

LEGAL PROFESSION ADMISSION BOARD

MARCH 2014

CONTRACTS

Time: Three Hours This paper consists of three questions.

Candidates are required to attempt all three questions.

All questions are of equal value.

All questions may be answered in one examination booklet.

Each page of each answer must be numbered with the appropriate question number.

Candidates must write their answers clearly. Lack of legibility may lead to a delay in the candidate's results being given and could, in some circumstances, result in the candidate receiving a fail grade.

Substantial credit will be given to concise well-reasoned answers based upon principles, which are clearly stated. Students are expected to answer the problems using the compulsory cases that were studied in this unit.

You should discuss all the relevant issues, even if you believe the answer to one of the issues will dispose of the matter. You should however address only issues directly raised by the facts.

You must canvass the arguments for and against the position you take. Where there are conflicting judicial approaches on issues, you should outline them, describe their potential effect on the outcome of the problem, and indicate, with reasons, which approach you prefer.

This examination is worth 80% of the total marks in this subject.

Permitted Materials: This is a closed book examination. No materials are permitted in the examination room. A case list appears in the exam paper.

As some instances of cheating, plagiarism and of bringing unauthorised material into the examination room have come to the attention of the Admission Board, candidates are warned that such conduct may result in instant expulsion from the examination and may result in exclusion from all further examinations.

This examination should not be relied on as a guide to the form or content of future examinations in this subject.

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Question 1

On 1 June Amber agreed to sell 500 tonnes of A Grade West Coast sand to Bill for \$100 per tonne which was the current market price at the time. The sand was to be in good condition upon delivery. The sand was to be delivered in 2 equal instalments with the first instalment to be delivered as soon as possible and the second half two months later. The price was payable upon delivery.

When Amber delivered the first instalment to Bill on 1 July Bill rejected it and told Amber he was terminating the contract. He did not give any reasons. Amber sued Bill for damages for breach of contract. At the trial the following facts appear:

- a) The first instalment was only 210 tonnes.
- b) It was possible for Amber to have delivered it sooner but she chose to use all her stock of sand at the time to fulfil another contract with a first time customer from whom she hoped to get repeat trade.
- c) Water had seaped into the truck carrying the sand and at the time it had arrived at Bill's 70% of it was wet and it would have taken Bill twice as long to unload it and move it to storage than if it had been dry.
- d) The market price for A Grade West Coast Sand after entry into the contract dropped to \$80 per tonne and Bill "wanted out" of the contract so he could obtain cheaper sand on the market.
- e) After termination of the contract the price for A Grade West Coast rose to \$110 a tonne and Amber was able to sell all her supplies on the market.

Do you think Bill had a right to terminate the contract? If you assume Bill had no right to terminate the contract what damages could Amber recover from him?

Put aside the facts in (a)-(e) and assume that after Bill terminated the contract the only relevant fact in evidence was that the first instalment tendered was Grade A East Coast Sand which was the same quality as Grade A West Coast Sand and had the same market price and was suitable for Bill's use. When the instalment was rejected by Bill, Amber inspected the sand and noticed it was East Coast sand, she quickly offered to send over the West Coast sand she had in stock for Bill but Bill had said that it was too late. What would be the rights of Bill and Amber in this circumstance?

(Question 2 follows)

Question 2

In January 2011 Jack visited the Saturn Casino in Sydney for the first time. He played cards and lost. He then visited the casino every day for the next 6 months. He lost every time. The management of the casino refer to him as an 'incompetent gambler'. Nevertheless, his frequent visits brought him to their attention and although the sums he lost were small they did not know much about him and could not tell how large a percentage of his income he was losing. As part of their community service they took him aside and told him that they offered a service to pay for an assessment with a psychologist if a customer may be at risk of having a gambling problem stating 'we are not in the business of taking away food from customers' tables'. When Jack hesitated they said to him that they might have to exclude him unless they were sure he did not have a problem. He then agreed to the assessment. The result of the assessment was that Jack was a pathological gambler but that he had no compulsion to gamble large sums of money. He earned a good income of \$300,000 a year and the sums he gambled and lost were a small fraction of this. On the basis of that report the casino allowed him to continue gambling there.

