

LEGAL PROFESSION ADMISSION BOARD

SEPTEMBER 2013

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 and could, in some circumstances, result in the candidate receiving a fail grade.

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

Permitted Materials: This is an open book examination. Candidates may refer to any books and any printed or handwritten material they have brought into 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.

PART A

Attempt two questions only in this part.

Question 1

In 1985, Danny and Sue Wong, the sole Members and Directors of Bamboo Garden Pty Ltd (Bamboo), opened a specialty Chinese restaurant in Sydney. Danny was the chef and responsible for the concept. Sue controlled front of house and handled all the money. They built up a very successful business over 15 years and began franchising their concept in the suburbs.

Their son, Albert, owned and operated the first franchise.

By 2010, the number of franchised restaurants had grown to 22. Sue became exhausted and very ill. Danny, Sue and Albert agreed, at dinner one night that they would add Albert as a Director and Sue would gift her shares in Bamboo to Albert, so as to give him incentive to take over her workload and ensure the company's future. The next day, Sue completed and signed a "Change to company details" form which she believed, would, upon being recorded by ASIC, have the effect of adding Albert as a Director and transferring her shares in Bamboo to Albert. Her assistant used the form to do an electronic lodgement with ASIC and then shredded it.

Sue is now well again and back working the front of house. However, Albert is causing tremendous problems with Franchisees after becoming addicted to cocaine. Danny fears Albert will destroy the business and insists that he resign as a Director and transfer the shares in Bamboo back to Sue. Albert refuses to do either. Instead, he insists that Bamboo be sold so that he can have his half of the proceeds and live a life of ease in Macao.

Advise Danny and Sue.

(20 marks)

(Part A Question 2 follows)

Question 2

In January 2012 Denise purchased a \$1,500 top of the range Morven™ front load washing machine from Home Products Limited (HP), a large white goods retailer. She did not use the machine for 6 weeks, as she was away. The Morven washer is manufactured by Morven Machines Limited (MM) in Albury NSW. It came with Instructions for Use. Denise threw the instructions away without reading them.

A month after she started using the Morven, Denise noticed an unpleasant odour coming from the washing machine when not in use. By the end of April, she noticed that the smell had permeated her clothes and linen. By June 2012, she noticed that the whole house smelt terrible and she was coughing constantly. She replaced all her towels, bed linen and some of her clothes.

Her son in law, Dan, investigated the problem for her in July 2012. He said that mould and mildew were accumulating in the machine. He recommended that she pour “a whole lot of bleach” in the machine and run a cycle to get rid of the “biofilm”. When doing so, Denise spilt bleach over the outfit she was wearing, and a rug. Both were ruined.

Initially, the problem was solved, but, after 3 weeks it reappeared. At the end of September, 2012 Denise rang HP. They told her to ring the customer service centre at MM. She did so in October 2012, and was told:

We are sorry that you have had this problem. As set out in our Instructions for Use, it is necessary to diligently wipe dry the inside steel basket and seal of your machine after each wash, and leave the door open when it is not in use”.

Denise does not want to leave the door open. She has small children, who might hang on the door and damage it, or even climb inside.

You are a legal officer at the Department of Fair Trading. Advise Denise.

(20 marks)

(Part A Question 3 follows)

Question 3

Winton Pty Ltd (Winton) placed an order with SunOil Limited (SunOil), for the supply of 100 shipments of identical volumes of petroleum products over 6 months. The products are priced at an amount per volume. SunOil filled the order for the first shipment by measuring the volume of petroleum, at the point of loading, at an ambient temperature of 27 degrees Celsius and invoiced Winton accordingly for \$2,225,000. Winton received and used the petroleum.

The ambient temperature at point of delivery (12 degrees Celsius) is much lower than at point of loading. The volume of petroleum decreases at lower temperatures and Winton believes that the volume should have been measured at the point of delivery, and not loading. Neither Winton nor SunOil measured the petroleum at point of delivery. However, Winton asserts that if it had been measured at delivery, the amount payable would be \$1,385,000. Winton has refused to pay \$2,225,000.

SunOil has sent a letter of demand giving Winton 14 days to pay, or face legal action for debt, based on the invoice for \$2,225,000, plus costs, plus interest, for overdue payment.

The contract between Winton and SunOil states in clause 5.1:

Title and risk in SunOil products purchased by Customer under this Agreement shall pass to Customer upon delivery at the Site.

