

REMEDIES
Professor Nilsson, Spring 2022

Instructions:

There are 3 questions in the examination.

Each question is weighted equally.

You will be given 3 hours to complete the examination.

QUESTION ONE

KCCL recently opened a 2-story multi-use office building, which KCCL contracted with PorQual to build. Shortly after completion, brick masonry on the building has developed cracks, and some bricks have fallen to the sidewalk below creating a danger to pedestrians. The rest of the building is structurally sound, although rather unsightly.

The bricks were laid by PorQual's employees using PorQual's equipment, and the work was monitored by a PorQual project supervisor. The project supervisor was an unpaid volunteer working under a written contract requiring that he indemnify PorQual for any negligent workmanship, and included the following provision:

"Project Supervisor agrees to pay PorQual \$100,000 as a predetermined sum as damages for failure to perform under the contract."

The cracks were caused by the negligent workmanship of PorQual's employees.

It will cost \$300,000 to repair the masonry so that the bricks will not fall and another \$200,000 to remedy the unsightliness.

On what theory or theories, if any, may KCCL sue PorQual and what damages should it recover? Discuss.

Assuming Unlucky tripped over one of the fallen bricks, and liability is uncontested, what are the types of damages Unlucky might recover?

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QUESTION TWO

John Dutton and Dan Jenkins entered into a valid written contract whereby (1) Dutton agreed to convey to Jenkins 100 acres of undeveloped land, which included the water rights to a stream that flows into and through the property, and (2) Jenkins agreed to pay Dutton \$10,000,000. During negotiations, Dutton said, "This property has been in my family for generations. I promised my father that this property will remain undeveloped." Jenkins replied, "It is gorgeous land. I can certainly understand your feelings." In fact, Jenkins intended to develop the land into a resort and golf community.

The conveyance was to take place on May 1. On April 15, Dutton called Jenkins and told him the deal was off. Dutton said that a third party, Chief Thomas Rainwater, had offered Dutton \$13,000,000 for the land. Dutton also said that he had learned that Jenkins intended to develop the land.

On April 16, Jenkins discovered that Dutton only holds title to 90 of the 100 acres that was part of the contract, and that Dutton does not have water rights in the adjacent stream.

Jenkins still wishes to purchase the property. However, it will cost him \$1,500,000 to purchase the water rights from the true owner of those rights.

Assume that Dutton, the seller, breached a valid written contract. What are the equitable and contractual remedies Jenkins, the buyer, should seek?

What defenses could Dutton assert, and what is the likely outcome on each?

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QUESTION THREE

The Fabulous Company has operated a compost facility within Zone A of Kern County for the past six years. A major portion of Fabulous Company's operations involves crushing pistachio shells, which produces considerable noise and dust. The County's zoning ordinance permits a compost facility to operate in Zone A. Last year, several residential subdivisions were developed and occupied inside Zone A. The nearest of which is located $\frac{1}{2}$ mile from the Fabulous compost facility.

Residents of the new subdivisions are concerned because Fabulous trucks regularly haul toxic chemicals from its offsite warehouse to the compost facility on a regular basis. The only reasonable route to the compost facility is on a street bordering the residential subdivisions. Recently, a strong wind blew some of the chemical into the air. No one received any personal injuries, but the wind-blown chemicals stained four of the homeowners' roofs, and two homeowners had pets die as a result.

Despite urging by several of the residents, the County has not yet brought suit against Fabulous Company. Goh, one of those who urged action by the County and whose roof was stained by the chemicals blown by the wind, has sued Fabulous seeking damages and equitable relief.

What are Goh's rights and remedies, if any? Discuss.
Briefly, what is the measure of damages for the lost pets?

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Bonus Question

Question 4

You were asked to prepare and circulate case briefs and outlines over the course of the semester. This is an opportunity to reward excellent work from your classmates with respect to their performance in those assignments. Please indicate a score for each student (including yourself) taking into account whether the student's efforts reflected going above and beyond, doing just enough to satisfy the assignments, or failing to contribute in a meaningful way. This is not a significant part of the grading process, but can reward students for extraordinary efforts.

	1 Not significantly helpful	2 Slightly less helpful than average	3 Average	4 More helpful than average	5 Extremely helpful
Amanda					
Lori					
Nick					
Nikki					

The responses to this question will be circulated separately from the Final Exam to avoid any inadvertent disclosure of the exam taker's identity.

It was a pleasure getting to know you this semester. I have no doubt you will each be successful attorneys and I wish you each the best in your legal careers.

