Solution and Answer Guide

Miller, Business Law Today, Comprehensive Edition: Text & Cases 13e, 9780357634783;
Chapter 16: Performance and Discharge

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# Critical Thinking Questions in Cases

Case 16.1

1. The lease between RRE and Chalk Supply required a security deposit to cover any default on a month’s rent by the tenant. Chalk Supply did not pay the deposit. Should the court have ruled that this breach prevented Chalk Supply from prevailing on its claim against RRE? Discuss***.***

Solution

No, the court should not have ruled that a tenant’s failure to pay a security deposit required under a lease constituted a breach sufficient to prevent the tenant from prevailing on a claim against the landlord in the circumstances of the *Chalk Supply* case.

Of course, a party who breaches a contract cannot base an action for breach against the other party on a subsequent breach or refusal to perform. But to prevent an action for a later breach, the first breach must be substantial. As a consequence, the non-breaching party must not have obtained the benefit reasonably expected under the contract.

In the typical sequence of events under a lease, a tenant’s failure to pay a security deposit is likely to precede the landlord’s repudiation of a duty owed under the contract. In the *Chalk Supply* case, Chalk Supply failed to pay the security deposit before RRE balked at its duty to pay the initial cost for a fire suppression system.

But the failure to pay the deposit was not a substantial breach. The purpose of the deposit was to cover a default on the payment of a month’s rent by the tenant. Chalk Supply paid most of the rent in advance. With this advance, RRE clearly obtained the benefit it reasonably expected under the lease.

1. Suppose that RRE had received an estimate of the cost of the fire suppression system before the parties executed the lease and had then insisted on conditioning its payment on a longer term. Would the result in this case have been different? Explain.

Solution

Yes, the result in the *Chalk Supply* case would have been different if the landlord had received an estimate of the cost of the system before the parties signed the lease and had at that time insisted on negotiating a longer term.

RRE’s duty to pay for the initial cost of the fire suppression system was a provision in its contract to lease a warehouse to Chalk Supply. The landlord received an estimate of the cost after the parties executed their agreement and then notified the tenant that it was repudiating its duty to pay that price without a longer lease term.

If, however, RRE had insisted on the condition of a longer term during the parties’ original negotiations over the provisions of the lease, the proposal would not have been a repudiation of its duty. The landlord’s refusal to otherwise pay for the fire suppression system would not have been a legitimate basis for the tenant to bring an action for material breach, and the result in the *Chalk Supply* case would have been different.

Case 16.2

1. Did Brown and DWB breach the lease? If so, was the breach material? Discuss.

Solution

Yes. Brown and DWB breached the lease, and the breach was material. The lease for the commercial premises owned by Boydston and D&T on which Brown and DWB operated Mayflower RV required the lessees to obtain insurance coverage in the amount of the replacement value of any structures and other improvements on the property. Despite this requirement, the lessees insured the property with cash-value insurance providing $450,000 worth of coverage. This was a clear breach of the lease.

Did Boydston and D&T accept that there was only $450,000 of cash-value insurance on the property, and thereby waive their right to enforce the lease? A party to a contract, who, with knowledge of a breach by the other party, continues to accept the benefits of the deal, waives the right to file a claim for the breach. Here, there is no indication that Boydston or D&T agreed to the lower insured value. In fact, the amount and type of insurance that had previously covered the property was replacement-value. This would support a finding that the landlords would not have agreed to the lower amount of coverage, and that they did not waive their right to enforce this provision of the lease.

A breach is the nonperformance of a contractual duty. A breach is material when performance is not at least substantial. Brown and DWB breached the lease by failing to obtain the required amount of insurance to cover any damage to the leased property. This failure deprived Boydston and D&T of a substantial benefit that they anticipated under the contract.

1. Suppose that Boydston and D&T had agreed to the cash-value policy in lieu of the lease’s required replacement-value coverage, and that they had subsequently accepted the insurance check. Would the result have been different? Explain.

Solution

Yes. If the landlords had agreed to their tenants’ procurement of cash-value insurance in place of the lease’s required replacement-value coverage, and had later accepted the insurance proceeds, the result in the *DWB* case would have been different.

