

# COMMONWEALTH OF AUSTRALIA

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Family Name	
Given Names	
Student Number	
Teaching Period	Semester 1, 2016

<b>FINAL EXAMINATION</b>	<b>DURATION</b>				
<b>LWZ210 – Equity</b>	<table border="1"> <tr> <td>Reading Time:</td> <td><b>10</b> minutes</td> </tr> <tr> <td>Writing Time:</td> <td><b>180</b> minutes</td> </tr> </table>	Reading Time:	<b>10</b> minutes	Writing Time:	<b>180</b> minutes
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### INSTRUCTIONS TO CANDIDATES

1. This examination paper **contains THREE (3) questions**.
2. **All three (3) questions must be answered.**
3. This examination accounts for sixty (60) assessment marks (60% of the unit assessment).
4. **Each question** is of equal **marking value of twenty (20) marks** as set out immediately following each question.
5. Use only black or dark blue ink. Do not write in pencil.
6. Read ALL questions carefully.
7. Please ensure that your Name and Student Number are written clearly in the space provided at the top cover page of the examination answer booklet(s) and on this examination question paper.

### EXAM CONDITIONS

**You may begin writing from the commencement of the examination session.** The reading time indicated above is provided as a guide only.

This is an OPEN BOOK examination

Any non-programmable calculator is permitted

Any handwritten material is permitted

Any hard copy, English dictionary is permitted (annotated allowed)

<b>ADDITIONAL AUTHORISED MATERIALS</b>	<b>EXAMINATION MATERIALS TO BE SUPPLIED</b>
Any printed material with the exception of CDU Library books	2 x 20 Page Book 2 x Scrap Paper

**THIS EXAMINATION IS PRINTED  
DOUBLE-SIDED.**

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BLANK.**

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## EXAMINATION QUESTION PAPER

### ANSWER ALL OF THE FOLLOWING THREE (3) QUESTIONS

In accordance with the terms of reference in the following paragraphs, on the basis of equity only, analyse and address the problems raised by the assumed facts of the following **Three (3)** questions.

#### Terms of Reference:

Assume that you are employed as a legal practitioner in a particular legal firm ("the legal firm") from which the client, respectively specified in each set of assumed facts for each question, has asked for guidance. Your role in the legal firm is as a member of a team of lawyers who work together on issues. The leader of that team has asked you to write an internal advice for his or her information and of all of the other members of the team (who will all review your advice) as part of the process of the team assembling an agreed overall advice for the client.

Your role in the team is to exclusively consider how equity applies in relation to the matters set out in the facts of each respective problem. You are regarded as being the team-member who is most proficient in the field of equity. For that reason, your advice is intended to exclusively concentrate on how equity applies in relation to the matters set out in the respective assumed facts. You have been asked for an equity analysis partly because of your expertise and also for the reason that other lawyers in the team have been assigned to consider the implications of other components of law.

Your advice must also take into account that the team leader does not practise in the equity field. For that reason, he or she is no longer familiar with the principles of equity and has specifically instructed you not to assume any background knowledge on his or her part. Moreover he or she has asked you to write your report in an educative and analytical manner to give him or her the opportunity to revise their forgotten knowledge of equity. Moreover it is very important that you give definitive authority for any propositions contained in your advice because, as you have been instructed, your team leader all other members of the team may wish to verify what you say.

Be sensitive to your brief being limited to the topic of equity. Stick to equitable principles and doctrines and try not to venture into the fields of the laws of Contract, Property, Succession, Partnership, Tort, Consumer law, Criminal law, Family law, Insurance Law and similar fields. Other members of the legal team have been assigned to consider how those other components of law apply to the case. However it is appropriate to enlist the help of those other fields if doing so involves the application of principles

and doctrines that have been incidentally examined in the study of the equity unit at Charles Darwin University.

## **Question 1**

### **The Problem of Sarah's Noisy Son**

When businessman Robert Sims (Mr Sims) was 38-years old, he moved into the home of his widowed mother Sarah Sims, aged 75, to live with her. Their motive was mainly to help Mr Sims save money because there had been a downturn of his business. Ultimately however that economy measure led to Mr Sims volunteering to stay on and look after his mother.

The mother was not incapacitated, nor was she infirm; however she had a preoccupation with her personal security which made his suggestion welcome. Moreover, the prospect of declining health in the immediate future years of her life indicated that there was wisdom to the proposal. For those reasons, Sarah readily agreed to her son's idea. Mr Sims did not request anything of his mother in return for his offer of help; nor did she make any statement to the effect that she would recompense him in any way.

