Best

Student

Answers

Contracts II
Final Exam
Essays
Spring 2006

Exam Grading Key for Prof. McDonald

Issue

I1 = Correct issue statement
I2 = Incomplete issue statement
I3 = Incorrect issue statement

Rule

R1 = Correct statement of governing legal principles
R2 = Incomplete statement of same
R3 = Incorrect statement of same

Analysis

A1 = Correct factual analysis
A2 = Incomplete factual analysis
A3 = Incorrect factual analysis

Conclusion

C1 = Correct conclusion
C2 = Incomplete conclusion
C3 = Incorrect conclusion

Other Notations

D = Did not follow directions or instructions provided on front of exam or as part of question.
G = Good point or analysis.
OR = Need better IRAC organization and analysis (e.g., fully complete each issue before moving on to the next issue; do not "front load" rules—discuss them only where appropriate to each IRAC of a specific issue).
S = Start analysis by identifying overarching issue and governing rule.
T = Need to budget time between answers more effectively.
Y = "Yes!" (as in "righto!").

1)

Part A

C v. O concerning the name of the team.

The issue here is whether or not O was in breach of the contract with City by naming the team the Megacity Mites of Boresville. Here, there is a term in the contract which says that that Ozzy's name for the football team will include the city's name, Boresville. Becuase there is an express term in the contract that is controlling, the issue becomes a question of interpretation of this term. Looking to the general rules of interpretation and considering the most reasonable interpretation in light of the principal purpose of the K and the context, it seems that the name Boresville was definetely to be included in the name of the team, and considering the purpose of the K, for O to have a lease of a stadium for the team and for C to bolster the image of the city and attract tourism and new business, it seems that Boresville should ~~be prominently~~ displayed in the name of the team in order to fulfill these goals.

Looking to the specic aids of interpreation, here O is bringing evidence regarding the intrinsic nature of the contract and C is going to bring bother commercial practice evidence, intrinsic evidence and contextual evidence. There may be a plain meaning issue becuase C is probably going to bring in prior negotiation evidence to show that they talked about naming the city after Boresville while negotiated the contract, and that O said she would name the team after

Boresville and she even went so far as to demand assruances in the K that the name of the town would not be changed. The plaing meaning rule operates when the parties have set there final agreement down in a clear and complete document and bars parol evidence. The first question is was there a competely integrated document? here, looking at both the intrinsic ande extrinsic evidence it seems as if we have a clear and complete document becuase the agreement contained a merger clause, it was a standard form K and the parties after the K was signed, treated it as a final expression of their agreement. The second question is, is the term at issue vague or ambigous on its face? here, the terms is that O will name the team and include Boresville. This seems umambigious and seems to have a plain meaning that Borsville must be in the name somewhere. . So, since there is a plaing meaning of the term, we must consider whether the evidence being brought contains a latent ambiguity in the plaing meaning of the term? The majority approch for this term is the modified 4 corners approach where the court considers the intrinsic and extrinsic evidence, except for evidence of prior negotations. here, the intrinisic evidence from the K language shows a plain meaning of the term that the name Boresville must be included in the name of the term. However, looking at the entire purpose of the K, it seems that since C's main purpose was to attract attention, tourism and business to the town, it seems that the K language would also suggest that the name Boresville should be promiently displayed in order to effectuate these goals. Additionally, another provision in the K, where it says that Boresville will not change its name, suggests that naming the team after boresville was going to occurLooking at the extrinsic evidence, C is going to use trade custom of the strong tradition that NFL's terms are named after the cities they are located in. Trade usage evidence may only be used if it is such of regularity in a trade or locale that one party is justified in believing that the

other party should have been aware or held to this information. IF the person is member of that trade they are held to the trade customs per se. Here, O is not a member of the trade of the NFL becuase he was new owner of the team. However, the facts show that O was aware of the tradition of naming the team after the cities, so the trade usage would be controlling. Thus, considering the majority approach, the evidence of the recitals of the K and the trade usage creates a latent ambiguity in the K that the name Boresville should be prominents displayed and should be the principal name of the team and thus the Prior negotiation evidence between the party would go to the jury. Thus, the jury would be able to consider the fact that they talked about naming the team actual after boresville and that O even demanded assurance in the K that they wouldnt change the towns name.

