Legal Profession Admission Board

September 2013

Contracts

Question 1

This question required students to work through the facts to determine:

(a) whether the parties had breached the contract,

(b) if there was a breach classify that breach by reference to the tripartite classification scheme,

(c) determine whether there were any acts of repudiation or anticipatory breach of contract,

(d) if there was a right to elect to terminate the contract determine whether or not the parties had affirmed the contract.

The question had a large number of facts but those facts served as the facts for question 2 and the background for question 3. Moreover, it was a relatively easy question which allowed students display their knowledge of performance, breach and termination. Students were expected to be able to define a breach of contract and identify breaches (if any) by construing standards of performance, for example, the 'best endeavours' provision. The classification of any breach and the identification of any repudiation had to be carried out by using the case law: students were not expected to produce a 'right' answer but merely to defend the view they took by reference to principle and the case law. Whether or not there had been an election had to be determined by reference to the principles of election; most students saw the affirmation issue but few students were able to state the principles by which they concluded there was or was not an election.

The major weakness in answers were: poor definitions; imprecise statements of basic principles; conclusions drawn without analysis or not sufficient analysis; no consideration of counter-arguments; insufficient use of the facts; poor use of the case law to build and assess arguments; repetition of the facts; copying out of memorised notes.

Question 2

This question raised general principles of damages giving a few different contexts to allow students to display their knowledge of the principles in claims for different heads of damage. Part (a) was a basic issue of expectation loss, as there is a market for the goods the starting point should be the prima facie measure of the contract price – the market price with Belinda mitigating her loss by going into the market place. However, all that was expected was for a student to display how such a claim might be made by reference to causation, remoteness and mitigation. Part (b) was designed to prompt students to discuss reliance loss and display their knowledge of the case law, at a minimum students should have stated that the reliance loss is recoverable only if the expectation measure cannot be assessed, good students went on to discuss that under Australian law (*Amann Aviation*) reliance loss forms part of expectation loss and therefore a plaintiff claims expectation damages and

the court will determine whether it can only award damages assessed on a reliance basis; Parts (c) and (d) required students to display their knowledge of the remoteness rules and how they might apply in these cases, many students also raised the concept of loss of chance in relation to (c) and descriptions of the relevant principles for loss of chance were usually very good; Part (e) required students to display their knowledge of when such damages are awarded in Australian contract law by reference to *Baltic Shipping*.

The weaknesses in answers all flowed from superficial statements of principle. Very few students were able to say anything more about the first or second limb of *Hadley v Baxendale* other that state it, and often that statement was poorly expressed. This made it then difficult for students to apply the principles in any meaningful way.

Question 3

This was a basic exclusion clause question requiring discussion of:

(a) whether the clause was incorporated into the contract

(b) if it was incorporated how would it be construed

(c) could third parties take advantage of the clause to avoid liability.

As regards incorporation of the clause, the most important point was the fact that Andrew signed the contract and would therefore generally be bound. Students should then have considered whether or not the 'half truth' told by the representative was a misrepresentation that would prevent reliance on the clause and, if so, whether it could carry through to all the other contracts that Andrew entered into over the course of dealing with Speedy; there was no expected 'right' answer', students had to display a good working knowledge of the principles. There was also an issue around the relationship between incorporation by reference and incorporation by notice. Many students got confused in this section in structuring their answer when there was a signature and when the same facts raised an issue of incorporation by notice. As regards incorporation by course of dealing, very few students were able to state the principles of this method of incorporation clearly and very few noted that it is based on consent. In addition, many students were not able to state the finding in the *DJ Hill* case clearly and apply it to the facts.

The construction discussion should have commenced with an application of the methodology adopted by the High Court in *Darlington*. Often that method was stated but not applied. Students also had to deal with the *Canada SS* rules and determine whether or not the clause excluded liability for negligence. Statements of the *Canada SS* rules were generally poor.

There was a lot of confusion around the position of third parties. Many students took the view that it was necessary to find an exception to privity in order for Andrew to sue a third party for breach of contract and then determine whether the third party could claim the protection of the clause rather than noting that the third party could be sued by Andrew in negligence and it was necessary for the third party to prove that there was a contract between it and Andrew which incorporates the exclusion clause. Most students however discussed the agency exception to create a contract

between Andrew and the third party. Most students also noted that the acts of the third party probably fell outside the four corners of the contract but very few students noted that the four corners rule is a rule of construction with the result that they applied it as a rule of law.