

1. **What is Jack's likelihood of success in his lawsuit and what damages, if any would he be entitled to? Discuss.**

**Uniform Commercial Code (UCC)**

The UCC applies to the sale of goods. Goods are defined as moveable and identifiable at the time of the formation of the contract.

The contract is for Austin Brown Stone. The Austin Brown Stone is moveable and identifiable at the time of the formation of the contract. Therefore, the UCC governs this contract

**Merchant**

A merchant is one who regularly deals in the goods involved in the transaction at hand or otherwise holds themselves out as having a special skill or knowledge in the trade. They have a higher duty of good faith, which is the duty of honesty in fact, and the observance of reasonable commercial standards of fair dealings.

We can infer from the facts that Stone-Co a local stone distributor is a merchant. However, Jack is a retiree and plans on building a new home on his vacant property. He is contracting for Austin Brown Stone. There are no facts to support that he is familiar with building a home, or doing stone work. Thus, Jack is most likely not a merchant because he does not hold himself out with special knowledge or skill. Thus, the merchant rules would not apply to this contract.

**Offer**

An offer is an outward manifestation of present contractual intent, with definite and certain terms that is communicated to the offeree.

Jack drafted a contract to present to Stone-Co. The contract stated Jack agreed to buy all of the Austin Brown Stone he needs to build the exterior wall of his house at a price of \$200, thus an outward manifestation of present contractual intent. The terms were all that is needed, quantity, to be delivered in 5-ton lots within 10 days following the request, time period, Jack and Stone Co, the identity of the parties and all the Brown Stone needed is the subject matter.

Jack dropped off the contract to Stone-Co for its review, and a Stone-Co salesperson signed the contract evidencing a communication to the offeree.

Therefore, there was a valid offer.

**Acceptance**

An acceptance is the unequivocal assent to the manifestation of the offer.

In this case, a Stone-Co, salesperson signed the contract. However, he wrote just below the liquidated damages clause, "Notwithstanding the foregoing, if Stone-Co has difficulty getting Austin Brown ...." Hence, the acceptance contained additional terms. Therefore, this was not a mirror image of the offer, since there was no unequivocal assent to the terms of Jack's offer.

Therefore, there is no acceptance of Jack's offer.

### **Battle of the Forms**

Under UCC 2-207 if the parties are merchants, additional terms become part of the contract automatically after a reasonable period of time unless: 1) the offer expressly limits acceptance to the terms of the offer; 2) The additional terms materially alter the contract; or 3) The original offeror notifies the offeree that he objects to the additional term within a commercially reasonable period of time.

The additional term the salesperson included was a provision stating ...if Stone-Co has difficulty in getting Austin Brown Stone, Stone-Co may substitute Austin White Stone. Jack received the contract and never read the modified contract, nor did he see the term added by Stone-Co. Jack will argue Stone-Co's failure to notify him of the change of the terms in the contract, the new terms should not be added to the contract. However, the offer does not expressly limit acceptance to the terms of Jack's offer.

Jack will contend that the substitution of the stone from Austin Brown to Austin White does materially alter the contract since it would prevent Jack from having the specific stone he ordered to build the exterior of his house. However, if the stone is the same in color, size, weight and quality, most likely, this term would not materially alter the contract and thus, would be considered part of the contract.

Further, since Jack did not notify Stone-Co that he objects to the additional term, and the additional term does not materially alter the contract, the added term will become part of the contract.

Thus, a valid contract existed. However, as discussed above, Jack is not a merchant. U.C.C. provision 2-207 only applies to merchants. Thus, the court should rule against the added term.

### **Counter-Offer**

A counter-offer is a rejection of the original offer, and a creation of a new offer.

Stone-Co signed the contract that Jack drafted and returned it to Jack. However, the salesperson added "Notwithstanding the foregoing, if Stone-Co has difficulty in getting Austin Brown Stone, Stone-Co may substitute Austin White Stone." As such, the added term was a rejection to Jack's original offer. Further, the added term to the contract created a counter-offer, due to the new term.

Therefore, there was a valid counter-offer.

### **Acceptance**

An acceptance can be made by conduct of the parties.

Stone-Co signed the contract that Jack drafted and returned it to Jack. However, the salesperson added "Notwithstanding the foregoing, if Stone-Co has difficulty in getting Austin Brown Stone, Stone-Co may substitute Austin White Stone." As such, if 2-207 does not apply and Jack did place an order with Stone-Co which they did deliver, based on the companies conduct a contract is formed.

Thus, there is a valid acceptance.

However, Jack will argue that the Austin stone delivered was non-conforming and that fact that Stone-Co delivered the stone, based on the companies conduct they did accept the offer and are now in breach of contract.

### **Consideration**

Consideration is that which is bargained for in exchange for a return promise.

Stone-Co agreed to deliver 100 tons of Austin Brown Stone to Jack in exchange for Jack's payment for the Austin Brown Stone. Jack agreed to pay for the Austin Brown Stone in exchange for Stone-Co's delivery of the Austin Brown Stone. Each party has agreed to a legal detriment in exchange for the benefit each is receiving under the contract.

Therefore, there is consideration.

### **Breach**

A breach is an unjustified failure to perform which goes to the essence of the bargain.