Beyond the plain meaning, commercial practice evidence such as trade usage can be consider in interpreating the K if there can be a reaosnable consistent meaning with the trade usage and the K terms. here, I have already concluded the O will be held to the NFL custom of naming the team after the city in which it is located, and thus we need to see if this custom can be reasonably interpretated consistently with the express term in the K requiring Boresville to be in the name of the teach. There is a reasonably consistent interpretation, that the team should be named after Borseville and Boresville should be the prominent part of the name of the team. Thus, the Trade usage evidence will be conisder in deciding on interpreting this express term.

After weighing the K langauage, the prior negotiation evidence and the trade custom, the court must decide under restatmeent 201 whether the parties shared a meaning of the term at the time of the K. here it seems that the parties did share a meaning, that the team will be named after Boresville, but now O is changing her tune. This is shown by the PN evidence that they

specifically discussed naming the team after Borseville, that O wanted assurances that the name would not be changed and that this was in the K, and that the principal purpose of the K supports this conclusion. Thus, the jury, finding they both shared th meaning, should interpret the K term to require her to name the team specifically after Boresville, and then O would be in breach of contract.

18

C v. O on games to be held at the stadium.

Here, C is going to claim that O is in breach of contract by not havaing the first season of the team at the new stadium. O is going to claim that she was justified in moving the team because C did not satisfy the express condition in the K that the stadium be ready by 9/1. The requirement that the staduim be open by 9/1 could be viewed as a express condition or a duty. A EC condition is a express statement in a K that requires an event, not certain to occur, to occur or the parties duties will be discharge. Under the restatment the preference of interpreation is for a duty if it is ambigious. Here, it is not clear that if the stadium did not open on 9/1, both parties duties under the K would be discharged. This would result in substantial forfeiture for the city as they had built this stadium and would not then have lease for the team. Thus this is duty rather than a sole express condition. When there is no express condition, modern courts imply constructive conditions of exchange in each contract making promises dependent to one another. Satisfaction of Implied conditions are judge by substantial performance, rather than strict compliance. Here, the question becomes did C substantially perfrom the implied condition of starting by 9/1 by starting on 9/14. Looking at R 241 factors, we consider: to what extent was O

G

8

IV

deprived of here expectation interests. here, O could not open the stadium up by the first game which would be a huge deprivate of here expectations because she wanted to open the stadium up for the new season. As a corally to this, we consider whether she can be compensated for this deprivation. Here money damages would be hard to ascertain because her rent on the new stadium was based on ticket sales, and price she paid at the new stadium was a flat fee. However, she did obtain subp by going and renting out the new stadium. Third, we look at the forfeiture that woudl result to C, which here would be large unless they could find a new team to rent the stadium. Fourth, how likely is that they will come in a fix it, this would be unlikely because they tried their best to get it out on time. Fifth, they acted in good faith. However, I think that because of the significant effect on her expectation to have the new staidum ready, C was in material breach and thus had not substanitally performed. If C materially breached, the O must give him reasonably opportunity to cure unless there was a clear rupidation. Here i think C clearly could not fix the rbeach becuse he could not perform by 9/1.

IF there is no SP, then O was justified in witholding performance and obtainind substitute performance by going to Megacity and thus she would not be in breach of the agreement. If there was SP, then she would not be justified in doing that and would have to keep the team in Boresvile.

Here, C may claim an excuse of impracticabily based on the contractor's failure to build it on time. Was there a superveing event making agreed upon performanc impractical? yes, the K quite and thus they couldnt get it open on 9/1? Did C bear the risk of this? it is possible that C did bear the risk of this consider it was was construction K but there is no K langauge for this. IF C did not bear the risk, we have to consider did he cause the supervening event and

impracticabiliy> here, the facts say that the contractor walked off. if it was their fault, i.e cuz they breached, that the contractor walked off then they wouldnt have an impracticability defense. If it wasnt, then they probably would and then their breach would be excused and O would be in breach because she moved the team to a nother city.

Additionally, included in this is C's duty to use best efforts because we have a percentage lease situation and a situation of heavy dependency because there is no minimum rent. So they might be in breach of duty of best efforts to get stadium built by Sept 1.

remedies for both issues...

