THE UNIVERSITY OF ADELAIDE AUSTRALIA

Contracts – Semester 1, 2014

Assessment: Take Home Exam

Gabrielle

Marker: Golding

Aspect of Exercise	Unsatisfactory	Satisfactory	Good	Excellent	Comments
1. Structure — answer organised in a clear and logical way?				✓	Headings would have assisted the structure of your answer, but you have dealt with the issues in a logical sequence
2. Clarity of expression — answer well written and easy to understand?				✓	Your expression is clear & easy to understand throughout.
3. Coverage of relevant issues — legal issues raised by question identified and discussed, and major issues prioritised?				✓	Good coverage of the major issues. It would have been helpful to identify Amelia's counter-offer in Q1, & min. equity in Q2 (see comments on paper).
4. Citation of authority — statements of legal principle backed by appropriate authority?				✓	You have appropriately relied on & cited authorities where necessary.
5. Effectiveness of argument — arguments made clear and effective, revealing sound understanding of issues raised?				✓	Your argument is coherent & reveals a solid understanding of the issues.
6. Overall quality of the paper.				✓	Great overall!

GENERAL COMMENTS:

This is a very strong paper that is well argued – just note the comments throughout for the minor areas in which you could have improved.

Final Mark (incorporating penalties)	⓪ ① ⓪ ① ② ③ ④ ⑤ ⑥ ⑦ ● ⑨ ⓪ ① ● ③ ④ ⑤ ⑥ ⑦ ⑧ ⑨ ½	**Final Mark**
82		82

Question 1

Who bears the onus of proof to establish intention? (Ermogenous)

Amelia is likely to initiate proceedings against Bryce and bring an action in breach of contract.

For a contract to exist in the circumstances there must be necessary intention from the parties to enter into legal relations.[1] This is an objective test, it will be assessed on what the parties reasonably appeared to intend rather than what they actually intend.[2] Bryce will argue this arrangement was not intended to be legally binding; he and Amelia are siblings and there is a presumption that agreements between family members are not legally enforceable. [3] This presumption strengthens if the family relation is close.[4] However, it can be rebutted if the agreement is commercial in nature.[5] Bryce may argue that this was a casual lunch, not a business meeting, and that Amelia was only providing a favour as a sister. However, it would reasonably appear that both parties were pursuing their personal commercial interests outside of their sibling capacity; a plan for renovations was devised and the agreement formalised through email. Amelia would point out that emailing a memorandum after these discussions would reasonably indicate intention to be bound.[6] It is likely the agreement was intended to be legally enforceable as it was commercial in nature not domestic.

good discussion (agreement)

also

Amelia will need to establish the necessary offer and acceptance existed in order to establish a binding contract with Bryce. An acceptance is effective when the offeror

---

[1] *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95.
[2] *Ibid.*
[3] *Balfour v Balfour* [1919] 2 KB 571.
[4] *Sion v NSW Trustee & Guardian* [2013] NSWCA 337.
[5] *Roufos v Brewster* (1971) 2 SASR 218.
[6] *Merritt v Merritt* [1970] 1 WLR 1211.

you could also refer to Riches v Hogben

because these discussions seem like pre-contractual negotiations

receives it from the offeree.[7] Amelia may argue that she accepted a contract offer from Bryce during their lunch discussions, and that the 'agreement for renovations' email was merely the formal version of an already binding preliminary agreement.[8] If it is found there was no offer over lunch, Amelia would otherwise argue the email correspondence constituted an offer that she accepted. Amelia would also point to the fact she accepted the offer 2 days after receiving it, satisfying the reasonable time requirement.[9] Bryce would argue that Amelia's email response did not amount to a clear expression of acceptance as she only wrote that it looked 'OK'. From here it would follow that Amelia never contacted him with a clear statement of acceptance, and that her mere silence would not constitute an acceptance of his offer.[10] However, an offeree will effectively accept an offer if their behaviour reasonably indicates they have agreed to the terms. [11] Amelia's conduct indicated her acceptance when she noted she was 'really looking forward' to choosing a painting. If Bryce is successful in proving Amelia never accepted his offer, then no contract existed between the parties and Bryce's second email constituted a revocation of his offer, which he is free to do at any time before acceptance.[12] Despite this, it is probable that Bryce made an offer that Amelia accepted. In the event it is found there was an offer and subsequent acceptance, Amelia would need to establish that both parties had provided good consideration. For an arrangement to constitute a bargain there needs to be an exchange of sufficient