This all changed 6 months later when Jack brought his new girlfriend Eliza to the casino. Eliza was well known because she was one of the richest women in the world. She had amassed her own individual fortune as well as inherited a large family fortune and had recently been in the press in relation to a bitter court battle she was involved in with her brother over the family fortune. It was well recorded that this litigation subjected her to a lot of stress. She had made a statement to the press during the litigation, 'if I left this business to my brother he would have broken it up and sold it and 1000s of people would have lost their jobs, I have tried to save it yet the press have portrayed me as the evil one, I feel I do not have a friend in the world'.

On their first visit to the casino she opened an account with the Casino in both her name and Jack's name and deposited \$5 million. She had no interest in gambling and allowed Jack to use the money. He lost all \$5million that night. They regularly visited the casino and every time Jack gambled away millions of dollars. The casino noticed the massive increase in bets that Jack was making which did not correspond with the report given to them by the psychologist but thought that this was still small change for Eliza. At one time when Eliza went to the counter to transfer more money into the casino account the woman at the counter said to her, 'are you sure you want to do this, he does not seem to have much luck winning anything, perhaps you should buy him some card lessons'. To this Eliza replied, 'I know but I love him and would do anything for him and I would hate for him to leave me, I do not know what I would do if that happened, he is all I have'. At another time when Eliza was depositing \$5 million into the account the attendant said, 'you know that if he loses that you get nothing but if you deposit \$10 million into the account and he loses then we would refund you back \$1million'. Eliza thought that was a good deal and from then on deposited amounts of \$10 million each time. Needless to say Jack lost it all.

(Question 2 continues)

(Question 2 continued)

On another occasion when Jack was playing cards he ran out of credit and asked Eliza to go and transfer some more money. The attendant at the card table heard her say, 'have you not had enough for tonight let's go home'. He also heard Jack then say to her, 'if you do not do it I will leave you, you would not want that would you'. At that point Eliza immediately went and transferred the money.

Finally Jack and Eliza agreed that their relationship was not working and went to see a counsellor. At that meeting when they told the counsellor what had been going on he replied, 'that casino sure seems to have taken you two for a ride'. Jack and Eliza now approach you for advice as to whether Jack has any claim against the Casino for the monies he lost and similarly whether Eliza has any claim for the monies she deposited into the casino account and lost.

Advise them on what rights (if any) they have to do so. As a starting point, you may assume that the contracts between Jack and the Casino, and Eliza and the Casino, respectively, were prima facie valid and legal.

(Question 3 follows)

Question 3

Andrew always gets his car repaired at Smith's Auto. He has been going there for 7 years and takes his car there for repairs and service about twice a year. As he enters the door at Smith's there is a sign on the wall behind the counter that says, 'All vehicles are accepted for repair subject to the terms and conditions appearing in our invoice'. The sign is on white paper (A4) with Black writing, next to it are numerous advertisements for products sold at Smith's auto. Andrew never read the sign, he always dropped off his car on his way to work and was in a hurry.

When he returned to pick up his car the attendant would hand him an 'invoice' to sign. This had his name on it, the details of the car and the work done. The invoice stated:

The customer acknowledges that the agreed repair work has been satisfactorily performed.

Smith's Auto regrets that no responsibility can be accepted for damage or loss caused to the customer's cars by fire, theft or otherwise.

On the occasion in question Andrew left his car for some repair work to be done and followed the usual routine set out above. When he returned to pick it up the next morning he signed the invoice as above and went out into the yard to collect his car. To his shock he found that the GPS navigation system fitted to the car was missing and the car clearly showed signs of being in an accident.