Specific performance may only be ordered if money damages would be inadequate, the court considers the ascertainability of the money damages, the ability to collect those damages and the ability of sub p. Here, I think that in regard to the name of the team, C would be entitled to the injunction because $ damages would be difficult to ascertain and it would be hard to get substittute performance. No discretionary factors really apply here unless the court considers the PP in getting boresville to have the name of an NFL team. In regard to the games at the stadium, if C was in breach, then she would not be able to SP. If o was in breach then C probably still wounldnt get SP, but possible expectation damages based on the tickets sales at MEgacity and 10% value of those.

Part B-

O v. C on the cc that he should be allowed to name the new stadium. Here we have parol

evidence issue because O is going to bring PN evidence that they made a deal prior or contemparanoues to the K formation that she would give 10k to them each month for the right to name the stadium. The first question in the PER is whether the parties had a final and integrated express of their agreement? here they had a final agreement as the agreement contained a merger clause, they treated it like a final agreement and it was a standard form. Secondly we consider whehter this final agreement was completely or partially integrated. The majority approach is the contextual approach, considering all intrinsic and extrinsic evidence and ask is there a legitimate reason why the term wouldnt have been included in the K. Here, although there was a merger clause, it was a boiler plate merger clause, and thus it does not automatically mean that there was compelete integration. The prior negotiation evidence here shows that O and C had a collateral agreement to the main K with its own consideration. This weighs heavily to the consideration that it was a partially integrated document. Additionally, the K does not address the issue of the name of the stadium, so it might seem reasonable that they woudlnt have included it in the K. IF we are the UCC then the test is whether the term would certainly be included. Under this standard it is even more likley to have a partial integration because the term wasnt addressed in the K. Thus, I conclude there was a partial intergration and if the information is consistent in that it adds to or supplements the K, then it will be admissible. here the name of the stadium is not specfically included in the K, thus the promise to pay 10k ot be able to name the team would only add to or supplement and thus would be admissible.

IF the PN evidence is in and they had K for O to be able to name the stadium then C would be in breach of K becuase they did not let O name the stadium. O is seeking specific performance here allowing here to name the stadium. Specific performance may only be ordered

if money damages would be inadequate, the court considers the ascertainability of the money damages, the ability to collect those damages and the ability of sub p. Here, money damages would not be adequate because it would difficult to ascertain the amount of damages this caused. The court looks to discretionary factors, including certainity of terms, difficulty of supervsing K and equity/PP concerns even if money damages are inadeqaute. Here the terms are certain, pay 10k a year to be able to name the stadium. However, this may be difficult for court to supervise. They can easily order the name change but to enforce 25 years of payment might be difficult. however, I think cuz they could easily change the name that the court would be likely to grant SP.

ESSAY I: VERY GOOD JOB.

1)

A:

The general issue is whether Ozzy breached the contract by not naming the team "boresville something" and by refusing to play the first home season in the stadium.

Common law principles would govern this transaction because the contract does not predominately involve the sale of goods.

The lease was not to begin until September 1st and the City is bringing his claim before that date. The first issue then becomes whether or not the city can bring the claims before the time for Ozzie's performance was due. The city would be able to sue under the contract before the time for performance if Ozzie had anticipatory breached the contract. An anticipatory breach occurs when the other party either expressly or impliedly repudiates the contract. An express repudiation is a clear and unequivocal statement that the other party intends to materially breach the contract. An implied repudiation is when the party does an affirmative act which would render the party unable to perform the contract. Ozzie did several affirmative acts: he launched a marketing campaign for his new team naming the team "the megacity Mites of Boresville" and also signed a contract to play the team's 2006 season home games in the stadium of Megacity University. These acts would render Ozzie unable to perform the contract when the performance became due on September 1st. Thus, this would be an implied repudiation and the City would be able to sue for breach at that time.

Secondly, if the city did sue for breach would they be able to prevail on their claim that Ozzy name his team after Boresville.This issue hinges on a question of interpretation. The city argues that when the contract stated "The name of Ozzy's football team will include Boresville in it" it meant that Ozzy was required to name the contract "boresville something or other." Ozzy argues that the phrase simply means that Boresville just needs to be included, as in "The Megacity Mites of Boresville.".

