SECTION A

Question 1

A real estate agency was selling apartments with a view of the sea.  The agency assured prospective buyers that the view was protected because the land between the apartment block and the sea was zoned for low-rise development. This was based on information provided by a council officer.  However, the council officer was wrong. The zoning was about to change, allowing high-rise development.

Would you consider the agency liable for this commitment?  Explain your answer.

Answer

The agency is not liable for this commitment.

Australian law recognizes that building owners who suffer losses arising from defective buildings may have a cause against negligent contractors and agents, including municipalities who negligently certify defective buildings (Koltai, 2012, p.34). Subsequent owners therefore have a right of recovery against the contractor, agency and the relevant authorities or consultant who negligently oversaw the construction of the defective building. The building is defective in the sense that the high-rise development will obscure the view of the sea, which was one of the factors that motivated the prospective buyers to purchase the apartments.  The buyers will therefore suffer an economic loss because the knowledge of future high-rise development would have substantially reduced the value of the apartments at the time the contract was being signed. Regardless of the fact that the buyers will not incur any actual costs to restore the building to any specific standard, they arguably acquired property of a lower value than they had reasonably believed.

Notwithstanding, the real estate agency was only acting in good faith and had no intention whatsoever of deliberately misinforming the clients in order to obtain a higher price for the apartments. On the other hand, the council officer who provided false information is liable for the commitment having negligently misinformed the real estate agency, which in turn conveyed the false information to the prospective buyer.

Question 2

Whereisit.com Pty Ltd proposes to offer customers exclusive rates and benefits for selected accommodation on condition the customer acquires the goods or services with their MasterCard credit, debit or pre-paid card and such promotion was to be from November 2013 to February 2014.

Could this be a breach of the law?  Discuss what possible breach(es) this might entail and the consequences.

Answer

The company’s offer is an example of a ‘standard form’ contract. Such contracts are non-negotiable and are offered to customers on a ‘take it or leave it’ basis. Section 23 of the Australian consumer law (ACL) provides that “a term of a consumer contract is void if: (a) the term is unfair [and] (b) the contract is a standard form contract.” The offer is a breach of contract because the terms stated therein are unfair thereby rendering them void. According to section 25, article 1 d of the ACL, A term is considered unfair if it permits the supplier but not the consumer to vary the terms of the contract.  In this case, the company is only obliged to provide exclusive rates and benefits when the consumer complies with a particular formality, that is, the acquisition of goods or services with a MasterCard credit, debit or pre-paid card. Moreover, because the offer only applies to selected accommodation, it is implied that the company can vary the type of accommodation available to eligible clients. Even though unfair terms do not normally warrant the termination of a contract, there is only one term in this contract and consequently the entire contract is void. Termination of the contract would mean that the client reserves the right to decline to pay for any goods and services consumed under the unfair terms. Other consequences include injunction against the company and remedial orders for the losses incurred by the clients.

Question 3

What are the consequences of supplying goods and services that do not comply with an information standard?

Answer

The supply or distribution of goods and services that do not meet relevant information standards is considered as a criminal offence under Chapter 4, Part 4-4 of the Australian Consumer law (Commonwealth of Australia, 2010, p.36). Individuals who do not comply with this provision are liable to a fine not exceeding $ 220,000 while corporate bodies are liable to a maximum fine of $1.1 million. Possible remedies and penalties for the breach of an information standard include compensatory orders, damages, non-punitive orders, injunction and adverse publicity orders. Infringement notices, disqualification orders, public warning orders and redress for non-parties are also provided for this breach.

Question 4

Would a term in a gym membership contract, that allowed the operator of the health club to change location of the club within 12 kilometres without allowing the customer to terminate the agreement, be considered an unfair term?  Would it make any difference to your argument if that term was brought to a consumer’s attention prior to signing of a contract?

Answer

The term is considered unfair because it “permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract” (Australian Capital Territory Office of Regulatory Services et al, 2010, p.16). Changing the location of the health club will not only alter the terms of the initial contract but might also prompt the customer to incur additional costs in order to access the gym services. The case of *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd* clearly illustrates this scenario. In the case, the Victorian Civil and Administrative Tribunal established that the clause in the consumer contract that allowed the operator of the health club to change its location was unfair because the latter had failed to draw the attention of the consumer to the term. It was argued that the term might have operated in an unexpected manner to the disadvantage of the client. Such a unilateral variation might result in a substantial imbalance in the rights and obligations of the two parties. This is because it essentially puts the gym operator in a position to vary the terms of the contract at their discretion without being held accountable for any infringement on the client’s rights.

Even if the term were brought to the attention of the client prior to the signing of the contract, it would still be unfair because it restricts the client from terminating the contract in the event that the gym operator decides to relocate from the current premises. In essence, it still allows the one party to limit or avoid the performance of the contract at the expense of the other party and as such, the aspect of imbalance has not been eliminated. Moreover, the contract should clearly stipulate the circumstances that would necessitate the relocation of the gym to prevent the operator from abusing this right.

SECTION B

Dear Sir,

My name is [insert your name]. I recently purchased a franchised Pizza business but was forced to close down due to stiff competition; a fact the previous owner was well aware of but failed to disclose during the negotiation stage. I have herein described the details of the contract and proposed what in my humble opinion is the best course of action, within the law. Kindly advise me accordingly

On July 2012, I purchased a franchised home delivery Pizza business, Pizza Heaven, at Quakers Hill. Exactly one month later, in August 2012, a new home delivery business was opened at the same location as a Pizza Tent Franchise. I only found out two days after the business was opened that, Joe, the previous business owner had been aware of this for some months. During the preliminary negotiations, I learnt that Pizza Heaven had a large potential for growth given the large housing estates in Kellyville, Bella Vista and the surrounding areas. I was also given the sales figures for the last three years and was made to believe that this business was one of the best performing businesses in New South Wales.

