

Word count: 1995

Question 1

Jack could argue there was a valid contract between he and Linda. If he were unsuccessful, Jack could estop Linda from denying the existence of a contract.

To establish a contract existed, Jack must show that both parties intended for the agreement to be legally binding, there was a mutual agreement on the terms, and these terms are certain and complete, and sufficient consideration was provided from each party.

Jack must show that both parties intended the agreement to have legal significance. Linda may deny this, as arrangements between family members are presumed to lack intention¹, and she and Jack are cousins. Jack could rebut this presumption, arguing that the agreement was of commercial nature,² despite being between relatives. He is likely to succeed as both parties were acting in the interests of their businesses. If unsuccessful, Jack could reason that the relationship between he and Linda should not be given as much weight as the relationship between Mr. and Mrs. Balfour, reasoning the relationship between cousins is not as significant as the relationship between a married couple.

Linda may dispute whether intention existed, citing the agreement drawn up by Jack as a preliminary agreement or an agreement to agree, evident in the fourth clause. Linda would be unlikely to succeed as it appears the “formal agreement” mentioned would relate to legal issues central to the finished program, rather than the process for its creation. Jack could argue that whether or not these further details were drafted before he began work is irrelevant in determining formation. If Linda should succeed in showing the written agreement was preliminary, Jack could argue that it would still be immediately binding, with parties to draw up a further, formal version.³

¹ *Balfour v Balfour* [1919] 2 KB 571.

² *Roufos v Brewster* (1971) 2 SASR 218.

³ *Stirnemann v Kaza Investments Pty Ltd* [2011] SASCF 77.

Jack must show both parties agreed on the terms. He could apply the offer and acceptance approach. In offer an acceptance, an invitation to treat by the initial party is followed by an offer from the second party, which can then be accepted by the initial party.⁴ Linda may argue an offer was not made, or an offer was made but not accepted.

Jack could argue Linda made an invitation to treat at the Christmas party, having prior knowledge of his expertise when she mentioned her company was having problems with its existing software. An invitation to treat is an invitation to make an offer or enter into negotiations. There are no set rules as to what constitutes an invitation to treat, and a court will judge each case on the given facts. It is likely that the court would find Jack's identification correct.

Jack could argue he made an offer at the Christmas party. An offer is an expression of willingness to enter into a contract on certain terms.⁵ Linda is likely to oppose Jack's argument by claiming that the terms were too uncertain. She could argue it would be impossible for a court to decide the requirements of a "special software program."

If Linda were successful in showing there was no offer, then she may argue their discussion was merely negotiations over a potential future offer. If Jack succeeded in showing there was an offer, he could argue that the discussion on January 15 was a request for more information on Linda's behalf.

In terms of the email Linda sent Jack on January 20, if having already made out there was an offer, Jack could argue that this was a request for information, which would keep the offer open. Linda may rebut this by claiming it a counter offer, which would serve as rejection.⁶ If Linda had been successful in showing that no offer had been made, she may argue that it was preliminary negotiations.

⁴ *Pharmaceutical Society of Great Britain v Boots Cash Chemists Ltd* [1953] 1 QB 401.

⁵ Carter, Peden and Tolhurst, *Contract Law in Australia* (5th ed, 2007), [3-07].

⁶ *Stephenson, Jacques & Co v McLean* (1880) 5 QBD 346.

If having successfully argued that he had made an offer, Jack could claim that the email containing the written agreement sent on January 27 to Linda was essentially the same offer, but presented as a new offer as it included additional details. As previously mentioned, Linda would be unlikely to succeed in showing that the fourth clause indicated that the agreement did not constitute a contract. Hence, in terms of offer and acceptance, it is likely that Jack would be successful in showing that his written agreement is an offer. This leads to the question of whether or not Linda accepted Jack's offer.

Jack should argue that Linda did accept. The form of acceptance must be stipulated by the offeror for it to be binding.⁷ Jack should argue that Linda did accept, via email as he had requested. Linda may argue that this did not serve as acceptance, as she stated that the agreement “[looked] like an accurate record of [their discussion]”, rather than stating she agreed with the offer. Jack could argue that Linda's conduct inferred acceptance over time. The facts similar to *Empirnal Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 523 (*Empirnal*). In both situations, the person seeking the service did not directly accept, but let the other party commence work. Jack could apply the same principles and argue that a reasonable person would have said a contract existed. Linda may contend by claiming that she was not aware that Jack had begun work, hence *Empirnal* would not apply. Both parties have a reasonable chance of success.

If Jack were successful in establishing that Linda accepted his offer, he must also show there was sufficient consideration from each party. This is easily established, as a benefit and detriment to both Jack and Linda can be identified.⁸ Jack can show that he would benefit from the \$30 000, and the time and energy he expended were a detriment. Likewise, Linda would benefit from obtaining the software, but would also suffer detriment from paying.