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QUESTION ONE

RESPONSE OUTLINE (QUESTION ONE)

Contract Remedies

Express Contract

KCCL entered into a contract with PorQual to build the office building. Although PorQual performed by completing the office building, it was not built properly and thus PorQual breached its contract by failing to build a structurally sound building.

Breach of Contract

PorQual's breach, however, will be deemed minor as KCCL received the benefit of its bargain. PorQual did build the multimillion-dollar building, despite its defective performance. Assuming that KCCL paid for PorQual's work, KCCL is entitled to obtain its remedy for breach.

Contract Remedies/Construction Contracts

Compensatory Damages

If a builder has substantially performed, damages are measured by:

- 1) cost of repair or replacement or
- 2) difference in value of the building as built and its value as if it had been constructed under the contract specifications.

Restitutionary Remedies

Restitution is not available to the owner.

Specific Performance

Under the modern view, specific performance is granted when there is no adequate remedy at law.

Unenforceable **Personal Services Contract**; Servitude.

Unenforceable **LD Provisions**; Penalty.

Tort Remedies

Compensatory Damages

KCCL should receive compensatory damages for the \$300,000 in masonry work needed to repair the structure. \$200,000 for "unsightliness" should be awarded only if caused by Mason's negligence.

PorQual's failure to supervise caused property loss.

KCCL's tort remedies would be the same as in its contracts action, and it would receive

\$300,000 for PorQual's negligence. If foreseeable, it would also receive \$200,000 to eliminate the "unsightly" appearance of the building, if caused by PorQual's negligence.

Defenses

No applicable defenses.

Unlucky's Damages

Actual Damages: Compensatory damages that seek to put plaintiff back where he was before the tort. Actual damages in tort look to the past.

Nominal Damages: A small amount of money available when no actual damages can be proved.

Punitive damages: Damages to punish and deter. They do not compensate for actual injury suffered by the plaintiff. Must be some proportionality between actual or nominal damages and punitive damages. Can consider defendants wealth.

Legal remedies would be adequate so no equitable remedies.

RESPONSE OUTLINE (QUESTION TWO)

Equitable Remedies

Specific Performance

Specific performance is a mandatory decree that orders a contracting party to perform; in order to apply, there must be a contract between the parties. Here, there is a valid written contract between Dutton and Jenkins.

Inadequacy of Legal Remedy

Specific performance may be ordered only if the legal remedy is inadequate; land is deemed unique, so money damages would be inadequate.

Definite and Certain

The contract between Dutton and Jenkins is definite and certain since the court can easily determine what each party needs to do to perform their obligations.

Feasibility of Enforcement

The court can easily supervise performance, since it can order Dutton to convey title to Jenkins. It can be assumed that the land is within the court's territorial jurisdiction.

Mutuality of Remedy/Performance

Jenkins appears to be ready and able to perform by paying Dutton \$100,000,000 and thus mutuality of performance exists.

The court should grant Jenkins's request for specific performance unless Dutton is able to successfully assert a defense.

Equitable Defenses

Unclean Hands

Dutton may argue that Jenkins has unclean hands because he did not disclose the true purpose for which he purchased the property. To prevail, Dutton must show that Jenkins is guilty of misconduct concerning the contract.

Misrepresentation or Concealment

Specific performance will be denied when misrepresentation or concealment is used to obtain a party's assent to the contract. However, here Jenkins did not affirmatively misrepresent his intentions to develop the property. He just did not overtly disclose his true intentions.

Equitable Conversion

Dutton may argue that a sale by the seller to a bona fide purchaser cuts off the buyer's right to equitable conversion, because the buyer is considered the equitable owner until title is conveyed. However, because Dutton has not yet conveyed title to Thomas, he will lose on this issue.

Dutton's defenses will likely fail, so Jenkins will be entitled to specific performance, including the value of the bargained-for water rights.

Legal Remedies

Since Jenkins wishes to purchase the property, legal remedies are inferior to specific performance, but they should be discussed nonetheless.

Abatement

The court may abate the purchase price of the contract to reflect the 10 acres and water rights that Dutton did not own. Jenkins agreed to pay \$10,000,000 for 100 acres, Dutton only owned 90 acres. The \$10,000,000 purchase price should be reduced by \$1,000,000 to reflect the 90 acres actually owned by Dutton (90 instead of 100).

The purchase price should also be reduced to reflect the value of the water rights Jenkins contracted to purchase (but which Dutton does not own). This can be determined by the amount Jenkins must now spend to acquire the water rights.

Damages for Seller's Breach

Damages must be definite and certain, foreseeable, unavoidable and caused by the breach.

