

**October 2022 Baby Bar  
Question 4 Contracts  
Model Answer**

**1. What arguments can Brad reasonably make support of his lawsuit and against Alex's counterclaim? Discuss.**

**Does the U.C.C. Apply?**

The U.C.C. applies to a transaction in goods.

The contract between Ellen and Contractor deals with the renovation of the condominium's bathroom with new fixtures and tile; (2) replace the flooring in the kitchen; and (3) repaint the interior of the entire condominium. The supply of the materials by Contractor are considered a transaction in goods.

However, since the contract is for goods and services, further review is necessary to determine whether the U.C.C. applies in this case.

Therefore, the U.C.C. may apply to this contract.

**Goods Versus Services Contract**

**Predominant Factor – Majority Rule**

Under the Predominant Factor test, the court will look to the predominance of the contract to determine if it is a goods or a service contract. If the contract is predominantly a contract for the sale of goods, and not services, then the U.C.C. governs the contract.

The contract is for both goods – the new fixtures, tile, flooring, and paint – and services – the renovation, installing and painting the interior of the condominium. The contract price is \$100,000 which \$25,000 is for the materials and the remaining \$75,000 is for the labor. Thus, the labor is most of the cost, then the predominant factor of the contract is for the service making the labor the predominant factor.

Therefore, the U.C.C. would not apply in a majority jurisdiction.

**Gravamen – Minority Rule**

Under the Gravamen Rule, the court will look to the cause of the injury to determine whether a contract is for goods or services.

The contract called for the work to be completed in three months. Contractor took six months to complete the renovations due to production and delivery issues. Ellen wants a deduction to the price based on the agreement of a late fee. Thus, the injury complained of under the contract was for service.

Therefore, in a minority jurisdiction, the U.C.C. would not apply.

## **Offer**

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

Ellen recently bought a small condominium in City for her son Dylan's use during college. Ellen signed an agreement with Contractor to: (1) renovate the condominium's bathroom with new fixtures and tile; (2) replace the flooring in the kitchen; and (3) repaint the interior of the entire condominium. Ellen and Contractor agreed that the project would be done for \$100,000, of which \$75,000 was for the cost of labor. Thus, there was an outward manifestation of present contractual intent.

The terms were for 1 renovation, quantity, and \$100,000 each was the price, work to be completed in three months was the time period. Ellen and Contractor were the identity of parties. Further, the offer dealt with renovation of the bathroom, replacing the flooring in the kitchen and repaint the interior, thus subject matter was also identified. Hence the terms were stated with particularity making them definite and certain.

Ellen and Contractor entered into an agreement, thus communicated to the offeree.

Hence there is a valid offer.

## **Acceptance**

An acceptance is an unequivocal assent to the terms of the offer.

Ellen and Contractor entered into an agreement. Thus, there was an unequivocal assent to the terms of the offer.

Therefore, there was an acceptance.

## **Consideration**

Consideration is that which is bargained for and given in exchange for a return promise requiring a benefit and a legal detriment.

Contractor agreed to renovation of the bathroom, replacing the flooring in the kitchen and repaint the interior, in exchange for Ellen's payment of \$100,000. Ellen agreed to pay \$100,000 for Contractor to renovate the bathroom, replace the flooring in the kitchen and repaint the interior in exchange for Contractor's work. Each party has agreed to a legal detriment in exchange for the benefit each is receiving under the contract.

Thus, valid consideration does exist.

## **Parol Evidence**

Evidence of prior or contemporaneous negotiations or agreements that contradict, modify, or vary contractual terms are inadmissible if the written contract is intended as a complete and final expression of the parties.

Contractor will argue he had not mentioned the cost of the building permit because in his experience it was typically paid for by the owner. Contractor seeks to introduce extrinsic evidence to interpret the contract between Ellen and himself.

