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Question 2

75/100

Was there a contract?
A contract exists between Gabrielle and Harriet. Consideration has been given and there is an intention to create formal relations based on the commercial nature of the transaction and the large quantity and cost of goods involved.

Termination

A contract can be terminated under several circumstances.

Repudiation

It could have been terminated for repudiation when a delivery (whose delivery on time was not an essential term) was late and a reasonable notice was given to complete the delivery within a reasonable time period, and the notice was not complied with. Thus this would show that the party not complying with the notice did not feel bound by the terms of the contract (Trawl Industries).

However, Gabrielle chose only to issue a notice to complete for the August delivery. However, it was not late and the notice was complied with. She therefore would not terminate the contract for a breach of a non-essential time stipulation.

Therefore, repudiation in this case cannot be used as a basis for termination as there was no repudiation.

Therefore, to justify her termination, another basis has to be used.

Time of the essence

To prove time was of the essence, it would have to be proven the term was a condition of the contract. This would be proven if Gabrielle would not have entered the contract ‘but for’ the time being of the essence (Associated Newspapers v Bancks). As Gabrielle’s business was structured in such a way that she had to deliver goods to her customers as soon as she received the goods, this is proven to be true. However, it would also have to be proven that Harriet knew of this. Based on her knowledge of Gabrielle’s business as a wholesaler, a general implication would be made that she knew of the fact that delay would cause some sort of problem with Gabrielle’s contracts. But there is not enough information to prove she knew of the exact way she carried out her business.

However, even if time was of the essence, Gabrielle failed to terminate at the time of the delay. She cannot terminate for past delays.

Is clause 3 an essential term, breach of which would allow Gabrielle to terminate the contract?

It could be argued that Gabrielle would not have entered the contract ‘but for’ the 44% soybean protein warranty (Luna Park). It is known from the facts that Gabrielle specifically entered the contract because of Harriet’s reputation in relation to this. Whether this was known to Harriet would require further information. However, as Gabrielle had probably already been a wholesaler before entering the contract with Harriet, it might have been known to Harriet that the
probable reason why Gabrielle chose to change suppliers was because of Harriet’s reputation [✔✔]. However, this cannot be completely implied from the facts.

On the other hand, it could possibly be argued that termination for the breach of the 44% protein warranty deprived Gabrielle of substantially her whole benefit under the contract. Termination can be made if such an outcome results from the breach of a term (Hong Kong Fir). But, it cannot be said that one delivery of 500 tonnes not conforming to the 44% protein warranty, out of 15,000 [✔✔] could have deprived Gabrielle of substantially the whole benefit of the contract. Therefore, it remains uncertain whether or not Gabrielle could have terminated the contract for breach of a condition [✔✔].

**Damages**

However, damages can nonetheless be claimed for breach of terms in the contract. The loss has to have been caused by the defendant (Luna Park). This of course comes after proving loss was suffered. It was because of late deliveries caused by Harriet that Gabrielle had to pay her staff overtime. Under the first limb of Hadley v Baxendale, this loss would probably have been in the reasonable contemplation of the parties as a likely result of the breach (financial loss). However, the fact that hiring extra staff to deliver was based very much on the specific way in which Gabrielle ran her business, it could come under the second limb referring to ‘actual knowledge’ of the potential result of the breach [✔✔].

Because there is an available market, Gabrielle would have to mitigate her loss (Sotiros Shopping Centre), or otherwise her damages would be reduced. Furthermore, as there was probably a breach of a condition from the breach of the 44% protein warranty, Gabrielle could refuse to pay for her August delivery. The breach of a condition, however slight, permits this (Luna Park).

Furthermore, although the TPA does not cover this transaction, an analogy could be made that the 44% protein clause was a ‘quality of goods clause’. Under the TPA, such a clause has to be a condition. This could help establish the term as such a condition [✔✔].

Excellent, thoughtful analysis; good, appropriate use of authorities. Identified and dealt well with relevant issues.