In an accord and satisfaction, the parties to a contract agree to accept performance different from the performance originally promised. An accord is the agreement to perform and accept the different act, and its performance is a satisfaction. This arrangement discharges the original obligation.

The sequence of facts stated in the question would have supported a finding of an accord and satisfaction. Any subsequent claim against Brown and DWB for the related property damage would have failed.

Case 16.3

1. Did HRB violate any ethical duty by refusing to pay Harvard’s golden parachute? Explain.

Solution

No. Hampton Road Bankshares (HRB) did not violate any ethical duty by refusing to make the golden parachute payment that the employer had originally agreed to make to its employee, senior executive officer Scott Harvard. The payment was made illegal by the federal Emergency Economic Stabilization Act (EESA), which contained the Troubled Assets Relief Program that barred participating financial institutions from making golden parachute payments.

HRB was a participant in the program. Harvard agreed to an amendment to his employment agreement with HRB that provide that the agreement “will be interpreted, administered and construed to, comply with EESA.” Harvard quit the firm and sued to obtain the golden parachute. Ultimately, the Virginia Supreme Court agreed with HRB.

In the words of the court in the *Hampton* case, “by its plain language, the amended Employment Agreement must be read to comply with EESA. Nothing therein exempts the agreement from . . . EESA . . . or places the risk of performance . . . on HRB.” Further, “there is nothing in the record that would suggest HRB refused to make the golden parachute payment in bad faith.” HRB asked the U.S. Department of the Treasury for its advice—the agency advised that the payment would be in violation of the law, and that the law would be enforced.

Arguably, HRB would have committed ethical misconduct if it had made the golden parachute payment in the face of these facts.

# Chapter Review

Practice and Review

Val’s Foods signs a contract to buy 1,500 pounds of basil from Sun Farms, a small organic herb grower, if an independent organization inspects the crop and certifies that it contains no pesticide or herbicide residue. Val’s has a contract with several restaurant chains to supply pesto and intends to use Sun Farms’ basil in the pesto to fulfill these contracts. When Sun Farms is preparing to harvest the basil, an unexpected hailstorm destroys half the crop. Sun Farms attempts to purchase additional basil from other farms, but it is late in the season, and the price is twice the normal market price. Sun Farms is too small to absorb this cost and immediately notifies Val’s that it will not fulfill the contract. Using the information presented in the chapter, answer the following questions.

1. Suppose that Sun Farms supplies the basil that survived the storm but the basil does not pass the chemical-residue inspection. Which concept discussed in the chapter might allow Val’s to refuse to perform the contract in this situation?

Solution

The appropriate concept might be failure of a condition. Under the terms of the contract, Val’s does not have to perform (pay) unless the basil meets the stated condition (that it pass an independent inspection for chemical residue). Because the basil did not pass the inspection, Val’s is not obligated to perform.

1. Under which legal theory or theories might Sun Farms claim that its obligation under the contract has been discharged by operation of law? Discuss fully.

Solution

Because a hailstorm destroyed half of Sun Farms’ basil crop, it can claim that it is impossible for it to perform the entire contract. Also, Sun Farms attempted to procure the balance of the contracted amount from other sources, but discovered that the basil was extremely expensive. Therefore, Sun Farms can argue that its performance should be excused due to commercial impracticability.

1. Suppose that Sun Farms contacts every basil grower in the country and buys the last remaining chemical-free basil anywhere. Nevertheless, Sun Farms is able to ship only 1,475 pounds to Val’s. Would this fulfill Sun Farms’ obligations to Val’s? Why or why not?

Solution

Substantial performance is good faith performance that does not vary greatly from the contract and confers the same benefits as promised in the contract. In this situation, Sun Farms acted in good faith and shipped as much chemical-free basic as it could obtain, which was only 25 pounds less than the contracted amount. Therefore, a court would likely find that it had substantially performed its obligation to Val’s.

1. Now suppose that Sun Farms sells its operations to Happy Valley Farms. As part of the sale, all three parties agree that Happy Valley will provide the basil as stated under the original contract. What is this type of agreement called?

Solution

This is a novation—an agreement between the contracting parties to substitute a third party for one of the original parties. This is the type of agreement described here. Under a novation, the new contract extinguishes the old contract and discharges the obligations of the prior party to the contract.