Jack must show that the terms were certain and complete. Linda may contend this. She may argue that “gold exploration data software program” is an essential term, but is too vague. Jack could show that although the exact requirements are not specified,

⁷ *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256.

⁸ *Currie v Misa* (1875) LR 10 Ex 153.

both parties understood its meaning from their discussions on January 15. She may argue that “ongoing support” is unclear. Jack may argue that this was specified in their email correspondence. Linda may argue that “other relevant matters” is not specific. Jack could argue that courts generally give meaning to words unless it is impossible to do so.⁹ Jack could argue that this is possible, or that the phrase could be severed as it is not essential for the operation of the contract. Jack is likely to be successful in arguing that the agreement is not too uncertain or incomplete, as the agreement has been partially performed.¹⁰

If Jack was not successful in arguing that a contract existed, he could estop Linda from denying the formation of a contract. Jack could argue that Linda encouraged him to adopt the assumption that a contract existed.¹¹ Jack would then need to show that he suffered detriment from Linda departing from his assumption.¹² He could put forward that he suffered an expectation loss, the \$30 000 he did not receive, as well as a reliance loss, the time and money he spent in designing the program. Linda may succeed in arguing that Jack was unreasonable in assuming that a contract had been formed.¹³ If not, Jack must show it was unconscionable for Linda to depart from the assumption.¹⁴ He would probably be successful. Hence Jack would have effectively proven that a contract existed.

If Jack was successful in arguing that a contract did exist, he would be entitled to claim the \$30 000 owed through an action for debt. There is no need to prove loss, only that the money is owed and has not been paid. He would succeed in showing this, meaning the court would be obliged to order the full amount of money be paid, as the cost was specifically stated.

⁹ *Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd* (1968) 118 CLR 429.

¹⁰ *Husain v O&S Holdings (Vic) Pty Ltd* [2005] VSCA 269.

¹¹ *Legione v Hateley* (1983) 152 CLR 406.

¹² *Je Maintiendrai Pty Ltd v Quaglia* (1980) 26 SASR 101.

¹³ *Murphy v Overton Investments Pty Ltd* (2001) 112 FCR 182.

¹⁴ *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582.

Question 2

There are two arguments Jack could justify. Firstly, that the existing contract was replaced by a new one, or secondly, that the existing contract had been modified.

If he were to argue that the existing contract was terminated and a new one formed, Jack would be entitled to \$50 000. This argument is unlikely to succeed, as Jack would have to show that both he and Linda had intended for a new contract to be formed. From the facts, it appears this was not the case. Jack had commenced work on the program, and Linda's offering of more money was an incentive to finish.

Jack would have more success if he were to argue Linda modified the original contract. Linda will likely assert that a promise to perform an existing duty is legally insufficient as no consideration is provided.¹⁵ If Linda succeeds, the contractual variation will be unenforceable and Jack will not be able to claim the additional money. Jack may argue that the existing legal duty rule may be departed from if it is found that the party who modified the contract obtains a practical benefit from the other party performing their existing duty.¹⁶ He could argue that Linda clearly benefitted by promising an additional \$20 000, as it ensured he completed the program. Linda may argue that it was not good consideration as she agreed to pay extra money under duress.¹⁷ If Jack did not finish the program, Wildcat Pty Ltd would lose their prospective large mining company client. This argument is unlikely to succeed as Jack had not intentionally set out to cause economic harm and had not procured the increase in pay from an unlawful threat.

If Linda is successful in identifying her promise to pay an additional \$20 000 as a gratuitous promise, Jack could estop her from doing so. He must establish that Linda encouraged him to adopt an assumption,¹⁸ he suffered detriment from relying on this assumption,¹⁹ and that it was unconscionable for Linda to depart from this

¹⁵ *Stilk v Myrick* (1809) 170 ER 1168.

¹⁶ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1.

¹⁷ *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] 3 WLR 419.

¹⁸ *Legione v Hateley* (1983) 152 CLR 406.

¹⁹ *Je Maintiendrai Pty Ltd v Quaglia* (1980) 26 SASR 101.

assumption.²⁰ He could establish that Linda encouraged him to adopt the assumption that she would pay an extra \$20 000, as it is the reason he did not travel immediately. Jack could argue that he suffered detriment by relying on Linda's promise, as he now cannot afford an overseas trip, one he forfeited in reliance on the fact that Linda's extra money would allow him to do so. As Jack had both adopted an assumption because of Linda and experienced detriment because of it, he could easily show that it was unconscionable for Linda to not pay him the additional \$20 000.

If Jack is successful in arguing that the additional \$20 000 is owed by Linda, he could expect to be awarded this in the form of compensatory damages. Mitigation of loss is not an issue, as Jack could not have prevented the loss suffered.

²⁰ *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582.