

**FEBRUARY 2001 CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS**

Contracts

QUESTION

Owens, a homeowner, approached Carter, a licensed contractor, to discuss construction of a new garage attached to Owens' home. After several meetings, Owens and Carter signed the following contract.

Carter will build a two-car garage, with overall dimensions of 30' (width) by 25' (depth). Included within the overall dimensions will be a storage area at the rear. Storage area to be 30' by 4', and divided from the remainder of the garage by a wall containing a door. Wooden siding, paint, and roof will be matched to Owens' home. Carter will commence work on March 15 and will complete job no later than April 30. Owens agrees to pay \$8,500 upon completion. The time for performance of these obligations shall be of the essence.

The contract was signed on January 15, and Carter arrived on the job site on March 15 to begin work. Several weeks later, Carter learned that roofing shingles of the exact type and color used on Owens' home were difficult to obtain. Therefore, he used shingles made of other material which were of even higher quality than those originally planned but which, although very close, did not precisely match those on the roof of Owens' home.

Carter completed the garage on May 10 and presented Owens with a bill in the amount of \$8,500. Later on the same evening, Owens placed his car in the garage only to learn that the length of his car did not permit the garage door to close. Upon closer inspection he discovered that the storeroom at the back of the garage was 30' by 6', two feet deeper than planned. As a result, the garage parking area was only 19' in depth. While this would be sufficient for most automobiles, it was several inches too short to accommodate Owens' large car.

The cost of removing and relocating the dividing wall would be \$800. The cost of removing and replacing the shingles with others matching Owens' home would be \$2,200. Owens has refused to pay any part of Carter's bill, citing as reasons Carter's failure to (1) complete the job by April 30; (2) use matching shingles; and (3) build a garage and storeroom of the dimensions called for by the contract.

What are Carter's rights and liabilities? Discuss.

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ANSWER A

I. Carter's liabilities and rights under the Contract

Carter's contract with Owens complied with all the formation requirements because it has mutual assent, consideration, and it was in writing, satisfying the Statute of Frauds. So the issue here involves the performance of such a contract by Carter. If Carter's contract with Owens had conditions, then Carter's compliance with those conditions will be at issue. Whether Carter's performance is excused is also determinative of his rights and liabilities. Finally, if Carter's performance duty is not excused, then whether his performance was a breach [sic].

A) Time of Essence Clause on Contract

The Contract specifically had a time of the essence clause at the end. Courts will construe these clauses strictly if they are intended by the contracting parties. Since it was expressly stated, the courts will not second-guess the intents of the parties and strictly construe this clause.

Since the clause will be strictly construed by the courts, then this clause will be viewed as a condition precedent to payment. If the party can't fully perform by the prescribed dates, then the condition precedent to payment hasn't been satisfied. As such, Owens need not pay Carter the \$8,500 because the express condition of completing the construction by April 30 wasn't complied with. So Owens has a right to withhold payment because the condition wasn't satisfied as stated on the contract.

But to render the whole contract breached just because the time of the essence clause wasn't fully complied with will be too harsh on the breacher. Carter did tender substantial, if not full, performance by building the garage and the storage room. (The issues with the shingles and storeroom will be discussed separately in the next sections.) So the court may not strictly construe the time of the essence clause as an express condition. Instead, if the court construes the condition as a covenant instead, then Carter's failure to finish by April 30 will not be fatal.

Covenants are promises by the parties that they'll abide by them, and failure to do so will result in damages to the aggrieved party. If the time of the essence clause is not an express condition precedent to payment, then Owens' obligations to payment is not excused. He will only be able to claim dollar damages because Carter didn't comply with the covenant of the time of the essence clause.

B) Matching Shingles

The express terms of the contract have to be complied with by the parties because that reflects the parties' intent and their duties under the contract, since the contract expressly stated that the "shingles will be matched to Owens' home." Failure to do so will be a breach. The issue is whether the breach is a material one or a minor one.

In a minor breach, the aggrieved party is not excused from full performance of her duties. So Owen[s] should still pay the contract price to Carter minus the costs of the minor breach if the

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matching shingles is indeed considered minor. But if the failure to put matching shingles onto Owens' garage is a material breach, then the aggrieved party is excused from payment.

The matching of the shingles to the house is probably a minor breach. Whether singles match or not does not affect the construction of a garage and a storeroom. This only goes to an aesthetic issue. It is also subjective whether Owens thinks the shingles match with the house or not. So the failure to match is not a material breach since the substantial part of the contract was not to put shingles on but rather to build a garage and a room.

Carter may even argue the singles matched and so there wasn't even a minor breach. But Owens will counter by saying the contract expressly asked that they match his home and since they don't "precisely" match, there's a breach. Albeit the discrepancy may be minor, but courts, again, will construe the contract as the intent of the contracting parties.

Another way to get around the problem of not getting precisely matching shingles and so having breached in a minor way would be the concept of excuse. Carter may assert he's excused by impracticability because the perfect shingles weren't obtainable with ease. But for impracticability to be a viable excuse, the burden must be so severe for compliance to render the compliance impracticable. Here, the burden to look harder for those matching shingles can't be severe. Although Carter did use better quality shingles, Owen[s] contracted for "matching," not "high quality" shingles. So Carter's assertion of impracticability to excuse his duty to get matching shingles can't prevail.

But Carter can assert that he's mitigated by using almost matching shingles. (Remedies section will discuss mitigation.)

C) Building of a Garage and Storeroom as Specified

Once again, the contract expressly stated duties and term for Carter to perform and abide by. So Carter's failure to comply will be a breach.

