

Marker: Gabrielle Girding

Aspect of Exercise	Unsatisfactory	Satisfactory	Good	Excellent	Comments
1. Structure — answer organised in a clear and logical way?				✓	You have used headings effectively to structure your answer.
2. Clarity of expression — answer well written and easy to understand?				✓	Throughout your expression is clear & easy to follow.
3. Coverage of relevant issues — legal issues raised by question identified and discussed, and major issues prioritised?				✓	You have covered all relevant issues raised by the facts (see comments on paper for feedback on minor additions you could have made).
4. Citation of authority — statements of legal principle backed by appropriate authority?				✓	You have used authority where appropriate to support your argument & conformed to AGLC requirements.
5. Effectiveness of argument — arguments made clear and effective, revealing sound understanding of issues raised?				✓	Your paper is argued effectively, referring to both sides of the argument where necessary.
6. Overall quality of the paper.				✓	Excellent work!

GENERAL COMMENTS:

This is a great paper & you show a strong understanding of the issues. See comments throughout for minor additions you could have made.

Final Mark (incorporating penalties) 86	① ① ① ① ② ③ ④ ⑤ ⑥ ⑦ ● ⑨ ① ① ② ③ ④ ⑤ ● ⑦ ⑧ ⑨ ½	Final Mark 86
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Q1:

Offer and Acceptance:

For a binding contract to be formed, it must first be established that the parties have reached an agreement. The framework of offer and acceptance analysis is used to establish when an agreement has been concluded. ✓

An offer is an expression of willingness to enter into a contract on certain terms.¹ An acceptance is an unqualified assent to the terms of an offer.² Agreement is generally said to occur when acceptance of an offer is communicated to the offeror.³ ✓

Amelia would argue that Bryce made a formal offer on October 14th where Amelia could assert that she communicated acceptance of Bryce's offer, which included additional consideration of several thousand dollars and a painting, by exclaiming that the offer 'sounds fantastic'. Bryce would rebut this, explaining that this was simply a negotiation that was intended to give rise to a formal offer in the future. ✓

Even if Bryce could successfully argue this, Amelia would point to the email sent to her by Bryce on October 20, with the option to argue that the email was either: a memorandum that clarified the points of the parties' agreement made on October 14, or, that Bryce's email constituted a definitive offer from Bryce, which was subsequently accepted by Amelia on October 22 via a reply to the email. ✓

Little turns on which of the interpretations is accepted, as the terms of the agreement consist of the terms contained in Bryce's email in any case, and that the offer was accepted by Amelia on both occasions, although more formally in the second instance via email. It has not been authoritatively determined when communications of acceptance via email are deemed to take effect, however this is of insignificance as the email has been replied to.

To minimise the extent of his consideration, Bryce would attempt to argue that Amelia accepted his offer made on October 1st. Amelia could refute this successfully, as by adding an additional term, Amelia's alleged acceptance actually constituted a counter offer, simultaneously rejecting Bryce's initial offer.⁴ ✓

*yes, good that you recognised this!

Revocation of offer by Bryce:

Bryce will argue that his offer was revoked on December 10, and that a new offer of \$30,000 was made in lieu of the revocation. ✓ Amelia will refute this, as Bryce's revocation occurred after Amelia's acceptance. It is therefore likely that Amelia will

¹ Carter, Peden and Tolhurst, *Contract Law in Australia* (5th ed, 2007) [3-07].

² Ibid.

³ *Latec Finance Ltd v Knight* [1969] 2 NSWLR 79.

⁴ *Harris v Jenkins* [1922] SASR 59

be successful in this argument, as revocation of an offer must occur before acceptance of the offer occurs.⁵ ✓ *great discussion here.*

Intention to create legal relations:

Another necessity of a binding contract is that an objectively⁶ apparent intention to create legal relations exists between the parties, which can be perceived by the reasonable person.