Practice and Review: Debate This

1. The doctrine of commercial impracticability should be abolished.

Solution

Contracts are not made to be broken, even if that is a popular saying. Contracts are made to be respected. Those who seek to avoid their contractual obligations by using the excuse of commercial impracticability, if successful, reduce the certain of contractual obligations and end up hurting the commercial society in which we all live.

Sometimes, a contract cannot be fulfilled through no fault of one of the parties. That is why the principle of commercial impracticability was created. If one party, usual a seller of goods or services, cannot perform because in so doing, that party would lose large sums and maybe go out of business, the courts should step in an allow that party to avoid the contract.

Issue Spotters

1. Ready Foods contracts to buy two hundred carloads of frozen pizzas from Speedy Distributors. Before Ready or Speedy starts performing, can the parties call off the deal? What if Speedy has already shipped the pizzas? Explain your answers.

Solution

Contracts that are executory on both sides—contracts on which neither party has performed—can be rescinded solely by agreement. Contracts that are executed on one side—contracts on which one party has performed—can be rescinded only if the party who has performed receives consideration for the promise to call off the deal. Thus, in this question, if neither party starts to perform, the deal can be rescinded solely by agreement. If Speedy already shipped the pizzas, however, the contract can be rescinded only if Speedy receives consideration to call off the deal.

1. C&D Services contracts with Ace Concessions, Inc., to service Ace’s vending machines. Later, C&D wants Dean Vending Services to assume the duties under a new contract. Ace consents. What type of agreement is this? Are Ace’s obligations discharged? Why or why not?

Solution

Novation substitutes a new party for an original party, by agreement of all the parties. The requirements are a previous valid obligation, an agreement of all the parties to a new contract, extinguishment of the old obligation, and a new, valid contract. Novation revokes and discharges the previous obligation. Here, C&D delegated its duties under its contract with Ace to Dean, with Ace’s consent. Ace’s obligation to pay C&D for the execution of those duties is discharged, but its obligation under the new contract to pay Dean for those services will not be discharged until Dean is paid. The novation did, however, discharge C&D’s obligation under the contract.

Business Scenarios and Case Problems

1. **Conditions of Performance.** The Caplans contract with Faithful Construction, Inc., to build a house for them for $360,000. The specifications state “all plumbing bowls and fixtures . . . to be Crane brand.” The Caplans leave on vacation, and during their absence, Faithful is unable to buy and install Crane plumbing fixtures. Instead, Faithful installs Kohler brand fixtures, an equivalent in the industry. On completion of the building contract, the Caplans inspect the work, discover the substitution, and refuse to accept the house, claiming Faithful has breached the conditions set forth in the specifications. Discuss fully the Caplans’ claim. (See *Conditions of Performance.)*

Solution

If the specifications are considered to be express conditions to the Caplans’ acceptance and payment under the contract, Faithful must perform fully—that is, must install Crane brand plumbing fixtures—to recover the contract price. Until Faithful does so, the Caplans are not obligated to any performance. If, however, the specifications are merely promises (implied conditions), justice and fairness require only *substantial*, rather than full, performance for the Caplans’ obligation to become absolute. This does not mean that Faithful has not committed a breach. Faithful is liable for any damages that can be proved to have resulted from its less than full performance.

In this case, the specifications were stated not as express conditions but as mere promises (implied conditions). To avoid the harsh result of the Caplans having a house on their lot without having to pay Faithful, the courts would require only that Faithful prove substantial performance. Because Kohler brand is equivalent to Crane brand by industry standards, the substantial performance test has been met, and the Caplans are obligated to accept and pay. Whether they can deduct any damages from the contract price for the less than full performance will depend on proof that they suffered monetary damages.

1. **Discharge by Agreement.** Junior owes creditor Iba $1,000, which is due and payable on June 1. Junior has been in a car accident, has missed a great deal of work, and con-sequently will not have the funds on June 1. Junior’s father, Fred, offers to pay Iba $1,100 in four equal installments if Iba will discharge Junior from any further liability on the debt. Iba accepts. Is this transaction a novation or an accord and satisfaction? Explain. (See *Discharge by Agreement*.)

