

EXAMINER'S COMMENTS

CONTRACTS

MARCH 2009

Question 1

(a) This part of the question raises the issue of whether the assurance not to lease premises to another florist constitutes a collateral contract. West's statement is likely to be viewed as promissory in nature and thus the first requirement of a collateral contract is established: *J J Savage v Blakeney*. As to the second requirement of no inconsistency with the main contract as set out in *Hoyt's v Spencer*, the terms of Clause 26 establish an inconsistency. Thus, it is unlikely that a collateral contract can be established.

(b) This part raises the issue of whether equitable estoppel can be raised by Field. Clause 26 does not exclude claims based on estoppel. The elements of estoppel set out in the judgment of Brennan J in *Waltons v Maher* need to be stated and applied in the context of the facts.

Part (a) of this question was generally well done. However, in part (b) many students discussed various equitable remedies, rather than the basis upon which equitable relief would be grounded, ie equitable estoppel.

Question 2

(a) This part of the question raises a number of issues. First there is the issue of whether Bill's offer has been validly accepted by Alan in the light of Bill's attempt to retract the offer. Bill's revocation of the offer must be communicated and thus, could only be effective on 4 March. Whether Alan accepted the offer before then depends upon whether the postal acceptance rule applies: *Henthorn v Fraser*. There is nothing to exclude the rule in the terms of the offer. Arguably, given that the offer was by mail it would be reasonable that the acceptance could be by mail and thus acceptance occurred when Alan posted his letter on 3 March, which is before the revocation was received. Thus, a contract would arise. The second issue is whether the agreement is sufficiently complete. The price provision is sufficiently certain as the agreement contains a means by which it can be determined without the need for any further agreement by the parties: *Booker Industries v Wilson Parking*. The third issue relates to the requirement of writing. Section 54A can be satisfied by various documents, included letters. The fourth issue relates to whether there is a binding agreement created by the exchanged letters or whether that only arises upon the execution of a formal contract. On the basis of *Branca v Corbarro*, this case is probably falls within the first category of *Masters v Cameron* and thus is enforceable without the need to enter into a formal contract.

(b) This part of the question raises the issue of whether the postal acceptance rule was excluded by the offer. *Bressan v Squires* would suggest that it has been. If so,

there is no contract as Bill's revocation of the offer occurred before Alan's acceptance of it.

Many students, in answering part (a) of this question failed to raise the second, third and fourth issues notes above, and simply dealt with the principles of offer and acceptance.

Question 3

The first issue in this question is whether Trust Us can overcome the doctrine of privity and rely on an exclusion clause contained in a contract to which it is not a party. This requires a statement and application of the four elements set out in *Midland Silicones v Scruttons*. If Trust Us satisfies these requirements then the issue arises as to whether the exclusion clause, on its proper construction, protects Trust Us from liability. The general principles of construction set out in *Darlington Futures v Delco Australia* need to be stated as well as the specific principles relating to negligence in *Canada SS v R* and whether those principles, especially rule 3, still are good law in the light of *Darlington Futures*.

Many students addressed only one of the issues in this question, although the answers, to that extent were generally well done.

Question 4

(a) This part raises the issues of whether damages can be recovered to include the costs of the contract price and compensation for non-economic loss. *Baltic Shipping v Dillon* is relevant authority for both claims.

(b) Wendy, not being a party to the contract, would need to establish that the fact establish a claim under one of the exceptions to the doctrine of privity. *Trident General Insurance v McNiece Bros* is relevant authority.

(c) This part raises whether the contract is frustrated in accordance with principles set out in *National Carriers v Panalpina*. If so, Mark would only have a claim to the recovery of the contract price paid prior to frustration.

This question was generally well done, although a number of students did not address the possibility of the trust exception to privity in part (b).

Question 5

(a) This question raises the application of the principles in *Yerkey v Jones*. The facts of the problem are based upon *Garcia v NAB* and in that case the High Court held that the guarantees given by the wife were unenforceable on the basis of special equity that applies in favour of a wife set out in *Yerkey v Jones*.

(b) Part (i) raises the question of termination for anticipatory breach. Part (ii) raise the issue of being ready willing and able as a pre-requisite to being able to terminate. A relevant illustrative case, which also covers the principles, is *Foran v Wight*.

In part (a) a number of students completely missed the point of the question, whilst others were not altogether clear in differentiating the principle in *Yerkey v Jones* from that of undue influence.

Question 6

This question requires students to discuss the consideration rule relating to whether a promise to perform an existing contractual duty already owed to the promissory is good consideration, ie a variation of a contract usually arising where one party promises extra payment for the performance by the other of its contractual obligations. *Stilk v Myrick* states that it is not. However, *Stilk v Myrick* has been bypassed by the practical benefit approach in cases such as *Williams v Roffey Bros*. The impact of this decision needs to be discussed. Better answers will also discuss the impact of the decision in New Zealand in *Antons Trawlings v Smith* which goes further and states that there is no need for consideration in a variation of a contract.

Overall, this question was reasonably well done in terms of setting out the decisions and principles laid out in the relevant cases. Few actually delved into the merits of the different approaches exhibited in these cases.