

COMMERCE/BUSI 393 FINAL EXAMINATION APRIL 2010

QUESTION #1

Fine Organic Foods (FOF) is a distributor of organic foods. It has a team of sales representatives that sell organic food plans door-to-door in neighbourhoods throughout the City. Customers sign up for two years of weekly deliveries of specified products. Esther is a sales representative and regional manager. She was able to convince Jeremiah to sign a 2 year contract with FOF. The form of contract that FOF gave Esther said in bold print by the signature line that the contract would not be binding on FOF until signed by the President of FOF. Esther found this process slowed up payment of her commissions, so had new forms printed that did not contain the term. The form of contract that Jeremiah signed did not restrict Esther's authority and did not require approval of the President of FOF. The regular price for the produce was \$100 per month. Without authority from FOF, Esther gave Jeremiah a 15% discount. When FOF got Jeremiah's contract from Esther it refused to honour the contract, saying that Esther had no authority to negotiate the discount.

a) 10 MARKS 15 MINUTES

Will FOF be bound to honour the contract with Jeremiah?

b) 5 MARKS 8 MINUTES

Assume that Jeremiah gave Esther a cheque for \$100 payable to FOF to pay for the first month of produce, and that FOF cashed the cheque. Might that fact be significant in determining whether FOF would have to honour the contract with Jeremiah?

c) 15 MARKS 22 MINUTES

Assume that FOF is bound to the contract with Jeremiah. Esther told Jeremiah when he signed up for 2 years of organic produce he would get 2 additional months for free. Jeremiah asked of the produce was local and Esther told him that all the produce came from within 15 miles of the City. The contract did not contain those promises. Jeremiah has not yet received any produce, and has found out that not only does FOF not intend to give him 2 additional months for free, but that most of the produce comes from California, and not from within 15 miles of the City. FOF said that Esther was not authorized to make those statements on behalf of FOF. Would Jeremiah have any legal rights against FOF as a result of either of Esther's statements?

d) 5 MARKS 8 MINUTES

Would Jeremiah have any recourse against Esther as a result of the statements set out in c) above?

e) 5 MARKS 7 MINUTES

Assume that Jeremiah has a valid defence to paying FOF. Jeremiah had given FOF a series of postdated cheques to cover the remaining 23 months of deliveries under the contract. FOF had endorsed the cheques to BC Finance Company, a company with which FOF regularly did business. BC Finance Company is suing Jeremiah, who has stopped payment on the cheques. Will Jeremiah be liable to BC Finance Company?

f) 10 MARKS 15 MINUTES

Assume that instead of endorsing the cheques over to BC Finance Company, FOF endorsed them over to Money Mart, which gave FOF \$4000 in return. Would Jeremiah be liable to Money Mart?

QUESTION #2 15 MARKS 23 MINUTES

There are a number of different relationships in which one party owes a fiduciary duty to another party. What is a fiduciary duty? Give examples of 2 different types of relationships in which a fiduciary duty is owed, and explain what remedy would be available to the plaintiff in each case.

QUESTION #3

Peter Kralik and his 16 year old son Tomas decided to spend the day skiing at Seymour Mountain. The ski area was busy as it was spring break, and there was fog and drizzle at the base of the ski area. Peter and Tomas bought lift passes from the ticket booth. There were terms on the passes, outlined in red and bolded, that stated as follows:

“Seymour Mountain Inc. will not be liable for its negligence and the negligence of its employees. Skiers accept all risk of any injury to person or property.”

Neither Tomas nor Peter read those terms.

Tomas and Peter were experienced skiers who had boarded chairlifts many times. As they were about to load onto the Chairlift, Tomas noticed that the seat was wet with ice and snow. He turned to brush it off, and as he was doing so, found himself at the end of the loading ramp. Tomas had no time to sit down, so quickly grabbed onto the side of the chair just before it left the loading ramp. As the chair rose up the mountain, Tomas was dangling from it. He decided that it would be safer for him to jump rather than continue to dangle. He dropped about 3 metres to the ground below and fell on his back. As a result of the fall, Tomas injured his back and right arm.

Peter helped Tomas to the bottom of the lift. Peter was angry with Pam, who was the lift attendant at the bottom. Peter asked her why she had not stopped the lift, and she said that Tomas did not need help loading, and that she was busy watching a group of younger children behind him. Normally there would have been an additional lift attendant, but he was off on a coffee break.

Peter took Tomas to the hospital where Tomas was operated on for a broken arm and injured shoulder. The surgeon says Tomas is likely to have continuing back and shoulder problems that will cause some pain for the rest of his life, and impede his ability to participate in sports and do much heavy lifting.