Ellen will argue that the agreement with Contractor to: (1) renovate the condominium's bathroom with new fixtures and tile; (2) replace the flooring in the kitchen; and (3) repaint the interior of the entire condominium for \$100,000, of which \$75,000 was for the cost of labor. However, Contractor will state that at the time of the agreement he had not mentioned the cost of the building permit because in his experience it was typically paid for by the owner. Therefore, Contractor's statement is outside the written agreement and is barred by parol evidence, and the fact that owners always pay for the building permit cannot be admitted to vary, add to, or contradict the terms of the signed "contract."

## **Fully Integrated Contract**

Where there is a writing that states the parties' prior oral negotiations or agreements are fully integrated into their written agreement, evidence of any prior oral negotiations or agreements is parol evidence and thereby excluded by the parol evidence rule.

Ellen and Contractor signed an agreement. Therefore, the written agreement was intended to be the complete and final expression of Ellen and Contractor.

Consequently, Contractor will not be able to introduce the statement that in his experience the building permit was typically paid for by the owner.

Therefore, parol evidence will bar the testimony.

## **Exception - Ambiguity**

Extrinsic evidence is admissible to aid in interpreting an ambiguity of a term in a fully integrated contract.

Contractor will argue the agree project price did not include the building permit cost. The cost of the building permit was not stated because in his experience it was typically paid for by the owner and was not addressed in their agreement. Thus, the lack of discussion on what the project terms included is ambiguous as to who pays for the building permits. However, the court will most likely find the term "permit" is not ambiguous since you can look to the standard

in the trade and determine when hiring a contractor to renovate and paint, that the building permit would or would not be included in the price.

Therefore, the testimony will come in to clear an ambiguity.

### **Unilateral Mistake**

Contractor will argue that he didn't mention the cost of the building permit because in his experience it was typically paid for by the owner. At the time of their discussions Ellen understood and believed that the \$100,000 price included all permits. If Ellen was told that she would be responsible for paying for all the building permits she may not have agreed to the \$100,000 price for the renovation. Thus, Ellen was under a mistaken belief when she contracted with Contractor that the price included the building permits. Therefore, Ellen entered the contract based on a mistake.

The court will permit the testimony and determine the standard in the trade.

### **Breach**

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

Ellen refused to pay Contractor's bill for the cost of City's building permit, which he had to obtain before starting work. Thus, Ellen's conduct is an unjustified failure to perform.

Therefore, Ellen's unjustified failure to pay Contractor for the building permit is a major breach.

2. Does Dylan have any basis to make a claim against Contractor? Discuss.

### **Third Party Beneficiary**

A third-party beneficiary contract is one where performance by the promisor will benefit a third party. His status arises at the formation stage of the contract.

Ellen recently bought a small condominium in City for her son Dylan's use during college. Ellen signed an agreement with Contractor to: (1) renovate the condominium's bathroom with new fixtures and tile; (2) replace the flooring in the kitchen; and (3) repaint the interior of the entire condominium. Ellen and Contractor agreed that the project would be done for \$100,000, of which \$75,000 was for the cost of labor. Ellen told Contractor that Dylan was renting an apartment and would move into the condominium as soon as Contractor finished his work which shows an act to the benefit Dylan, the third party.

Dylan's rights were created at the time that Ellen signed the agreement with Contractor. Dylan's status arose at the formation stage of the contract, i.e., the execution of the agreement contract.

Therefore, Dylan has enforceable rights as a third-party beneficiary.

## **Privity of Contract**

Privity of contract is the interest or relationship which exists between two or more contracting parties.

Contractor will assert that Dylan was not a party to the contract and, therefore, has no interest or relationship in that contract upon which to sue since Contractor made his promise to Ellen, and not to Dylan.

Dylan will rebut that although he was not a party to the Ellen-Contractor contract, privity is not required for Dylan to assert his rights as a third-party beneficiary under **Lawrence v. Fox**.

Thus, the lack of privity will not bar Dylan from asserting his rights.

## **Intent to Benefit**

Intent to benefit is defined as the promisee's intent to extract a promise from the promisor to benefit a third party.