The contract does not mention volume contraction or expansion.

Advise Winton:

- (a) Whether it has any legal basis for declining to pay \$2,225,000 for the first shipment.**
- (b) Whether it must accept and pay for the next 2 shipments, as invoiced.**
- (c) What steps it could take to prevent the same issue arising in future.**

(20 marks)

(Part B follows)

PART B

Attempt two questions only in this part.

Question 4

Jim and Dan each own large cattle stations in different parts of Queensland. Each of them has borrowings and other credit arrangements with Rural Bank Limited (Rural). Each has granted to Rural a security interest over their personal property, including all livestock. Both of these security interests were registered on the PPS Register in March 2012.

In December 2012, due to floods, it became important for Jim to be able to move 1,000 cows to dry ground to fatten up, and to borrow money to survive for the next 5 months. By May 2013, the cows would be fit for sale. The proceeds of sale would pay for a loan and the agistment.

Rural refused to lend Jim any more money.

LiveCo Limited (LiveCo) is a livestock trading and finance company. It agreed in December 2012, to buy the 1,000 cows from Jim and lease them to Dan for 5 months. At the end of 5 months, the cows were to be sold, LiveCo was to receive the purchase price plus rental payments, Dan an agistment fee and Jim any balance left over. The agreement with Jim and the lease to Dan were in writing but, as the arrangement was for less than 6 months, not registered on the PPS Register.

Prior to the end of the 5 month lease, Dan became insolvent and a bankruptcy Trustee was appointed. Each of Jim, LiveCo, Rural and Dan's Trustee in Bankruptcy has claimed the cows.

Advise Rural on its legal position and whether it is entitled to the cows.

(20 marks)

(Part B Question 5 follows)

Question 5

Ultimate Financial Services Limited (UFS), a subsidiary of CAC Bank Limited (CAC), is a Financial Planner which specialises in providing financial planning advice to local government councils. Their Australian Financial Services Licence permits them to deal in "securities". The definition of "securities" in the relevant law specifically excluded derivatives. The operations manager of UFS did not know that. The CAC in house lawyer often did not understand complex investment instruments. UFS had stopped requesting an opinion each time they dealt in a new investment instrument.

In May 2011, Emil, the UFS salesman, persuaded Pauline, the Investment Manager at Magnolia Regional Council (Magnolia), to invest in \$3,000,000 worth of POT Notes, a complex derivative rated "AAA" by S&P.

The indices on which POT Notes were based collapsed. The Notes became worthless. Magnolia successfully sued UFS and CAC for its losses. CAC claimed indemnity from their insurer RED Limited under a policy which covered losses arising from the provision of, or failure to provide, services to third parties suffered by CAC in the course of business. The names of 274 subsidiaries of CAC (including UFS) were noted on the policy.

RED Limited has denied indemnity under the Policy, claiming that CAC breached its duty of disclosure under s.21 of the Insurance Contracts Act, in that:

- CAC failed to disclose at the time of renewal of the policy that UFS dealt in derivatives, a high risk and complex activity not covered by its licence, and therefore unlawful.
- CAC had misrepresented the risk profile of the UFS business.

Advise CAC:

- (a) **Whether you recommend that CAC or UFS take legal action against RED Limited to enforce the contract of insurance, giving reasons.**
- (b) **The likely outcome if a court found a breach of the duty of disclosure had occurred.**
- (c) **Whether UFS is able to separately enforce the contract of insurance between RED and CAC.**

(20 marks)

(Part B Question 6 follows)

Question 6

Please answer 5 only of the following questions:

- (a) What type of dispute is appropriate for expert determination?
- (b) Is it possible to have "*a Holder in due course*" of a Promissory Note?
- (c) What was the relevance of child labour to the claim in VIS Moot 20?
- (d) What is meant by the expression: "*The seat of arbitration*"?
- (e) What should I expect to happen if I make a formal complaint to my bank about a service they have provided to me?
- (f) Why is the involvement of lawyers sometimes perceived as an impediment to a successful mediation?
- (g) Explain the legal risks to an artist considering a consignment arrangement with an art gallery.
- (h) Why would a public company wish to include a social media policy term in employment contracts?
- (i) Describe an example of action taken by ACCC with respect to misleading and deceptive conduct by a commercial enterprise in the last 12 months.
- (j) What would be the legal situation if an 18 month old child used an app on her father's phone to buy a car on eBay?

(20 marks)

END OF PAPER