The evidence shows that overnight thieves had broken into Smith's Auto and stolen the GPS system from the car. Andrew's car was not locked, however, Smith's Auto was locked and the alarm was on but the thieves managed to disarm the alarm system and get past the locks: it was alleged it was an inside job but this could not be proven.

In addition, during the previous day the manager needed to go to a meeting. The car yard was full of cars that day that were in for repairs and he could not get his own car out without having to move many cars. Andrew's car was over near the curb so he decided to take it to get to his meeting. By this time the repair work had been done and the manager thought it would be good to see how it was running before Andrew picked it up. He drove the car to his meeting and parked it outside the cafe where the meeting was being held. While at the meeting someone ran into the car causing damage to the rear of the car. They then drove off and were never identified.

Andrew seeks your advice as to whether Smith would be protected by the clauses in the invoice if Andrew were to take action against Smith's Auto.

Answer this question by reference to general principles of common law. Do not consider any statutory provisions you might think relevant.

END OF PAPER

Case List

Formation of Contract

Australian Woollen Mills Pty Ltd v Cth (1954) 92 CLR 424
Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256
Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) [1953] 1 QB 401
 **Barry v Davies* [2001] 1 All ER 944
 **Blackpool and Fylde Aero Club v Blackpool BC* [1990] 1 WLR 1195

The Fact of Agreement: Acceptance

(a) *Acceptance generally*
R v Clarke (1927) 40 CLR 227
 **Household Fire & Carriage Accident Insurance Co v Grant* (1879) LR 4 Ex D 216
 **Brinkibon v Stahag Stahl* [1983] 2 AC 34
 **Bressan v Squires* [1974] 2 NSWLR 460
 (b) *Alternatives to Offer & Acceptance*
Butler Machine Tool Co v Ex-Cell-O Corporation [1979] 1 All ER 965
 (c) *Termination of Offers*
Stevenson, Jacques and Co v McLean (1880) 5 QBD 346
Dickinson v Dodds (1876) 2 Ch D 463
 **Mobil Oil v Lyndell Nominees* (1998) 153 ALR 198, at 222-228

Certainty and Completeness

Booker Industries v Wilson Parking (Qld) (1982) 149 CLR 600
Whitlock v Brew (1968) 118 CLR 445
United Group Rail Services Limited v Rail Corporation New South Wales [2009] NSWCA 177
Masters v Cameron (1954) 91 CLR 353
Meehan v Jones (1982) 149 CLR 571

Consideration

Australian Woollen Mills v The Commonwealth (1954) 92 CLR 424
Coulls v Bagot's Executor and Trustee Co (1967) 119 CLR 460
 **Pao On v Lau Yi Long* [1980] AC 614
Williams v Roffey Bros and Nicholls (Contractors) [1991] 1 QB 1
Foakes v Beer (1884) 9 App Cas 605

Equitable Estoppel

Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387
 **Je Maintiendrai v Quaglia* (1980) 26 SASR 101
 **Giumelli v Giumelli* (1999) 196 CLR 101

Formation of a Contract - Intention to Create Legal Relations

Balfour v Balfour [1919] 2 KB 571
Jones v Padavatton [1969] 2 All ER 616
Esso Petroleum Ltd v Commissioners of Customs & Excise [1976] 1 All ER 117
Ermogenous v Greek Orthodox Community of SA Inc (2002) 209 CLR 95

The Requirement of Writing – Do Contracts Have to be in Written Form?

