Law of Associations
Examiners Comments
March 2013

Question 1

This question was concerned with section 180 of the *Corporations Act* but more particularly with the judgements of *ASIC v MacDonald* (2009) 71 ASIC 368 and *ASIC v Healey* [2011] FCA 717.

Most students applied the facts in the question to the principles in *MacDonald's*case *Healey's* case namely that that each director armed with the information available to him or her, was expected to focus on matters bought before them and to seriously consider such matters and take appropriate action. Directors were required to take reasonable steps to place themselves in a position to guide and monitor the company's affairs. Directors cannot substitute reliance upon the advice of management for their own attention and examination of an important matter that falls specifically within the Board's responsibilities. The question required not only reference to *MacDonald's* case and *Healey's* case but also to *ASIC v Adler*(2002) 41 ACSR 72*; Vines v ASIC*(2007) 62 ACSR 1*; ASIC v Rich*(2009) 236 FLR 1.

Question 2

This question requiredconsideration of sections 127-130 of the *Corporations Act* dealing with the indoor management rule.

Most students answered this question well. Students recognised the issues and the relevant sections raised by the question. The better students applied *Story v Advance Bank of Australia Limited* (1993) 31 NSWLR 722to section 128 (1) which provides that a person is entitled to make the assumptions in section 129 of the *Act* in relation to "dealings" with the 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.

All students recognised that a central issue in the question was whether the Bank could make the assumptions in section 129 notwithstanding that Joanne had forged the signature of Max to the security documents. 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 of *Soyfer v Earlmaze Pty Limited*[2000] NSWSC 1068*; Sunburst Properties Pty Limited v Agwater Pty Limited*[2005] SASC 335*; Errichetti Holdings Pty Limited v Western Plaza Hotel Corp*(2006) 201 FLR 192. Most answers emphasised that the test of whether the Bank could rely on the forged security documents by making the assumptions in section 129 was dependent on whether the Bank had "actual knowledge" or "actual suspicion" of Joanne's fraud: section 128(4) and that the test was not "being put on enquiry". A few students however sought, with some success, to argue that the Bank must have had "actual suspicion" in circumstances in which Joanne sought to have the Loan cheque made out to her personally

A few answers also correctly applied *Brick and Pipe Industries v Occidental Nominees Pty Limited* (1990) 3 ACSR 649 to the facts in the question in which Joanne forged the signature of Max describing him as "secretary" of the company when the ASIC search by the Bank revealed that he was only a "director".

Question 3

This question required an analysis of sections 237 (1), (2) and (3) of the *Corporations Act* dealing with derivative actions. Overall the question was answered well.

Most answers referred *to Swanson v R A Pratt Properties Pty Limited* (2002) 42 ACSR 313 and the test set out by Justice Palmer to satisfy the requirements in section 237(2) of the *Act* and applied the test to the question. The better answers also referred to the following principles and applied them to the facts:

(a) the requirement of good faith will be relatively easy for the applicant to demonstrate to the Court's satisfaction where the application is made by a current shareholder of the company who has more than a token shareholding and the derivative action seeks recovery of property so that the value of the applicant's shares would be increased: *Swanson's* case; and

(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 and that section 237(3) provides the circumstances in which there is a rebuttable presumption that granting leave would not be in the "interests of the company: see also Justice Austin's judgment in *Fiduciary Limited v Morning Star Research Pty Limited*[2004] NSWSC 664

Question 4

This question concerned partnership. Overall the question was answered poorly. The question needed to be answered in two parts.

Firstly, the question required a consideration of whether a partnership existed between Don and Mark pursuant to section 1 and section 2 of the *Partnership Act*. This part of the question also required reference to authorities such as *Canny Gabriel Castle Advertising v Volume Sales (Finances) Pty Limited* (1994) 131 CLR 321; *United Dominions Corporation v Brian* (1985) 157 CLR 1; *Lang v James Morrison and Co Limited* (1911) 13 CLR 1; *Ex Parte Delhasse In re Megevant* (1877- 1878) 7 Ch D 511. The better answers referred to section 2(3) of the *Partnership Ac*t.

The second part of the question required a consideration of whether Mark was liable to Hospital Products. This meant that students had to assume (if they had not found a partnership between Don and Mark pursuant to section 1 and 2 of the *Partnership Act*) that Don and Mark were in partnership.

Having found a partnership (or assumed a partnership) the second part of the question required an analysis and application of section 5 of the *Partnership Act*. As with the first part of the question this part of the question was answered poorly. This part of the question required students to considerand properly apply to the question the elements of section 5 of the *Partnership Act* and have regard to the authorities such as *Polkinghorne v Holland* (1934) 51 CLR 143; *Mercantile Credit v Garrod* [1962] All ER 1103; *Construction Engineering (Aust) Pty Limited v Hexyl Pty Limited* (1985) 155 CLR 541.

Question 5

This question required an analysis of sections 232 and 233 of the *Corporations Act* and was generally answered well.

Most answers referred to the general test in section 232 by reference to *Wayde v NSW Rugby League Limited (1985)* 180 CLR 459and then went on to discuss the particular facts in the question by reference to cases such as *Kizquari Pty Limited*(1993) 10 ACSR 606*; D G Brims (1995)* 16 ACSR 559*; Campbell v Backoffice Investments Pty Limited (2009)* 238 CLR 304*; O'Neill v Phillips*[1999] 2 All ER 961*;John J Starr (Real Estate) Pty Limited v Robert R Andrews* (1991) 6 ACSR 63.

Most answers referred to section 233 remedies and in particular compulsory purchase of the minority shares in order to bring an end to the oppression: *Campbell's* case. In this context virtually all students who attempted the question recognised that because a Liquidator had been appointed to the Company by consent prior to the Hearing and that the Liquidator had sold the whole of the Business conducted by the Company, a compulsory purchase order was not appropriate.

Question 6

This question related to theinsolvent trading provisions in sections 588G and 588H of the *Corporations Act* and was answered well by most students.

Most studentsapplied the criteria set out in section 588G and then considered the defences in section 588H and applied the relevant authorities to considerations of "insolvency" "debt" "reasonable suspicion" and in relation to statutory defences such as*Hall v Poolman* (2007) 65 ACSR 123;*ASIC v Plymin*(2003) 21 ACLC 700; *Metal Manufacturing Limited v Lewis* (1988) 6 ACLC 725; *Commonwealth Bank v Friedrich* (1991) 9 ACLC 945; *State Tobacco Services Limited v Morley* (1990) 8 ACLC 827.