Where the buyer sues for breach of a land sale contract, the buyer's damages can be measured by:

1. Out-of-pocket loss under common law.
 - a. e.g., down payment, cost of title searches and escrow expenses. Jenkins will only recover any costs he has actually expended in furtherance of the contract.
2. Benefit-of-the-bargain under modern rules.
 - a. the difference between the market price and the contract price.
 - i. If the \$13,000,000 Thomas offered reflects the fair market value of the property, Jenkins could recover \$3,000,000, plus any incidental expenses.

Contract Defenses

Dutton may also attempt to rescission or contract reformation, both of which will likely fail.

Rescission

If the seller or buyer is guilty of fraudulently inducing the contract, the other may rescind the contract.

Reformation

An innocent or fraudulent misrepresentation is grounds for reformation of the contract.

Breach of Contract Issues

Breach of contract should be assumed, but students may show an understanding of **anticipatory repudiation**:

Words or conduct of the promisor which unequivocally indicate she cannot or will not perform entitles the non-breaching party to 1) treat the anticipatory repudiation as a breach and sue; 2) suspend performance and wait to sue on the date of performance; 3) treat the repudiation as a rescission; or 4) ignore the repudiation and urge the promisor to perform. Here Dutton has unequivocally stated his refusal to perform, and thus anticipatory repudiation can be assumed.

and the **Parol Evidence Rule:**

Where the parties express their agreement in a final writing, other written or oral expressions, made prior to or contemporaneously with the writing, are inadmissible to vary the terms of the writing.

RESPONSE OUTLINE (QUESTION THREE)

Nuisance

Public Nuisance

An act that unreasonably interferes with the health, safety, or property rights of the community. Recovery is available for public nuisance only if a private party has suffered some unique damage not suffered by the public at large. Goh, as a private individual, must prove special injury because the County has not acted. Goh will have no difficulty proving this element, as her roof was damaged by the chemicals from Fabulous' compost facility and thus suffered a unique damage not experienced by other members of the public.

Private Nuisance

A substantial, unreasonable interference with another private individual's use or enjoyment of property. The interference must be offensive, inconvenient or annoying to an average person in the community. Here, Fabulous Company is interfering with Goh's use of her land in the following ways: 1) noise and dust, 2) toxic chemicals, and 3) property damage.

Balancing the Hardships

The court will weigh the utility of Fabulous Company's activities against the harm to the homeowners. Balance the economic hardship be if the compost facility were ordered closed along with the importance of composting to the community, against the actual harm caused to the homeowners.

Number of workers affected? Is activity "vital" to the community?

Burden on the nearby community (health and well-being)?

Consider other alternatives, such as building a new route so that the chemicals hauled by the trucks no longer endanger the nearby residential community. Under the circumstances, an alternative that would allow the continued operation while reducing any danger to the community should be strongly favored by the court.

Because Goh's enjoyment and use of her land was affected by the toxic chemicals from the company trucks/chemicals, and Goh suffered property damage to her roof, she will likely prevail under either a public or private nuisance theory.

Defenses to Nuisance

Zoning Ordinance

Zoning ordinance violations may be evidence of nuisance.

The zoning ordinance which permits the operation of the compost facility may be strong evidence rebutting Goh's nuisance claim. Goh and the other homeowners clearly had notice of the company's activities and should have considered that fact before moving into Zone A.

Coming to the Nuisance

The company may attempt to defend on the grounds that Goh and the other homeowners came to the nuisance. Normally, the fact that the alleged nuisance existed before the plaintiff moved onto the land is not a defense to a nuisance action. However, the plaintiff may be required to pay costs of moving defendant's

activities elsewhere. Under this rule, Goh may be liable for the cost of relocating the company's facilities because the neighboring residences were built six years after the compost facility was constructed.

Due to the danger of the company's activities to the community, these defenses will likely be rejected and Goh will prevail on both a public and private nuisance theory – especially with a reasonable alternative to mitigate the risk to the homeowners.

Legal Remedies

Monetary Damages

Usual remedy is damages.

Goh may seek compensatory damages for the damage to her roof and use and enjoyment of her land. The standard measure for a continuing nuisance includes the value of the loss and enjoyment of the land and any costs of abating the nuisance and damages suffered by the residents resulting from the nuisance. If Fabulous' activities are deemed a permanent nuisance, incapable of being abated, Goh may also obtain damages measured by the permanent diminution in the value of her land. Goh would successfully argue the nuisance is continuous because of the threat of future harm.

Injunctive Relief

Inadequate Legal Remedy

Continuing nuisance/unique nature of land; danger of multiple suits by homeowners.

Because the activities constitute a continuing nuisance and affect land, a unique chattel, damages are inadequate. Chemical scattering may continue to endanger the residents. Furthermore, injunctive relief will avoid multiple suits by the homeowners or multiple suits by a single homeowner for multiple wrongs.

