

## EMPIRE COLLEGE SCHOOL OF LAW

Remedies: Spring 2013 Final Exam

Issue Outline/Summary Answer

(Professor Shiver)

### QUESTION NUMBER ONE:

[NOTE: This essay question is a close adaption of Question No.5 on the July 2007 California Bar Examination. The Committee of Bar Examiners selects two (2) actual answers from the Bar Exam involved, which received “clear pass” grades, as being illustrative of good to very good answers. The two “selected answers” for Question No. 5 on the July 2007 Bar Exam are **presently** “on line” at the State Bar website. However, the State Bar Admissions Office periodically “pulls down” older selected answers from its website and the selected answers here in question appear to be next in order for removal. When removed, copies of the sample answers (and removed questions) can be ordered from the Admissions Office, for a fee if you wish.]

Can P obtain specific performance of S’s agreement to sell her the selected Monay?

1. The alleged contract in question will be governed by applicable provisions of the Uniform Commercial Code (“UCC”) because it is an agreement for the sale of goods. (However, UCC provisions only applicable to contracts between merchants would be inapplicable, because S is not (yet) a “merchant” dealing in fine art.)

2. Specific performance, an equitable remedy, requires (a) a valid contract, (b) with definite and certain terms, (c) with necessary conditions satisfied or readily amenable to same, (d) with no adequate remedy at law for its breach, (e) mutuality in enforcement, and (f) no viable equitable defenses to its enforcement, such as waiver, laches or unclean hands.

3. A valid contract requires a valid offer and acceptance, consideration, and certain and definite terms. Here a valid contract was likely formed whereby S agreed to sell P whichever of the three Monay original “the Pond” paintings P selected when the time came, for a price of \$200,000. Consideration is present: S’s legal detriment is giving up possession of a rare and valuable painting; P’s detriment is the payment of money.

4. The possible bar (defense) of the Statute of Frauds (“SOF”) : here the S-P contract was oral, and for a sale of goods for a price more than \$500; thus its enforcement could be barred by the SOF, unless there is an exception to its application.

a. Full performance by a party (or, “part performance” of the contract overall) can be an exception to SOF application. P would argue she fully performed her side of the bargain by selecting the one “the Pond” painting, and transferring the purchase price money into S’s bank account. However under the UCC “full performance” to satisfy the SOF usually requires the delivery of the goods involved, not just mere tender of payment. Thus “performance” excusing the SOL is probably insufficient.

b. In an appropriate case a party may be estopped to assert the SOL, where one party detrimentally relied on the (estopped) other party's promise (to sell the selected Monay painting.) P would argue her "detriment" to be that she promised the Museum to deliver the painting and failure to perform could seriously injure her budding career.

However the SOL application is clear here and P's estoppel argument depends on a number of inferences, so P may not be able to avoid application of the SOL.

5. The terms of the agreement to sell the painting are sufficiently certain. S may argue the terms are uncertain because there was not an agreement on the exact Monay painting to be sold. But under the UCC, where, as here, the price is agreed to, other terms may be expected to be agreed to in good faith. And, here, lack of specificity in designation of a specific painting is not fatal as the four paintings are in a series by the same painter and appear to be equal in value.

6. Satisfaction of conditions: P will argue that she met this requirement by making payment of the agreed price, and designating the particular painting. S will argue that she declined to complete the sale before P designated the selected painting. If so, S cannot assert her own prevention of a condition occurring to comprise failure of a material condition of the contract. The fact that P did tell S is shown by S's writing of "refund on 1<sup>st</sup> of Monay Pond series" on her certified check tendered to P.

7. Inadequate remedy at law (damages for breach on the contract to sell a Monay painting); applies where the subject is real estate, or unique goods. Here the valuable and unique Monay painting (any of the four) which are "rare" and only "held by private collectors" and had not "been on the market in recent years" should satisfy this basic requirement for equitable relief.

8. Uncertainty in damages: P would have difficulty in establishing "certainty" due to her new advent into her profession; and, the damages she would suffer by her inability to "deliver" of her first fine art venture would be very speculative. Courts are leery of awarding new businesses "future lost earnings" as being too speculative

9. Feasibility of enforcement of an equitable decree: the enforcement of the P-S contract would be simple to oversee; by S's delivery of the painting to P, and P's payment of the purchase price to S.

10. Mutuality: it is arguable that S might not obtain specific performance against P because she would have a ready "legal" remedy: her lost profits on the sale. However courts award specific performance despite lack of absolute mutuality if it is clear, as here, that the plaintiff (P) will perform.

11. Defenses:

a. Unclear Hands (UH): the equitable maxim for this defense is that the court will not use equity to aid a party with “unclean hands” in the transaction. Here S will argue that by making S believe that she was a “private buyer” knowing that S did not want to sell one of the Monay paintings to someone (such as the Museum) other than a private buyer, P acted with “unclean hands.” P will respond that she had a duty of confidentiality to her client (the Museum) not to reveal its involvement; and, that S did not make it an express condition of its contract that P could not be acting for any buyer other than a “private” one. If the museum’s directive to P of strict confidentiality is established, likely the defense of UH will not apply.

b. P did not have a duty to S to correct S’s possible misunderstanding about the eventual owner of the Monay painting, and thus P’s “nondisclosure” here of that fact does not comprise misrepresentation.

c. Unilateral mistake: S will argue that P knew from S’s statements to her that S only wanted a private collector to own the Monay painting. As P knew S’s intent, P knew that S was mistaken about the eventual owner of the painting; however, P will argue that S’s mistake was not material of their agreement, since S never made such ownership limitation an express term of their agreement.

However, the court may find that there was a unilateral material mistake by S, which was known by and taken advantage of by P (through her silence), denying equitable relief to P on the grounds of unilateral mistake

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**QUESTION NUMBER TWO**

1. May P recover attorney's fees for a successful defense of the "civil rights" action filed by Zeelot's church.
2. Is there a nuisance involved here? If so, is it a public or private one? Will equity enjoin either type of nuisance?
3. What is the standard procedure (standards) for obtaining a preliminary injunction?
  - a. Is a prohibitory injunction available to P?
4. Is a Temporary Restraining Order (TRO) available to P?
  - a. What are the standards for obtaining a TRO?
5. Is a bond required for a TRO? For a preliminary injunction? In what amount?
6. Should a permanent injunction be issued? Should it be modified, and if so, why?
7. What damages in any are recoverable for any "nuisance" involved here?
8. If attorney's fees are awarded, should they be apportioned, and if so, how?
9. Should any prejudgment interest be awarded, and if so, why?

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**QUESTION NUMBER THREE**

1. What are the damages recoverable here for Dev based on Catz' breach of the earthmoving machines conversion contract? Can Dev recover any expectancy damages, and if so on what bases?
2. Is Catz liable to Dev for \$3,000,000 worth of lost work? On what bases?
  - a. If Catz is liable for Dev's loss of work damages, to what extent if not \$3,000,000?
3. To what damage offsets, if any, is Catz entitled to, and in each instance, why?
4. May Dev obtain specific performance relief against Catz? To do so, what showings must Dev make?
5. If specific performance is awarded to Dev, is Dev also entitled to any incidental and/or consequential damages? If so, on what bases.
6. Is constructive trust relief available to Dev? If so, on what bases?
7. Is Dev entitled to an equitable lien? If so, on what bases, and upon what property?
8. If Dev obtains a judgment against Catz, is Dev entitled to prejudgment interest; and, if so, on what bases?