CONTRACTS EXAM SEMESTER 1 2012

PART A - PROBLEM QUESTIONS

QUESTION 1

a) As Major Events (ME) contracted with Lisa (L) for her to perform at the event and she did not do so, they may seek damages for breach of contract.

Lisa may respond to this claim by saying that she had a valid right to terminate the contract and was no longer obliged to perform as a result. No termination clauses appears in the contract; at common law Lisa may terminate the contract if ME:

- breaches an essential term of the contract, or
- fundamentally breaches an intermediate term or
- repudiates the contract.

If L would not have entered the contract without the term regarding George (G) being invited to perform, then it is likely to be an essential term of the contract (Associated Newspapers v Bancks). L could argue this, as prior to signing the contract, she asked for something in addition to the fee; her request was granted and she then accepted the agreement. However, she did say she was happy to perform even without the change, suggesting she would have entered the contract regardless. This would suggest the term was not essential, particularly given the informal, non promissory language used in requesting additional benefits (Tramways Advertising v Luna Park).

- If term was essential (though not likely) then L can terminate and receive damages for loss of bargain.
- Consequential loss must be of the type expected by parties on formation (Hadley v Baxendale) - eg possibility of performing in Melbourne (though that was not certain at formation to both parties).
- Loss of a chance damages likely to compensate for lost potentially successful commercial venture (Commonwealth v Amann Aviation).

The breach does not appear to be fundamental either, as it does not deprive Lisa of the benefit of the contract herself.

L may be able to argue that as ME evinced an intention of seriously refusing to be bound by the term of the contract regarding George, ME has repudiated the contract. However, an anticipatory breach of this type - refusal prior to performance - must also be fundamental (depriving L of the benefit of the contract) (Hochster v De La Tour). As it does not affect L personally whether or not G performs, she will still benefit from performance, so she cannot terminate for this.

Because L has wrongfully terminated the contract (assuming the term regarding George was not essential), she has in fact repudiated it, giving ME a right to terminate. ME can seek loss of bargain damages - the amount to be gained to them from having L perform minus that gained from whomever substituted for her at the event. They may also be able to claim the $40,000 deposit back in a restitutionary claim for money had and received. Because L did not perform at All, ME may argue that there was total failure of consideration (Baltic Shipping v Dillon). However, this contradicts the contract's express terms, so it is unlikely that such a claim would succeed.

L may argue, to seek some remedy, that ME were estopped from breaching their promise to invite George to play. To establish this L must show

- she was induced to assume George would perform,
- she acted in detrimental reliance on this assumption, and
- ME reneged on this assumption unconscionably. (Waltons Stores v Maher)

However, on the facts, no detriment occurred to L relying on the promise by ME. An estoppel is likely to fail on these grounds.

As ME did breach the contract (not for wrongful termination, but for not inviting George to perform) they will also be liable for damages in a counter claim by L. However, with no actual loss resulting specifically from this breach, and no apparent right for her to terminate, L may only receive nominal damages.

b) George is not a party to the contract between L and ME. As a result he cannot directly enforce it or sue under it for damages (Coulls v Bagot's). However, in certain circumstances he may be able to still seek a remedy.

He may attempt to have Lisa sue for breach of contract. However, as only she is a party to the contract, damages will only compensate for her loss (Coulls, Beswick). It is also too late for specific performance, as the date of the concert has passed and George has not performed (and thus is not owed any payment). Courts may discern an intention for L to hold a chose in action for debt or breach of contract on trust for G. If this is the case, L is obliged to enforce it on G's behalf and will receive damages for G's loss (including the $12,000 owed to him and possibly the lost chance for George to perform in Sydney and Melbourne, along with the $6,000 foregone by agreeing to perform for ME). It is uncertain judicially as to whether a trust is inferred in all cases where a 3rd party stands to benefit from a contract they are not privy to. Dean J, in Trident v McNiece, suggests this is the case, but Mason CJ and Wilson J in the same case say that examination of the language of the parties and of their contract is necessary. Without more facts we cannot determine whether or not the parties showed such intention in their contract, so a trust as a means of compensating G is uncertain.

G may seek an estoppel if ME induced an assumption in him that he would benefit from L's contract, G acted in detrimental reliance on that assumption, and it is unconscionable for ME to renege (Waltons Stores). It does not seem that ME directly induced the assumption in G. However, it would be reasonable to assume that they were suggesting that they were bound to invite him to perform by the inclusion of comments to that effect in L's contract. By rejecting other paid work on the night, G is showing detrimental reliance on the assumption. It seems that Briony, at least is aware of the possible detrimental reliance by G, which may be enough to establish unconscionability by ME. He would receive "minimum equity" in damages - $6000.

