

LEGAL PROFESSION ADMISSION BOARD

SEPTEMBER 2009

COMMERCIAL TRANSACTIONS

Time: Three Hours

This paper consists of **six** questions.

Candidates are required to attempt **two** questions only from **Part A**, and **two** questions only from **Part B**.

If a candidate answers more than the specified number of questions, only the first **two** questions attempted from each Part will be marked.

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 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.

Permitted Materials:

This is an open book exam. Candidates may refer to any books and any printed or handwritten material 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.

PART A

Attempt any two (2) questions in this part.

Question 1

Ray drove his BMW coupe to Performance Service Centre Pty Ltd (PSC), a combination retail/service centre for prestige cars, where it had been booked in for some work to be carried out. He handed the service advisor, Pat, the key on arrival and summarised the problems he had been having. The key was on a key ring which contained a remote control for the car alarm.

Although the car was supposed to be ready for collection at 4pm the same day, Pat rang Ray to say that an oil leak had been found and the car would be ready the following day.

After the car had been booked in, Pat filled in a job sheet. He allocated the job to Phil, who carried out an inspection, during which he discovered the oil leak and then fixed the problems Ray had mentioned. Early the next morning, Phil fixed the oil leak, took the BMW for a road test and then returned it to the parking lot. He returned the vehicle key to the downstairs key safe where all vehicle keys were kept. The vehicle was then moved into the wash bay area, where it was cleaned by Sam and then returned to the car park, after he had locked it by pressing the button on the key but not the remote for the alarm. The parking lot was shared between vehicles that had been serviced and were waiting for collection, new vehicles not in the showroom and used vehicles for sale but not in the showroom. There were gates, but these were always open during business hours.

When Ray came to collect his BMW, it was not to be found. There was no broken glass anywhere and the key was in the key safe. A key is required to start the BMW because of sophisticated immobilisation equipment onboard.

Pat said to Ray "Someone drove the car out of here .You must have given them a key. Here is the invoice. You owe us \$1,350 for the repairs".

Advise Ray.

(25 marks)

(Part A Question 2 follows)

Question 2

Martin and Clare owned a unique vintage 18m motor yacht known as VIOLET. Having purchased it for \$80,000, they carried out major restoration works at a cost of \$297,000 and when finished on 29 June 2009, it was their pride and joy. It was attached to a swing mooring in Rose Bay, Sydney Harbour, pursuant to a Mooring Agreement, signed by both parties, under which Rose Bay Marina Pty Ltd promised to supply a non-exclusive right to use and occupy the mooring to moor VIOLET.

The agreement contained the following limitation of liability clause:

The Licensee agrees and acknowledges that the Licensor shall not be liable for the care and protection of the Craft or its fittings and contents and shall not be liable for any loss or damage howsoever caused.

The Licensee was obliged to arrange their own insurance. VIOLET was insured for \$108,000. The insurance premium has been paid by Martin and Clare to their insurance company. They had meant to update their policy after the restoration work, but had not got around to it. A shipping broker advised them that after restoration, it should be insured for the fair market value of \$400,000.

On 1st July, 2009, in severe weather conditions, another vessel, also attached to a swing mooring at Rose Bay Marina, dragged its mooring until it bumped into VIOLET. After about an hour, this bumping severed the rope securing VIOLET so that VIOLET was driven by the wind across Rose Bay to a sea wall where it was battered until it broke up and was a total loss. Five other vessels were also destroyed in the storm.

Rose Bay Marina Pty Ltd have denied liability for loss to any Licensee.

Martin and Clare have sought your advice on:

- (a) Whether there is any legal basis on which they could make a claim for the difference between \$400,000 and \$108,000 against Rose Bay Marina, and if, so,**
- (b) What they would have to prove in order to be successful.**

(25 marks)

(Part A Question 2 follows)

Question 3

Ms. Norden (N) and Mr. Tane (T) commenced a close personal relationship in February 2006. During the course of the relationship, T gave N a number of gifts including a gold watch, a diamond bracelet, various holidays and some valuable artwork. On 17 May 2008, N entered into a contract with City Toyota (C) for the purchase of a Toyota Prius for \$57,000. That contract included the following terms:

Until the Dealer has received payment in full of the Purchase Price, title shall not pass to the Customer and if in possession the Customer shall hold the vehicle as bailee only.