To maintain Mr Sims' privacy, the two of them decided that, at his expense, he would build a self-contained flat for Mr Sims to live in. Though self-contained, the flat would be an extension to Sarah's home (rather than a separate and totally private structure). The new structure would cost approximately \$500,000. At the time, the market value of the mother's home was \$1,500,000.

These living arrangements worked well for five (5) years during which time Mr Sims maintained nonintrusive supervision of his mother's life. From time to time he did a little shopping for her but she did prefer to maintain her independence in that respect and there had been no suggestion that she should surrender her driver's license. Now and again, it was necessary for Mr Sims to accompany his mother on medical appointments but for the most part she was quite healthy and no great effort was required in that respect. In fact there was not a lot more required of him other than for the commitment of always being there and available should she need his help.

Around about five (5) years into this arrangement, when Mr Sims was approximately 43, he was elected president of the NT Chamber of Commerce. After that the lifestyles of mother and son began to clash. He began hosting frequent meetings of businessmen in his living quarters and sometimes that continued until very late at night. The visitors were noisy. The openness of tropical architecture meant that there noise penetrated Sarah's living quarters to an uncomfortable degree. They did not restrict their noisy debates to Mr Sims' living room; their enthusiastic, and sometimes heated, exchanges were also conducted on the grounds as they

came and went. In general, Mr Sims' new role disrupted Sarah's residential tranquillity.

Ultimately Sarah could stand no more of sharing her living space with numerous people whom she did not know and did not wish to know. She politely raised the topic with her son. She asked Mr Sims if the meetings could be held elsewhere. Unfortunately he could not comply. It was not possible for him to make other arrangements. Sarah eventually made the decision to "lay down the law". She told Mr Sims that she could cope no longer with the invasion of her privacy and said that they would have to find him somewhere else to live.

Things had turned around in Mr Sims' business and so, reluctantly, he was able to agree even though we had reservations about the care of his mother in later years. He found a house for sale in Fannie Bay which he considered satisfactory. He showed it to his mother and she agreed that it was perfect for him. Mr Sims asked the real estate agent to arrange a contract for the purchase of the house, by him as the sole purchaser, at the agreed price of \$1 million.

Sarah paid the deposit of \$100,000 to the agent before her son had the opportunity to do so. When Mr Sims learned of this he spoke to her and said that he had not expected her to do so. His mother responded by saying she intended to make a surprise gesture. She went on to say words to the effect that they had "a fair bit to sort out" and she would pay half the balance of the purchase price.

Mr Sims acquiesced and the result was that the final payment, on completion of the contract, was comprised of a cash payment of \$450,000 from Sarah Sims and \$450,000 borrowed by Mr Sims from his bank. The transaction was duly completed and the new home was registered in Mr Sims's sole name subject to a mortgage in favour of the bank to secure repayment of the loan.

A year later, at the age of 81, Sarah died and left her entire estate to the Salvation Army. She stated in her will that she considered that her adult children Lily Sims and Robert Sims had been adequately provided for in her lifetime and did not need her money. Sarah's estate, including her home at Myilly Point, was worth several millions of dollars.

The will appointed her daughter Lily to be her executrix. For the last 20 years Lily has lived in New York, USA, where she has a successful career as an investment banker. As a result of her devotion to that career she has not seen either her mother or her brother in the previous 10 years.

Mr Sims approached Lily and asked her to give careful thought to how the estate was to be wound up. In particular he asked her to give due recognition to the money that he expended on his mother's home. At about

the same time, Lily received representations from the Salvation Army to the effect that in winding up the estate, and distributing the proceeds to it, she should recover from Mr Sims her late mother's loans made to him in respect of the Fannie Bay house.

That communication prompted Lily to ask the Salvation Army to express its attitude toward the \$500,000 expended by Mr Sims on his mother's home. Its answer was to the effect that the executrix should not recognize any rights in Sarah Sims' home that could not be officially substantiated by a written agreement or registration on the title.

The executrix, Lily Sims is the client. She has engaged your legal firm for assistance to guide her as to her proper response to the representations received. Your team leader has requested you to provide a report in relation to all equitable claims and liabilities that may arise out of these facts. Prepare the report as requested taking care to ensure that you cover the merits (if any) of the respective positions of Mr Sims and the Salvation Army with observations as to their potential remedies if any. Ignore any possible rights or claims that may arise under succession law.