To determine what the parties intended with the phrase in the contract the court will first apply a general aid of interpreation to attempt to get to the parties' intent. When the purpose of the contract can be discovered it will be given great weight. Here, the preamble to the contract states that the purpose of the contract was to provide a stadium to bolster Boresville's image as a tourist destination and attractive place for businesses to locate, and to provide its residents with a source of entertainment. The purpose of the contract is bolster Boresville's image. Thus, the name will be important because the city wants the association with the name to be the city of Boresville. The current name, the "Megacity Mites of Boresville" makes the emphasis Megacity and not Boresville. The focus would be on Megacity and would not meet the purposes stated in the contract as much as starting the name with "Boresville" would. Further, the context surrounding the contract indicates that the city expressed that Boresvillians were tired of living in Megacity's shadow. Placing the name "boresville at the end, seemingly as a mere afterthought, would not help the Boresvillians establish a separate identity from Megacity.

The court will further look to the words of the contract to determine whether that sheds light on

the intent of the parties. Here, the contract specifies that the city has to not change its name because Ozzy will have "invested in advertising and promoting his Boresville team, including uniforms, equipment and merchandise containing boresville team logo or mascot." In order to have a "boresville team logo or mascot" The focus of the name would have to be on the city of Boresville. If the team could be named, "the megacity Mites of Boresville" the team logo or mascot would more than likely be a "Mite" or "Megacity" and the Boresville will simply be the location of that team.

The city will bring forward trade usage to indicate that there was a strong NFL tradition of naming teams after the cities in which they are located. Trade usage is when a particular practice that is so widely used within a trade that it justifies a presumption that it would be used with respect to the contract at issue. If both parties are members of the trade they are per se expected to know of the particular trade usage. If not, then the party attempting to use the trade usage must show that the other party either knew or should have known of the trade usage. Here, both Ozzy and the City were aware of the particular trade usage, so it will be able to be used. This is more evidence to support the CIty';s interpretation that the team would be named after Boresville.

The City will also try to bring forward prior negotiation evidence to show that "ozzy replied that he was happy to name his team after Boresville" and that he was going to invest in team materials that featured it. And to further indicate that they were "thrilled that there was going to be an NFL team named after their city." Whenever a party attempts to offer prior negotiation evidence it implicates the plain meaning rule. The plain meaning rule requires that there be a

final integrated writing. This is a lease agreement and so would be a formal writing of the parties' agreed terms. Further, the parties acted as if it was a final expression of their writing. Thus, the writing is finally intergrated for purposes of this analysis. Second, the plain meaning rule asks whether the words were vague or ambiguous on their face. If so, then the plain meaning rule will allow the evidence to go to the jury. Here, the phrase "the name of Ozzy's football team will include Boresville in it." Does appear to be fairly vague. It is not clear whether Ozzie's use of the Boresville would meet the requirements. Thus, the plain meaning rule should not bar the prior negotiation evidence. However, if the court does find that the term is vague or ambiguous, the court will look at the words of the contract and extrinsic evidence surrounding the contract (excluding prior negotiatoin) to see if a latent ambiguity is created. Here, the trade usage information and the words of the contract especially the preamble do create an ambiguity as to what the parties intended and the evidence would go to the jury. The prior negotiation evidence suggests that the city found it important that the City Boresville be featured prominently in the team name. Further, that Ozzy planned to name his team after Boresville and NOT Megacity.

Based on the preceeding evidence, it seems that the City's defination of the team should be the one applied by the court. Ozzie either knew or should have known of the meaning prescribed by the city and as such, his meaning will not be used. Ozzie will therefore be found in breach of the contract.

Would the city be able to prevail on their claim that the court order Ozzy to play his remaining 14 home games in the new stadium? To decide this issue the court must first determine whether

it was a condition upon Ozzy's performance of playing in the homegames that the stadium be completed by September 1st.

First, was it an express condition or simply a duty that the condition be finished by September 1st? An express condition is an event that the parties have placed in the contract which must occur before the other parties' performance under the contract becomes due. The preference of interpretation is the the condition is merely a duty. To determine the parties' intent the court looks both to the words of the contract and the evidence surrounding the contract. Here, the words of the contract state that Ozzie would pay the City 10 percent of ticket sales from such games with the requirement that Boresville shall have the stadim completed by September 1st. The fact that it states that a requirement of payment is that the stadium is finished by September 1st it appears that the language suggests an express condition. The circumstances also suggest that it is an express condition. The season begins on September first. It does not make sense that Ozzie would want to be leasing a stadium and paying for the use when he would be unable to use it for the home games. Therefore, the completion of the stadium was an express condition. Express conditions require strict conformance with teh requirements of the contract. If they are not met in every particularity the other party's duties to perform are discharged.