Dylan will contend that when Ellen agreed and signed an agreement with Contractor to renovate the condominium she had purchased for her son Dylan to use during college, she had intent to benefit Dylan. Ellen told Contractor that Dylan was renting an apartment and would move into the condominium as soon as Contractor finished. Thus, Ellen intended to benefit Dylan. This promise was made at the time of the execution of the agreement that requires Ellen to pay \$100,000 for the renovation of the condominiums bathroom, replace the kitchen floor and repaint the interior, which further demonstrates Ellen's beneficial intent Dylan.

## **Classification - Donee Beneficiary**

If the promisee's primary intent is to confer a gift to a third party, the third party is a donee beneficiary.

Dylan will argue Ellen's intent to enter into the contract with Contractor to renovate the condominium for her son under the terms of the Ellen-Contractor agreement created a donee beneficiary. Ellen was obligated to pay the \$100,000 to confer a benefit to Dylan for receiving the renovations.

Therefore, Dylan would be classified as a donee beneficiary.

## **Vesting**

The Restatement Second states the rights of any intended beneficiary vest when it has notice of and assents to the promise, sues to enforce the promise, or materially changes position in justifiable reliance thereon.

If the court should rule that Dylan was a donee beneficiary, Dylan will argue that since he had to delay and continue to rent an apartment shows he had notice and assent to the Ellen-Contractor agreement.

Further, once Dylan found out of the delay, he could bring a lawsuit. Hence, the bringing of the suit to enforce the promise shows his rights vested as a third-party donee beneficiary.

Once a third-party beneficiary's rights vest, the third-party steps in the shoe as the original contracting party. Hence, Dylan can sue Contractor under the original obligation under the Ellen- Contractor contract.

3. Does Contractor have any defense(s) for his late performance? Discuss.

### **Express Condition**

An express condition is explicitly stated in a contract and is where one party expressly conditions performance on the performance of the other party in the contract terms.

Ellen will argue that the agreement between her and Contractor expressly stated the project would be completed within 3 months. The agreement stated if the work was not completed within three months, a late fee would be deducted from the price.

The agreement also included this clause: "Neither party shall be held liable or responsible to the other party for delay in performing any obligation set forth herein when such delay is the result of causes beyond the reasonable control of that party." Thus, the terms are explicitly stated in the contract. Contractor must renovate the bathroom, replace the flooring in the kitchen and repaint the interior before Ellen's obligation to pay arises.

Contractor will argue that the agreement provides that there would be no late fee if the delay resulted from causes beyond the reasonable control of either party.

Therefore, there was an express condition in the contract.

### **Defense – Impossibility of Performance**

Impossibility of performance excuses performance under a contract where it becomes objectively impossible for the party to perform a condition.

Contractor will argue that it took six months to complete the renovations due to production and delivery issues for the flooring and tile since there was a nationwide material shortage. Thus, to complete the job in 3 months became objectively impossible, thereby excusing his performance.

Thus, Contractor will be excused from performing his job within the 3 months per the agreement.

## **Frustration of Purpose**

The defense of frustration of purpose requires that, due to an unforeseeable event, the value of the contract as contemplated by both parties is totally destroyed.

Contractor will argue since there were delivery issues for the flooring and tile causing him a delay in getting the renovations completed, he needed more time on the job. Thus, he was sustaining a loss if it is required to perform the contract without the agreed upon price since the delays were not caused by himself but by a third party since there was a nationwide material storage.

The unexpected delay in the delivery of the flooring and tile does totally destroy the purpose of the contract for the completion of the renovations within 3 months since Contractor will be assessed a late fee based on the failure of a third party.

Thus, frustration of purpose is a valid excuse.

## **Breach**

Defined supra.

Contractor took 6 months to complete the renovations due to production and delivery issues for the flooring and tile. Ellen refuses to pay Contractor the full price and Contractor refused to accept any deduction to the price due to this delay because of a nationwide shortage of those materials. Thus, Ellen's conduct is an unjustified failure to perform.

Therefore, Ellen's unjustified failure to pay Contractor the \$100,000 is a major breach.