Conveyancing Act 1919 (NSW), s 54A
 **Pirie v Saunders* (1961) 104 CLR 149
 **Khoury v Khouri* (2006) 66 NSWLR 241

Terms of a Contract

(a) Express Terms

**Ellul and Ellul v Oakes* (1972) 3 SASR 377
Oscar Chess v Williams [1957] 1 All ER 325
J J Savage and Sons v Blakney (1970) 119 CLR 435
 **Hoyt's v Spencer* (1919) 27 CLR 133
 **SRA v Heath Outdoor Ltd* (1986) 7 NSWLR 170
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 79 ALJR 129
Curtis v Chemical Cleaning and Dyeing Co [1951] 1 KB 805
Thornton v Shoe Lane Parking [1971] 2 QB 163
Parker v South Eastern Railway Co (1877) 2 CPD 416
D J Hill & Co Pty Ltd v Walter H Wright Pty Ltd [1971] VR 749

(b) Implied Terms

**Attorney General of Belize v Belize Telecom Ltd* [2009] 2 All ER 1127
Codelfa Construction v State Rail Authority of New South Wales (1982) 149 CLR 337
Byrne v Australian Airlines Ltd (1995) 185 CLR 410
 **Con-Stan Industries of Australia P/L v Norwich Winterthur Insurance (Australia) P/L* (1986) 160 CLR 226

The Meaning of Terms

Codelfa Construction Pty Ltd v State Rail Authority of NSW (1982) 149 CLR 33

The Construction of Exclusion Clauses

Darlington Futures v Delco Australia (1986) 161 CLR 500
 **Alderslade v Hendon Laundry Ltd* [1945] KB 189
 **White v John Warwick & Co* [1953] 2 All ER 1021
Sydney City Council v West (1965) 114 CLR 481
Competition and Consumer Act 2010 (Cth) Sch 2 (Australian Consumer Law) ss 64 and 64A

Privity of Contract

Coulls v Bagot's Executor and Trustee Co (1967) 119 CLR 460
Trident General Insurance Co v McNiece Bros (1988) 165 CLR 107
New Zealand Shipping Co v A M Satterthwaite and Co (The Eurymedon) [1975] AC 154

Vitiating Factors

(a) Misrepresentation

**Balfour & Clark v Hollandia* (1978) 18 SASR 241
 **Edgington v Fitzmaurice* (1885) 29 Ch D 459
 **Smith v Land and House Property Corp* (1884) 28 Ch D 7
 **Redgrave v Hurd* (1881) 20 Ch D 1
 **Nicholas v Thompson* [1924] VLR 554

(b) Mistake

(1) Common Mistake

McRae v Commonwealth Disposals Commission (1951) 84 CLR 377
Bell v Lever Brothers [1932] AC 161

(2) Mutual Mistake

(3) Unilateral Mistake

Taylor v Johnson (1983) 151 CLR 422
Cundy v Lindsay (1878) 3 App Cas 459
Lewis v Averay [1972] 1 QB 198

(c) Duress

Universe Tankships Inc of Monrovia v International Transport Workers Federation [1983] 1 AC 366

Barton v Armstrong [1976] AC 104

Crescendo Management Pty Ltd v Westpac Banking Corp (1988) 19 NSWLR 40

North Ocean Shipping Co v Hyundai [1979] QB 705

(d) *Undue Influence*

Johnson v Buttress (1936) 56 CLR 113

**Yerkey v Jones* (1939) 63 CLR 649

Garcia v National Australian Bank Ltd (1998) 194 CLR 395

(e) *Unconscionable conduct*

Commercial Bank of Australia v Amadio (1983) 151 CLR 447

(f) *Rescission*

Alati v Kruger (1955) 94 CLR 216

(1) *Affirmation*

**Coastal Estates v Melevende* [1965] VR 433

(2) *Restitutio impossible*

**Vadasz v Pioneer Concrete* (1995) 130 ALR 570 or (1995) 184 CLR 102

(3) *Third parties*

**Car and Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525

(4) *Lapse of time*

(g) *Statutory Unconscionability*

(h) *Contracts Review Act 1980* (NSW)

**Baltic Shipping Company v Dillon* [1991] 22 NSWLR 1

**Ford v Perpetual Trustees Victoria Limited* (2009) 257 ALR 658

(i) *Misleading or Deceptive Conduct*

Competition and Consumer Act 2010 (C'th), Schedule 2 (referred to as Australian Consumer Law) ss 4, 18