This could be seen as a new term & therefore a counter-offer, which Bryce does not accept when he calls off the deal, & there is no contract. Bryce's offer of $50,000 would be a new offer that Amelia does not accept.

[7] *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256.
[8] *Masters v Cameron* (1954) 91 CLR 353.
[9] *Bartolo v Hancock* [2010] SASC 305.
[10] *Felthouse v Bindley* (1862) 142 ER 1037.

[11] *Taylor v Johnson* (1983) 151 CLR 422, 429;
Jeannie Paterson, Andrew Robertson and Arlen Duke, *Principles of Contract Law* (Thomson Reuters, 2002, 2009 ed) 71-72.
[12] *Fletcher v Minister for Environment & Heritage* (1999) 73 SASR 474.

promises. [13] Bryce could argue that Amelia was not receiving an adequate promise in return for the promise she was providing. Before the paintings were valued they only carried emotional value, and after the valuation the price became significant; in any case, Bryce will argue that value of the paintings does not represent the value of the renovations. Amelia will argue that promises do not need to be adequate, only sufficient, and that the promise of a painting, regardless of value, is good consideration. [14] Amelia's argument is likely to be successful.

For a contract to exist between the parties all the essential terms must be certain and complete. Courts will attempt to resolve any uncertain elements of a contract through interpretation or severance. [15] If the terms cannot be interpreted but are too uncertain to remain and are vital to the contract's performance, then the agreement will be terminated. [16] Bryce would likely argue that there cannot be a contract due to a lack of agreement on some essential terms. Firstly Bryce would argue that the 'cost of materials' is too uncertain to remain but cannot be severed due to being integral to the performance of the contract, and thus the agreement should be terminated. Amelia would argue that the "cost of materials" was understood to mean a fair and reasonable sum in the context of ordinary cafe renovations and that it should be subject to interpretation by the court.[17] It is likely Amelia's argument will succeed as courts will generally strive to uphold agreements where possible.[18]

Secondly Bryce will argue that agreements to agree are unenforceable.[19] Here Bryce would outline that the agreement to agree on which painting Amelia received is

[13] *Currie v Misa* (1875) LR 10 Ex 153 at 162.
[14] *Chappell & Co Ltd v Nestle & Co Ltd* [1960] AC 87.
[15] *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429.
[16] *Whitlock v Brew* (1968) 118 CLR 445.
[17] *Hall v Busst* (1960) 104 CLR 206.
[18] *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd*
[19] *May & Butcher Ltd v R* [1934] 2 KB 17n.

an essential term of the contract, but that it has no effect, hence making it unenforceable. Amelia would point to the circumstances where an agreement to agree will be deemed enforceable, namely where the parties agree to negotiate in good faith.[20] Because the significant elements of the agreement, such as dates and plans, had been clearly expressed - and the major aspects of the agreement concluded - the parties would only be negotiating on a relatively minor element, that being the selection of one of six paintings. This could be seen as a sufficiently bounded exercise that could be sensibly determined between the parties through negotiation.

On the facts it is likely an employment contract exists between Amelia and Bryce and the court would proceed to award a remedy if loss is proved. ✓

for breach of contract

it could be a contract for services (?)