These breaches have a stronger argument to be material ones because the contract's essence is to build a garage and storeroom in a specified dimension. Since the contract expressly required Carter to build them in a certain size, the intent of Owen[s] was clear. So Carter's failure to perform as instructed will be a material breach because the dimensions of the garage and storeroom didn't follow the contract as stated.

As such, Owen[s] can be excused from performing because it's a material breach. However, if it's a minor breach, then the court will still require Owen[s] to pay Carter.

The failure to comply with the exact dimensions could be viewed as a minor breach because the garage and storeroom were completely built as directed with the design, materials, and overall dimensions roughly. The deviation from the dimensions are 2 inches only. So the breach could be minor. Since normal cars would fit, the purpose of the contract is not frustrated because Carter still built a garage usable by cars. It's just that Owen[s] has peculiarly long cars

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that don't fit without the extra 2 inches. However, Owens didn't communicate this to Carter, so Carter's failure to take heed in ensuring the dimensions are at least 30' by 4' and 30' by 25' couldn't be Carter's fault. Therefore, Carter's failure to follow precise directions could possibly be viewed as a minor breach. Then he'll still be entitled to the contract price minus the cost of fixing the breach.

II. Breacher's Remedies

A) Material Breach

If the court construes all the aforementioned breaches as material breaches, then Owen[s] is permitted to withhold payment. Owen[s] can also get the cost of completing the garage and storeroom and the replacement of the shingles from Carter. Those are his expected damages and Carter will be liable for them

However, under restitution, it'll be unfair for Owen[s] to get the entire garage and storeroom without paying Carter anything. So restitution allows Carter to get back the benefit conferred onto Owen[s] so that an unjust enrichment of Owen[s] wouldn't result. Owen[s] should disgorge the costs of the garage and storeroom minus any costs he'll incur for fixing the material breaches. Since the contract price was for \$8,500 and Owens' cost of remedying the wall and shingles cost \$3000, Carter can get \$5,500 back on his restitution costs.

B) Minor Breach

If those breaches are minor, then Owen[s] should pay the \$8500 to Carter since he did substantially perform and his breaches weren't willful. A breacher can still collect the contract price because he substantially performed. However, Carter must pay Owen[s] the costs for remedying the shingles and the wall removal so the car will fit. But Carter will argue that he need not pay \$2,200 to Owen[s] because he substantially complied by providing better quality and closely matching shingles. Carter mitigated by using closely matching shingles. So Owen[s] needs to mitigate the damages from these non-matching shingles by not replacing them entirely. Carter should not be liable for the \$2,200 for replacing all the shingles.

C) Specific Performance

Generally, courts are reluctant to grant specific performances because personal services contract[s] are hard to administer and will be imposing involuntary solitude. So if Owen[s] asked for specific performance by Carter to redo the garage and the replacement of the shingles, such a remedy will not be granted. Most important reason is that there is an adequate legal remedy in making Owen[s] whole. So specific performance will not be something Carter needs to do for his breaches.

ANSWER B

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Owens (O) and Carter (C) entered into a valid construction contract, to which the common law of contracts applies. The determination of C's rights and liabilities depends upon an analysis of his performance of the terms of the contract and any breach thereof.

At common law, the duty to perform may be discharged by exact performance of the terms of the contract. A performance which does not conform to the terms of the contract does not discharge the duty and is a breach of the contract. A breach may either be minor or material. A material breach is one that so substantially affects the value of the contract (or the benefit of the bargain) that the duty to pay the contract price is discharged, while a minor breach occurs when substantial performance has been rendered. In the event of a material breach, the breaching party may not recover under the contract but may recover any benefit bestowed under quasi-contract (or quantum meruit) principles. For minor breaches, the breaching party may receive the contract price, less the amount by which the defective performance reduced the bargained-for benefit.

1. Breach of the "time is of the essence" clause

A "time is of the essence" clause serves to notify the parties that a failure to render performance by the specified date is a breach of a contractual term and may entitle the promisee to damages.

Here, C breached the time is of the essence clause, because he finished performance ten days late. There is no showing that this caused any actual damages and so O's remedy would be limited to nominal damages. Carter's liability for this (minor) breach is negligible.

2. Failure to use matching shingles

C has an argument that he did not breach the relevant term at all. It is unclear from the contract whether the term "matched" means: a) the siding, paint and roof on the garage shall be constructed from precisely the same materials as the corresponding pieces on the house; or b) the siding, paint and roof shall be of reasonably similar materials so that, as a totality, the house and garage match (to a reasonable person or even to O's satisfaction). If customarily in construction contracts it means the latter, C will prevail, in the absence of contrary evidence of the parties' intentions. O could have (but did not) specifically bargain for exactly matching shingles. (It might have been wise to ask or notify O about the non-match earlier, though.)

Assuming that C loses the above argument on interpretation, he has failed to perform exactly and thus has breached. This breach does not go to the value of the bargained-for consideration - the roof is otherwise a perfectly good roof (and may be superior to the one bargained for!). O will not be able to obtain the cost of removal and replacement, but will only recover the difference in value, if any. Again, C may be liable only for nominal damages.

3. Failure to build the dividing wall

C's failure to put the wall in the right place is a more serious issue, because that failure does go to the suitability of the garage for O's intended use (i.e., to the value of the bargained-for

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benefit). However, the cost of correcting this problem is less than 10% of the total contract price. This is likely to be considered a minor breach as well, with damages of \$800.

C may file suit against O for \$7,800; i.e., the contract price of \$8,500 less the \$800 to relocate the dividing wall. Unfortunately, the time of essence clause has the effect of cutting off the time of performance allotted to C, so C cannot correct his mistake and sue for the entire contract price.