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	Family Name	
	Given Names	
	Student Number	
	Teaching Period	Semester 1, 2017
FINAL EXAMINATION	DURATION	
LWZ210 – Equity	Reading Time:	20 minutes
	Writing Time:	180 minutes

INSTRUCTIONS TO CANDIDATES

1. This examination paper **contains THREE (3) questions.**
2. Candidates **must answer ALL THREE (3) questions.**
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

No calculators are permitted

Any handwritten material is permitted

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

ADDITIONAL AUTHORISED MATERIALS	EXAMINATION MATERIALS TO BE SUPPLIED
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.**

EXAMINATION QUESTION PAPER

ANSWER ALL THREE (3) OF THE FOLLOWING 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 **all three (3) only** of the following 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 your team leader and 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 Never on a Sundae

Anthony Armbrust ("Tony") is the son of Max Armbrust ("Max") and his wife Margaret Armbrust ("Margaret"). Armbrust & Son Pty Ltd is a corporate entity effectively controlled by Max and Margaret. Mary-Anne Armbrust ("Mary-Anne") married Tony in 1991. They separated in 2009 and divorced in 2011.

Max and Margaret are now in their seventies. They have run a pastoral business on various properties for approximately 50 years. Max and Margaret have owned each of those properties in their own names. Tony has worked for, or with, Max and Margaret in that pastoral business for most of his adult life.

Currently their major asset used in the pastoral business is a property known as Sundae Creek Station. Max and Margaret purchased Sundae Creek Station in their own names as joint tenants, in 1985. Max and Margaret paid the purchase price of \$690,000 by \$490,000 from their own cash and the balance was borrowed by them from a banking institution.

In 1992, Max and Margaret sold the family home in Darwin. Some of the proceeds from the sale were used to reduce the debt on Sundae Creek Station. Max and Margaret later used the balance to purchase land in Katherine and build a home on that land. That home was completed in 1996.

After the purchase of Sundae Creek Station, Tony lived and worked on Sundae Creek Station during the working week. Max also resided at Sundae Creek Station during the working week. In the early years they returned to the family home in Darwin on weekends.

When Tony and Mary-Anne married in May 1991, they permanently resided at Sundae Creek Station but Mary-Anne commuted on week days to work as a hairdresser in Katherine. Her income was used to fund the station household. After the birth of their children, Mary-Anne ceased her paid employment in Katherine and undertook domestic and other duties at Sundae Creek Station assisting in its operation.

After the purchase of Sundae Creek Station, grazing activities were conducted on it through various partnership structures. Max and Margaret always remained the registered owners of Sundae Creek Station. There were various business structures which leased that property from Max and Margaret. The actual structure was of no interest to any member of the family; they simply follow the advice of their tax consultants to take into account the best way of achieving the least taxation on their activities.

At one time the business structure was a partnership of the parents only; later it was a partnership of all four members of the family; at one time the operating entity was Armbrust & Son Pty Ltd; subsequently it was a partnership between Max, Margaret and Armbrust & Son Pty Ltd (which acted as corporate trustee of a discretionary trust with Max and Margaret as its primary beneficiaries, and their children and grandchildren as secondary beneficiaries. That structure operated between 1985 and 1993.

On 1 July 1993, a new partnership was formed between Tony, Mary-Anne and Armbrust & Son Pty Ltd. Tony and Mary-Anne each held a 25 per cent stake. The remaining 50 per cent stake was held by Armbrust & Son Pty Ltd. No partner made any financial contribution towards the acquisition or maintenance of partnership property at the commencement of that new structure. No monies were paid to become a partner of that structure.

In 1996, Tony instigated the start-up of an agricultural spray business. However all of the shares in the company that he arranged to establish that business were owned by Armbrust & Son Pty Ltd. Tony and his brother served as the directors of the company. In 2001, Mary-Anne replaced the brother and became a co-director, with her husband Tony, of the agricultural spray business operating company but neither she nor Tony ever actually held any shares.

