

LEGAL PROFESSION ADMISSION BOARD

SEPTEMBER 2013

CONTRACTS

Time: Three Hours This paper consists of **three** questions.

Candidates are required to attempt all **three** questions.

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 write their answers clearly. Lack of legibility may lead to a delay in the candidate's results being given and could, in some circumstances, result in the candidate receiving a fail grade.

Substantial credit will be given to concise well-reasoned answers based upon principles which are clearly stated. Students are expected to answer the problems using the compulsory cases that were studied in this unit.

You should discuss all the relevant issues, even if you believe the answer to one of the issues will dispose of the matter. You should however address only issues directly raised by the facts.

You must canvass the arguments for and against the position you take. Where there are conflicting judicial approaches on issues, you should outline them, describe their potential effect on the outcome of the problem, and indicate, with reasons, which approach you prefer.

This examination is worth 80% of the total marks in this subject.

Permitted Materials: This is a closed book examination. No materials are permitted in the examination room.

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

Andrew manufactures hair care products. Belinda supplies 20 hair salons in the Sydney Metropolitan Area with products to be used in those salons. The owners of these salons approached Belinda to source some shampoo and conditioner, which they could sell to their customers. Belinda approached Andrew to supply these products for on-sale to the salons. During discussions Belinda informed Andrew that she intended to contract with these salons for a 2 year supply of the products and hoped to later extend those contracts. These contracts would be in addition to, but separate from, the current supply contracts she has with those salons. She said that if things worked out she might supply salons elsewhere in New South Wales and would be developing a business plan to explore that.

As a result of these discussions Belinda and Andrew entered into a contract which contained the following terms:

1. Andrew agrees to supply Belinda with all her reasonable requirements of shampoo and conditioner as requested.
2. Belinda to purchase a minimum quantity of 300 bottles of each product per week.
3. Price to be \$3 per bottle.
4. Belinda to notify Andrew each Monday of her exact requirements as to quantity for the following week.
5. Andrew to deliver directly to salons nominated by Belinda.
6. Belinda to nominate which of the 20 Sydney Metropolitan salons require products in the following week when she places orders each Monday.
7. Andrew agrees to use his best endeavours to deliver on Saturday the orders that are placed on the prior Monday.
8. Andrew guarantees the products will be of acceptable quality.
9. Andrew undertakes to deliver the products in good condition.

Based on this contract Belinda entered into 2 year contracts with the 20 Sydney Metropolitan salons.

Everything ran smoothly for the first 3 months. However, in months 4 and 5 Belinda received reports from about half of her salon clients that deliveries had arrived on Monday morning and they were having difficulty unpacking them in time for trade each week with the result that they were beginning to stockpile the products. Belinda contacted Andrew and obtained an assurance that this would not happen again. In month 6, Belinda was contacted by a number of her salon clients who told her that on average every second delivery was arriving late. In addition, from the very start about 10% of the bottles being delivered were damaged and could not be sold by the salons to their customers. When Belinda asked why they had not sent them back she was told by the salon owners that they had been using the damaged bottles in their salons. Belinda then again contacted Andrew to ask for an explanation. Andrew replied that he was doing his best but the carrier he was using appeared to be constantly running late and somehow damaging the goods. Belinda was so angry she said to Andrew, "I will not be placing any orders with you this week, my clients have enough of the stuff – your products are not selling very well".

(Question 1 continues)

(Question 1 continued)

To this Andrew replied, 'you cannot do that'. Belinda then said, 'you watch me and I am in a mind to terminate this contract, but I will see how it goes'. Belinda carried out her threat and did not order any products that week. The next week she put in an order and the goods arrived on time, however, this time 100% of the bottles were damaged and the salons immediately returned them to Andrew. Andrew apologised and sent another batch to the salons which arrived on Monday morning but were accepted by the salons. Later that day when Belinda heard of this she phoned Andrew and said, 'you have to change that carrier'. Andrew replied 'we cannot do that they are the cheapest available and we are just breaking even on this contract. We have under-quoted you'. Belinda replied, 'well here is the deal, my clients have enough product at the moment so every time you are late or if anything goes wrong I will not be putting in an order for the following week, you know I am not joking I did it once and I will do it again'. Andrew replied:

'We are doing our best and we never guaranteed we would get the products delivered by Saturday. I would also add that it would help if, when you nominate the salons that need product, you also tell us how much they need. In all this time you have never done that, we are left hanging till the following Friday before you send in the quantities even though you nominate what salons will need product on the Monday as required under our contract. The result of this is that we have not been able to plan deliveries much in advance and we are left with having to call in the carrier just before closing on Friday afternoon. I admit that I am still not sure why the carrier does not get them to the salons the next morning I am just saying from our perspective it is all a bit of a last minute rush'.