Property Right

A property right is at issue because damage to land is involved.

Feasibility

The court may order a negative injunction, forcing the company to cease its activities, and thus the requirement of feasibility is met.

Balancing the Hardships

Weighing the company's economic survival against the community's health, safety and property concerns, and the danger created by potentially toxic chemicals favor injunctive relief. The court should consider any alternatives available to Fabulous that would make their activities safer.

Goh will likely obtain injunctive relief.

Defenses to Injunction

As stated above. None likely to prevail.

Damages for Pets

Market value, although students may argue sentimental value or special circumstances (like service animals).

1)

1) KCCL's Legal Tort Remedies

KCCL likely has a claim for both tort and contract injuries. There are both legal (monetary) and equitable remedies (non-monetary). Legal remedies consist of compensatory, which may be special or general damages, punitive, nominal, attorneys fees, and possibly restitution, if applicable. Special damages are more calculable such as for doctor's bills or unpaid wages. Whereas, general damages are associated with pain and suffering, emotional distress, etc.

Compensatory Damages

Compensatory damages are awarded to plaintiff to put them back into the position they were in prior to the injury. Compensatory damages must be foreseeable, unavoidable, the injury must have been caused by the tortfeasor's negligence, and damages must be certain.

Foreseeable

Foreseeability requires that the harm cause was reasonably foreseeable under the circumstances. Since bricks had begun to fall onto the sidewalk it may be argued that the injury was foreseeable since KCCL would need to fix the issue.

Unavoidable

Unavoidably centers around whether the injury was avoidable both by the tortfeasor and potentially the plaintiff. KCCL may have avoided some of their injury if they had employed their own project manager to oversee the project. Here, the facts do not indicate that KCCL had any inclination that the work was faulty. Thus, the injury was likely unavoidable.

Causation

Whether the injury was caused by the Defendant's negligence. Here, KCCL can trace their injury (having to correct the faulty work) back to PorQual. Thus, the causation element appears to be satisfied.

Certain

The damages are certain. KCCL apparently has already received bids to correct both the brick issue and the unsightliness issue. Their repair costs will be \$500,000. Therefore, the element of certainty has been satisfied.

Thus, KCCL should be able to recover compensatory damages.

✓ **Collateral Source Rule**

Third party payments to the plaintiff are not deductible from the damages owed by the tortfeasor. If KCCL required PorQual to obtain a bond on this project, KCCL may be able to file against that bond for damages. Furthermore, if the bond paid out the amount received by KCCL would be in addition to any other damages recovered. *generally, but California rule is different*

Incidental Damages

Since KCCL may need to shut down while the corrective work is completed, there may be some incidental damages owed to KCCL. They can claim it, but unless they can prove some out-of-pocket expense, they may not be likely to recover.

Punitive Damages

Punitive damages may be awarded to punish the tortfeasor and deter them from future misconduct. Here, KCCL could seek punitive damages against PorQual to deter their use of shotty craftsmanship in the future.

*standard?
likely to recover?*

*Liquidated
Damages?*

2) Unlucky's Legal Remedies

There are both legal (monetary) and equitable remedies (non-monetary). Legal remedies consist of compensatory, which may be special or general damages, punitive, nominal, attorneys fees, and possibly restitution, if applicable. Special damages are more calculable

*Specific
Performance?
Restitution?*

such as for doctor's bills or unpaid wages. Whereas, general damages are associated with pain and suffering, emotional distress, etc.

Compensatory Damages

Compensatory damages are awarded to plaintiff to put them back into the position they were in prior to the injury. Compensatory damages must be foreseeable, unavoidable, the injury must have been caused by the tortfeasor's negligence, and damages must be certain.

Special Damages - Unlucky could potentially claim special damages for his doctor's bills and lost wages, if any, for the time he was out of work.

General Damages - Unlucky could potentially claim general damages for pain and suffering. It's a long shot, but certainly worth the try.

Foreseeable

Foreseeability requires that the harm cause was reasonably foreseeable under the circumstances. Since bricks had begun to fall onto the sidewalk it may be argued that the injury was foreseeable. Although the bricks started falling shortly after completion of the project, the facts do not indicate whether PorQual was still on site for walk throughs, etc. However, assuming PorQual had already left the site KCCL should have noticed the fallen bricks and attempt to mitigate any potential injuries due to the bricks falling from their building. Unlucky should file suit against both KCCL and PorQual because the the danger was foreseeable.