In 2001, Mary-Anne resumed working in Katherine, part-time with the Katherine Shire Council. She converted to full-time work in 2004. Again, Mary-Anne's income was used to help fund the household. In 2004, Armbrust & Son Pty Ltd alone commenced operating the pastoral business.

At that time, Tony and Mary-Anne became directors and shareholders of Armbrust & Son Pty Ltd. The consequence of this change was that the shareholding of Armbrust & Son Pty Ltd was held equally by Max and Margaret and Mary-Anne. Each owned one share. Mary-Anne did not pay any money for her share. The grazing operation continued to operate under that structure from 2004.

In 2005, Max and Margaret considered retirement. Discussions were held between Max, Margaret, Tony and Mary-Anne about selling Sundae Creek Station. The discussions contemplated that part of the proceeds of sale were to be used to purchase a home for Tony and Mary-Anne. They were also to receive the agricultural spray business including its equipment.

Sundae Creek Station was offered for sale in 2005, and again in 2008. The asking price was never realised and it was later withdrawn from sale. In late 2009, the marriage between Tony and Mary-Anne broke down. Tony left the family home and commenced another relationship. Mary-Anne continued to reside rent-free at Sundae Creek Station. Tony and Mary-Anne divorced in 2011.

Mary-Anne has retained the legal firm for which you work and requested the firm to take proceedings on her behalf to get some recompense for her efforts over the years. She cannot achieve that through the Family Law Act because the title to Sundae Creek Station is vested in her parents in law.

Your team leader has requested you to provide him with a report on the implications of the principles of equity as they may apply to these facts and the judgment and orders that the client might be able to achieve.

Your Task: Write the necessary report identifying and reviewing the doctrines of equity that are relevant, explain how they may apply, whether they are likely to be successful and if so why; and alternatively, if not – why not.

(20 Marks)

Question 2.

The Problem of Slips Not Ships

Two somewhat special marine berths were developed by Cullen Bay Marina Management Corporation (“the Management Corporation”) in the Cullen Bay Marina Complex. They were the two largest marine berths to come on stream in any mooring basin in the Port of Darwin area. Even more special, they were immediately adjacent to a site on the shore of the Marina that was approved for the development of a hotel (“the hotel site”). The two berths could most certainly be used in a manner ancillary to any hotel activities conducted on that site.

National Hotels Ltd (“National Hotels”) had planned to buy the hotel site and acquire control over the two marine berths as part of a planned expansion into tourism in the North Australian market. After it successfully acquired the rights to the two marine berths but before it had acquired the hotel site its management, at national level, resolved to slow down on the expansion that it had planned. It already had one hotel in the area and the policy was adopted that, for the moment, that degree of representation would be sufficient.

Trepang Dreaming Pty Ltd (“Trepang Dreaming”) was a company active in the local level of the tourism-hotel sector under the management of Paul Pocock its sole director and financial sponsor. Trepang Dreaming purchased the hotel site for more than \$2,000,000 and planned to construct a development on the site which would be greatly improved if it had access to both berths. Accordingly Mr Pocock opened negotiations with National Hotels to acquire its rights to the two marine berths. That was not a very straightforward process as National Hotels did not own the marine berths; it held tenure over them on long-term 99 year leases.

National Hotels had acquired their leases on reasonably easy terms. A small capital premium of \$20,000 “up-front” had been paid to the Marina Management Corporation, on each lease, and thereafter the annual rental was at the rate of a peppercorn per annum (in effect \$nil) on the basis that the lessee was liable for certain recurrent expenses (“the outgoings”). However all necessary improvements (pontoons and docking systems) were required to be installed by National Hotels as lessee at its own expense. That was an estimated expense of approximately \$50,000 per berth.