I was informed that Joe had bought the business after he retired from his previous work in the hope that his son could take it over.  However, the latter moved interstate instead so Joe talked his brother into buying another Pizza Heaven franchise business at Parramatta and as such, he was liquidating the franchise in order to help his brother acquire the Parramatta franchise. For this reason, I did not ask why Joe was selling the Quakers Hill franchise given that the business was so profitable. In order to investigate possible competition in the area, I drove around and noticed an old, tired, and generally unattractive Pizza Tent restaurant. I also noticed a Dominion’s pizza business as well as a McDonald, a KFC, numerous other food outlets, and a small Pizza Tent shopfront that did not offer home delivery.

The new home-delivery pizza business had made announcements in search of part-time employees, before it was opened. Unfortunately, I did not read local newspapers nor did I make any inquiries about any new business at the Council so I was not aware of this. When the new business opened, I complained to Joe but was simply advised to wait and see what the impact may be.  Despite various attempts to mitigate my losses in the face of steadily falling sales, sales continued to fall.  I have since closed the store and abandoned the business.

I believe that I am entitled to rescind the contract because the previous owner failed to inform me of this new business before I purchased the franchise. In reference to *Crawford v Parish* (1991) 105 FLR 361, such information would have significantly influenced my decision to purchase the business and therefore amounts to misrepresentation on the part of the previous owner. Moreover, because misrepresentation is a breach of section 8 of the Australian Consumer Law, I believe I should also be compensated for any losses I incurred in the business. Additionally, I relied upon the representation that the business had a potential for growth. Regardless of the fact that this was a statement of opinion, I have reason to believe that it was made fraudulently to induce me into purchasing the business and is therefore actionable as misrepresentation (Christensen & Duncan, 2009, p.61). Even though another Pizza Tent Franchise and a host of other Pizza outlets existed in the area at the time we were negotiating the contract, none of them offered home-delivery. The home delivery franchise consequently posed a unique threat that did not exist prior to its establishment. I would greatly appreciate your professional advice in the matter.

I look forward to your feedback

Thank you in advance

[Your Name]

PART II

The Australian Contract Law, s29 (1), (e), (f), prohibits false or misleading representations regarding testimonials. This implies that businesses should refrain from facilitating misleading endorsements by professionals such as doctors or celebrities in advertising and marketing campaigns (Latimer, 2010, p.567). It also bans representations that purport to be testimonials regardless of whether they are genuine or not. To this effect, a testimonial, be it genuine, should be neither fictitious nor misquoted or misrepresented. Romantic Getaways Pty Ltd (RG) will therefore contravene this provision by engaging a third party, to lie about spending a night at the Port Douglas, Queensland resort. Regardless of whether the service delivery at the resort is genuinely of high quality, the testimonial will be fictitious and is therefore prohibited by contract law. This action constitutes misrepresentation, which might lead prospective clients to contract the services of the resort by mistake. Such contracts will therefore be void for mistake and might be negated by the representees.

Furthermore, if the services offered at the resort are of poor quality, the tweet will have provided misleading information. Even though the tweet is not a term in the contract to be made with the clients, it will substantially influence their decision to contract and therefore amount to actionable or major misrepresentation. Such misrepresentation might make these contracts voidable and give rise to the equitable remedy of rescission. This remedy will seek to indemnify both parties giving the clients the right to recover any benefits they will have conferred to the resort prior to the performance of the contract. Apart from misrepresentation in contract, engaging the celebrity to lie about spending a night at the resort is also tantamount to fraudulent misrepresentation in tort. RG’s action will be termed as fraudulent because it will have recklessly misrepresented the facts regardless of whether they are true or false. In this case, apart from rescission, the South Australian Act s 7(3) and s 175 empowers the court to order damages if it is reasonable and fair to do so.

Other than misrepresentation, the company could also be held liable for publishing defamatory statements about its competitor. Even though the defamatory comments did not originate from RG, the company took part in communicating the comments to third parties. Australian law provides that every party involved in publishing defamatory material is liable for defamation (CMCITL, 2013, p.21). Because it has administrative privileges for the site, the company was in a position to delete the comment and is therefore liable for ‘authorizing’ a ‘publication’. Failing to delete the comment implied the company’s approval or ratification of the comment. This scenario is exemplified by a similar case in the United States, *Stratton Oakmont Inc. v Prodigy Service Co.*, where Parody Service Co. was held liable for defamatory statements about the plaintiff made by an unknown subscriber on the company’s website called ‘Money Talk’ (Clark, 2010, p.317).  Another case is that of *Byrne v Deane* in which the owners of a golf club were held accountable for publishing a lampoon that was attached to the club’s wall by an unidentified third party. The golf club knew that the material would be read by anyone patronizing the golf club and therefore took part in publishing the defamatory material.

The company will however only be liable for defamation if the said competitor has more than ten employees. According to Australian law, a company with less than ten employees does not merit a reputation deserving of legal protection and as such, it has limited actions in libel (Fox, 2011 p. 43). Nevertheless, even if RG only has less ten employees it will still be liable for publication of the defamatory comment. Additionally, the extent of the damage caused by the defamatory comment also depends on the number of people who viewed the comment. If the number of people was 80 as opposed to 500 then the injury caused to the competitor’s reputation would have been less significant

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