Unavoidable

Unavoidably centers around whether the injury was avoidable both by the tortfeasor and potentially the plaintiff. The issue was avoidable if PorQual had used decent materials and a brick mason that knew what they were doing. KCCL may also have avoided this situation by reviewing the project history of PorQual to make sure they had no previous issues on other projects. Conversely, Unlucky may be partially responsible for his injury if the Defendants' can prove that he was also negligent while walking along the sidewalk, such as whether he was talking on the phone or distracted in some manner where he was not paying attention to his surroundings.

Causation

Whether the injury was caused by the Defendant's negligence. The cause of Unlucky's injury can be directly traced to the tortfeasor's (PorQual's) negligence. However, the issue becomes more speculative with regard to KCCL's role in the cause of the injury.

Certainty

Whether the damages are certain and not speculative. Unlucky may claim special damages due to any doctor's bills, lost wages, possibly lost future wages and future medical bills for physical therapy if required. However, the facts do not specify the type of injury, severity of the injury, what type of work Unlucky performs, or whether he is even employed. If Unlucky simply tripped and sprained his ankle he would likely recover far less damages than if he severely injured his leg, back, etc. Depending on the extent of the injury the damages could be calculated with some sense of certainty.

As to PorQual - Since all of the elements are met, Unlucky could likely recover compensatory damages.

As to KCCL - Because the causation is too speculative, Unlucky will unlikely be able to recover compensatory damages from KCCL.

Collateral Source Rule

Third party payments to the plaintiff are not deductible from the damages owed by the tortfeasor. Assuming that PorQual's insurance pays Unlucky's medical bills, they may try to request that the court deduct the amount of damages based on what the insurance company paid out to Unlucky. Under the collateral source rule this cannot happen.

Punitive Damages

Punitive damages may be awarded to punish the tortfeasor and deter them from future misconduct. Here, Unlucky could seek punitive damages against PorQual to deter their use of shotty craftsmanship in the future. However, they are unlikely to recover punitive damages from KCCL.

Unlucky could likely recover punitive damages against PorQual.

Attorney's Fees

Attorney's fees may be awarded to the prevailing party. Here, it is likely that Unlucky will prevail in court since the liability is uncontested. Therefore, Unlucky will likely recover his attorney's fees.

Nominal Damages

Nominal damages may be awarded to validate an uninjured party. Since Unlucky was injured nominal damages would not be appropriate.

2)

Jenkins v. Dutton

Here the parties entered into a valid written contract. In fact, the facts explicitly state to assume that Dutton, the seller, breached a valid written contract. Thus, the damages and remedies will focus on contracts, not torts.

Anticipatory Repudiation

Dutton called off the contract just about 15 days before the conveyance of the property under the contract was supposed to take place. This calling off by Dutton is an anticipatory repudiation and Dutton may be held liable for damages to Jenkins.

Legal Remedies - Contracts

Legal remedies are used in order to put the Plaintiff in a position he or she would have been in if the wrongful act or injury had not occurred or if the contract was performed correctly. Legal remedies look to the injury to the plaintiff. The current problem deals with a breach of contract.

Compensatory Damages

Compensatory damages aim at putting a plaintiff in the position he or she would not have been in if the wrongful act or injury had not occurred. Compensatory damages has 4 requirements that must be met. These include: (i) causation; (ii) foreseeability; (iii) unavailability; and (iv) certainty.

(i) causation

But for Dutton's calling off the contract, the contract would not have been breach and Jenkins would have gotten his property. This element is met.

(ii) foreseeability - at contract formation

A reasonable person would foresee that calling off an already made contract is likely to injure a plaintiff, as happened her. This element is met.

(iii) unavailability

The plaintiff must have taken steps to mitigate her harm or not been able to. Here, there was no way for Jenkins to be able to mitigate. Thus, this element is met.

(iv) certainty

Considering this is a contract that was breach, the damages are certain since the contract is clear and definite.

Thus, Jenkins may be entitled to compensatory damages. ... such as?

Expectancy Damages

*Benefit of the bargain
Fair market price v. K price*

Expectancy Damages aim to place the plaintiff in a position that he/she would be in if the contract had been fully performed. These damages are what was expected of the contract.

The facts do not indicate that Jenkins has paid anything for the contract yet, thus expectancy damages are unlikely.

- Abatement?

Nominal Damages

Nominal Damages are awarded if a plaintiff did not sustain any actual injury/harm.

If the court finds that Jenkins did not sustain any actual injury/harm, he may recover nominal damages. However, there was a breach of contract so this is not so likely.