**(20 Marks)**

## **Question 2**

### **The Problem of Alana's Home**

On New Year's Day 2013 Albert Isaacson and his wife June sat proudly in the audience at Sky City Casino, Mindil Beach, Darwin, witnessing their daughter Alana on stage competing in the "Miss North Australia Cultural Ambassador" talent and beauty contest. She was a ravishing beauty, a good public speaker and had great diplomatic skills. Mr Isaacson was very proud of her and pleased to be there to support her. He was overjoyed when, in the result, she carried away the crown.

In the late night intimate supper that followed with a few friends, relatives and the runners-up, Mr Isaacson said to Alana:

"I would have done this anyway. Winning the contest is not what it's all about but it is a good opportunity to add to your joy. I have always wanted you to have the Fannie Bay town house and I have just been waiting for the right time; and that's now. You are my grown-up daughter who is going to be a world-beater and you will need your independence."

Mr Isaacson turned to his wife June, and said:

"Give her the key now please dear. That's what we agreed on".

Alana's mother said:

"Too right it is. She has earned it. Here you are sweetie. Dad is going to the lawyer this week to transfer it over to you."

Mr Isaacson responded:

"Yes, well - that's if they are working this week. It doesn't matter anyway. It's yours as of now and the paperwork can be done as soon as practical. In the meantime I am holding it for you."

In January 2013, Mr Isaacson and made a couple of attempts to telephone his lawyer for an appointment. However it was holiday season and the lawyer was out of town on a break. As a precaution against forgetting all about it, Mr Isaacson sent the lawyer an SMS text message to confirm what he wished to do as soon as he could get an appointment. The message read:

"Need to see you. I want to transfer 2/17 Stokes Street Fannie Bay to my daughter Alana. Get back to me as soon as you can please."

In the third week of January 2013, Mr Isaacson's lawyer John Franklin, returned to work. It took him until 27 January, the day after Australia Day, to complete a review all of his inwards correspondence and other messages. At that point he found time to attempt to call his client back regarding the Fannie Bay property. Not surprisingly, by this time, Mr Isaacson was engaged on other matters. Indeed he was overseas on one of his many business ventures.

Over the next year or more, both the lawyer and the father did make attempts to get together on the subject of the daughter's home but they failed. That was partly because each of them was distracted by other responsibilities but there was another reason. On 12 February, 2013 the Northern Territory Treasurer made a media release to the effect that in the coming budget a concession would be introduced whereby stamp duty would be waived on the conveyance of residential property from parents to their offspring.

The Treasurer said that he wanted to assist parents who took responsibility for housing their children. Mr Isaacson was not an expert on stamp duty but he could see that this measure would save him approximately \$37,500. He was very pleased. That saving represented more money that he might be able to spend on his children. In his enthusiasm for that prospect, he developed the mindset that he would transfer the townhouse to his daughter when the legislation had been passed.

However that did not happen in the next budget as anticipated. The Treasurer's introduction of the necessary legislation was delayed by discord among the members of the governing party inflamed by pressure from the

opposition; both groups claimed that the measure was too generous a gift to wealthy people. As a responsible practitioner Mr Franklin kept in touch with his client on the issue. He suggested that the priority should be the conveyance rather than the savings and tried to persuade Mr Isaacson to deal with the matter more promptly.

In one telephone conversation with Mr Franklin, Mr Isaacson said:

"I'm coming in; that's for sure. Yes it's her unit and I will get it transferred over to her as soon as I can get free of this other stuff that I have to deal with at the moment and when the stamp duty concession goes through. It won't be long and in the meantime, there is no real worry on her behalf. I am holding it for her."

The promised stamp duty reform never came; at least not in the lifetime of Mr Isaacson. On 18 January, 2014, without prior warning, he died of a sudden coronary occlusion. By then things were not quite as happy in the Isaacson family as they had been. Albert Isaacson and his wife June had gone their separate ways. Mr Isaacson was in a relationship with a new woman. Alana was happily settled in 2/17 Stokes Street Fannie Bay which remained in her father's name, but she was naturally saddened by the rift between her parents, and was shaken by her father's sudden death.