The stadium was not completed by September 1st. However, the court can excuse a condition from occuring if the forfiture that would result would be disporportionate to the breach involved. Will the court excuse the condition based on the mitigating doctrine of excuse by disproportionate forfeiture? Here, the city would lose out on all of its profits for the entire home

season if the conditoin is not excused. If the contract was excused Ozzy could simply have played a game or two at the stadium at a fee of 100,000 per game. It seems that the non-occurence of the condition should be excused because it is a construction contract and the forefeiture would be too extreme for the loss that Ozzy would suffer.

7

E 2/A 2

If Ozzy is found to be in breach for not naming the team will the City be able to prevail the court to issue an injunction? A court will issue an injunction if monetary damages would be inadequate to protect the expectation interests of the party. The court looks at three factors to determien that issue 1)The difficulty in ascertaining monetary damages 2)The difficulty in procuring a suitable substitute 3)The liklihood that damages would not be able to be collected. here, the damages of Ozzy not naming the team after him would be very difficult to measure. Especially because it involves the cities' repudiatoin in the community and the prestige of the city and the perception as a tourist attraction. Monetary damages cannot adequately encompass the potential loss that the City would find. Due to the strength of that factor monetary damages are inadequate. however, the court does have some discretionary powers that it can use to not give specific performance. Those involve the certainity of the terms, the difficulty in enforcing the contract, public policy concerns, and personal service contracts. Here, the terms would be fairly certain, the contract would not be difficult to enforce because the court could just tell Ozzy to change the name, the City came into court will "clean hands" and this would not involve a personal service contract because the Ozzy was planning to use the stadium in Boresville, it just deals with the name he will call the team.

Thus, specific performance should be given.

7

If Ozzy is found to be in breach for not performing his home season games in the Boresville stadium will the court issue an injunction? This involves the same factors of specific performance as stated above. This situation is different however. Monetary damages are fairly easy to ascertain. Ticket sales are the only form of revenu that the parties will recieve in connection with the football games played. The court can just award the damages lost in the games that Ozzy fails to perform in the stadium. Further, this would involve a personal service contract because it would involve Ozzy being forced to use the stadium. Thus, the court should not award specific performance, but rather damages for the money that they lost for the games Ozzy will not play in the stadium.

B:

The general issue here is whether or not Ozzy will be able to enter into evidence the agreement that Ozzy would be able to name the new stadium. When the parties have expressed their agreement in writing, the parol evidence rule limits the ability of a party to enter a prior or contemporanous oral or written agreement. If the writing is a final integration, then the parol evidence will bar any other terms or agreements from reaching the jury. If the writing is only a partial intergration the court will only bar those terms that are contradictory to the express terms of the agreement.

Was the lease agreement a final intergrated writing? First, it must be a finalized writing. To determine this the court will look at both intrinsic and extrinsic evidence. Here, this is a standard

lease agreement. It contains all of the essential terms and states with particularity the details of the transaction. Further, the parties' actions suggest that they treated it as a final expression by treating it as if they had an agreement. Thus, the writing is finalized.

Second, was the finalized writing a complete integration? To determine this the court will look at the intrinsic evidence and ask whether the term would natrually have been included and then will also examine extrinsic evidence to see whether there is a legitimate reason why the term was not included into the writing. First, the contract does contain a standard merger clause: "this contract constitutes the final and entire agreement of the parties on the matters covered therin." This is evidence that the writing was completely integrated, however it will not be dispositive because it is contained within 15 pages of boiler plate terms. The court will still look at other evidence to see whether the agreement is completely integrated. Here, the parties addressed in the writing the subject of the name of the team. It mentions that the team's name will include "boresville" in it. It would seem that if the parties had agreed that Ozzy would be able to name the stadium himself that it would naturally have been included in that section when the parties were discussing the name. This would suggest complete integration. However, the court will also look to the agreement that Ozzy suggests shows his rights to name the stadium. That agreement is that he will get to name the stadium for an additional 10,000 a year. This is a collateral agreement. It contains a separate and independent basis of consideration for the promise. Collateral agreemnets are strong evidence that the agreement is a partial integration and not a complete integration.