K defenses

Restitutionary Remedies - Contracts

Restitutionary Damages

Restitutionary remedies look to the benefit of the defendant. The remedies aim to avoid unjust enrichment by the defendant. The court will look to whether or not there was a breach of contract or a void contract. Here there appears to be a breach of contract. If Dutton has been unjustly enriched as a result of the breach, then Jenkins may recover under restitutionary damages. The contract entered into between Jenkins and Dutton allowed for the sale of Dutton's property to Jenkins for \$10,000,000. This property was 100 acres of undeveloped land, which included water rights to a stream that flows into and through the property. Prior to the conveyance, Dutton called off the deal and offered it to a 3rd party for \$13,000,000. Jenkins later discovered that the water rights were not that of Dutton and Jenkins would have to pay an extra \$1,500,000. Further Dutton only owned 90 of those 100 acres. Thus, there has been a misrepresentation by Dutton. Jenkins will argue that if Dutton sells the property to the third party he will be unjustly enriched because he does not own all of that property and it is not worth the extra 3 million.

Equitable Remedies - Contracts

Specific Performance

Specific performance requires one party to perform their end of the contract. In order for specific performance to be ordered by the court, the following requirements must be met: (i) inadequate legal remedy; (ii) a valid contract; (iii) mutuality of remedies; (iv) feasibility; and (v) no defenses. Here, it is likely Jenkins will want specific performance since the facts indicates that he still wishes to purchase the property despite the misrepresentations by Dutton. Further, it is important to note that a buyer may still buy a property if they choose, despite major or minor defects.

(i) Inadequate legal remedy

Here, there appears to be an inadequate legal remedy because the property appears to be unique. There is 100 acres of undeveloped land that has water running through it. These types of property do not go up for sale very often, which makes it unique.

(ii) Valid contract

The valid contract must contain clear and definite terms. Here the contract is deemed valid by the facts, also there are clear and definite terms. Dutton agreed to convey to Jenkins 100 acres of undeveloped land which included water rights to a stream that flows into and through the property and Jenkins agreed to pay Dutton \$100,000 for the land.

This element is met.

(iii) Mutuality

Mutuality occurs if both parties are capable of performance of the contract. Here, Dutton is ready to sell his property and Jenkins has offered to buy the property. Thus, mutuality is met.

(iv) Feasibility

The purchase and sale of a property does not take supervision by the court that extends over a long period of time. Thus, this element is met.

(v) No defenses

The defenses to specific performance include: unclean hands, impossibility, laches, misrepresentation, mistake, etc. Here, Dutton may try to assert impossibility and unclean hands but he is likely to fail. *Equitable Conversion*

Impossibility and Unconscionable

Dutton will argue that performance of the contract by him is both impossible and unconscionable considering he does not actually own all 100 acres and the water rights, thus he cannot sell these to Jenkins. However, Jenkins will rebut that by stating that he now knows that Dutton only owns 90 of the 100 acres and not the water rights but he still wishes to pursue the purchase anyways. Thus, these defenses are likely to fail.

Unclean hands

Unclean hands occurs when the plaintiff's wrongful act has to do with contract. Here, Dutton will argue that Jenkins entered into that contract knowing that he was going to develop the land into a resort and golf community despite Dutton's mention of keeping the land undeveloped. However, this argument is likely to fail because the contract did not have a term demanding that the land be kept undeveloped. Rather, Dutton just said that the property has been kept for generations and his promise to his father was that the land would remain undeveloped. Thus, Dutton will not succeed in his defense of unclean hands.

Misrepresentation

Dutton will also claim misrepresentation by Jenkins for the same reason he claims unclean hands and this will likely fail.

As all of the elements appear to be met for specific performance, and there are no defense that will suffice, the court will likely rule that Dutton must specifically perform the contract subject to the court reforming the contract to reflect the accurate land as detailed below.

Reformation

Reformation occurs when the court modifies an existing contract to reveal the clear intent of the parties.

Here, the contract will be reformed due to Dutton's misrepresentation of the accuracy of property. The court will likely reform the contract to include 90 acres instead of 100. The court will also remove the water rights from the contract.

Defenses to Reformation

Defenses to reformation include unclean hands and laches. Laches does not apply because there is no indication of Jenkins sitting on his rights. However, Dutton will likely argue unclean hands, see supra for rule and argument. Dutton will fail with this defense.

Note that Jenkins can argue to rescind the contract, however that is not discussed because the facts indicate that he would still like to purchase the property.

Injunctions

An injunction may be issued to prohibit somebody from doing something (prohibitory injunction) or demand that someone do something (mandatory injunction). There are three types of injunctions: Temporary Restraining Order, Preliminary Injunction, and Mandatory Injunction. A TRO is issued before a hearing and lasts 14 days with renewal one time for good cause. A Preliminary Injunction is issued after a hearing but before trial on the merits. The goal of both is to maintain the "status quo." A Permanent Injunction is issued after a final trial on the merits.

