

LEGAL PROFESSION ADMISSION BOARD

SEPTEMBER 2009

CONTRACTS

TIME: Three Hours

This paper consists of six questions.

Candidates are required to attempt any five questions.

No question is compulsory.

All questions are of equal value.

If a candidate answers more than the specified number of questions, only the first five questions attempted will be marked.

All questions may be answered in one examination booklet.

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

Candidates must indicate which questions they have answered on the front cover of the first examination booklet.

Candidates must write their answers clearly. Lack of legibility may lead to a delay in the candidate's results being given.

Substantial credit will be given to concise well-reasoned answers based upon principles which are clearly stated. Further credit will be given where principles are properly supported by reference to decided authorities.

Permitted Materials:

This is an open book exam. Apart from books borrowed from any University of Sydney library, candidates may refer to any other books and any printed or handwritten materials they have brought into the examination room.

As some instances of cheating and of bringing unauthorised material into the examination room have come to the attention of the Admission Board, candidates are warned that such conduct will 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.

Question 1

Joe and Flo are wealthy retirees who have decided to spend a good part of their time relaxing and entertaining on their luxury yacht *Lucky Dip*. They have had continuing arguments with Desmond, the owner of the marina where *Lucky Dip* is berthed, and have organised petitions signed by other yacht owners about poor on-site servicing facilities and inadequate dock-master assistance. They decide to investigate a newly advertised marina that is about to start operating in the adjoining bay, and make an appointment to speak with Hector, its new manager. Hector tells them that his establishment will be 'very exclusive and probably the classiest new marina in Australia'.

Joe and Flo are delighted by the appearance of the facilities and ask Hector how long they have to wait to secure a berth. Hector says to them: "I think everything is just about ready. I doubt whether we'll have to wait more than one month." The couple sign up with Hector and happily give one month's notice to their current marina. However, demonstrations organised by the local environmental movement against the new marina result in legal action and a delay of its official opening and operations.

Joe and Flo reluctantly go to see Desmond and ask him whether *Lucky Dip* can stay at his marina until the problem is resolved. Desmond tells them there is great demand for berths at his marina and that they can stay only if they pay a weekly premium on top of the new fee he is charging to new yacht owners. Because this amounts to a 50 percent increase in payments, Joe and Flo are outraged and accuse Desmond of exacting revenge on them for their past complaints against him. They sign a new agreement with Desmond under protest because they have nowhere else to berth *Lucky Dip*, and they threaten to consult their solicitor about how they were forced to enter into the new arrangement.

After three months, the delay, protests and legal proceedings come to an end and *Lucky Dip* is finally moved to its new berth. However, Joe and Flo soon discover that the tavern in the new marina complex has just been converted into a disco and night club, and that Hector had forgotten to mention to them that its operating hours have been extended to 3.00 am. They now come to you for advice complaining that the noise from club patrons prevents them from entertaining on their yacht and getting a good night's sleep.

Advise Joe and Flo whether they have any rights to rescission under the general law and whether they have any cause of action under any statute.

(20 marks)

(Question 2 follows)

Question 2

Carlill is a manufacturer and seller of frozen food who recently constructed a new factory for his business. Carlill engaged McNiece Bros Limited to lay a special floor in the factory, the work to be completed by 1 August 2009, at a cost of \$50,000. Clause 7 of the contract stated:

If McNiece Bros Limited fails to complete the contract within the stipulated time, it will pay, by way of penalty, a sum of \$40,000 in full satisfaction of its liability to Carlill.

Carlill also had a contract with Roffey Brothers Limited for the latter to install machinery on the new factory floor between 5 and 10 August 2009 at a cost of \$2,000,000.

It was Carlill's intention to commence production of frozen food in his new factory on 15 August 2009. With this in mind, he contracted with Fresh Foods Limited for fresh food to the value of \$500,000 to be delivered to the factory on 14 August 2009.

McNiece Bros Limited only completed the floor on 15 August 2009. As a result Carlill paid Roffey Brothers Limited an extra \$100,000 to allow for overtime payments to its employees in order that the machinery could be installed as quickly as possible. Carlill finally commenced production of frozen food on 18 August 2009. The fresh food that was delivered by Fresh Foods Limited on 14 August 2009 was sold by Carlill for \$25,000 as pig food.

Carlill seeks your advice as to his rights against McNiece Bros Limited in relation to the latter's breach of contract.

(20 marks)

Question 3

Bruno was the owner of a large heritage listed house known as 'Bumper Hall' which was built on 10 hectares of land in the Hunter Valley. The house had been recently featured in a story in a popular heritage magazine. Jacko was impressed by the story and decided that he wanted to purchase the property. On 20 February 2009 Jacko wrote and posted a letter to Bruno which included the following statement:

I am prepared to pay you a price for 'Bumper Hall' determined by a valuer appointed by the President of the Real Estate Institute of New South Wales if you are willing to sell.

On 28 February 2009 Bruno wrote and posted a letter to Jacko which included the following statement:

I am happy to sell you 'Bumper Hall' in accordance with the terms of your letter dated 20 February 2009.

(Question 3 continues)

(Question 3 continued)

Bruno's letter to Jacko was delivered on 1 March 2009.

On 2 March 2009, Bruno telephoned Jacko and told him that he had changed his mind about selling 'Bumper Hall'.

In relation to the above facts answer the following questions:

(a) Is there an enforceable contract between Bruno and Jacko?

(8 marks)

(b) How, if at all, would your advice in (a) differ if Jacko's letter of 20 February 2009 had gone on to say: 'Please let me know about this by the end of this month'?

