



# ANU LAW STUDENTS' SOCIETY

## LAWS1204 Contracts 1<sup>st</sup> Semester 2003

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## Question 1

76/100

Advise Daniel on his possible causes of action and remedies against Isabella Pty Ltd

Daniel- D

Isabella- I

D has 2 complaints

- (1) Business only makes \$2000 max
- (2) Introducing seating was against licensing conditions

The business has been running for 18 months so D probably wants damages, (preferably expectation) and possibly rescission.

D will have an action if

- (a) The contract has been breached
- (b) There was a misrep
- (c) There was unconscionable conduct
- (d) Misleading conduct.
- (e) Estoppel

### Express Terms

D will have an action if either of I oral statements in negotiations were promissory and formed part of the contract (Oscar-chess). However there is a fully written document and as such it is subject to the parole evidence rule, such that no extrinsic evidence may be used to add to or vary the written terms (State Rail). Although the P.E.R. does not apply until it is established that a contract is wholly in writing the problem is that there is an integration clause. An integration clause operates to exclude all extrinsic evidence (Johnson Mathey). So it is unlikely that either of I's oral statements could be considered at all, part of the contract.

?

If there was found to be an exception to PER there would be a problem in that the statement about average takings was about the future. However it is likely that the statement about licensing would be promissory and damages would result if PER could be avoided.

### Collateral Contract

Collateral contracts are an exception to P.E.R. (State Rail). Induced entry into main contract (Sheppard). However the statement must be a promise (JJ Savage). Although I is the restaurant

owner (expert as in JJ Savage) it would be difficult to establish that her statements were promissory. If it was established to be a collateral contract D could probably terminate it for a serious breach and claim damages (Hong Kong).

#### Common Law Misrep ⇒ \$5000

Misrep must induce entry into contract and be made about some past or present event (Smith). The \$5000 statement was about the future and it would probably be argued that it was an opinion not fact. However statements of opinion can be considered fact if believed to be based on fact (Smith). Regardless it was made about future so this is a weak argument.

#### Common Law Misrep ⇒ Seating

With regard to the seating it was definitely a misrep that D had every reason to believe was based on fact and further D was under no obligation to check if it was the truth (Redgrave). It may have been a negligent misrep, in which case D can get damages in tort of negligence which would be desirable. More likely to be an innocent misrep in which case D can only get rescission → which is probably available.

#### Misleading Conduct

This is probably the best argument because of the damages remedy available to D. S52, a corporation shall not in trade or commerce engage in deceptive or misleading conduct. [Silence can be misleading conduct (Henjo)] I is a corporation, and conduct was in trade or commerce (Concrete Constructions). I made a representation told a half-truth and did not disclose info that was important, this is all covered by s52. Further I cannot contract out of s52. She should have told D that the chef was leaving. Withholding this was deceptive. Further there is no concept of contributory fault, I must take entire responsibility no matter how stupid D acted (Henjo).

4

#### Unconscionability

D may also have uncon action.

#### Amido:

(1) Must be proof of special disadvantage

-D was adversely affected by alcohol and very lonely

(2) Must have knowledge of disability

-I knew

(3) Must be exploitation

-It is not clear what state of mind D was in when he contracted. If he was drunk or very depressed then this action may be successful...

However D got independent legal advice which can rebut uncon action (Amido). But this is analogous to Henjo where legal advice may not be considered genuine. It was I's friend that gave the advice and he probably thought he was working for I, although this is not clear.

The contract was also not unfair, there was reasonable consideration (Bridge-Water). However when D asked for extra time I did not allow it. Ie there was not procedural fairness [only gave 48 hrs initially] (Amadio). Further everything was not explained to D (Amido). He would probably be successful in uncon action. The contract would be set aside but this is not really desirable.

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### Damages

The best remedy D can get is under s52 (breach of). He can get damages under s82 although this is only tortious damages (Gates) ie reliance damages and he probably wont be able to get expectation damages unless collateral contract or breach of contract action was successful which is unlikely. There may be argument that damage was caused by solicitor but I only needs to be one contributing factor (Henjo). So D probably will not get much of an award he definitely will not get the difference between what he is making and what she said he would although he may be able to recover for not being able to seat people outside (see Henjo)...

V good. N.B. Statement is as to past takings!

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Q. 2

Mark 70%

Advise Pete on Alexander's rights and liabilities in relation to McCutcheon

Alexander → A

McCutcheon → M

A will be liable if in breach of contract and not covered by liability clause. A may not be liable if M wrongfully terminated the contract and will have action for wrongful termination.

- Subject to fully written contract
- M complains breach of cl (2) fit for purpose
- A relies on exclusion cl (4)

What is the breach that gives rise to the application of the exclusion clause?

#### Exclusion Clause

4 Construed to have ordinary and natural meaning in the context of contract (Delco). Where ambiguous construed against A (Delco). Only applies to authorised acts (Delco, Glebe). The ordinary meaning would seem to be that where M gives A specific instructions A is not liable for any damage "howsoever caused". What A did however was use parts that were not fit for their purpose contrary to the contract, this is not authorised. The words "in connection with" may contemplate unauthorised acts however howsoever caused does not, just like cl(4) in Glebe-Island "whatsoever". So A is probably not protected by their exclusion clause although compare Delco and West and the outcome may be different where there is no consumer ⇒ exclusion clause construed less strictly against corporation in this instance. Regardless, the act was not authorised.

#### Termination

? M may only terminate if a condition was breached or an intermediate term was breached sufficiently seriously (Tramways and Hong Kong). It is very likely however that M would not have entered into the contract unless assured of strict or substantial performance (2). Although this has not been orally communicated the term is under 'conditions' of contract. Yet just calling something a term may not make it a term. Although merchantable quality is in TPA ⇒ we aren't supposed to consider this, however it would seem to me to be commonsense that if something is

specified to be fit for its purpose, this would be breach of a condition. Notwithstanding this, it may also be an intermediate term (Ankar). The right to terminate then arises when the breach deprives M of substantially the whole benefit of the contract (Hong Kong). Although M may still enjoy significant benefit in that he can still get other ships repaired, it was a serious breach in that two vessels were destroyed.

Another issue is that M said “just make them seaworthy” and as in Hong Kong “seaworthy” can have many meanings. Despite all this given that the parts used “were not adequate for storm conditions” I think that the termination was lawful for either breach of condition or sufficiently serious breach.

### Damages

#### Causation

4 Only liable for losses caused by breach (Alexander). But for A’s breach M would not have lost catch or lost business, this is common sense.

#### Remoteness

4 Only liable for foreseeable losses (Hadley). Losing catch was plainly foreseeable however losing other business may not be. May recover for losses outside natural course of events if contemplated by parties (2<sup>nd</sup> limb Hadley). This depends largely on the actual knowledge of the parties (Victoria Laundry). It is not clear whether A knew that not having two vessels would mean that M could not complete other contracts. But considering that A was hired to repair vessels I think that it would be fair enough to assume that from time to time ships would need repair, this is why A was hired and that during such foreseeable repairs contracts would not be lost... On the other hand it was “well-known” that they had these contracts. Compare Victoria, they only had one washing deal thing where as M has a fleet of ships! I think losing this contract is too remote unless M actually communicated to A that they need all their ships all of the time!

### Damages

Aim to put M in position they would have been in if contract was performed properly (Victoria, Howe). Get expectation damages (Howe). So would get \$40 000 for lost catch. Will only get \$100 000 if can satisfy remoteness test, this is yet to be shown. Although you can get damages for loss of chance to enter other contracts (Amann), still have to satisfy remoteness.

Good answer- good analysis of facts, linked to discussion of law.