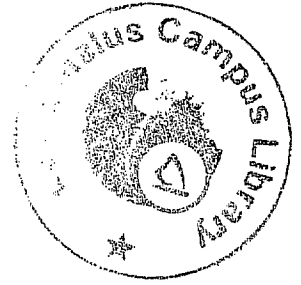


LA201 Contracts
First semester 2003 examination



Instructions for students

- (1) This is a closed book examination and no materials can be taken into the examination.
- (2) Writing time allowed is **THREE HOURS**. Reading time is **TEN MINUTES**.
- (3) Students are required to answer **FIVE** out of the seven questions listed.
- (4) Each question is worth 10 marks
- (5) This examination counts for 50% of your overall assessment.
- (6) All answers should be clearly written and should refer to relevant cases and/or statutory provisions.

Question 1

“In *Spencer v Harding* (1870) LR 5 CP 561, a circular stating that “we are instructed to offer to the trade for sale” certain goods was held to be an invitation to treat. In the more recent case of *Blackpool and Flyde Aero Club v Blackpool Borough Council* [1990] 1 WLR 1195 the court held that the Council was liable to the plaintiff for their failure to consider a tender”.

Discuss this statement in terms of how the courts distinguish between an offer and an invitation to treat and why the submission of the tender in the case of *Blackpool* was considered by the English Court of Appeal to give rise to a binding contract.

Question 2

The Lombard Centre is a large convention centre in Port Vila. On 1st March Lombard sent a flier to nurseries and gardens in the immediate region inviting submissions for the supply of the centre’s requirements for floral arrangements for the twenty four months commencing on 1st May. As a steady source of demand, this was a highly appealing prospect for interested horticulturists.

Ron Burke is an award winning horticulturalist who specialises in floral arrangements. On 8th March he wrote a letter to Lombard in which he advised that he could supply the centre’s monthly requirements at a rate of 3,000vt for a standard arrangement and 5,000vt for a deluxe arrangement. Due to a protracted and well publicised strike by officers of the Port Vila post office, this letter did not reach Lombard until 20th March. Lombard was delighted when it received this letter because of Burke’s reputation and his renown skill at creating floral arrangements. On 25th March Lombard sent a letter to Burke advising that it was ‘pleased to award you our contract’ and placing an order of 300 standard and 200 deluxe arrangements for May. Due to the strike this letter went astray and never reached Burke.

On 1st April Burke was getting concerned that he had not heard anything from Lombard and thought that it was because he had not made his submission sufficiently

appealing. That afternoon he posted a second letter in which he advised that after reconsideration, he had decided that he would supply standard arrangements for 2,000vt and deluxe arrangements for 4,000vt. This letter did not reach Lombard until 11th April. On 6th April Burke was at the local markets and was advised by a fellow horticulturist that she had sent a submission to Lombard for the supply of standard arrangements for 1,500vt and deluxe arrangements for 3,000vt. Determined that he would secure the contract, Burke immediately telephoned Lombard's management and left a message with the office secretary that he would only charge 1,500vt for standard arrangements and 3,000vt for deluxe arrangements. This message was placed at the bottom of a pile of papers in the secretary's in-tray.

On 11th April, Joanne, a Lombard manager read Burke's letter of 1st April and, not believing the company's good fortune at the prices being proposed, sent a letter by courier advising that it wished to 'retract our order of 25th March per your 8th March prices and place an order for 400 standard and 300 deluxe arrangements as per your letter of 1st April prices'. When Burke received this letter on 11th April, he realised that he had never received an order dated 25th March and that something had gone wrong. He thought that there was a chance he could get away with asking for a higher price than the one he had telephoned through on 6th April and so, using a neighbour's fax machine he sent a fax 'confirming' that he was willing to supply standard arrangements for 2000vt and deluxe arrangements for 4000vt. This fax was not noticed by Joanne because the office staff at Lombard's were having an office party to farewell a colleague.

The following day (the 12th April) Joanne was working through some papers and happened to find the telephone message dated 6th April. Pleasantly surprised by the even lower prices, she telephoned Burke and left a message on his answering machine that Lombard would require 500 standard arrangements and 400 deluxe arrangements for both June and July. This message was discovered by Burke on the afternoon of the 12th April.

Advise Burke in relation to any contractual relations that he may have entered into as between himself and Lombard. Fully discuss applicable legal principles and refer to relevant case authorities in your answer.

Question 3

In 2002 Joshua, an accountant in his own practice was involved in the following four events:

- (i) In January a client who owed Joshua 10,000vt for work which Joshua had done for him ran into financial difficulties. Joshua advised the client that he would accept 8,000vt in full settlement and promised not to seek the remaining amount. Soon after the client gave Joshua a cheque for 8,000vt and received a receipt marked "in full settlement of your account".
- (ii) In February when Joshua was about to go away on holidays for two weeks, he visited the local police station and promised the station sergeant 5,000vt if his men kept a special watch on his house while he was away.

