LEGAL PROFESSION ADMISSION BOARD

SEPTEMBER 2018

EQUITY

EXAMINER’S COMMENTS

Question 1

(a) This question raised the issue of trust powers of appointment and required a discussion of whether the objects of the powers were described with sufficiently certainty - the criterion certainty test in *McPhail v Doulton*. On similar facts, in *Crawford v Phillips* the court held that it failed to meet the 'loose class' requirement set out in *McPhail v Doulton*. There is no issue with the principle of non-delegation of testamentary capacity because of s 44 of the Succession Act 2006 (NSW).

(b) This question raised the issues of whether clause 4 was a valid charitable trust for the advancement of education and whether a *cy pres* scheme, either under the general law or pursuant to the Charitable Trust Act1993 (NSW) could be ordered to remove the references to male atheists. *Re Lysaght* is case that suggests that such a scheme could be ordered.

(c) This question raised the issue of secret trusts, the elements of which are detailed in *Ledgerwood v Perpetual Trustee Co Ltd*. In relation to the requirement of communication, communication to one of the trustees where the trustees hold as joint tenants is sufficient. If the secret trust elements are satisfied the fact that its beneficiary (Felicity) died before the death of the testator raised the issue of whether secret trusts are testamentary trusts or arise outside the context of wills. On the former, the trust would lapse and the property pass to the residuary beneficiary (Manuel). On the latter the trust would stand and the property would be held on trust for David (Felicity's heir).

(d) This question raised the issue of resulting trusts and whether the presumption of a resulting trust in favour of Darcy for a one-half share of the Bathurst property was rebutted by the presumption of advancement or whether Darcy's actual intention was that Michael only have a life estate in relation to that one-half share: *Napier v Public Trust (WA)*. If the latter, then the remainder interest would pass to Eric.
Question 2

This question raised the issue of whether the two contracts could be specifically enforced.

In relation to the guitar contract, the issues that arose were whether the contract was one for valuable consideration, whether damages were an adequate remedy, and whether specific performance should be refused on grounds of hardship (Falcke v Gray).

In relation to the painting contract the issues that arose were whether damages were an adequate remedy (Beswick v Beswick) and whether specific performance should be refused on the grounds that the contract was one for personal services.

Question 3

As a director Charles owed fiduciary duties to HB Ltd. Regal (Hastings) v Gulliver would suggest that he was in breach of his fiduciary duty and that he would liable to HB Ltd. However, as he has no assets, the question is whether, on the basis of the principles in Barnes v Addy, Crime Fiction Ltd would be accountable for the profits it made. This is of practical significance on the facts of the question as remedies against Charles would not be of any use to HB Ltd, given that Charles has no assets.

Alternatively, it could be argued that Crime Fiction was Charles's alter ego: Grimaldi v Chameleon Mining NL.

Question 4 (20 marks)

This question raised the issue of whether damages in lieu of an injunction could be awarded pursuant to s 68 of the Supreme Court Act 1970 (NSW). Relevant cases detailing the principles include Shelfer v City of London Electric Lighting Co, Break Fast Investments Pty Ltd v PCH Melbourne Pty Ltd and Lawrence v Fen Tigers Ltd. Even if such damages could be ordered, they might be refused on the basis of laches on the part of NDD.

Question 5

(a) Pursuant to Saunders v Vautier, the beneficiary would need to be sui juris, legally capable, and with a vested and indefeasible interest. To be able to extinguish the trust it would need to be established that the property is divisible and that partial extinguishment would not adversely affect the interests of the remaining beneficiaries. See textbook at 27.57-27.66, 27.74-27.81.

(b) An assignee of future property gains an equitable interest in the property when it comes into existence because the assignor then becomes a bare trustee of the
property: *Holroyd v Marshall*. Prior to then, the assignee has a proprietary interest in the property for reasons explained in *Re Lind*. See textbook at 5.76-5.85.