 20% and Nerida provided 80% of the purchase price. Nevertheless they were registered as joint tenants.

The car trailer business was going reasonably well so Patrick held off using funds in the creditor account. The development of the land also was proceeding well until the development application was refused on the grounds that the land was not big enough for the development proposed and that more land was required. The results of the application were published in the local newspaper.

Seeing an opportunity for making further money, Patrick spoke with the owner of the adjoining land at 16 Scenic Rd, Phegan's Bay and negotiated a price to purchase it. The land was quickly purchased but registered in Nerida's name in the Torrens register.

Life went on and nothing much happened for 2 years but then things took a turn for the worse. Patrick was made bankrupt. The trustee in bankruptcy claimed the bank account, 50% of the house at Little Beach and all of the land at 15 Scenic Rd Seal Rocks. When it was discovered that Patrick had provided the purchase price for 16 Coast St, the trustee made a claim for its ownership as well. Luke also discovered that Nerida was the registered owner of 16 Coast St and was incensed at Patrick's betrayal. She was demanding an exorbitant price for the land but Luke could not progress the development of his land without buying it. He felt that Patrick had broken their joint venture agreement by buying the adjoining land and putting it into Nerida's name.

(a) Will Nerida, Luke or Allcoast Metal get the funds in the bank account? (4 marks)

This is a *Quistclose trust* question. Students needed to discuss the elements of mutual intention required by the cases.

(b) Will the trustee in bankruptcy be able to claim 50% of the house at Little Beach? (4 marks)

This question was based on *Cummins*. Students needed to discuss resulting trusts and the presumptions of joint ownership that arise in the purchase of a matrimonial home and the cases that followed *Cummins*.

(c) Does the trustee in bankruptcy have a claim on the house at 15 Scenic Rd, Phegan's Bay? (4 marks)

This is a presumed resulting trust question. Students should have looked at the presumptions and how they are applied.

(d) Does the trustee in bankruptcy have a claim on the house at 16 Coast St, Phegan's Bay? (4 marks)

Here the relevant presumption was advancement. Students should have discussed it and how it can be rebutted. Once rebutted the presumption of advancement then arises.

(e) Does Luke have a claim on the house at 16 Coast St, Phegan's Bay? (4 marks)

The issues here was confidential information and fiduciary duty. Based on *Farah* the information was no confidential nor was there a fiduciary relationship which would have given rise to a *Barnes v Addy* constructive trust. Luke's claim is also destroyed by indefeasibility.