LLAW 1001 Law of Contract I

Mid-Year Examination

Examiner's Report

Overall

This examination proved unexpectedly challenging. While answers generally touched on the most obvious questions raised by the hypothetical, a substantial majority did not devote sufficient attention or analysis to the critical issues. A major failing is the reluctance to engage in a sustained and serious manner with the facts as they are recounted and the legal complications they raise. Despite being organized and structure, a good number of answers privileged breadth at the expense of depth. Comprehensiveness is a virtue, but it is important, in a timed exercise, to get quickly to the heart of the matter.

The part-specific comments which follow summarize common approaches and pitfalls, but they do not exhaust all possible issues and their resolutions.

(a)

A key issue here was incorporation of terms. Good answers addressed whether the loan clause was incorporated and, in so doing, considered when the contract between Becky and Bookworm was concluded. Answers that paid close attention to the content of the advertising poster, the words used in the application form and the way in which the loan clause was presented tended to be better reasoned. Although many answers recalled the red-hand rule, only a few pondered whether the requirement for notice to be given in a document intended to have contractual effect could sensibly be extended to this case.

In addition, strong answers should have addressed whether the loan clause—assuming it was incorporated—was nevertheless too vague and uncertain to be enforceable because it did not specify how the calendar days were to be counted. It might be pressed that any ambiguity in the loan clause did not matter given that Becky only returned the book after three weeks. But it can also be rightly pointed out that the existence of a contract should not be contingent on subsequent events.

Consideration was also brought up in many answers. Some were greatly vexed by the issue of Becky's consideration for the contract. But the relevant question was whether Bookworm, as promisee, gave consideration for Becky's alleged promise to purchase the book if she returned it late. (Bookworm clearly did.)

Finally, a few answers tried to apply the Control of Exemption Clauses Ordinance to the loan clause. The loan clause, however, did not purport to exempt any party from liability, nor would it operate to prevent liability from arising. To put it simply, the loan

clause was not, by any stretch of the imagination, an exemption clause. Invocation of the CECO was therefore inapposite.

(b)

An argument for resisting Clarion's demand for interest was promissory estoppel. Almost all answers rehearsed the elements necessary for a promissory estoppel claim; only a small number were careful in applying the legal principles and tests to the facts of the problem. For instance, the hypothetical stated that: "*On several occasions, Nancy asked Tony if she could arrange for payment to be sent 'sometime later'. Tony invariably agreed and told Nancy not to worry about being late.*" Was Tony's promise limited to those specific times when Nancy asked or was it also understood to cover all future payments? If the latter, then why did Nancy feel she had to ask more than once? The best answers—and lawyers—would have grappled with these doubts.

As for the revised commission, Clarion wrote to inform Bookworm that *"because of the adverse impact of market conditions on [Imprint's] profitability, to adjust [Bookworm's] commission on consignment sales to 50%, with effect from 1 December 2022."* It made no sense for Clarion to complain of declining profitability and yet propose to increase, rather than decrease, the commission due to Bookworm. Bookworm should, perhaps, have known that Clarion was mistaken about the terms of its offer and good answers ought to have discussed whether it was possible for Bookworm to hold Clarion to this putative mistake.

In any case, there was little Bookworm could do to stave off the inevitable. The consignment agreement provided for *"terminat[ion] without penalty by either party with written notice of 30 days"*. Clarion always had the option of terminating the existing contract and stipulating a reduced commission as part of any new agreement.