

# LEGAL PROFESSION ADMISSION BOARD

SEPTEMBER 2009

## CONTRACTS EXAMINATION

### EXAMINER'S COMMENTS

#### Question 1

The issues raised by this question are:

- (i) whether Joe & Flo have a claim based upon misrepresentation by Hector, and in particular whether Hector's failure to disclose the change in the disco's operating hours can constitute misrepresentation by silence;
- (ii) whether Joe & Flo have claims under based upon misleading or deceptive conduct for the same statements made by Hector; and
- (iii) whether the contract between Joe & Flo and Desmond was entered into as the result of economic duress or is an unjust contract under the *Contracts Review Act*.

#### Question 2

The first issue raised by this question is whether Clause 7 is a penalty or an enforceable liquidated damages clause. The principles set out in *Dunlop Pneumatic Tyre Co v New Garage & Motor Co* need to be discussed and applied. If the clause is enforceable then Carlill is entitled to recover \$40,000 from McNiece Bros.

However, if Clause 7 is a penalty, Carlill's rights depend upon the measure of damages he is entitlement to by applying the normal rules relating to the assessment of damages. If he cannot establish any compensable losses he will recover only nominal damages.

Carlill's losses clearly are:

- (i) losses of profits from the delay in commencing production of frozen food;
- (ii) the loss is selling of the food as pig food (\$475,000); and
- (iii) the additional money he had to pay Roffey Bros (\$100,000).

Whether these three losses are too remote is an issue and the rules in *Hadley v Baxendale* needed to be stated and applied. Mitigation is also be an issue in relation to the losses on the sale of the food as pig food and the relevant principles set out in cases such a *British Westinghouse v Underground Electrical Railways* should be stated and applied. It could be argued that Carlill should have contacted Fresh Foods to delay the delivery, given that he knew 13 days before the delivery date that there would be a delay in the commencement of production on account of McNiece Bros' failure to complete the

flooring work on 1 August. Alternatively he may have been able to arrange temporary storage elsewhere of the food pending completion of the flooring.

### Question 3

Part (a) raised the issue of whether the letters constituted a sufficient memorandum for the purposes of s54A of the *Conveyancing Act 1919*. The essential terms of the agreement were set out, the fact that the price was to be determined by a third party was not a problem: *Booker Industries v Wilson Parking*. There was no issue as to acceptance of the offer or the postal acceptance rule as the letter of acceptance was received before there was an attempt to withdraw the acceptance.

Part (b) raised the question of whether the offer excluded the postal acceptance rule – see *Bressan v Squires*. If the rule is excluded there would be no contract.

Part (c) raised the categories in *Masters v Cameron*. The facts are identical to those in that case, and thus there would be no contract as the memorandum would have been in the third category. Alternatively one could have argued that there was not an acceptance of the offer but a counter-offer, in which case the result would be the same.

### Question 4

(a) This part deals with whether Clause 17 is part of the contract. The signature rule set out in *Toll v Alphapharm* would indicate that the clause is part of the contract despite Yerkey's lack of knowledge about it. Principles of construction of exclusion clauses, set out in *Darlington Futures v Delco* and *Canada Canada Steam Ship* would suggest that Amadio is not protected by Clause 17 because of rule 3 of the latter case. However, it may be that rule 3 is no longer applicable in the light of *Darlington Futures*. If so Amadio could rely upon the clause to exclude liability for damages.

(b) The issue here is whether Amadio's breach of contract is a breach of warranty, condition or intermediate term. Termination is permitted for breach of condition and serious breach of intermediate term. The principles of classification of terms needed to be stated and applied.

### Question 5

(a) As the contract is expressly illegal and unenforceable by the terms of the statute, there can be no enforcement of the illegal contract: *Re Mahmoud & Ispahani*. However, if Hoenig's assurance as to having a licence satisfied the elements of a collateral contract, Giumelli can sue for contractual damages: *Strongman (1945) v Sincock*.

(b) The issue here is of implied statutory illegality: see principles in *Yango Pastoral v First Chicago*. If it is not, the contract is enforceable. If it is illegal, Ermogenous has an action to recover the book independent of the contract. The action is in tort to recover the title to the book that always remained with Ermogenous: *Singh v Ali*. This indicates that

although the contract may be illegal and unenforceable this does preclude actions being pursued based upon other principles – in this case tort law.

### **Question 6**

(a) The issue raised is whether the legislation frustrates the contract in accordance with the elements of frustration set out in *Nataional Carriers v Panalpina*. The decision in *Codlefa v SRA* would suggest that frustration has occurred. An issue that arises is whether Clause 54 precludes a finding of frustration on the basis that the passage of the legislation is construed as coming within its terms. *Metropolitan Water Board v Dick Kerr* would suggest that it does not.

(b) The trust ‘exception’ to privity is discussed in Deane J’s judgment in *Trident General Insurance v McNiece Bros*. The major point is whether contracting parties have intended to contract on the basis that one of them is a trustee for a third party. In pursuing a claim based on this principle, the third party is required to join to the two contracting parties to the proceedings as first and second defendants.