Because of the collateral agreement the writing is a partial intergration.. The evidence will go to

the jury as long as it does not contradict the express terms of the agreement. Here, the express terms are that the name include "boresville" in the name. The agreement that Ozzy will be able to name the name does not contradict that because he could easily name the team something with Boresville in it. Thus,Ozzy will be able to succeed on his claim that he will get to name the team.

If Ozzy were to succeed on his counterclaim would the court issue an injunction? A court will issue an injunction if monetary damages would be inadequate to protect the expectation interests of the party. The court looks at three factors to determine that issue 1)The difficulty in ascertaining monetary damages 2)The difficulty in procuring a suitable substitute 3)The liklihood that damages would not be able to be collected. Ozzy wanted the power to name the team to have product branding consistency between the team and the stadium's name. That ability seems to have commercial value due to the parties' agreement. It might be difficult to ascertain monetary damages of the harm if Ozzy is not able to have that type of consistency. The court will issue the injunction.

ESSAY 1: VERY GOOD JOB.

2)

Part A:

B vs. A

The K required that A complete the stadium by Sept. 1st. In February, A called P and told him that he was unable to getthe steel and that he was going to need more money. Unfortunately, P was unable to provide him with financing and A replied, "If youre not willing to pay me for my work, then I can't finish the job." At this point, A became a stranded supplier as was the situation in Iron rails. Was this a material breach of the K, or more likely, a repudiation of the K? When A hung up the phone, he made an express statement that he was going to commit a material breach, not finish the job, when time for performance came due. This was a repudiation of the K by A. At that point B has two options: await time for performance and see if they perform; they can urge the party to retract that repudiation and still retain the right to terminate the K. Or, B can terminate the K and sue for damages. B must give notice to A that they are accepting that repudiation as final, either by filing suit, or by a firm declaration. The window for retraction ends when either of those things takes place. Two weeks later, P signed a contract with another construction company and an hour later A called P and said that they found outside financing and could not finish the job. P replied that it was too bad. P never effectively gave notice to A that they accepted their repuidation as final and therefore will be liable to A for any damages caused for their material breach of the K when they refused to allow A to retract the repudiation.

Assuming: If A was determined to have made a material breach of the K at that time, they would defend of the basis of impracticability. There must have been a superving event that made

the agreed upon performance impracticable. Here, the event was not supervening, because the mines shut down a day after the K was entered into. The agreed performance was stated generally so A would be expected to find alternative means to finish the K. The non-occurrence of the event was not an assumption of both the parties because it was foreseeable by both, and A implicitly assumed liability when he assured B that there would be no problem in acquiring the steel and that B would get their stadium on time. Also, the builder warranted the completion of the K and therefore assumed liability expressly in that manner. Also, A could have avoided the impracticality if he would have gotten insurance or shifted the burden of increasing prices to B with a price escalator clause. Therefore, A will not be able to get out of any breach with the defense of impracticability.

He may also use the unilateral defense mistake. He went into the K with erroneous assumption of the existing facts at the time of K formation. In this situation, after he assured P that he was able to get the steel and would complete the project, P was no longer assuming that there was some material dispute as to the facts at the time. Therefore it was a unilateral mistake. This was a basic assumption that was material to the K. The use of steel was a necessity and had to be obtained for the K to be performed. By assuming that he could obtain that steel, it had a material effect on the value of the K because A was going to have to go to substantial expense in order to finish the project. Although, he does not meet the last two elements of the mistake defense. A did bear the risk of the erroneous assumption, because he warranted completion. Also, as a construction worker in this field, he had special expertise as to the ability to get steel and should have known that it may be difficult. In addition, it would not unconscionable to enforce the K and the mistake was not P's fault. Therefore, he would not be excused from his breach by

the mistake defense.

In summary, B will not be able to collect damages from A for the repudiation because they did not allow him to retract by notifying him that they were accepting his repudiation as final. In the event they could obtain damages, they would be entitled for their costs to engage in a substitute transaction. In this case, it was B's cost of cover, an extra 2 million on the contract, in addition to other losses incurred, such as being liable to B for not completing the stadium on time.

