

**Law of Associations
Examiners Comments
September 2019**

Question 1

This question concerned partnership and needed to be answered in two parts.

Firstly, the question required a consideration of whether a partnership existed with Jacob 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 Delhase In re Megevant* (1877- 1878) 7 Ch D 511.

The second part of the question required a consideration of whether Jacob was liable for the actions of Joanne. This required students to find or *assume* that Jacob was a partner and to consider and 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; *Goldberg v Jenkins* [1889] 15 VLR 36. *Mercantile Credit v Garrod* [1962] All ER 1103; *Construction Engineering (Aust) Pty Limited v Hexyl Pty Limited* (1985) 155 CLR

Question 2

This question required an analysis of sections 236 and 237 (1) (2) (3) and section 239 and 241 of the *Corporations Act* dealing with derivative actions.

Reference should have been made to section 236 of the *Act* regarding standing to bring an application under 237 and 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*. Answers should have included reference to and application of the principles in *Charlton v Baher* (2003) 47 ACSR 31; *Chahwen v Euphoric Pty Limited* (2008) 65 ACSR 661 and to Justice Austin's judgment in *Fiduciary Limited v Morning Star Research Pty Limited* [2004] NSWSC 664;

Students should have recognised 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 determining whether that section applied to the facts in the question.

Finally, section 241 was relevant to the remedies sought and whether ratification will impact the ability to bring the action pursuant to s 239.

Question 3

This question was concerned with directors duties to shareholders.

The student should have realised that the facts in the question were almost identical to the *Brunninghausen* case in which the Court found that the director acted in an unconscionable manner.

Students should also have referred to the judgment of Young CJ in *Crawley’s* case.

Question 4

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

Students were required firstly to apply cases such as *Freeman and Lockyer v Buckhurst Park Properties Co Limited* [1964] 2 QB 480 and *Story v Advance Bank of Australia Limited* (1993) 31 NSWLR 722 to section 128 (1) of the *Act*. Many students did not understand the significance of those cases in the light of the facts and did not adequately consider whether there was a “dealing” pursuant to section 128 (1) allowing the Bank to make the assumptions in section 129 of the *Act*.

Students were then required to specifically recognise sections 129 (1) (2) (3) (5) and (6) as containing the major assumptions that the Bank could make (assuming that section 128 (1) was satisfied) having regard to the facts in the question. Students should also have referred to *Soyfer & Anor v Earlmaze & Ors* [2000] NSWSC 1068 and the analysis of Hodgson J on the meaning of “appears” in sections 129(5) and 129(6).

Students were required to recognise that an important issue in the question was whether the Bank could make the assumptions in section 129 (assuming s 128(1) was satisfied) pursuant to sections 128(3) and 128(4) of the *Act* and *whether* the Bank had “actual knowledge” or “actual suspicion”.

Question 5

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

In relation to unincorporated non profit associations, the answer specifically required a consideration of the common law propositions set out in *Cameron v Hogan* unless it came under one of the exceptions at common law.

The second part of the question required an analysis of the relevant sections of the *Associations Incorporation Act* to highlight the difference between unincorporated associations and incorporated associations and to explain whether relevant sections of the *Act* would change your advice on the facts in the question and why.

Question 6

This question required an analysis of section 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; *Nassar v Innovative Precasters Group Pty Limited* (2009) 71 ACSR 343; *Mopeke Pty Limited v Airport Fine Foods Pty limited* (2007) 61 ACLR; *Campbell v Backoffice Investments Pty Limited* (2009) CLR and how those general principles applied to the facts in the question and having regard to specific cases dealing with the behaviour of Monica.