Even greater shocks came when Alana learned two further disturbing facts. The new woman in her father's life was Anna-Maria Segovia who was closer to Alana's age than that of her father. Indeed that was the connection. Her father had met Anna-Maria at the supper-party after the talent and beauty contest in January 2013. Anna-Maria had been the second place winner in the contest. The other disturbing fact was that Anna-Maria had been named in her late father's will as sole heir.

Unfortunately Mr Isaacson died on 18 January 2014. He left a will which he made less than a month prior to his death. It named his lover Anna-Maria Segovia as the sole beneficiary of all of his assets. The will had not been drawn up by John Franklin. Probably Mr Isaacson had been too embarrassed to go to his usual solicitor. Instead he had the will prepared by a different solicitor named Anthony Featherstone whom he also appointed as executor and trustee of the estate.

The town house in Stokes Street remains in Mr Isaacson's name and is claimed by the named sole beneficiary Anna-Maria Segovia. However Mr Featherstone has been contacted by John Franklin, former solicitor for Mr Isaacson, who visited him in company with Alana. They gave him a full briefing on the background which has convinced him that he ought to pass the townhouse to Alana.

The executor Mr Featherstone is the client. He has engaged your legal firm because he wishes to be independently professionally advised as to who is

entitled to the town house in Stokes Street. Your team leader has requested a report from you as to what doctrines of equity, if any, are applicable in the circumstances and, if there are any, in what way they apply and why? Write the report.

**(20 Marks)**

### **Question 3**

#### **The Problem of the Manipulative Mortgagees**

Mandrake Properties Pty Ltd ("Mandrake") was the owner of a large piece of land suitable for development into a profitable number of subdivided lots ("the land") for sale. The acquisition cost of the land was \$4.5 million. Mandrake had expended \$3.5 million of its own money on the purchase and borrowed \$1 million from Land-Dev Financing Pty Ltd ("Land-Dev") to assist it to purchase the land. As a result, the land was subject to a mortgage in favour of Land-Dev for that amount to secure repayment of the borrowed money.

The mortgage commenced in January 2007. Its terms required Mandrake to make monthly payments of \$10,000 interest to Land-Dev plus the full proceeds of any sale of a subdivided lot until such time as the original loan, and all interest, had been fully repaid. In September 2008, it became evident that Mandrake did not have sufficient financial resources to fund and carry out the necessary development works involving the construction of roads, drains, and reticulation of water, sewerage and electricity services. That fact became evident to Land-Dev when Mandrake made a further application to Land-Dev for additional finance to cover some of the development work.

Mandrake was up to date with payments required under the mortgage at the time of its application and had not approached any other possible financier. The likely gross earnings to be achieved by Mandrake on a successful completion of the development had the potential to be a very attractive and significant sum of money. Land-Dev did not refuse the application but instead made a proposal that the two companies enter into a joint venture. After a series of negotiations, Mandrake and Land-Dev came to an understanding regarding Land-Dev's proposal and entered into a formal joint venture agreement. As a result, Mandrake did not make any alternative applications to other possible financiers.

The main terms of the joint venture agreement were:

- (1) Mandrake would develop the land by subdividing it and selling the lots thereby produced in conformity to its original proposal.

(2) Land-Dev would advance any sums of money necessary to enable Mandrake to pay the cost of any construction work as required to complete the development.

(3) The operation of the existing mortgage would be enlarged to provide additional security to Land-Dev for any money advanced by it or the construction work.

(4) Until such time as all advances for construction costs, the original loan, and all interest, had been fully repaid to Land-Dev it would be entitled to, and have first charge over, all proceeds of any sale of a subdivided lot to the exclusion of Mandrake

(5) When all advances for construction costs, the original loan, and all interest, had been fully repaid to Land-Dev, all proceeds of any sale of a subdivided lot thereafter would be shared equally between the joint venturers.

(6) The joint venture was to terminate on the date of the earliest of the final distribution of net profits of the sale of all lots, three years from the date of entering into the agreement or on the expiration of notice of 30 days from Land-Dev to Mandrake if there be any default on the part of Mandrake in compliance with the requirements of the mortgage.

(7) It was also agreed that neither party would sell, assign, transfer, or mortgage their interest in the joint venture without first obtaining the written consent of the other party which consent would not be unreasonably withheld.

In January 2009 Mandrake was unable to pay its monthly mortgage instalment of \$10,000. That situation had been anticipated by Land-Dev as, by this time, it has lost confidence in the ability of Mandrake to make a success of the venture. Clearly it was the wrong time to be speculating in land. The month of January 2009 was the depth of a major financial crisis that was plaguing the entire global community.