Belinda replied, 'well you have not complained about that before and if that is your attitude I am terminating this deal now'. To this Andrew replied 'you cannot do that, we are trying really hard, in fact, rather than wait for your order and get the carrier to pick it up from our premises, today we sent off a batch to the carrier for next week, we based it on how much you usually order and the carrier has it in his possession – in fact I understand the carrier has already loaded it onto one of its trucks – so as soon as you make the nominations which are due later today they can hit the road'. 'Too bad' said Belinda. Andrew replied, 'well you are not terminating because we are terminating'. The final batch was never received by Belinda's clients or returned to Andrew and was in fact lost.

Advise Belinda whether she was within her rights to terminate the contract or whether Andrew had a right to terminate the contract. You can assume that Belinda has paid for all the goods that have been sold under the contract.

(Question 2 follows)

Question 2

Assume the facts are the same as in Question 1 and assume that Belinda had a right to terminate the contract and did elect to terminate. Belinda now seeks your advice as to whether she can claim the following damages:

- (a) The profit she would have made in supplying the 20 Sydney Metropolitan salons for the full 2 years.
- (b) The expenditure she incurred in negotiating and servicing the 2 year supply contracts with the 20 Sydney Metropolitan salons.
- (c) The contracts of supply she was offered by a further 10 salons in Newcastle that she will now have to reject and which came out of her business plan, which she discussed with Andrew, to expand this part of her business.
- (d) The deposit she has lost from the holiday she booked when the business was looking good but she now has to cancel.
- (e) Damages for the stress this has caused her.

(Question 3 follows)

Question 3

The facts are as per question one. This time Andrew comes to you for advice as to whether he has a cause of action against the carrier he used to deliver the products to the clients of Belinda, including an action against the carrier's subcontractor and subcontractor's employee. The carrier in question was Speedy Carriers Pty Ltd. Andrew had used Speedy numerous times in the past. Andrew originally found Speedy in his local paper. On the very first occasion he used Speedy, Andrew was asked to come into the office of Speedy to set up a commercial account. At that meeting Andrew filled out a form to start the account. The form stated: 'Speedy's standard terms and conditions govern this contract and can be viewed in Speedy's Head Office: a copy will be supplied on request'.

Andrew asked the representative of Speedy whether there was anything in those terms he needed to be concerned about. The Speedy representative replied, 'No just the usual stuff, they are over there on the wall behind that pot plant if you want to read them, but I will just note that we will not be responsible for any damage to the goods that results from you not packing them properly for transportation'. 'Fair enough' thought Andrew. He then looked over to the pot plant and decided it was too much effort to peer around it to read the terms and he was late for a meeting and so he signed the document to open the account. If Andrew had read the terms he would have seen that it contained the following clause:

Limitation of liability

1. All goods remain at the risk of the owner. Speedy Carriers Pty Ltd is under no liability whatsoever for any loss or damage to the goods, howsoever caused.
2. Speedy Carriers Pty Ltd enters into this clause as agent on behalf of its servants, subcontractors and subcontractor's employees and all such persons, shall, for this purpose, be deemed to be parties to the contract and be entitled to the full benefit of these terms and conditions to the same extent as Speedy Carriers Pty Ltd.

Each future occasion upon which Andrew used Speedy he did so over the internet by filling in an online order form. Each time Andrew filled in that form a notice appeared setting out the terms and conditions upon which Speedy did business, which included the above exclusion clause. To continue filling in the order form you had to press a 'continue' button but there was no requirement that the client tick a box to affirm that they had read the terms. Speedy would later confirm the order by email attaching a receipt for the payment that was made on-line when an order was placed and a copy of its terms and conditions; sometimes this email arrived before the goods were picked up by Speedy for delivery and at times not until delivery had taken place.

(Question 3 continues)

(Question 3 continued)

At the time that Andrew requested Speedy to commence deliveries to the clients of Belinda, Speedy was very busy and subcontracted the work to Drop and Go Carriers Pty Ltd who they had never used before. Speedy was able to subcontract work under the terms of its contract with Andrew. An employee of Drop and Go, Jeffrey, would pick up the products from the premises of Andrew and deliver them to the clients of Belinda. Investigations have shown that the reason why the deliveries were often late was because Jeffrey made money on the side as a Roadie for a local band and he used the truck on Friday, Saturday and Sunday to carry heavy PA systems to various venues for the band. Rather than empty the truck he would just load the PA speakers on top of the bottles. The result of this was that deliveries were often late – often not till Monday morning – and some bottles were damaged. Investigations have also shown that the final delivery that Andrew sent which was never delivered was in fact stolen when Jeffrey left the truck unlocked at a venue the band was playing at.

Advise Andrew. You should answer this question by reference to common law principles. Do not consider any statutory provision you might think relevant.

END OF PAPER