The Customer shall be deemed not to have paid the Purchase Price until the Dealer receives clear and unencumbered title to any trade in and all other payments are credited to the Dealer's account.

The Customer requires credit before effect can be given to this contract.

N delivered her old vehicle (red book value \$19,500) to C as a trade-in on 25 May 2008.

A financier, (SM) agreed to pay \$37,500 to C on condition that T enter into an asset purchase agreement. This agreement contained the usual stipulation that title in the vehicle vested in the financier until the debt was paid, when an option to purchase would be created and the vehicle could be purchased. T signed the agreement on 25 May 2008. SM paid C the \$37,500 on 26 May 2008

T made all payments required under the asset purchase agreement until May 2009, when the relationship with N ended. Neither T nor N made any further payments after that time.

On 5 June 2009, SM demanded that N deliver the vehicle to it. N claimed that it was a gift from T and refused to comply.

SM has sought your advice as to who owns the Prius, so that it can decide whether to take court action to recover it.

Advise SM.

(25 marks)

(Part B follows)

PART B

Attempt any two (2) questions in this part.

Question 1

Mr. and Mrs. Havers conduct a business in partnership. Partnership property consists of a restaurant in Glebe, a commercial kitchen in Marrickville and an orchard in Orange. All partnership property is insured with Northern Insurance Limited (NIL) by Mr. and Mrs. Havers as joint insured parties.

Mr. Havers deliberately lit a fire in the kitchen one night and the restaurant burnt down. Mrs. Havers played no part in the fire and did not know her husband had lit the fire. She lodged a claim with NIL.

When NIL investigated the claim, it concluded that Mr. Havers had deliberately lit the fire and refused to pay the claim.

Mrs. Havers has sought your advice as to:

- (a) Any legal action that can be taken to force NIL to pay the claim in a situation where they refuse to pay; and**
- (b) Her chances of success if she takes such an action in this particular case.**

(25 marks)

(Part B Question 2 follows)

Question 2

Miller Investments Limited (Miller) managed the funds for various life insurance companies and superannuation funds. It had an account with Wave Financial Limited (WFL) for share and options trading for these funds and large volumes of trades occurred every week. It had a cheque account with Emerald Bank Limited (Emerald) at Branch 1. Two authorised signatories must sign all cheques. One of these authorised signatories was the Financial Controller for Miller, Larry Limes (LL).

LL established a personal futures trading account with WFL. WFL maintained a trading account with Emerald at Branch 2.

LL fraudulently drew 17 cheques on the Miller account payable to WFL for a total of \$2.5million. Each cheque was signed by LL and one other authorised signatory. LL arranged with a courier to deliver all cheques from Miller to the back office of WFL, LL would then ring the person responsible for his account in the front office of WFL to advise them of his personal trades. The back office would bank all cheques received at the end of the day and credit the appropriate client account.

Over 6 months, LL was very successful in futures trading and at the end of that time closed his account with WFL, used the balance of \$11m to pay for property and rare antiques in 7 different countries outside Australia, and flew out of the country with his wife for places unknown.

A few days after LL did not show up for work, audit staff discovered the fraud and Miller has sought your advice on:

- (a) What legal or other action they can take to recover the \$2.5m lost;**
- (b) Against whom; and**
- (c) Their chances of success in any action taken.**

Advise Miller.

(25 marks)

(Part B Question 3 follows)

Question 3

Answer 5 only of the following questions.

- (a) Provide an example by reference to a legal case of a situation in which silence was found to be misleading conduct within s.52 of the Trade Practices Act.
- (b) What does *nemo dat* mean?
- (c) When considering delivery in relation to a valid gift in your lifetime, must it be actual, or is constructive delivery enough?
- (d) Identify a condition or warranty implied by statute as to quiet possession of goods.
- (e) Why is possession such an important concept in commercial law?
- (f) What is EDR?
- (g) The proposed reform of Personal Property Security law to create a national law and security register places substance over form when deciding on whether a transaction is a security or not. Briefly describe one difference this will make to current NSW law.
- (h) Is a *browse wrap* term of an online contract binding?
- (i) In the Trade Practices Act “goods” is defined as including electricity. Does this mean that emails are “goods”?
- (j) What is larceny by finding?

(25 marks)

END OF PAPER