Temporary Restraining Order

A TRO is issued before a hearing and lasts 14 days with renewal one time for good cause. A TRO may be achieved via ex parte if there was a good cause attempt for notice. The requirements for a TRO include: (i) immediate irreparable harm; (ii) plaintiff's likelihood of success; (iii) a balancing of the hardships; (iv) notice/service; (v) a bond.

Jenkins will seek a TRO to prevent Dutton from selling the land to the third party. Immediate irreparable harm must be present and must show that the plaintiff will suffer immediate irreparable harm awaiting for a hearing. Immediate irreparable harm seems to be present because Dutton breached his contract between he and Jenkins and is about to sell the property to a third party when Jenkins had already entered into the contract for the purchase of the property. The harm is immediate because Dutton called off the sale about 15 days before the conveyance was to take place. Plaintiff has a high likelihood of success since plaintiff was not the party who breached the contract. In balancing the hardships, by not granting the TRO, Jenkins would lose out on the opportunity to buy this significant piece of land. It is rare that land becomes available to purchase that consists of nearly 100 acres. Also, Jenkins was in the contract and ready to perform. However, Dutton will argue that this makes him lose out on the extra \$3 million he will obtain from the third party. However, this argument is weak since Dutton misrepresented his property and the FMV is likely less than the third party's offer. Further Dutton also breached the contract. If there is proper

notice on Dutton and a bond posted by Jenkins, then Jenkins is likely to succeed with the TRO. Jenkins must post the bond so that in case of losing, Dutton gets reimbursed for his expenses for court.

It is important to note that if the TRO is granted, Jenkins will likely seek to renew it for good cause so that it may exceed the conveyance date and the property may be conveyed to him safely.

Preliminary Injunction

A preliminary injunction is issued after a hearing but before a trial on the merits. The requirements for a preliminary injunction include: (i) irreparable injury, (ii) plaintiff's likelihood of success on the merits, and (iii) a balancing of the hardships.

See supra under TRO for rules and analysis.

Thus, in the alternative, if Jenkins is not successful with the TRO, Jenkins will likely be successful with the preliminary injunction.

3)

Goh's rights and remedies

Legal Remedies - Torts

Legal remedies are used in order to put the Plaintiff in a position he or she would have been in if the wrongful act or injury had not occurred. Legal remedies look to the injury to the plaintiff. The current problem deals with the the nuisance caused by Fabulous Company.

Compensatory Damages

Compensatory damages aim at putting a plaintiff in the position he or she would not have been in if the wrongful act or injury had not occurred. Compensatory damages has 4 requirements that must be met. These include: (i) causation; (ii) foreseeability; (iii) unavailability; and (iv) certainty.

(i) Causation

But for Fabulous Company driving their trucks regularly with toxic chemicals on a street bordering the residential subdivisions, Goh's house would not have been damaged and a nuisance would not have occurred.

(ii) Foreseeability

The injury must have been foreseeable at the time of the wrongful act. Here, Fabulous Company driving trucks with toxic chemical in it past neighborhoods, it is foreseeable to the company that harm may occur to the surrounds. Thus, this element is met.

(iii) Unavailability

The plaintiff must have took steps, if available, to mitigate their damages. This injury was unavoidable to Goh because he could not move his house and he could not dictate where the trucks drove. Fabulous Company will argue that Goh came to the nuisance because the Company has been in the same spot conducting the same actions for 6 years and the neighborhood is fairly knew. However, coming to the nuisance is not a defense.

Thus, this element is met.

(iv) Certainty

The damages appear to be certain because there was damage done to Goh's roof and repair will be easily ascertainable as to the cost of repair.

Thus, it is likely that Goh will be able to recover under compensatory damages. Goh may also recover for the loss of use and enjoyment of his property since he is no longer to enjoy his property due to fear of damage to both him, his family, and the property. The fear is likely great since the chemicals are toxic and great harm can occur to him or his family if the toxic chemicals were to land on them instead of the roof of his house.

Nominal Damages

If the court were to find that Goh suffered no actual injury, then he may receive compensation via nominal damages.

Equitable Remedies - Tort

Public & Private Nuisance

Injunctions

An injunction may be issued to prohibit somebody from doing something (prohibitory injunction) or demand that someone do something (mandatory injunction). There are three types of injunctions: Temporary Restraining Order, Preliminary Injunction, and Mandatory Injunction. A TRO is issued before a hearing and lasts 14 days with renewal one time for good cause. A Preliminary Injunction is issued after a hearing but before trial on the merits. The goal of both is to maintain the "status quo." A Permanent Injunction is issued after a final trial on the merits.