Question 2

In the event a binding employment contract exists between Bryce and Amelia, it must then be determined if the alteration to the contract is legally enforceable. If it is legally enforceable, then Amelia will be able to seek a remedy for her loss. If this argument is unsuccessful and there was no breach of contract, she may argue the circumstances amount to an estoppel. ✓

Bryce will argue that even though Amelia relied upon his promise, it was gratuitous in nature, and mere reliance is not enough to establish good consideration.[21] The necessary elements of a bargain were absent, as Amelia had not provided fresh consideration. Restating a commitment to an already binding obligation is not a new agreement and there is no consideration; a promise to perform an existing contractual

---

[20] *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1.
[21] *Beaton v McDivitt* (1987) 13 NSWLR 162.

duty is unenforceable. [22] However there are exceptions to this, a promise may be binding if the practical benefit doctrine applies in the circumstances. [23] Amelia would argue that Bryce has received a practical benefit from her completing the renovations which would amount to adequate consideration. A practical benefit will exist if there was a risk the contract would not have been performed if not for the additional promise, providing extra consideration is more beneficial than any remedy for breach of contract, and the promise was not induced through unfair pressure.[24] Amelia will argue that Bryce received a real benefit from the additional promise as it allowed his renovations to be completed on time; there was a serious risk that Amelia would not have been able to fulfil the contract without the extra consideration. It is likely that Bryce's benefit of having the contract performed outweighs the worth of any damages claimed for expectation loss. Bryce will argue that he only agreed to confer the additional promise because he was under duress. Amelia only informed him of her circumstances in late December, but they had organised for the renovations to be completed by the 15th January and bringing in another renovator on short notice would have been difficult and expensive. However, Amelia would likely be successful in arguing that the renovations were designed to be ready for "mad March", and that because she had already half performed the contract, there would have been plenty of time for another contractor to complete the remaining work in time. If Amelia's argument is successful she will be able to recover the $20000 in a breach of contract claim. It is worthy to note that precedent for practical benefit - *Musumeci v Winadell Pty Ltd* - was a decision of the NSWSC. This is not binding to the SASC, only persuasive. Whether it is applied in South Australia is up to the court on the day.

---

[22] *Stilk v Myrick* (1809) 170 ER 1168.
[23] *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1990] 2 WLR 1153.
[24] *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723.

If Amelia failed in this breach of contract claim she could argue that the circumstances give rise to an estoppel. An estoppel would exist if a party (to an existing legal relationship) was encouraged to rely on an assumption that a promise would happen in the future, and act on the promise so much so that if it was not performed they would suffer a detriment. [25] It must also be unconscionable for the promisor to depart from the assumption they have encouraged.[26] Amelia has organised a time extension on the debt with her creditors and turned down a new job worth $35000 based on the assumption she would be receiving the additional $20000 Bryce promised her. She has relied upon the promise to her detriment, as she is now unable to accept the offer of the new job. However, Bryce will argue that Amelia's assumption was unreasonable given she knew that his cafe was not making enough profit to justify expensive renovations, and that any reliance on an assumption must be reasonable.[27] Amelia would counter this with the expectation that once the renovations were completed the cafe's profits would increase during 'mad March' and Bryce would have been able to complete his promise. Bryce may argue that it is not unconscionable for him to renege on his promise, because his cafe is not 'going as well as he would like' and he cannot actually afford to pay. Amelia would point to the fact she informed Bryce about her circumstances; he was aware of the job offer she had received and the trouble she endured to complete their renovations contract. Despite knowing this, Bryce only indicated there was a possibility he could not pay her after Amelia had performed the contract, probably rendering ~~it~~ his actions unconscionable.

[25] *Legione v Hateley* (1983) 152 CLR 406.
[26] *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582; *Je Maintiendrai Pty Ltd v Quaglia* (1980) 26 SASR 101.
[27] *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 506.

It is likely an action for debt owing under the contract will be awarded to Amelia, as she has not been paid the promised price for her performance of the renovations. This is the liquidated sum of $20000, not $35000, as per the minimum equity rule.[28]

1985 words

yes, this is the correct rule to apply, but the "minimum equity" could be $35,000 (the amount she turned down for the job), less the value of the painting, compared to the $20,000 for a breach of contract if Bryce's promise was binding.

[28] *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 426.