If Amelia were successful in establishing an agreement, she would look to establish an intention to create legal relations between her and Bryce to validate her agreement with Bryce as a binding contract. (*cite Ermogenous here*)

Bryce would attempt to argue that as siblings, there is a presumption that no intention to create legal relations exists. ✓ Amelia would successfully rebut this presumption, as the context of the situation is suggestive of a commercial arrangement, where intention to create legal relations is presumed.⁸ ** does anything else on the facts support a commercial agreement, & therefore intention?*

Bryce would attempt to refute Amelia's claim, suggesting they had a private arrangement, however it seems likely that the objective approach to ascertaining intention based on the standpoint of a reasonable person would support Amelia's suggestion that intention to create legal relations did exist between the family members. ✓

Consideration

A requirement exists that consideration: an exchange of some value occurs between each party in return for the promise made by the other. If consideration cannot be shown for a promise to perform a duty, then the promise cannot be enforceable as a contract.

The promisor, Amelia, ✓ must be reasonably understood to be seeking something in return for her promise.⁹ Further, consideration need not be adequate (of fair value), but must be sufficient.¹⁰ ✓ The requirement of sufficiency stipulates that consideration provided must be something that the law regards as valuable. It is evident that both parties provide consideration that would be deemed sufficient. Some uncertainty exists over the precise consideration to be provided by each party.

⁵ *Dickinson v Dodds* (1876) LR 2 Ch D 463.

⁶ *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256.

⁷ *Balfour v Balfour* [1919] 2 KB 571.

⁸ *Roufos v Brewster* (1971) 2 SASR 218.

⁹ *Australian Woolen Mills v Commonwealth* (1954) 92 CLR 424.

¹⁰ *Chappell v Nestle* [1960] AC 87.

→ *you could also have cited Riches v Hogben here.*

✓ Certainty & Completeness:

Another requirement of a legally enforceable contract is that the terms must be sufficiently certain and that the parties have reached an agreement on all of the essential terms of the agreement. ✓

Bryce will attempt to render the contract unenforceable by arguing that no complete agreement was reached on all terms, as no specific painting was decided upon as consideration, just that 'one' painting be given and which one will be agreed upon 'later'. Bryce will argue that third term in the agreement be annulled, as agreements to agree are unenforceable.¹¹ Where an essential term of an agreement specifies that parties will agree on the specifics of that term at a future date, the agreement is incomplete and will not be legally enforceable as a contract. Amelia will attempt to argue that this was a negotiation in good faith¹² and therefore could be enforceable. ✓

Severance?
Waiver?
Mistake?

Additionally, Bryce could argue that the second term of the agreement is too uncertain, regarding the 'cost of the materials' This is unlikely to be successfully made out by Bryce, given that courts are reluctant to render entire agreements as too uncertain,¹³ and that it is not beyond the capabilities of the court to ascertain the meaning of these ambiguous words.¹⁴ ✓

Amelia would refute Bryce's claims, saying that the agreement can still be enforced appropriately despite the absence of specific details regarding the choice of painting and the cost of materials, as the contract and its terms are sufficiently certain and sufficiently complete. But as questions of certainty and completeness are subjective and questions of degree, it is unclear what the court would rule. If Amelia is successful in arguing that the essential terms have been sufficiently agreed upon, a binding contract will have been formed.¹⁵ ✓

Vitiating Factors/Conclusion:

Thus, in the absence of any vitiating factors, it seems likely that Amelia would be successful in establishing that a valid contract has been formed between her and Bryce and would be able to sue for breach. ✓

¹¹ *May and Butcher Ltd v R* [1934] 2KB 17n.

¹² *United Group Rail Services Limited v Rail Corporation New South Wales* (2009) 74 NSWLR 618.

¹³ *Hall v Busst* (1960) 104 CLR 206.

¹⁴ *Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd* (1968) 118 CLR 429.

¹⁵ *Thornby v Goldberg* (1964) 112 CLR 597.

Q2:

Existing Legal Duty Rule:

Whether Amelia can claim the additional \$20,000 promised to her by Bryce is dependent upon whether the alteration to the existing contract is legally binding. If it is binding, Bryce will have breached his contractual obligations and Amelia will be able to sue Bryce. ✓

Bryce would argue that despite an intention for such a contractual modification to be legally binding, courts would not generally enforce a promise such as this, as a promise to perform an existing legal duty is legally insufficient consideration¹⁶, rendering the contractual alteration unenforceable. ✓

Practical Benefit as Consideration:

Amelia, the beneficiary, would rebut this and argue that by completing her side of the bargain; a practical benefit was conferred upon Bryce, the modifying party. ✓ By completing the renovation, Amelia alleviated the need for Bryce to find another renovator and allowed Bryce's café to be open in time for the festival season, simultaneously conferring a practical benefit upon Bryce as well as obviating a disbenefit. Amelia would argue that this benefit acts as consideration for Bryce's promise¹⁷, which would deem the promise legally binding.