Jack placed an order and 10 days later he did receive 5 tons of Austin White Stone. However, the contract was for Austin Brown Stone. Since the delivery did not have a note of accommodations, rather the note stated Austin Brown Stone is not available in the U.S. and we demand payment of \$225 per ton, Stone-Co's failure to deliver the Austin Brown Stone, which the parties contracted for, goes to the essence of the bargain.

Therefore, Stone-Co will be in breach of contract.

### **Expectation Damages**

The buyer's basic remedy where the seller does not deliver or the buyer properly rejects or revokes acceptance of the tendered goods is the difference between the contract price and either the market price or the cost of buying replacement goods.

Jack contracted with another supplier for the Austin Brown Stone at \$225 per ton. Since the original contract price was \$200 per ton, Jack is entitled to \$25 per ton, the difference between the contracted amount \$200 per ton versus the new contract price of \$225 per ton. Thus, Jack's general damages are \$2,500.

### **Liquidated Damages**

Liquidated damages provision is a provision in a contract that fixes the amount of damages that can be recovered when there is a breach. The damages, if there is a breach, must be hard or impracticable to ascertain, the amount must be reasonable and the provision can't be made for the purpose of punishment.

Jack included in the contract that Stone-Co would pay \$5,000 per day for each day that the requested delivery is late. Jack could obtain the Austin Brown Stone from another supplier, and Stone-Co can pay the difference in price, and any cost associated with the delay.

Thus, the delay of not being able to get the stone as he requested, the amount of damages he will suffer can be ascertained. For example Stone-Co can pay the cost for workers that had to be paid when there was no work to be done, or additional expedited cost in order to get the stone timely. Thus, damages are not hard or impracticable to ascertain. In addition, \$5,000 a day for the price of \$1,000 in ordered stone is extreme. Lastly, the liquidated damages clause seems to be more of a punishment, rather than a provision where damages are hard to ascertain.

Therefore, the liquidated damages clause is not enforceable.

## **2. Buyers and Sellers Rights and Obligations**

### **Implied-In-Law – Constructive Condition Precedent**

A condition is a fact or event in which the happening or non-happening of either creates or extinguishes an absolute duty to perform.

Stone-Co must deliver the Austin Brown Stone, an event which must occur, before Jack's duty arises to pay. Stone-Co's act of providing the Austin Brown Stone to Jack creates an absolute duty for Jack to pay Stone-Co.

Therefore, a constructive condition precedent exists.

### **Impossibility of Performance**

Impossibility of performance is where a party's performance of a condition becomes objectively impossible.

Stone-Co will argue when they entered the contract with Jack, a statement was placed in the agreement "Notwithstanding the foregoing, if Stone-Co has difficulty getting Austin Brown Stone, Stone-Co may substitute Austin White Stone." Since Austin Brown Stone is not available in the U.S. it is impossible for Stone-Co to perform the contract. However, the Austin Brown Stone is available and can be imported from Canada. In addition Stone-Co knew at the time of signing of the contract that the stone was not easily obtained. Since the Austin Brown Stone is available Stone-Co's performance is not "objectively impossible" to perform but rather, "a \$25 per ton price increase which would reduce its profit margin" which shows Stone-Co still can perform.

Therefore, impossibility of performance does not excuse Stone-Co's performance.

### **Impracticability**

Impracticability requires that a party encounter extreme and unreasonable difficulty or expense that was not anticipated. A mere change in the difficulty or expense due to normal risks that could have been anticipated will not warrant a discharge by impracticability.

Stone-Co will argue the increase in the amount of \$25 per ton was not foreseeable at the time of the making of the contract.

However, the Austin Brown Stone is available and the price increase of \$25 per ton will not inhibit Stone-Co's ability to obtain the stone.

In addition, a \$25 increase would only reduce Stone-Co's profit margin, and that is not unreasonable. Further, the expense in cost should have been anticipated since Stone-Co knew that Austin Brown Stone was hard to obtain at the time of entering into the contract with Jack.

Thus, Stone-Co will not be able to discharge its duty under the doctrine of impracticability.

### **Frustration of Purpose**

Frustration of purpose is where due to an unforeseeable event, the value of the contract, as contemplated by both parties, is totally destroyed.

Stone-Co will argue that it could not deliver the Austin Brown Stone, since it was not available in the United States. Therefore, there was an unforeseeable event that frustrates the purpose of the contract. However, Stone-Co knew at the time of entering the contract that Austin Brown Stone was not easily obtained, and thus the fact that it is not in the United States, but can be imported from Canada, which will reduce Stone-Co's profit margin, does not totally destroy the purpose of the contract for either party. The contract can still be performed.

Therefore, frustration of purpose is not a valid excuse for Stone-Co's performance.

### **Anticipatory Repudiation**

Before the time for performance arrives, the other party indicates that they do not intend to perform and thereby "repudiates" the contract. There must be a definite and unequivocal manifestation of intention on the part of the repudiator that he will not render the promised performance when the time fixed for it in the contract arrives.

Jack will argue when Stone-Co delivered the Austin White Stone versus the Austin Brown Stone and stated Austin Brown Stone was not available, it indicated their unwillingness to perform. Furthermore, upon delivery Stone-Co demanded payment for \$225 per ton, versus the contract price of \$200 per ton. Based on its actions and demand for an increase in the contractual price expresses an unequivocal manifestation of Stone-Co's intention not to perform with the remaining term of the contract. Therefore, Stone-Co anticipatory repudiated the contract, excusing Jack's performance to pay.

Thus, Jack may sue Stone-Co for breach of contract.