Irrespective of the complexity, Mr Pocock, as the person who directed Trepang Dreaming, was comfortably satisfied that any efforts would be worthwhile by reason of the escalation of the value of the hotel site that would result from it having guaranteed water access on a permanent basis. He negotiated a deal with National Hotels by which the arrangement was not a sale and purchase of its leases but rather an agreement by which National Hotels and Trepang Dreaming agreed to enter into the two subleases. The terms of both subleases were from 23 February 2009 to 21 November 2108 (almost 100 years).

The parties agreed that the rent payable for the entire term of each sublease would be \$225,000 on the basis that National Hotels would be liable for the cost of the construction of the necessary pontoons (an amount of approximately \$100,000 in total). It was further agreed that Trepang Dreaming, as sub-lessee, would pay all of the rent in advance at the commencement of each sub-lease with the exception of a deferred amount of \$50,000 for each sublease (to cover the cost of the pontoons). The deferred rent liability was not activated until National Hotels provided Trepang Dreaming with a notice of its intention to commence construction of the pontoons. The deferred rent of \$50,000 for each sublease was then payable within three business days of the giving of notice and was to be held in a trust account until practical completion of the pontoons.

On or about 11 May 2012, three years after the sub-leases had been entered into (and Trepang Dreaming had paid \$175,000 advance rent for each sub-lease) National Hotels gave Trepang Dreaming a notice of intention to commence construction of pontoons and requested the payment of \$100,000 (that is, the deferred rent). At the time the notice was given, National Hotels had become insolvent. The notices came from Receivers and Managers appointed by creditors of National Hotels. For a variety of reasons, Trepang Dreaming did not pay the requested amount for more than two years.

On 17 April 2014, Trepang Dreaming received notices to remedy its breaches of sub-lease covenants with respect to the failure to pay the outstanding sum of \$100,000. The notices required payment within 45 days. Mr Pocock informed the lawyers for the Receivers and Managers of National Hotels that he was in the process of selling two properties and

would forward payment upon settlement. Copies of the contracts of sale were then provided to the Receivers and Managers of National Hotels on 26 May 2014 and 11 June 2014.

On 12 June 2014, the lawyers for the Receivers and Managers of National Hotels gave notice of termination of the subleases due to non-payment of the deferred rent. On 17 June 2014, Trepang Dreaming paid \$100,000, which was the full amount of the deferred rent, into the trust account of the Receivers and Managers of National Hotels. On 25 June 2014, the Receivers and Managers of National Hotels lodged notices for registration which purported to terminate the subleases. On 3 July 2014, the lawyers for Trepang Dreaming wrote to the lawyers for the Receivers and Managers of National Hotels requesting that the Receivers and Managers of National Hotels accept payment of the deferred rent, reinstate the subleases and withdraw the termination of the subleases.

On 11 July 2014, the lawyers for the Receivers and Managers of National Hotels also demanded the overdue outgoings of \$16,060.18 in respect of each sublease and subsequently requested further amounts for costs. From 24 July 2014 to 12 September 2014, Trepang Dreaming made various offers but negotiations broke down. On 3 October 2014 Trepang Dreaming paid into its solicitor's trust account all outstanding amounts as had been requested by the Receivers and Managers of National Hotels and instructed its lawyers to take National Hotels to court over the issues between it and the Receivers and Managers of National Hotels.

The legal firm for which you work, are the solicitors for Trepang Dreaming. Your team leader in that legal firm has requested you to provide him with a report on the implications of the principles of equity as they may apply to the facts. He has asked that you advise him as to which doctrines might be examined, mobilised and perhaps instituted in an effort to assist Trepang Dreaming.

Your Task: Write the necessary report identifying and reviewing the doctrines of equity that are relevant, explain how they may apply, whether they are likely to be successful and if so why; and alternatively, if not – why not.

(20 Marks)

Question 3.

The Problem of The Homeless Mum

Alison Hilder ("Mrs Hilder" or "the mother") was born in the England in August 1923. She is currently aged 93 years and is a high care resident in an aged care facility where she has been since about June 2012. Her son

Martin Hilder ("Mr Hilder" or "the son") was born in Tel Aviv, Israel, in February 1955, and is currently aged 62 years.