Tomas is suing Pam and Seymour Mountain Inc. They claim to be protected by the conditions on his lift ticket, and blame Tomas' injuries on his own inattention.

a) 25 MARKS 37 MINUTES

Assess the legal rights and liabilities of the parties.

b) 10 MARKS 15 MINUTES

Seymour Mountain Inc. agreed to pay Tomas \$150,000 to settle his claim against it, and Tomas and Seymour Mountain Inc. signed a written agreement releasing the claim in return for Seymour Mountain Inc.'s agreement to pay that amount. Seymour now wants to get out of the agreement because it has advice that the settlement is too generous. Seymour says it is not bound because there is no consideration, and because Tomas is underage. Is Seymour Mountain Inc. bound to honour the agreement?

#1

a)

Esther did not have actual authority to conclude the contract on behalf of FOF – her authority was restricted.

Did Esther have apparent authority?

Apparent authority exists if the principal did something to create an appearance of authority. Esther is FOF's sales representative and regional manager. Arguably that job title and the independence that Esther had would create an impression that she had authority to conclude contracts on behalf of FOF. There were restrictions on Esther's authority, but Jeremiah did not have notice of the.

FOF will likely be bound by the contract Esther concluded on its behalf.

b)

FOF can be bound to the contract if it ratified the contract. Ratification can be express or implied. By cashing the cheque even though the president had not approved the contract, FOF will likely be found to have ratified the contract, and will be bound by it.

c)

If FOF is bound to the contract, it is bound by everything Esther did on its behalf even though FOF did not know about it.

Esther promised Jeremiah that he would get two extra months of organic produce for free. This promise would be excluded by the parol evidence rule, that says that the court will not admit evidence of prior oral terms that add to or contradict a final written agreement.

Esther also told Jeremiah that the produce came from within 15 miles of the City. This is a misrepresentation – a false assertion of fact that induced Jeremiah to enter into the contract.

The normal remedy for misrepresentation is rescission, which must be asked for promptly. Jeremiah has not yet received any produce, so would be in a position to rescind the contract. He would not be bound by it and should get his deposit back.

d)

An agent is independently liable for torts committed on behalf of the principal. Esther's statement that the produce came from close by even though it did not was probably made either fraudulently or negligently, and Jeremiah should be entitled to damages.

e)

This is a Consumer Purchase – a sale of goods by a dealer to an individual, paid for by postdated cheques. The cheques will be void if unmarked – except in the hands of a holder in due course with no notice that this related to a consumer purchase. BC Finance regularly does business with FOF, so would know this relates to a consumer purchase. If the note is marked, BC Finance takes subject to the equities between the parties.

f)

Money Mart is much less likely to know FOF's business, and if the cheques are unmarked, would have the rights of a holder in due course of a negotiable instrument.

A holder in due course of a negotiable instrument takes free of the equities between the parties and can sue the drawer and all endorsers.

Jeremiah would be liable to Money Mart even though he stopped payment on the cheques (Sarkar case).

#2

There are many relationships to which fiduciary duty applies – employee- employer, agent – principal, professional- client, partner- partnership, director- corporation.

Fiduciary duty is a duty to act in good faith in the interests of the other party, and not to engage in a conflict of interest without full disclosure and consent.

A plaintiff suing for breach of fiduciary duty can seek damages/disgorge the profit.

#3

a)

Tomas could sue Pam for negligence.

He must show

1. She owed him a duty of care – to all those whom she should reasonably foresee will be affected by her actions
2. Breach of a reasonable standard – what would a reasonable person in her position have done?
3. Breach caused harm
4. Damages reasonably foreseeable.

Pam owed Tomas a duty of care – did she breach a reasonable standard? When Tomas fell off the chair Pam's attention was on children behind him. It may not have been possible for her to have her attention on him and the children at the same time. It is quite possible that a court would find that she did not act unreasonably in the circumstances.

If Pam is found to have been negligent – Seymour would be vicariously liable. An employer is liable for torts of employees committed in the course of employment.

Tomas could sue Seymour directly for negligence – as occupier it owes people on the property a duty to make sure they are reasonably safe in the circumstances.

It appears that the lifts were understaffed. This was a busy day which should have been anticipated since it was spring break. To have had only one attendant at the bottom of the lift would probably be considered to be a breach of a reasonable standard. Relevant might be what other ski companies were doing.

Seymour would not be protected by the waiver on the lift ticket. Tomas was only 16 years old and therefore an infant. Contracts with infants are unenforceable against the infant.

Tomas could be found contributorily negligent.

According to the Negligence Act, if Tomas did something careless that caused the accident to occur, the court can apportion liability according to the degree of fault, and apportion damages accordingly.

Any reasonably experienced skier should know that it is dangerous to turn around to brush the seat of a chairlift off because it comes quickly and you may be knocked over or not have time to get on. Arguable Tomas was not careful himself, and will be found contributorily negligent.

b)

Consideration is what a party gives up or agrees to give up in exchange for the promise of the other party. Tomas' promise to give up his claim, and Seymour's promise to pay, are consideration, and the agreement does not fail for want of consideration.

Because Tomas is underage Seymour would not be able to enforce the agreement against him, but Tomas will be able to enforce it against Seymour.