**Henjo Investments v Collins Marrickville* (1988) 79 ALR 83

**Taco Co of Australia v Taco Bell Pty Ltd* (1982) 42 ALR 177

(j) *Unfair Terms*

Competition and Consumer Act 2010 (C'th), Schedule 2 (referred to as Australian Consumer Law) ss 23-28

Discharge

(a) *Discharge by Performance*

Cutter v Powell (1795) 101 ER 573

Sumpter v Hedges [1898] 1 QB 673

Hoenig v Isaacs [1952] 2 All ER 176

Bolton v Mahadeva [1972] 1 WLR 1009

(b) *Discharge by Agreement*

**Crawford Fitting Co v Sydney Valve & Fitting P/L* (1988) 14 NSWLR 438

**Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537

**McDermott v Black* (1940) 63 CLR 161 at 183-184

(c) *Breach of Contract*

(d) *Discharge by Breach of Contract*

Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd (1938) 61 CLR 286

Associated Newspapers Ltd v Banks (1951) 83 CLR 322

Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26

Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited (2007) 233 CLR 115

**Louinder v Leis* (1982) 149 CLR 509

**Sargent v ASL Developments Ltd* (1974) 131 CLR 634

Foran v Wight (1989) 168 CLR 385

**Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315

(e) *Discharge for Repudiation*

Federal Commerce & Navigation Co Ltd v Molena Alpha Inc [1979] AC 757

Universal Cargo Carrier Corporation v Citati [1957] 2 QB 401

Termination

(a) Requirement of an election

Tropical Traders Ltd v Goonan (1964) 111 CLR 41

(b) Estoppel as a restriction on the right to terminate

Foran v Wight (1989) 168 CLR 385

(c) Effect of termination

McDonald v Dennys Lascelles Ltd (1933) 48 CLR 457

Discharge by Frustration

Codelfa Construction v State Rail Authority of New South Wales (1982) 149 CLR 337

Taylor v Caldwell (1863) 122 ER 309

Krell v Henry (1903) 2 KB 740

Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour [1943] AC 32

*Frustrated Contracts Act 1978 (NSW)

Remedies

(a) Common law damages

**Johnson v Perez* (1988) 166 CLR 351

**Howe v Teefy* (1927) 27 SR (NSW) 301

Baltic Shipping Co v Dillon (1992) 176 CLR 344

The Commonwealth v Amann Aviation (1991) 174 CLR 64

Tabcorp Holdings Ltd v Bowen Investments Pty Ltd (2009) 236 CLR 272

Victoria Laundry (Windsor) v Newman Industries [1949] 2 KB 528

**Simonius Vischer & Co v Holt & Thompson* [1979] 2 NSWLR 322

Koufos v Czarnekow Ltd [1969] 1 AC 350

(b) Equitable damages

**Supreme Court Act 1970*, s 68

**Johnson v Agnew* [1980] AC 367

(c) Actions for Fixed Sums and Debt

Dunlop Pneumatic Tyre Co v New Garage [1915] AC 79

**Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656

McDonald v Dennys Lascelles Ltd (1933) 48 CLR 457

White & Carter (Councils) Ltd v McGregor [1962] AC 413

**Andrews v Australia and New Zealand Banking Group Ltd* (2012) 290 ALR 595, [2012] HCA 30

(d) Rectification

**Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603

**George Wimpey UK Ltd v V I Construction Ltd* [2005] EWCA Civ 77

(e) Restitution

Pavey and Mathews v Paul (1987) 162 CLR 221

**Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32

**Lumbers v W Cook Builders Pty Ltd (in liquidation)* (2008) 232 CLR 635

Sumpter v Hedges [1898] 1 QB 673

**David Securities P/L v Commonwealth Bank of Australia* (1992) 175 CLR 353