

**Law of Associations
Examiners Comments
March 2014**

Question 1

This question was in two parts, namely liability at common law of an unincorporated non profit association and liability of an incorporated non profit association under the *Associations Incorporation Act 2009 (NSW)*.

In relation to unincorporated associations, the answer required a consideration of the following major principles:

- (a) an unincorporated association is not a legal entity in its own right and has no capacity to enter into a binding contract;
- (b) any contract purportedly made on behalf of such an association would have to be made with all the members or with an agent or trustee acting within their authority on behalf of the members or the committee members in order to be enforceable;
- (c) as a usual rule, members of an association are not liable for contracts made on their behalf by committee members or by agents of the committee: *Freeman v McManus* [1958] VR 15;
- (d) as a general proposition contracts are entered into on behalf of an unincorporated association by committee members; however the law is uncertain in relation to liability of committee members under a contract; in this regard the answer required an analysis of the following major cases concerning committee members' liability:
 - (i) generally where committee members acting within their authority have entered into a contract purportedly on behalf of the association, they will generally be personally liable to the party with whom they made the contract: see *Bradley Egg Farm v Clifford* [1943] 2 All ER 378;
 - (ii) despite the proposition in (i) above, complications will arise where the members of a committee enter into a contract which is intended to last or which performance is contemplated to take place beyond the term of office of those committee members: see *Carlton Cricket and Football Social Club v Joseph* [1970] VR 487;
 - (iii) other problems in making the committee of an unincorporated association liable were illustrated in *Peckham v Moore* [1975] 1 NSWLR 353.

Students were required to apply the above principles to the facts whom if anyone it could commence proceedings.

The second part of the question required students to identify the *Associations Incorporation Act* to highlight the difference associations and incorporated associations. In particular reference ss.19-22 inclusive and 26.

Question 2

This question required an analysis of the law relating to section 181 of the *Corporations Act* which provides that a director of officer of a corporation must exercise their powers and discharge their duties in good faith in the best interests of the corporation and for a proper purpose. Students were required to recognise the following major principles relating to section 181 of the *Corporations Act* and the relevant cases dealing with those principles including:

- (a) the duty to exercise powers for a proper purpose and the obligation to act in good faith are separate duties: *Bell Group Ltd (in liq) v Westpac Banking Corporation (No. 9)* [2008] WASC 239;
- (b) in relation to good faith, the general principle is that directors must exercise their discretion, bona fide in what they consider to be in the interests of the company; the test is an objective one and it has been held that subjective honesty is insufficient to exclude liability for failing to act in good faith: *Permanent Building Society (in liq) v Wheeler* (1994) 14 ACSR 109; *Advance Bank Australia Limited v FAI Insurance Limited* (1987) 5 ACLC 725; *Re HIH Insurance Ltd (in prov liq)*; *Australian Securities and Investments Commission v Adler* [2002] NSWSC 171;
- (c) directors must exercise their powers for the purpose for which they were conferred and that ordinarily directors of a company cannot exercise a fiduciary power to allot shares for the purpose of defeating the voting power of shareholders by creating a new majority: *Whitehouse v Carlton Hotel Pty Ltd* (1986-1987) 162 CLR 285.

The student was then required to apply the above principles to the facts.

Question 3

This question required an analysis of sections 236 and 237 (1) (2) and 238 of the *Corporations Act* dealing with derivative actions.

Reference should have been made to section 236 of the *Act* regarding the application under 237 and to *Swanson v R A Pratt Properties Pty Ltd* (2008) 313 and the test set out by Justice Palmer to satisfy the requirements of section 237(1) of the *Act*. Answers should have included the following principles proper

- (a) “good faith” was required to be proved by the applicant by evidence that the applicant honestly believed that a good cause of action exists and has a good prospect of success and that the applicant was not seeking to bring a derivative action for a collateral purpose;
- (b) “best interests of the company” has been interpreted to mean the company’s separate and independent welfare: *Charlton v Baher* (2003) 47 ACSR 31; *Chahwen v Euphoric Pty Limited* (2008) 65 ACSR 661; see also Justice Austin’s judgment in *Fiduciary Limited v Morning Star Research Pty Limited* [2004] NSWSC 664; that this enquiry will include taking into account the circumstances of the company and its ability to undertake litigation and the ability of the defendant to pay a judgment;
- (c) that section 237(3) provides the circumstances in which there is a rebuttable presumption that granting leave would not be in the “best interests of the company;” and
- (e) the Court must be satisfied that that there is a serious question to be tried.

Question 4

This question required an analysis of sections 232 and 233 of the *Corporations Act*.

The question required reference to the general test of oppression in section 232 by reference to such cases as *Wayde v NSW Rugby League Limited* (1985) 180 CLR 459 and *Nassar v Innovative Precasters Group Pty Limited* (2009) 71 ACSR 343 and how those general principles applied to the facts in the question. The question then required an analysis of the particular facts in the question by reference to cases dealing with oppression such as *Kizquari Pty Limited v Prestoo Pty Limited* (1993) 10 ACSR 606; *Re D G Brims & Sons Pty Limited* (1995) 16 ACSR 559 ; *Campbell & Anor v Backoffice Investments Pty Limited* (2009) 238 CLR 304 and *O’Neill v Phillips* [1999] 2 All ER 961; *John J Starr (Real Estate) Pty Limited v Robert R Andrews & Ors* (1991) 6 ACSR 63.

The answer then required reference to section 233 of the *Act* dealing with remedies for a breach of section 232 and in particular the compulsory purchase of the minority shares in order to bring an end to the oppression: *Campbell’s* case.

Question 5

This question required consideration of sections 127-130 of the Act with the indoor management rule.

Students were required to apply *Story v Advance Bank of Australia Limited* (1993) 31 NSWLR 722 to section 128 (1) of the Act. The principles in *Story's* case provided that a person is entitled to make the assumptions in section 129 of the Act in relation to “dealings” with a company and that the section applied to “dealings” that were entered into with purported company agents who lacked actual authority and extended to forged instruments.

It was **essential** that students recognised in the context of “dealings” that Max and Lucy were the sole directors and shareholders of the family business, that Max and Lucy are married and Lucy was the Managing Director of the Company with de facto control and how those facts went to establishing “dealings” in the context of s128(1) of the Act.

Students were then required to specifically recognise sections 129(1) (2) (5) and (6) as containing the major assumptions that the Bank could make having regard to the facts in the question. With regard to section 129(2) reference should have been made to the fact that although Max was not recorded as Secretary of the Company with ASIC he was recorded as a Director and should have applied that fact to the principles expressed in *Brick and Pipe Industries v Occidental Life Nominees Pty Limited* (1990) 3 ACSR 649. With regard to section 129(5) and (6) reference should have been made to section 127 and how that section applied to the way that the documents were executed.

Students were required to recognise that a central issue in the question was whether the Bank could make the assumptions in section 129 notwithstanding that Lucy had forged the signature of Max. This required an analysis of sections 128(3) and 128(4) of the Act. Students were required to apply the facts to the major cases such as *Sunburst Properties Pty Limited v Agwater Pty Limited* [2005] SASC 335 and *Errichetti Holdings Pty Limited v Western Plaza Hotel Corp* (2006) 201 FLR 192.

Question 6

This question required an analysis of the facts to sections 588G and 588H of the Corporations Act

The question required an application of 588G by reference to cases dealing with “insolvency” “debt” and “reasonable suspicion”.

The question then required an application of sections 588H(2)-(4) with attention to *Hall v Poolman* (2007) 65 ACSR 123 and *Manpa* and *Ceccattini* (2002) ACLC 1,204 in relation to section 588H(3).