

Legal Profession Admission Board

March 2014

Contracts

Question 1

This question required students to assess clauses (a) – (e) by reference to tripartite classification scheme using the compulsory cases in the course outline. That is, students had to assess whether the clauses were conditions, warranties or intermediate terms. Good answers would also consider whether Amber's conduct overall constituted a repudiation. Some students considered whether the fact Bill wanted out of the contract in any way impeded him from relying on a breach by Amber that would allow for termination. This part of the question was reasonably well done. However, many students did not display a working knowledge of the case law. For example, they could state what the relevant test was for a condition but could not apply it and simply made a conclusion whether a term was or was not a condition after stating the test. Not many students considered the conduct of Amber overall as to whether it could be construed as a repudiation of the contract. Many students failed to make the point that the classification of a term as a condition or warranty occurs at the time of formation and if classified at that time as a condition then any failure to comply with the standard of performance results in a breach and a right to terminate. Many students investigated the actual consequences of breach in determining whether it was a condition or warranty.

The second part asked students to assess damages. Some students used the formula of the contract price - market price but it was not necessary to use that formula to get a good mark in the question. The main purpose of the question was for students to display a working knowledge of the loss – causation- remoteness rules.

The last part of the question raised an issue of substantial performance and required students to think how that doctrine applies if the breach is question is capable of being construed as a breach of condition. It was still possible to do well in this part of the question by classifying the terms breached and determining whether it gave rise to a right to terminate. Some students went further and questioned what the position was if time was not the essence, must Bill give Amber a chance to perform on time.

Question 2

Question 2 required students to display a good knowledge of the principles of *Amadio* unconscionability. Students should have been able to state the principles clearly and apply them to the facts. A weakness in many answers was that students displayed a good knowledge of what evidence was relevant to obtaining a remedy but failed to address what legal principle that evidence was addressing. Many students went on to provide good discussions of undue influence and duress. Jack's position should have been considered in relation to the small amounts he gambled after the casino received the report as well as when he started to gamble large sums. Many students noted the account was opened in their joint names and it was possible they were joint promisees which might then have allowed either Jack or Eliza to recover the large sums deposited by Eliza. Some students also raised statutory provisions. Others raised misrepresentation and mistake. These latter two were not as obvious an approach for Jack and Eliza but if students provided a reasoned

argument for raising them they were rewarded. However, generally students raising these arguments had difficulty formulating their case for these vitiating factors.

Students should also have stated the available remedy (rescission) and be able and note the requirements necessary for rescission to be ordered. Very few students referred to the remedy. Many suggested the remedy was damages and others went off into long discussion of restitution for unjust enrichment without focusing on the requirements of rescission.

Question 3

This question consisted of two parts, first incorporation of the exclusion clause and second the construction of the exclusion clause. Students should have worked through incorporation by notice and assess whether there was reasonable notice using all the available evidence; whether the signature on the invoice could be relied upon as an incorporation by signature or whether it is too late coming after formation (and possibly after performance). Students should also have considered incorporation by a course of dealing with some discussion of the DJ Hill case. To that end they should have considered the length of time the parties have been doing business in this way on those terms, whether reliance on the signature can occur when it is part of a course of dealing, whether incorporation by course of dealing requires the relevant document to be contractual in nature and whether it came too late on the reasoning in DJ Hill. Most students took the view that the notice was not reasonable notice because it did not contain the terms but attempted to incorporate them by reference to a document (invoice) that was not available until much later. Students generally also took the view that the A4 paper amongst a whole lot of advertisements was not sufficient. Only one student suggested that an A4 piece of paper with black printing on it would probably stand out amongst a whole lot of advertisements which no doubt had pictures and colourful designs on them! Whether that was right or not there is a point to noting that students generally jumped to the conclusion that the document was not sufficient without considering the counter-arguments available and assessing them. Very few students considered whether it was relevant to consider the fact the customer was always in a hurry and whether he was partly responsible for him not reading the sign.

The construction exercise should have commenced with the approach set out in the Darlington decision and then moved to application of the four corners rule to the facts. The four corners rule should have been stated as a rule of construction. Very few answers did this despite this being commented on in the examiners comments to the last exam. Very good answers should not assume that just because conduct appears outside the four corners of the contract it is not protected by the clause, the clause can use language to capture that conduct. To the extent students think a cause of action depended on negligence then some discussion of the Canada SS rules was warranted.