Mrs Hilder made a Will dated 15 October 1974 in which she appointed her husband, Norman Hilder, as executor and sole beneficiary of her estate, but in the event that he did not survive her by one calendar month, then her son Mr Hilder was appointed as executor and sole beneficiary of her estate in his stead. Norman Hilder, the husband, died in December 1994.

On 6 October 2000, the mother granted to the son an Enduring Power of Attorney in the form prescribed in Powers of Attorney Act (NT) which was subsequently duly registered. The document expressly stated that authority was conferred on the son, as attorney, to do, on the mother's behalf, anything that she may lawfully authorise an attorney to do. The Power of Attorney, also gave the attorney express authority "to execute any assurance or other document, or do any other act, whereby a benefit is conferred on him".

The Power of Attorney was also expressed to be given with the intention that it continue to be effective even if the mother suffered a loss of capacity through unsoundness of mind after its execution. On 26 August 2008, the mother also appointed the son as her enduring guardian "if because of disability I am partially or totally incapable of managing my person".

In November 2001 the mother purchased a property in Cullen Bay for \$245,000. It is a one bedroom residential apartment with an area of 45 square metres, comprising an open lounge-dining room, a kitchen, bathroom and laundry, and a very small balcony. It has an open single car space with an area of 13 square metres. The title was unencumbered.

A medical report made in June 2012 stated that the mother suffered from macular degeneration and had short term memory loss. Shortly after that report Mrs Hilder was admitted to the aged care facility. In a later report of 29 January 2014, the mother's general medical practitioner advised that she suffered from blindness, poor hearing to a moderate degree, and mild dementia. On a standard structured mental state review examination she had scored 21/30.

Subsequent to going into the aged care facility, Mrs Hilder transferred her apartment to her son. The registered Transfer of the Cullen Bay property was executed on 31 July 2013 and showed the transferor as the mother and the transferee as the son. The Transfer was made for an expressed consideration of \$1.00. The Transfer was signed by the son as the Attorney for the transferor and by himself as the transferee. In early August 2013 a Certificate of Title to the Cullen Bay property was issued by the Titles Office showing the son as the registered proprietor of the Cullen Bay property which remains in his name free of any registered encumbrance.

As at 1 August 2013, the amount the mother's account with the aged care facility, owing for her care and support, was out of order to the amount of \$8,130.19 in arrears. A significant proportion of the charges incurred by the mother, for her care at the facility, was paid by the automatic application of her aged pension in part payment of her liability. Nonetheless, there was a balance of charges which she or her family were responsible to pay. The arrears were attributable to the son's failure to make any arrangements to cover that shortfall.

After several attempts were made by the management of the aged care facility to approach the son and discuss the matter, it was learned that on 18 November 2013, the son had officially resigned his appointments as the mother's Attorney and as her Guardian. On 31 January 2014, the Manager of the aged care facility lodged an application with the NT Civil and Administrative Tribunal, for the appointment of the NT statutory Infirmity Trustee and Guardian to manage the mother's affairs.

The application was supported by written evidence in the form of affidavits one of which gave an account of Mrs Hilder's finances being out of order and another of which provided a review of her property including reference to the fact that her former Cullen Bay residential flat was now owned by her son.

The son did not seek to be a party to the hearing but a firm of solicitors called Larrakeyah Lawyers sent a letter, dated 13 April 2014, to the Tribunal on his behalf. The letter stated that the solicitors were not instructed to appear at the hearing and that their "client, Mr Hilder is, himself, too ill to participate". The letter also contained this information:

"...4. Residence at premises – my client is not residing at the premises as I am instructed that it is presently uninhabitable due to damage caused by Mrs Hilder's treatment of the place prior to her move to care in or about June 2012. The assertion that the property was purchased from the sale of her previous residence is not correct. The situation is rather complex, but involved my client advancing substantial loans to his mother when she decided to return to Europe to reside and the loan was repaid to my client on the sale of her property and my client acquiring the present property. Solicitors handled the transaction which was in good faith and properly documented."