Solution

A novation exists when a new, valid contract expressly or impliedly discharges a prior contract by the substitution of a party. Accord and satisfaction exists when the parties agree that the original obligation can be discharged by a substituted performance. In this case, Fred’s agreement with Iba to pay off Junior’s debt for $1,100 (as compared to the $1,000 owed) is definitely a valid contract. The terms of the contract substitute Fred as the debtor for Junior, and Junior is definitely discharged from further liability. This agreement is a *novation.*

1. **Impossibility of Performance.** In the follow-ing situations, certain events take place after the contracts are formed. Discuss which of these contracts are discharged because the events render the contracts impossible to perform. (See *Discharge by Operation of Law.*)

Solution

Normally, events that take place after the formation of the contract and that make performance of the contract more difficult or burdensome do not render the contract impossible to perform and do not discharge a party’s liability for failure to fully perform. If such events make performance so extremely difficult or burdensome that it is, in effect, impossible, impractical, or unreasonably expensive to perform, however, the contract is discharged. The basic problem is determining when this degree of difficulty or burdensomeness is reached.

1. Jimenez, a famous singer, contracts to perform in your nightclub. He dies prior to performance.

Solution

Jiminez’s contract is personal, requiring his services for full performance of the contract. His death makes performance totally impossible, thereby discharging his estate from liability.

1. Raglione contracts to sell you her land. Just before title is to be transferred, she dies.

Solution

The passage of title to this land can be by Raglione or any person so authorized. Therefore, the death of Raglione does not render the contract impossible to perform, because a representative of her estate can perform it in her place. The contract is not discharged.

1. Oppenheim contracts to sell you one thousand bushels of apples from her orchard in the state of Washington. Because of a severe frost, she is unable to deliver the apples.

Solution

The contract called for apples to come from a *specific* orchard. Through no fault of Oppenheim’s, the specific subject matter of the contract is destroyed by the frost. Therefore, Oppenheim cannot deliver the apples called for in the contract, rendering the contract impossible to perform.

1. Maxwell contracts to lease a service station for ten years. His principal income is from the sale of gasoline. Because of an oil embargo by foreign oil-producing nations, gaso-line is rationed, cutting sharply into Maxwell’s gasoline sales. He cannot make his lease payments.

Solution

Major discussion should center on the doctrine of commercial impracticability or frustration of commercial purpose. For the doctrine to be applied, most courts would need proof that either the rationing frustrated the very purpose both parties had in mind in making the contract, or that there was an implied condition that the premises were to be used for the sole purpose of selling products no longer available, or that the events rendered the anticipated performance extremely difficult or costly. In cases involving rationing during World War II, some courts held that the rationing merely created a hardship, not an absolute prohibition, and the lease contracts were enforced even though performance was more burdensome.

1. **Conditions of Performance.** Russ Wyant owned Humble Ranch in Perkins County, South Dakota. Edward Humble, whose parents had previously owned the ranch, was Wyant’s uncle. Humble held a two-year option to buy the ranch. The option included specific conditions. Once it was exercised, the parties had thirty days to enter into a purchase agreement, and the seller could become the buyer’s lender by matching the terms of the proposed financing. After the option was exercised, the parties engaged in lengthy negotiations, but Humble did not respond to Wyant’s proposed purchase agreement nor advise him of available financing terms before the option expired. Six months later, Humble filed a suit against Wyant to enforce the option. Is Humble entitled to specific performance? Explain. [*Humble v. Wyant,* 843 N.W.2d 334 (S.Dak. 2014)] (See *Conditions of Performance.*)

Solution

No. Humble is not entitled to specific performance. The equitable remedy of specific performance calls for the performance of an act promised in a contract. In a case involving an interest in real property, specific performance can be the appropriate remedy when money damages would be inadequate.

In some situations, however, contractual promises are conditioned. A condition is a possible future event, the occurrence or nonoccurrence of which triggers the performance of a contractual obligation. If the condition is not satisfied, the obligations of the parties are discharged and cannot therefore be enforced. A condition that must be fulfilled before a party’s promise becomes absolute is called a condition precedent.

In this problem, Humble’s option had conditions—once it was exercised the parties had thirty days to enter into a purchase agreement, and Wyant could become Humble’s lender by matching the terms of the proposed financing. Humble exercised the option, tolling the two-year deadline. But the parties engaged in protracted negotiations. Humble did not respond to Wyant’s proposed purchase agreement and did not advise him of available financing terms before the option expired. In other words, none of the option’s conditions were satisfied before it expired.