A vs. B

There is an implied condition that performance will happen simultaneously unless one party's performance takes time, then that will occur first. Here, the first part of performance, that there was to be an advance payment of 2 million upon A immediately commencing performance implies simultaneous performance. Both performed this part of the agreement. However, when a performance takes some time, that performance is due prior to the performance that takes no time, B's payment. A will still be entitled to payment of the K if he substantially performed. Determining whether a party substantially performed: (1) extent that the injured party's expectations will be fulfilled? Here, B's expectations were only fulfilled as to the parking lot. There is substantial performance in that manner. (2) extent that the injured party will be deprived of the benefit they were seeking? B was seeking a complete stadium and parking lot. They have received the value as to the parking lot, but have not received the value as to the completion of the stadium. There is substantial performance for the parking lot and not for the stadium, because only 4 M out of the 14 M cost was completed. (3) if non-substantial performance, extent that

breaching party will suffer forfeiture? The breaching party will not get their payment for the finished parking lot and will forgo the 2 million in profit for the stadium. (4) how likely is breaching party to cure the defect? A was in fact willing to cure the defect, but was prevented from doing so by B, because they hired someone else to complete it. (5) Good faith of A? A acted in good faith and there is no evidence otherwise. Therefore, there has been substantial performance as to the completion of the parking lot, but not as to the stadium. For the parking lot, he will be paid the agreed upon price, which was 3 million, because there was substantial performance and he is entitled to expectation interest. In fact, there was complete performace as to that part of the K. As for the non-substantial performance of the stadium, we will have to look to our mitigating factors. This K is not divisible because we cannot divide the portions of the K into roughly equivalent agreed upon exchanges of value. If we did, the construction company would be deprived of the benefit of the completed stadium. BUT, the K can be divided between the parking lot and the stadium: these have there roughly agreed upon exchanges and each represent an entire structure. They were given individual amounts in the K and B would not be deprived of the value of the K if it was divided in this manner. The part that is indivisible is within the construction of the stadium itself. Therefore, since there was non-substantial performance of the stadium, we need to look to other mitigating factors to avoid forfeiture by A. However, A can recover in restitution any benefit that they have conferred on B less any damages caused from breach of performance. The stadium foundation costs them 4 million to do. The amount of injuries sustained by B is the increased price of the other K, which is 14 million - 12 million. Therefore, B may only be able to recover 2 million. They will be able to recover lost profits if they are foreseeable. If we consider B as the breaching party for not allowing enough

time for repudiatoin, then B would be entitled to their lost profits, or their expectation interest.

Part B: O vs. A

There was no direct contractual relationship between O and A and O will only be able to sue A if he is a third party beneficiary. Is he a donee beneficiary? Yes, he is receiving the benefit of the K between A and B. B obviously meant to bestow this benefit on O, but did A as the promisor of the building? The K language specifically indicated that the stadium was to be constructed for the specific purpose of hosting O's football games. Therefore A had knowledge of who was to benefit from the K and could have contemplated suit from O in the event that A failed to live up to its obligations. Therefore, is a third party beneficiary and this status gives him the ability to bring direct suit against A. Because A pulled their crew off of the job, they were unable to complete the stadium by September 1st. O was forced to engage in a substitute transaction. O had a duty to avoid or mitigate damages. The stadium will be completed one day before the second home game and there is no need for O to schedule ALL of the home games at the Megacity U. Therefore, they have a duty to mitigate their losses and will be only entitled to seek the damages caused by A's breach which is only one game for 100K.

2)

QUESTION 2

A. A v. B

The first issue here is whether a condition may be implied into the K. Here, we have a bilateral K where one party is promising to build a stadium and the other party is promising to pay. The modern presumption is that promises are dependent and here, in the absence of evidence to the contrary, these promises are considered to be dependent. The next question is going to be deciding who has a duty to perform first. Here, under a the general rule of construction (and Re. 234), since performance can't be rendered simultaneously, the party whose performance is going to take time needs to perform first. In this case, that would be A who needs to build an entire staduim. Our next inquiry is whether A has sufficiently performed. Unlike express condition, implied conditions need only be substantially performed; if condition is substantially performed, the remainder is considered a nonmaterial breach and the injured party's duty will arise. Here, A had only completed the parking lots and foundation of the stadium at the time he stopped performance. To determine if this constitutes a material breach, we need to run A's performance through a Re. 241 analysis. The most weighty factor is the first where we determine if B has received a material part/essence of the K. Here, the answer is clearly no. B has only received a parking lot and a slab of cement when if we look to the recitals of the k, B wants a "football stadium for the purpose of hosting O's new Boresville NFL team." It is apparent that B has not received the essence of the K. Secondly, it wouldn't be too overly