By order of 16 April 2014, the Tribunal was satisfied that the estate of the mother should be committed to the authority and control of the NT statutory Infirmity Trustee and Guardian. On 27 August 2014 the solicitor for the NT statutory Infirmity Trustee and Guardian wrote to a firm understood to have acted on behalf of the son on the conveyancing of the Cullen Bay residential flat from the mother to the son. The letter relied on a particular provision of

the infirmity legislation to require those solicitors to provide a copy of their file in relation to the transaction.

By a letter dated 25 September 2014, accompanied by a copy of his file, the solicitor stated:

"I act for Martin Hilder. I refer to your letter dated 3 July 2014. The purpose of this letter is to respond on instructions to the matters raised in your letter. In July 2013 Mr Hilder attended at my office with his mother's will showing him to be sole beneficiary and a registered enduring power of attorney of his mother appointing him as her attorney. Mr Hilder also produced a valuation from a registered valuer for stamp duty purposes. I was holding and have held the unencumbered Certificate of Title to the property from when Mrs Hilder purchased it in 2001. Mr Hilder instructed me to transfer the title to him. I acted on his instructions, having regard to the following: Mr Hilder is sole beneficiary of his mother's will; Mr Hilder is Mrs Hilder's attorney under an enduring power of attorney; Mrs Hilder does not have mental capacity; Mrs Hilder is in a nursing home; there were no outstanding debts against the property and Mrs Hilder's living expenses were being taken care of by her aged pension and her St George Bank account. On the basis of the documents sighted and the explanation given in support of my instructions to transfer the property, to do so was reasonable in all the circumstances."

The NT statutory Infirmity Trustee and Guardian subsequently caused a caveat to be registered on title to the Cullen Bay property. On 31 August 2015, the NT statutory Infirmity Trustee and Guardian received a letter from Larrakeyah Lawyers, the first firm of solicitors, in the following terms:

"I continue to act for Mr Hilder who has handed me a letter from the NT Registrar General with a copy of Caveat attached. Mr Hilder wants me to point out again that the subject property was purchased with his funds and put into his mother's name to be held in Trust for him. As previously advised, there was a change in circumstances and the property was legitimately transferred to my client as the lawful owner. At no time was there ever an expressed or implied Trust that he would hold the property for his mother. Nevertheless, it is the case that Mrs Hilder is 93 years of age and only in moderate health. My client is the sole beneficiary of her estate pursuant to a will, a copy of which I attach for your information. Accordingly, and in all the circumstances noting in particular the legal costs that could be incurred in respect to action to remove the Caveat, my client will, at this stage, refrain from such action."

The NT statutory Infirmity Trustee and Guardian responded in a letter dated 8 September 2015 including these terms:

“It is appreciated that Mr Martin Hilder is the sole beneficiary of his mother’s estate. However, the NT Trustee has the pressing and immediate problem of debts owing to the nursing home where Mrs Hilder resides. The current debt balance is \$20,797.02. The relevant property was assessed as an asset for the purposes of setting Mrs Hilder’s aged care costs. The result of that assessment is that her aged care costs exceed her pension and, in the absence of any cash payments by her (or Mr Martin Hilder) the nursing home debt will continue to escalate. If your client wishes to put a proposal that will deal with the present and future debt to Nightcliff Aged Care Centre, the shortfall in social security and costs then it will be considered. In the absence of any such proposal litigation will proceed.”

You are employed by Larrakeyah Lawyers. Martin Hilder, the son, has engaged your legal firm for assistance to guide him as to his proper response to the NT statutory Infirmity Trustee and Guardian's letter. Your team leader has requested you to provide a report in relation to all equitable claims, liabilities and defences that may arise out of these facts.

Your Task: Prepare the report as requested.

(20 Marks)

END OF EXAMINATION QUESTION PAPER