(6 marks)

(c) How, if at all, would your advice in (a) differ if Bruno's letter of 27 February 2009 had instead gone on to say: 'My agreeing to sell to you is subject to the preparation of a formal contract of sale which is acceptable to my solicitor'?

(6 marks)

Question 4

Yerkey owns a vintage car, a 1937 Lincoln Zephyr. In order to reduce the costs of maintaining the car, he negotiated a contract with Amadio to service it every six months for a period of five years, on the basis that Amadio's fees for the work would be 15 percent below the fees he usually charged. A written contract was signed by both parties at the beginning of 2004. Clause 17 of the contract stated:

Amadio shall not be liable to Yerkey for any damage to the car, howsoever caused.

In early 2005, Yerkey brought the car in for a scheduled service. Having completed the service, Amadio took the car for a short test drive to ensure it was operating smoothly. During the test drive Amadio, due to his own carelessness, had a minor accident. The front bumper-bar on Yerkey's car was slightly dented.

When Yerkey came to collect the car, he was told of the damage to the bumper-bar caused by Amadio's carelessness. Yerkey demanded that Amadio pay the costs of having a panel beater repair the damage. Amadio, who conceded that, in causing damage to Yerkey's car, he had breached his contract with Yerkey, denied that he was liable for the costs of repair, relying on clause 17 of the contract. Yerkey, who had not noticed clause 17 when he signed the contract, claimed that he was not bound by it because Amadio had not drawn his attention to it at that time.

(Question 4 continues)

(Question 4 continued)

Yerkey seeks your advice as to the following:

- (a) Can Amadio successfully rely on clause 17 of the contract to escape liability for the costs of repairing the damaged bumper-bar?

(12 marks)

- (b) Can Yerkey terminate his contract with Amadio?

(8 marks)

Question 5

Answer BOTH parts of this question.

(a) Giumelli is an avid backgammon player and is keen to purchase a particular new backgammon set imported from the Middle East, which is selling in most major department stores for \$500. Giumelli sees an advertisement in a local newspaper in which Hoenig is selling sets for \$400. Giumelli telephones Hoenig, who confirms that he has sets for sale, but says that the supply in his Sydney warehouse has been exhausted. He says that he is expecting fresh stock from his warehouse in Melbourne, where supplies have recently arrived from the Middle East. Giumelli asks if Hoenig is licensed to sell backgammon sets under the *Sale of Board Games Act* 1996. That Act provides that any contract for the sale of a backgammon set is illegal and unenforceable unless the seller has a licence issued under the Act. Hoenig assures Giumelli that he has the required licence. Giumelli then visits Hoenig's premises and signs a contract for the purchase of a backgammon set for \$400. The contract states that collection of and payment for the backgammon set will take place the following day at Hoenig's premises. The next day Giumelli goes to the premises to collect and pay for his set. On arrival he finds that the premises have been closed by the police, and that all backgammon sets have been confiscated as Hoenig has been operating without a licence under the Act. Unable to get his backgammon set from Hoenig, Giumelli purchases a set from a licensed dealer for \$600.

Giumelli seeks your advice as to whether he has a claim against Hoenig to recover damages for breach of contract.

(10 marks)

(b) Under the terms of the *Rare Books Act*, 2001 (the Act), it is an offence 'for a person, in the course of their trade or business, to buy or sell, agree to buy or sell, or otherwise deal in, rare books' without a licence issued under to the Act. A rare book is defined as any book listed in the schedule to the Act. Any breach of the Act is punishable by a fine of \$500.

(Question 5 Part B continues)

(Question 5 Part B continued)

Kruger, who has no licence, but who occasionally sells books in his antique store, enters into a contract to buy for his business, from Ermogenous, a second hand, multi-volume encyclopaedia on American military involvement in Central America during the nineteenth century for a sum of \$1,500. The terms of the contract are that Kruger will take immediate delivery of the encyclopaedia, but that title to the work will not pass to him until the last of the equal monthly instalments is paid. The encyclopaedia is listed in the schedule to the *Act* as a rare book.

After receiving one monthly instalment payment, Ermogenous decides he does not want to sell the encyclopaedia to Kruger. He is prepared to give Kruger back the first instalment. Kruger wants to proceed with the purchase, as he is confident of making a tidy profit by selling the encyclopaedia through his business.

Ermogenous seeks your advice as to whether he is legally obliged to proceed with the contract with Kruger or whether he is able to reclaim the encyclopaedia from Kruger.

(10 marks)

Question 6

Answer BOTH parts of this question.

(a) Tweedle contracted with the State Rail Authority of New South Wales (SRA) to build a portion of a new railway line for the Sydney metropolitan area. Both Tweedle and the SRA believed that Tweedle could not be prosecuted for noise pollution whilst the construction work was being done. Assuming, on this basis, that he would be able to work on the project 24 hours per day, Tweedle contracted to complete the work by 1 March 2010. Clause 54 of the contract between Tweedle and the SRA stated that 'if there was a delay in the completion of the project for any reason whatsoever' an extension of time of up to two months would be available for Tweedle to complete the construction work. In August 2009 the Parliament of New South Wales passed the *Noise Abatement Act 2010*, the effect of which was to prevent Tweedle working on the project between 9.00pm in the evening and 7.00am on the morning of the following day. This was due to the noise levels of the machinery Tweedle used being above the levels permitted by the legislation between those times. As a result Tweedle will be unable to complete the construction work until 1 December 2010 at the earliest.

Tweedle seeks your advice as to what effect, if any, the passage of the *Noise Abatement Act 2010*, has on his contract with the SRA.

(10 marks)

(Question 6 Part B follows)

(b) Discuss the principles governing the right of a third party to a contract to take enforcement action in relation to that contract under the 'trust exception' to the doctrine of privity of contract.

(10 marks)

END OF PAPER