difficult to compensate B for the performance not received. Third, A will not suffer disproportionate or undue forfeiture as he has only completed a parking lot and foundation (which it could be compensated for through restitutionary measures). Fourth, it does not seem that A will fix the breach and finish. And lastly, although A hasn't acted with best efforts, he hasn't acted in bad faith either. Weighing these factors and giving special weight to the first, it seems that A has NOT substantially performed and his stoppage of performance constitutes a material breach.

SInce we have determined that A's performance was due first, and he didn't sufficiently perform, we need to look to see if A may be excused from performance. Since both parties entered into the K with the erroneous assumption that the iron ore mines in Africa were stable and there would not be any trouble obtaining such ore, A's best chance would be through the doctrine of ~~mutual~~ mistake. The first element is met as discussed in the previous sentence. The second element is met because the availability of iron was a material assumption on which the K was based. The third element is met because the existence of iron ore vitiated the value of the exchange of consideration since without the ore, the builder couldn't perform. The last element will prevent A from using the excuse of performance because he bore the risk of loss since he knew of the potential strife in Africa and was in the better position to secure a guarantee from his suppliers. A could argue that the risk was borne equally by both parties because B could also foresee the problems with iron ore in Africa. However, since A was an expert in this area, he should be held to a higher standard and required to take the appropriate steps to ensure that his supply chain would be sufficient for the K. Therefore, the excuse of mutual mistake is not available to A.

Since A has stopped performance before rendering sufficient perfromance but before the time performance was due, in order for B to recover damages for a substittue performance and not be liable for breach itself, B must show that A committed an anticipatory breach. To do so, B must show a clear repudiation by A. In this case, Al expressly said, "If you're not willing to pay my for my work then I can't finish the job." This is a clear repudiation and combined with A's conduct (or lack thereof), B can establish an anticipatory breach. However, A came back and attempted to retract his repudiation. Generally, a repudiator may retract its repudiation anytime before performance comes due. The exception to such rule is when the injured party has notifed repudiator of its intend to treat the repudiation as final or has materially relied on the repudiation. The latter is applicable here since B entered in a K with another builder to finish the project before A retracted. Therefore, A could not retract. Finally, we need to decide if B's reponse to A's breach was proper. Here, we determined that the breach was material; therefore, B has the option of treating such breach as total or partial. Here, it treated it as total as evidenced by it's subsequent K with another builder. If total breach, then need to give time for breaching party to cure, however, since there was a clear repudiation here, B didn't need to give A any time to cure and B's response was proper.

Remedies.

As a breaching party, A would be entitled to restitutionary damages under Re. 374

FMV of work conferred - damages.

A owes B expectation damages.

A: loss in value

$14mil (full stadium + lots) - $6mil (amount of value received) = $9mil

B: other loss

$14 mil + $(10% of lost profits for 1st home game assuming that they are ascertainable: assume $1mi) = $15mil

C: cost avoided

$15mil (total K price) - $2mil (deposit) = $13 mil

D: loss avoided

$12 mil (full stadium)

DAMAGES = A+B-C-D = $1mil

B.

The issue here is whether O can have 3PB status under the K as an intended beneficiary. Here, O would qualify as a donee beneficiary because A's performance under the K between A and B was intended to benefit O. However, it is unknown whether A had the intend and was willing to be sued by A in the event of breach. Therefore, A would NOT likely be liable to O. However, if A was liable to O, would he be liable for the damages incurred by A? The pertinent inquiry here would be whether O's damages were foreseeable to A. It seems as though the lease payments were not direct damages that flowed directly from the breach, and thus consequential damages. Furthermore, it would not be foreseeable to A that in the event of a breach, A would

be liable for damages incurred by O - public policy would limit such unlimited liability in a case) C3 such as this and prohibit o from recoverying from A.

3