- (iii) In April, a neighbour promised both Joshua and his friend Mary that they could use his caravan over the next Christmas period if they painted the exterior of his house. The house was painted entirely by Mary.
- (iv) In May, Albert entered into an agreement with Mary in which Albert promised Mary that he would mow Joshua's lawn if Mary paid him (Albert) 3,000vt.

Bearing in mind that the events are completely separate and do not relate to each other in any way, advise Joshua as follows:

- (i) In relation to event (i) whether he (Joshua) can claim the outstanding 2.000vt. Joshua wishes to claim this amount because his client is now over his financial difficulties and can afford to pay. (2.5 marks)
- (ii) In relation to event (ii) whether Joshua is legally bound to pay the sergeant who has told Joshua that he had made sure a police car went past the house every night while he was away. (2.5 marks)
- (iii) In relation to event (iii) whether Joshua, personally, can enforce the promise made by the neighbour if the neighbour decided not to lend him and Mary the caravan. (2.5 marks)
- (iv) In relation to event (iv) whether Joshua can enforce the promise made by Albert. Mary paid Albert the 3,000vt but Albert has refused to mow Joshua's lawn. (2.5 marks)

Question 4

"On occasions equitable estoppel may achieve the same purpose as a contract. However, that is not to suggest that equitable estoppel supplants contract law".

Discuss this statement in light of the judgments of Mason CJ and Wilson J in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387. You should include in your answer a reference to any differences between equitable estoppel and contract.

Question 5

Note: Both parts of this question are to be answered:

- (1) Joshua agrees to sell his car to Mary. Mary agrees to buy the car after Joshua repairs the air-conditioner. They then enter into a written agreement and the sale takes place. The written agreement failed to contain any clause concerning the repair of the air-conditioner. Can Mary hold Joshua liable for this repair work? (5 marks)
- (2) What is the difference between a term, a representation and an in nominate term and what are the consequences for a breach of each? (5 marks)

Question 6

In *The Moorcock* (1889) 14 PD 64 Bowen LJ said:

“In business transactions such as this, what the law desires to effect by the implication is to give business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances”.

Discuss this statement in light of the reasons why courts imply terms into a contract **and** the requirements that must be shown before a court will imply a term on the basis of business efficacy.

Question 7

Both Parts of this question are to be answered:

- (1) What are the exceptions to a signed document being absolute and binding on the signatory to the document? (5 marks)
- (2) In what circumstances (if any) will a customer who is party to an unsigned document and who has not read an exclusion clause still be bound by it? (5 marks)

END OF PAPER

LA201 Contracts – First semester 2003 examination
Summary of general comments

Question 1

- An offer is a willingness to be bound to any person who accepts the terms of the offer.
- An invitation to treat is an invitation to make an offer.
- Examples of invitations to treat – display of goods on a shop shelf (*Pharmaceutical Society of Great Britain v Boots Cash Chemists*) – advertisements, although if an advertisement includes words which demonstrate a willingness to be bound then it may be construed as an offer (*Carlill v Carbolic Smoke Ball Co*). In the first case the consumer does not intend to enter into a contract by accepting the goods off the shelf because that would mean they could not change their mind. In the second example the person advertising the goods will not generally intend to contract with everyone who responds to the advertisement because there is (usually) only a limited number of the goods for sale.
- In relation to tenders the courts regard the call for tenders (by advertisement or otherwise) as an invitation to treat. The offer is made when the bid is made. The acceptance is when the goods are knocked down by the auctioneer to the final bidder. (*Sivans Transport Ltd v Nadi Town Council*)
- In the case of *Blackpool and Flyde Aero Club v Blackpool Borough Council* the issue was not whether the tender submitted was an offer but rather whether there was a contract to the effect that the Council would consider all the tenders submitted in accordance with the instructions. In *Blackpool*, the plaintiffs tender, although submitted on time, was not found until after the closing time for tenders and was therefore not considered. The court found for the plaintiffs.