QUESTION 2 LUKE (L) V SUNNY SOLAR PTY LTD (S)

L has entered a contract with S on a misapprehension - that the solar systems would be installed by an A-class electrician with due care. This was not the case. As a result he may seek various remedies.

1. Breach of contract

If S's statement regarding the use of A-class electricians was a warranty, and was incorporated into the contract, then L may sue for breach of the contract.

A representation is more likely to be a warranty if the party giving the statement is knowledgeable about the subject (Oscar Chess v Williams). Here S is in the best position to know whether its employees are properly licensed. S may argue that the time span between the alleged warranty and the contract's signing along with the lack of promissory language mean that it was more of a representation - Van den Esschert v Chappel.

It is likely that S, as the employer of Jeremy, were responsible for ensuring he remained licensed and by stating that they use A-class electricians exclusively, the term is a warranty.

The contract does not mention this representation. A written contract is presumed to be complete, to the exclusion of additional oral terms (LG Thorne v Thomas Borthwick & Sons). If it can be shown that the parties intended their contract to be partly written and partly oral then this presumption may be rebutted (SRA NSW v Heath Outdoor). L may argue that the contract was obviously incorrect without the term (Nicolazzo v Harb) and so the term should be incorporated. However, regardless of whether a party has read the written contract, they are conclusively accepting its terms by signing (Toll v Alphapharm). It is possible that S's statement misrepresented the contract, in which case that representation would take precedence over the contract's omission of the term (Curtis v Chemical Cleaning). However, because the term was omitted entirely in the written contract rather than merely misrepresented it is likely that the oral term is not incorporated and the non-use of a fully licensed electrician was not a breach of contract.

- Collateral contract also possible - doesn't contradict main contract. However, collateral contract covers same subject matter as main contract - may be less likely as a result (Shepperd v Ryde)

If it were a breach of contract, then L would be entitled to damages. The aim of such damages would be to put him in the position he would have been had the contract been properly performed (Robinson v Harman). The direct loss is that of the solar systems - the one now destroyed and the one that is faulty (enough to repair it).

Consequential losses are those caused by the breach - including rebuilding to the shed, L's loss of amenity and physical injury (medical costs), and his lost damages for uncompleted carpentry work. Such damages must be either of the kind usually expected, or, if not, contemplated by the parties at formation as not unlikely to occur (Hadley v Baxendale).

It is likely that S knew that the shed was a commercial workshop, but if they could not have been they may not be liable for the entire damage (the $20,000 of loss). However, as causation is established, at least partial recovery of the remaining loss is likely.

However, damages will be reduced if S can prove L could have reasonably avoided the loss by undertaking certain actions - TC Industrial Plant v Robert's Queensland. They may argue that L should have at least salvaged some of his carpentry work to prevent some of the loss. Mere hindsight is not enough, however, to determine the reasonable course of mitigation (Banco v Portgula v Waterloon and Sons) so given the stress of the situation this argument may not apply.

2. Rescission for misrepresentation

Rather than saying that the contract was breached, L may argue that the contract should be rescinded because entry was induced by a misrepresentation of a material fact.

It is likely that the type of electrician used would be material to L, given his concern about the potential for faulty installation, and not a mere puff by S (Mitchell v Valherie). This was L's main concern in entering the contract and so the onus is on S to disprove that it at least partially induced entry to the contract (Holmes v Jones). It is unlikely S will be able to do this. However, a bar to rescission may apply - as the shed has burnt down it is impossible to restore both S and L to their pre contracting positions. However, substantial restoration (by way of monetary compensation) may be enough (Alati v Kruger) in which case the contract can be rescinded and S and L will both be returned to their pre-contracting position by means of damages.

3. Tort

Liability may arise for S by means of the tort of deceit if they were aware that J was not fully licensed, or by negligent misstatement if they should have been aware and breached a duty of care. The Misrepresentation Act 1972 s7(1) allows a party to seek damages in tort if innocent misrepresentation induces entry into a contract. If S can show they reasonably believed in the truth of their statement they may defend such liability (s 7(2) of the Act).

4. Misleading or deceptive conduct

L may say that S engaged in misleading or deceptive conduct in trade or commerce against s 18 of the Australian Consumer Law. He may seek this against both Nick, who made the representation on behalf of S, and against S itself. Personal liability only applies if Nick was knowingly deceiving L (Houghton v Arms). It is likely that the statement was in trade or commerce, as S is a company and L is a consumer. It is also likely that stating S only used A class electricians when they did not was also deceptive, regardless of whether or not Nick knew that J was not properly licensed - L was still led into error as a result of the statement (Parkdale v Puxu).

