CONTRACTS
MARCH 2013
EXAMINER'S COMMENTS

Question 1

(a)   This part raised two issues. The first was whether Garth had validly revoked his offer. The requirement of communication of revocation needed to be stated. On the fact Garth had done what was necessary to validly revoke his offer, but the question of whether is was valid depended on the second issue, The second issue was the operation of the postal acceptance rule in relation to Frank's letter of acceptance. Most students stated the principle reasonable well and concluded that the acceptance occurred before the revocation and that there was a contract. However, many students did not discuss Garth's attempt to revoke the offer. This needed to be raised, because, if there was no attempt to revoke the offer, there was no need to discuss the postal acceptance rule. Relevant cases setting out the relevant principles included *Henthorn v Fraser* and *Byrne v Van Tienhoven*nt.

(b)   This part raises the question of whether the postal acceptance rule had been excluded. If it did exclude the rule there would be no contract because the revocation would have occurred before acceptance. A relevant case is *Bressan v Squires*.

Question 2

(a)   The first issue raised in this part is whether the loss suffered was too remote from the breach in accordance with the rules in *Hadley v Baxendale*. It is likely that the loss was within the second limb of *Hadley v Baxendale*. If the loss was not too remote there was the issue of whether the loss was $20,000 or merely the chance to make a profit of $20,000 on the basis that there is some doubt that, had there been no breach by MGL, that, given the distance he had to travel in the time available, Arthur would have been able to exchange the contract with Vicky in time. Many students did not raise the loss of chance issue.

(b)   This part raised the question of whether the sign was an effective exclusion clause. Issues of its incorporation of the clause and its construction need to be discussed. The incorporation issue focussed on whether reasonable notice was given prior to or at the time the contract was entered into. Relevant cases here included *Thornton v Shoe Lane Parking* and *Parker v South Eastern Railway Company*. On the issue of construction the principles set out in *Darlington Futures v Delco Australia* were particularly relevant. A common failure in the answers was that students only discussed one only of the incorporation and construction issues. Another error was discussion of the principles relating to exclusion of liability for negligence. There was no negligence committed by MGL – it simply did not comply with its contractual obligation to complete the repairs on by the stipulated time.

Question 3

This question raises the issue of common mistake. There is no mistake at common law: *Bell -v- Lever Bros*. Whether a mistake in equity exists depends upon satisfying the criteria in *Solle -v- Butcher*, and the further question of whether *Solle v Butcher* is good law in Australia in the wake of the *Great Peace Shipping v Tsavliris* decision. If satisfied there is a right to rescind unless it has been lost. This may have occurred given the lapse of time from the making of the contract. There is no misrepresentation on the facts.This question was poorly answered by many students. Many treated this as a misrepresentation question. Others discussed questions of whether there was a breach of a term of the contract or a collateral contract. If only for the reason that the question asked whether the contract was void or voidable, the issue of whether there was a breach of contract was irrelevant.

Question 4

Part A

Part (i) of this question raises the issue of termination for anticipatory breach. Part (ii) raises 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*.

Part B

The issue is in this question was whether clause 7 wa an enforceable restraint of trade. At common law restraints of trade are void and unenforceable unless reasonable: *Nordenfeldt v Maxim Nordenfeldt Guns*. The key aspect of reasonableness here is whether the clause is reasonable as between the parties. On two grounds it is likely that the clause was not be reasonable: (i) the terms of the restraint are too wide, in that it restrains the opening up of not only second-hand furniture shops, but also new furniture shops; and (ii) the geographical area of 25 kilometres is probably too wide in the context of the Sydney metropolitan area – the fact that the exact location where Harry intended to open the shop is within what would have been reasonable on this criteria does not make the restraint reasonable: *Papastravou v Gavan*. However, s. 4 of the *Restraints of Trade Act* enables the court to remove references to 'new' shops from clause 7 and also overcomes the effect of *Papastravou*. The appropriate remedy to be sought would be an injunction. Many students failed to discuss the *Restraints of Trade Act* provisions.

Question 5

Part A

The employees in this question were not privy to the contract between BBC and Athena and could only succeed if they come within one of the so-called exceptions to the doctrine of privity of contract. The most realistic possibility is that of trust as discussed especially by Deane J in *Trident General Insurance v McNiece Bros*. A number of students raised estoppel as an applicable exception. However, that was not possible on the facts, given that the employees never knew of the promised benefit until after they had performed the work.

Part B

This question raised the rule in *Pinnel's Case* and its application in cases such as *Foakes v Beer*. Unless there was an exception to the rule in *Pinnel's Case*, the balance of the loan can be recovered. Part-payment in a different currency may amount to such an exception. It may also be argued that the practical benefit approach to consideration in *Williams v Roffey Bros* may lead to a finding that consideration was given and that the balance of the loan cannot be recovered.