However, such an alteration would be binding only if made in the absence of duress¹⁸, whereby Bryce would argue that his promise to pay an extra \$20,000 to Amelia was as a result of 'unfair pressure'¹⁹ on the part of Amelia. Despite the presence of coercive undercurrents, it is likely that Amelia would be successful in refuting Bryce's claims of economic duress, due to the high threshold to prove such claims and that it was Bryce who was 'desperate' and made the offer to Amelia, rather than Amelia actively pleading Bryce for the additional money. ✓

Finally, for the practical benefit to serve as valid consideration for Bryce, it must be capable of outweighing a corresponding award of damages.²⁰ Given the financial costs associated with lengthy litigation proceedings, it is likely that the practical benefit would serve as valid consideration. ✓

It therefore appears likely that a practical benefit could be established by Amelia, meaning that that contractual variation would be binding on both parties and that Amelia could sue Bryce in breach of contract. ✓

* Great discussion & application of the law to the facts here.

¹⁶ *Stilk v Myrick* (1809) 2 Camp 317.

¹⁷ *Williams v Roffey Bros and Nicholls (Contractors) Ltd* (1990) 1 All ER 512.

¹⁸ *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723.

¹⁹ *Ibid.*

²⁰ *Ibid.*

Remedies:

If it is found that Bryce has breached his contractual obligations, Amelia may bring an action for debt for the \$20,000 that Bryce agreed to pay for Amelia's performance of her contractual obligations. ✓

An action to recover a debt is distinct from an action for damages²¹, whereby the plaintiff has no need to prove loss when recovering the money due under the contract, only that Bryce owed her \$20,000 and Bryce has not paid her. It is likely that Amelia would be successful in her action for debt, as the two limbs have been satisfied: ✓

- The sum of money is a contractually specified amount of money, and
- Amelia has accrued the right to payment of money through performance of contractual obligations.²² ✓

* suing for damages is also a possibility.

Estoppel:

If it was found that the contractual variation was unenforceable due to insufficient consideration or the presence of coercion, Amelia could use the doctrine of estoppel as an alternative remedy to contract. Estoppel is available at the discretion of the courts, not of right. ✓

A remedy in

It should be noted that courts have established²³ that in Australia, estoppel can be used as a method of active litigation, unlike in the UK where it may only be used as a defensive device. Enabling Amelia to estop Bryce if she can show that: ✓

- Bryce induced an assumption that he would pay her,
- That she acted in detrimental reliance on that assumption,
- Amelia must show that it was unconscionable for Bryce to renege on his promise.²⁴ ✓

Amelia would argue that she was encouraged to adopt an assumption by Bryce that she would be paid an additional sum.²⁵ Further, it is very likely that Amelia would be able to successfully argue that she acted in detrimental reliance on Bryce's promise, given the arrangements she made with her creditors as well as her turning down another job worth \$35,000. Finally, it must be proven that it was unconscionable²⁶ for Bryce to depart from his promise, whereby it is likely that Amelia would succeed in doing so, given that Bryce knew or ought to have known of Amelia's detrimental reliance upon his promise. ✓

* Good, clear discussion of estoppel.

²¹ *Young v Queensland Trustees Ltd* (1956) 99 CLR 560.

²² *Westralian Farmers Ltd v Commonwealth Agricultural Service Engineers Ltd (in liq)* (1936) 54 CLR 361.

²³ *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

²⁴ *Ibid.*

²⁵ *Legione v Hateley* (1983) 152 CLR 406.

²⁶ *Ausotel v Franklins* (1989) 16 NSWLR 582.

If Amelia was successful in her estoppel, the court would provide remedy at their discretion, using the minimum equity necessary to prevent Amelia from being worse off than she would've been had she not relied upon Bryce fulfilling his promise. ✓
However, remedies are not limited to the reversal of detriment, although it appears likely that the court would award Amelia with \$20,000 in compensation.

* Note: The "minimum equity" may also be assessed as the \$35,000, less the value of the painting.

(as compared to \$20,000 for breach of contract, if Bryce's promise was binding).