J's non disclosure that he was not, in fact, an A-class electrician may also be misleading as a reasonable person would expect such a disclosure in the circumstances, given Nick's previous statement. If so, L may also pursue J for a breach of s 18.

L may seek damages for the amount of loss - s 236 of the ACL. The court may also set aside the contract or vary it.

5. Rectification

If a court is satisfied both S and L intended to include the term in the contract, then L may seek damages for breach of contract after having it rectified. However, if both parties are aware of the excluded term (as L should be by signing the contract) the court will not rectify it (Pukallus v Major Enterprises).

b. Although past authority (eg George Mitchell Ltd v Finney Lock Seeds) suggest exclusion clauses must be fair and reasonable in cases of serious breach, recent authority suggests they are to be taken for their ordinary meaning (Darlington v Delco). Additionally, general but strong language, particularly that excluding negligence, will be taken at its word and operate (Davis v Pearce Parking, Commissioner for Railways NSW v Quinn). Though the exclusion clause appear to effectively limit liability, L may still seek a remedy under the Australian Consumer Law, particularly s 64's guarantees in consumer transactions.

c. S may seek to claim the $15,000 owed to it under an action for debt. The money must be owed under the contract. Here, because it requires only $1,000 of extra work, L may argue they have substantially performed the contract and so are still entitled to payment.

- $1000 set off against price in damages - Bolton v Mahadeva
- Lump sum payments for each part of the transaction suggest that entire performance is required to claim full value (Phillips v Ellinson Bros).

If it is found that they have only partially performed, S may seek reasonable payment for services provided under a claim of quantum meruit. However, the substantial cost of removing the solar panel and having another installer complete it may mean L has not freely accepted S's work and so S cannot succeed in a quantum meruit (Sumpter v Hedges).

PART B - ESSAY QUESTIONS

QUESTION 3

Australia's contract law derives mostly from the English common law and equitable doctrines of the same area. However, the Australian Consumer Law provides some protections that are truly unique. These co-exist with the law of contract to provide a broader range of remedies to a wider scope of afflicted parties. The prohibition on misleading and deceptive conduct - s 18 (1) of the ACL - provides a good example of this. Under the common law of misrepresentation and misinformation, many restrictions apply for a party seeking remedies for a contract entered into as a result of a misapprehension, such as the parol evidence rule, the Hoyts v Spencer rule on collateral contracts, and bars to rescission. These do not apply to s 18 claims - any misleading conduct does not need to be incorporated into the contract or a collateral contract. Additionally, courts have a general power to set aside a contract in the ACL (s 237), and courts do not need to be restricted by the bars to rescission in using this power (Henjo Investments). This may mean a party unable to seek a remedy in contract can be awarded a variety of remedies - including damages (s 236) and other general orders to compensate for damage (ss 237 - 245) which may better assist an afflicted party. However, these are subject to the limitation of conduct being in trade or commerce. This excluded parties to many types of contract from being able to seek a remedy under the ACL - notably, consumers in private sales of non-business assets and employees and employers misled inside a company.

Beyond the s 18 prohibition, the ACL also prohibits two types of unconscionable conduct. The first of these - s 20 - prohibits conduct unconscionable under the common law. It is most relevant when dealing with the equitable doctrine of unconscionability (ACCC v Berbatis), as it allows parties to seek a broader range of remedies than mere voiding of a contract - including those mentioned above. Some authority, such as ACCC v Samton, suggests it may also apply to other common law doctrines of unconscionability, such as estoppel or unilateral mistake. In this case the ACL mostly does not replace the law of contract, but provides additional means of compensating afflicted parties.

Section 21 covers a wider range of unconscionable conduct - not merely equitable doctrines - for instance it could include abuse of bargaining power. This means it provides remedies where none were available before, going beyond the common law of contract. However, it is also limited to conduct in trade or commerce, and only covers natural persons and non-publicly listed companies. Even with that restriction,

only rarely have courts found that conduct between businesses is unconscionable (eg ACCC v Simply No Knead). Thus, although the ACL does go further than the law of contract in this area, it does not usurp it.

The ACL also differs from the common law on the matter of exclusion clasues. Darlington v Delco, among other recent authority, suggests that such clauses are to be taken ‘at their word.’ However, the ACL provides against such clauses under its ‘unfair terms’ provisions (s 23). It also provides certain consumer guarantees that may not be excluded in a consumer contract (s 64). Here, the ACL makes up for what the Parliament has seen as inadequacies or injustice in the common law of contract.

The Australian Consumer Law cannot and will not ever replace the law of contract in Australia due to its limitations on claims. However, it does extend the range and variety of remedies available to parties afflicted by breaches of contract or by unfair contracts themselves.