In the circumstances Land-Dev considered that it's only prudent course of conduct would be to take action to enforce its rights under the mortgage. It gave immediate notice to Mandrake of default under the mortgage requiring Mandrake to remedy the breach. At this time, Land-Dev refrained from giving a 30 day notice to terminate the joint venture agreement. Its decision, in that respect, was to firstly ascertain the capacity of Mandrake to rectify its default in compliance with the mortgage if possible.

Mandrake was not able to remedy the breach as it did not have the necessary money and could not acquire alternative finance from any other source. Alternative finance was impossible to arrange because the global economic downturn had depressed the value of the land to well below \$1

million. That was a serious threat to the interests of Land-Dev because the accumulated debt of Mandrake, taking into account construction finance drawings, was approximately \$2 million. Land-Dev consulted several real estate agents for professional advice. All advised that it was an inopportune time to force a sale of the land. One of the agents advised that the most likely way to earn any financial advantage from the land in the present circumstances would be to find tenants to occupy and use various parts of the land in return for payment of some form of ground rent.

Land-Dev then notified Mandrake that it had decided to recoup as much of its money as possible by finding a third-party willing to purchase its mortgage interest in the land and thereby take over its problem. Within a short time it arranged for Oak-Tree Investments Pty Ltd ("Oak-Tree") to purchase Land-Dev's mortgage. By this time, the mortgage default notice previously given by Land-Dev to Mandrake had well and truly expired without being rectified by the debtor. In those circumstances, as it was entitled to do, Land-Dev then gave a 30 day notice of termination of the joint venture agreement.

After purchase of the mortgage, Oak-Tree's management met with the board of Mandrake and explained what they said was their strategy in making the purchase of the mortgage. The plan, they disclosed, was not to force a sale of the land under the mortgage powers but, rather, to pursue a strategy to generate revenue from the land by leasing out a number of the existing subdivided lots on the land which were empty awaiting sale (and which had become difficult to achieve).

Oak-Tree's management said that its lender's powers under the mortgage, which Oak-Tree had purchased, would be sufficient to enable it to rent out the vacant land without the cooperation of Mandrake but that they would prefer to have its cooperation. Oak-Tree's officers explained the proposed strategy would work more smoothly if it was implemented with Mandrake as part of the team. They suggested that, if so, Mandrake could be paid a commission of 10% of all rentals collected (as well as all net rentals being directly credited off its debt).

The proposal was attractive to Mandrake board members and all of them said words to the effect that Mandrake was willing to enter into such an arrangement. The Oak-Tree management team offered their hands saying words to the effect "then we have a deal". There were handshakes all round and thereafter, for approximately three months, both parties proceeded on the basis of the plan to recruit tenants to occupy vacant land and pay rent as a means of addressing the debt problem.

However, there was virtually no success during that 90 day period. Oak-Tree had clearly misunderstood the demand for rental arrangements in respect of vacant land. After that fruitless period the management of Oak-Tree decided that it should give up on the idea. Without further

consultation with Mandrake, as mortgagee, it resolved to enforce its right to sell the land as a mortgagee in possession. It had the right to do so because Land-Dev's default notice remained operative and unsatisfied. Oak-Tree set in motion all of the correct procedures for a mortgagee's sale of the Mandrake's land.

Of the several bids that were received for the land, the most advantageous bid was \$850,000. As assignee and successor of Land-Dev's as mortgagee, Oak-Tree accepted that bid. The land, in its partially completed developed state, was duly transferred to the successful bidder. The impact of the sale on Mandrake was, of course, a ruinous financial loss.

Mandrake is the client. It has engaged your legal firm for the purposes of general advice as to its position. It is searching for some means of passing on some of its losses. As part of your legal firm's preliminary investigation, corporate searches were conducted on both Land-Dev and Oak-Tree. The searches revealed that one of the directors of the first entity was also a director of the second entity. That director was also a 40% shareholder in both entities. His shareholding was not readily ascertainable but could be traced indirectly insofar as it was held via the means of different nominee companies in each respective case.

Your team leader has requested you to formulate a report as to whether any equitable obligations or duties have been contravened by either Land-Dev or Oak-Tree and if so what are the possible remedies.

**(20 Marks)**

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**END OF EXAMINATION QUESTION PAPER**