Temporary Restraining Order

A TRO is issued before a hearing and lasts 14 days with renewal one time for good cause. A TRO may be achieved via ex parte if there was a good cause attempt for notice. The requirements for a TRO include: (i) immediate irreparable harm; (ii) plaintiff's likelihood of success; (iii) a balancing of the hardships; (iv) notice/service; (v) a bond.

Immediate irreparable harm must occur while awaiting a preliminary hearing. Here, Goh will likely seek an injunction to prohibit Fabulous Company from taking its route and mandate that Fabulous Company take a new route. The chemicals that are being transported are toxic. Being toxic, a reasonable person would realize that these chemicals likely are able to harm them. On its face, this appears as an immediate irreparable harm. Further, Goh does have a likelihood of success due to the severity of the situation. Toxic chemicals are harmful to anybody and everybody. In balancing

the hardships, Goh's would argue that its hardship includes potentially sustaining life-threatening injuries if the toxic chemicals reach him. Fabulous Company will argue that the chemicals are unlikely to reach Goh. Goh will rebut this by saying that the chemicals damages his roof and if they have damages his roof, there is potential for these chemicals to reach him and his family. Fabulous Company would not suffer much of a hardship at all, they would just take a different route. Although their route is the only reasonable route, maybe the city can build another route to abate the nuisance. The hardships balance in Goh's favor. Lastly, Goh will succeed with the TRO if he does proper notice and posts a bond. The purpose of the bond is to reimburse the defendant if the defendant happens to succeed.

Preliminary Injunction

A preliminary injunction is issued after a hearing but before a trial on the merits. The requirements for a preliminary injunction include: (i) irreparable injury, (ii) plaintiff's likelihood of success on the merits, and (iii) a balancing of the hardships.

See analysis supra under TRO.

Thus, all of the elements for Goh to succeed on a preliminary injunction are met.

Permanent Injunction

A permanent injunction is issues after a trial on the merits. The requirements for a permanent injunction include: (i) inadequate legal remedy; (ii) plaintiff's right of possession; (iii) feasibility; (iv) balancing of the hardships; and (v) no defenses.

(i) inadequate legal remedy

Inadequate legal remedies occur where there may be a multiplicity of lawsuits, money damages are not adequate, etc. Here, there runs a risk of being a multiplicity of lawsuits and being continuous since there is a current ongoing continuous nuisance. Thus, this element is met.

(ii) plaintiff's right of possession

Traditionally, the plaintiff had to have a right of possession. Modernly, the requirement is an interest in possession. Here, the damages property is Goh's house that he owns. This element is met.

(iii) feasibility

For prohibitory injunctions, the feasibility is rarely called into questions because if the defendant fails to abide by the injunction, then they may just be subject to contempt. However, mandatory injunctions make the court's job a little harder because the court will have to supervise. Here, feasibility appears to be met since it is feasible for the trucks to take another route. Driving a different road should not require too much supervision.

(iv) balancing of the hardships

In balancing the hardships, Goh's would argue that its hardship includes potentially sustaining life-threatening injuries if the toxic chemicals reach him. Fabulous Company will argue that the chemicals are unlikely to reach Goh. Goh will rebut this by saying that the chemicals damages his roof and if they have damages his roof, there is potential for these chemicals to reach him and his family. Fabulous Company would not suffer much of a hardship at all, they would just take a different route. Although their route is the only reasonable route, maybe the city can build another route to abate the nuisance. The hardships balance in Goh's favor.

(v) no defenses

zoning ordinance?

Fabulous Company must not succeed with any defense. Fabulous Company will likely say that the neighborhood came to the nuisance since Fabulous Company has been in its spot doing the same work for the past 6 years and the residential neighborhood is fairly new. However, coming to the nuisance is not a defense. *- shift costs ?*

Unconscionability

Fabulous Company will likely argue that ordering them to take a different route to the compost facility is unconscionable since the route they are currently taking is the only reasonable route. Goh will argue that the city can build a new road that allows a reasonable route for Fabulous Company away from the residential neighborhood. Goh will also argue that there are other roads available that Fabulous Company can take, it just may take a little longer. Thus, Fabulous Company's argument is weak and will likely fail.

Thus, Goh will likely succeed in his remedy of a permanent injunction.

The measure of damages for lost pets

While one may consider the loss of a pet to be very sentimental in nature and require more than the fair market value of the pet, that is not the case. The measure of damages for the loss of a pet is the current fair market value of the pet. Basically, how much is that pet selling for in the market.

4)

Amanda - 5

Lori - 5

Nick - 5

Nikki - 5

END OF EXAM