Question 2

- Flier dated 1st March sent by Lombard to nurseries is an invitation to treat. It could not be an offer because Lombard did not intend to be bound to everyone who responds. (*Carlill v Carbolic Smoke Ball Co*)
- On 8th March Ron Bourke wrote a letter advising cost of supply at 3,000vt for standard and 5,000vt for special arrangements. This quotation was an offer. (*Butler Machine Tools v Ex Cell O Corp*) The offer did not reach the offeree (Lombard) until 20th March.
- On 25th March Lombard wrote to Burke advising acceptance of the offer and placed an order for 300 standard and 200 deluxe arrangements for the month of May.
- Since the letter of offer was sent by the post can it be said that there was an expectation by the parties that the post would be the means of communication? Against this is the argument that the postal acceptance rule is an exception to the general rule and that since the postal strike was protracted and well publicized, the general rule concerning acceptance and not the exception should apply. If the postal rule applies then the acceptance is effective when the letter is posted, that is on 25th March (*Adams v Lindsell*) and the terms of the contract are as per Lombards letter of 25th March. If the general rule applies there cannot be said to be a contract because the letter was never received by Burke. It is more likely that the general rule would apply in these circumstances.
- On the 11th April Lombard receives another letter from Burke quoting a lower price for the flowers. If the letter of 25th March did not give rise to a contract (which is more likely) then this letter is a new offer by Burke (or if not, is a counter offer by him – *Hyde v Wrench*) which means that at this stage there is still no contract between the parties.

- Lombards accepts the offer contained in the second letter by sending a letter by courier. This acceptance is communicated to Burke on the same day – the 11th April. At that point there is a contract between the parties for the supply of arrangements for the month of May for 2,000 and 4,000vt respectively.
- On 6th April (that is prior to the receipt of the second letter sent by Burke) Burke had telephoned Lombard advising that he would charge only 1,500 for standard arrangements and 3,000 for deluxe arrangements. This message was not read until the 12th April, that is after the contract of the 11th April had been made. This new offer by Burke can be said to be an offer for the supply of flowers for the subsequent months of June and July. The offer was made by telephone. The fact that Burke did not hear the acceptance (leaving a message on the answer phone is not sufficient) means that there has been no contract (*Entores v Miles Far East Co*). The fax sent by Burke can be regarded as a revocation of his earlier offer made by telephone. A revocation is not effective until received by Lombard. We are not told when the fax was received but it appears to have been after the 12th April. Burke is notified of the acceptance of his telephone offer on the afternoon of 12th April. At that point (provided there has been no revocation of the telephone offer received by Lombard) there is a contract between the parties for the supply of flowers for June and July.
- The most likely conclusion on the facts is that there is a contract between the parties for the supply of flowers at the price of 2,000vt and 4,000vt respectively for the month of May, and a contract for the supply of flowers at the price of 1,500 and 3,000 respectively for the months of June and July.

Question 3

- (1) Part payment of a debt is not consideration for a promise to accept less than the full amount. This is known as the rule in *Pinnel's* case. (See also *Foakes v Beer*). Unless there is "accord and satisfaction" for example payment at a different place, or at a different time or in another form and this is at the request of Joshua, then there is no contract to bind Joshua to his promise to accept less. There may be an estoppel if it can be shown that by going back on his word the client would suffer a detriment due to the fact that he had done something in reliance of the promise; however this would be difficult to establish from the existing facts.
- (2) The performance of an existing public duty is not consideration for a promise to pay an extra amount. (*Glasbrook Bros v Glamorgan CC*). However if the police did more than what their duty required (and this appears to be the case here) then this can be regarded as good consideration and Joshua would be bound by his promise to pay.
- (3) A promise can be made to two or more promisees. In these circumstances it is sufficient if the consideration is provided by only of the promisees – in this case Mary. (*Coulls v Bagot's Executor and Trustee Co*). This contract was between the neighbor as promisor and Joshua and Mary as joint promisees.
- (4) Here, the consideration given by Albert (the mowing of the lawn) provided a benefit for a third party (Joshua). The rule is that consideration must move from the promisee to the promisor; however it is sufficient if it moves to a third party at the request of the promisor. The contract is between Albert and Mary. In this case, the consideration received by Mary is the fact that Joshua's lawn was mowed. If that is what she wants then that is sufficient consideration. It should be noted that since

Joshua is not a party to the contract he is unable to sue Albert if his lawn is not mowed. (*Dunlop Pneumatic Tyre Co v Selfridge*)

Question 4

- In *Waltons Stores v Maher* the Maher's relied upon a promise from Walton's lawyers that there would be no problem in the signing of a lease and therefore proceeded (at Walton's request) to demolish a building that was on the land that was the subject of the lease. The building was 40% demolished when Walton's changed their mind. There was no binding contract between the parties because this was an agreement that had to be signed by both sides. At the time of changing their minds Walton's had not signed the necessary documents.
- The Australian High Court held that there need not be a contractual relationship between the parties for estoppel to operate. This can be compared to *Central London Property Trust v High Trees* where being in a contractual relationship was said to be one of the conditions of estoppel.
- The High Court also held that estoppel could be used as a cause of action (ie a sword) despite the *High Trees* case and what Denning J held in *Combe v Combe*.
- Estoppel is a remedy in equity where it would be unconscionable for the promisor to renege on the promise. The unconscionability of the case is determined by the elements of reliance on the promise and detriment to the promisee.
- The result was that the Maher's got an order holding Walton's to their promise. This in effect, gave the Maher's a remedy akin to a remedy for specific performance for breach of contract. To this extent the decision achieved the same purpose as contract law.
- However equitable estoppel does not supplant contract law. If there is a promise that is binding in contract then breach of that promise gives rise to a remedy in contract law, not estoppel. It is when contract law cannot provide a remedy for the breach of promise that estoppel can be applied. Furthermore, it is not the fact that one has reneged on one's promise that gives rise to estoppel; rather it is that this 'going back on your word' causes detriment to the other side in circumstances where it is unconscionable to do so.

Question 5

- (1) The issue is whether the failure by Joshua to repair the air-conditioner is a breach of contract.
- Is the promise to repair a term or a representation? The general test is the overall intention of the parties (*Oscar Chess v Williams*) plus certain subsidiary tests. Since the facts state that Mary only agrees to the purchase provided the a-c is repaired this suggests that the promise was a term.
 - Since the written agreement fails to mention the repair of the a-c Mary would need to establish one of two things; either:
 - i. The contract was partly oral and partly in writing and as such the oral statement was intended to be included as a term of the contract. (*Sun Islands v Fewtrell*), or
 - ii. The oral statement gave rise to a collateral contract. A collateral contract is where the consideration given for the promise (that the a-c would be

repaired) is the entry into the main contract, in this case the purchase of the car. (*City of Westminster Properties v Mudd*)

- In this case it is likely that Mary can hold Joshua liable for this repair work.

(2) A term is a promise that is contractually binding. A representation is a statement that is not a term of the contract. A misrepresentation is a false statement. A misrepresentation may be fraudulent, negligent or innocent. The test as to whether a statement is a term or a representation is based on the overall intention of the parties. (*Oscar Chess v Williams* – where the promise was said to be a misrepresentation, compared with *Dick Bentley Productions v Harold Smith Motors* – where the promise was said to be a term of the contract). There are a number of subsidiary tests namely, time between the making of the statement and the formation of the contract; whether the oral statement was later reduced to writing; whether the person making the statement had special skill or knowledge. An innominate or intermediate term is a term of a contract that cannot be classified as a condition or a warranty. A condition is a term that goes to the root of the contract, breach of which gives a remedy in damages or the right to terminate. (*Wickman Machine Tools Sales v L Schuler AG*). A warranty is a lesser term, breach of which only gives a right to damages. The reason why a term may be classified as an intermediate or innominate term is that circumstances may mean that a breach of the term denies the innocent party of the substantial benefit under the contract or in other cases such breach would be only trivial. An example is a clause in a contract to the effect that a boat must be seaworthy. (*Hong Kong Fir Shipping v Kawasaki Kisen Kaisha*). If breach of an innominate term denies the innocent party of the substantial benefit under the contract then the remedy lies in damages and/or termination. If the breach is only trivial then the remedy lies in damages only.

Question 6

This statement refers to the fact that courts will imply a term into a contract on the basis of business efficacy, that is, to make the contract work. In the case of the *Moorcock* the term implied was that the defendants had taken reasonable care to ensure that their wharf was safe at low tide. In most cases, the parties to a contract do not express all the terms; they leave a lot of things as 'implied' in the sense that they go without saying and are "in the contemplation of both parties". Courts will not imply more into a contract than what is necessary. This view is reflected in the statement given. In terms of the requirements that must be shown before a court will imply a term on the basis of business efficacy these are as follows:

- It is so obvious that it goes without saying
- It is reasonable and equitable
- The implied term goes no further than is necessary to make the contract effective
- It must be capable of clear expression
- A term will not be implied if it is inconsistent with any express term.

The implication of terms on the basis of business efficacy is an example of terms implied by the common law. Terms may also be implied by statute, for example the *Sale of Goods Acts*.

Question 7

- In the case of a signed document the person is bound by the terms of the contract unless there is: (i) fraud (ii) misrepresentation (iii) the defence of non est factum applies. (*L'Estrange v Graucob*) For the defence of non est factum to succeed the plaintiff must establish:

- That the document was radically different from the one which the person thought they were signing;
 - That the person is of the class of persons to whom the defence applies;
 - That as between innocent third parties, the person was not negligent. (*Maeaniani v Saemala*)
- In the case of an unsigned document the person is bound by the terms of the contract unless there is (i) fraud (ii) misrepresentation (iii) or the document cannot be said to be contractual in nature (*Curtis v Chemical Cleaning Co; Chapleton v Barry*) and (iv) reasonable notice of the term was not given to the person before the contract was made. (*Thornton v Shoe Lane Parking*).
 - In respect of both signed and unsigned documents a person will not be bound by an exclusion clause unless the clause can be said to cover the damage that occurred. In terms of the interpretation of such clauses, the courts interpret them against the person seeking to rely on them. Furthermore if negligence is to be excluded it must be done so in clear words or must be apparent from the circumstances of the case.