In the actual case on which this problem is based, the court issued a judgment in Wyant’s favor. On Humble’s appeal, the South Dakota Supreme Court affirmed.

1. **Discharge by Operation of Law.** Dr. Jake Lambert signed an employment agreement with Baptist Health Services, Inc., to provide cardiothoracic-surgery services to Baptist Memorial Hospital–North Mississippi, Inc., in Oxford, Mississippi. Complaints about Lambert’s behavior arose almost immediately. He was evaluated by a team of doctors and psychologists, who diagnosed him as suffering from obsessive- compulsive personality disorder and concluded that he was unfit to practice medicine. Based on this conclusion, the hospital suspended his staff privileges. Citing the suspension, Baptist Health Services claimed that Lambert had breached his employment contract. What is Lambert’s best defense to this claim? Explain. [*Baptist Memorial Hospital–North Mississippi, Inc. v. Lambert,* 157 So.3d 109 (Miss.App. 2015)] (See *Discharge by Operation of Law*.)

Solution

Lambert’s best defense to Baptist’s allegation of breach of contract is the doctrine of impossibility. Under this doctrine, if, after a contract has been made, a supervening event makes performance impossible in an objective sense, the contract is discharged. The doctrine applies only when the parties could not have reasonably foreseen the event that renders the performance impossible. One of the situations in *which this doctrine applies occurs* when a party whose personal performance is essential to the completion of the contract becomes incapacitated prior to performance.

In the facts of this problem, Baptist hired Lambert to provide certain surgical services to Baptist Memorial Hospital–North Mississippi. When complaints about his behavior arose, a team of doctors and psychologists conducted an evaluation, diagnosed him as suffering from obsessive-compulsive personality disorder, and concluded that he was unfit to practice medicine. The hospital suspended his staff privileges. Baptist terminated his employment and filed a suit against him for breach. The doctrine of impossibility discharges Lambert from the performance of his contract—his performance was made impossible through no fault of his own.

In the actual case on which this problem is based, in Baptist’s suit against Lambert, the court issued a judgment in the defendant’s favor. A state intermediate appellate court applied the doctrine of impossibility to affirm this judgment.

1. **Business Case Problem with Sample Answer— Conditions of Performance.** H&J Ditching & Excavating, Inc., was hired by JRSF, LLC, to perform excavating and grading work on Terra Firma, a residential construction project in West Knox County, Tennessee. Cornerstone Community Bank financed the project with a loan to JRSF. As the work progressed, H&J received payments totaling 90 percent of the price on its contract. JRSF then defaulted on the loan from Cornerstone, and Cornerstone foreclosed and took possession of the property. H&J filed a suit in a Tennessee state court against the bank to recover the final payment on its contract. The bank responded that H&J had not received its payment because it had failed to obtain an engineer’s certificate of final completion, a condition under its contract with JRSF. H&J responded that it had completed all the work it had contracted to do. What type of contract condition does obtaining the engineer’s certificate represent? Is H&J entitled to the final payment? Discuss. [*H&J Ditching & Excavating, Inc. v. Cornerstone Community Bank*, 2016 WL 675554 (Tenn.App. 2016)] (See *Conditions of Performance*.)
**—For a sample answer to Problem 16–6, go to Appendix E.**

Solution

The requirement that the contractor obtain an engineer’s certificate of final completion before the final payment will be made under the contract is a condition precedent. In most contracts, promises of performance are not expressly conditioned—they are absolute and must be performed to avoid a breach of the contract. In some situations, however, performance is contingent on the occurrence of a certain event. If the condition is not satisfied, the obligations of the parties are discharged. A condition that must be fulfilled before a party’s performance can be required is a condition precedent.

In this problem, H&J was hired to excavate and grade land for a residential construction project. Cornerstone Community Bank financed the project. As the work progressed, H&J received payments totaling 90 percent of the price on its contract. But the last payment was not forthcoming when H&J believed it was due. The contractor filed a suit in a Tennessee state court against the bank to recover the final payment. The bank responded that H&J did not receive the payment because it failed to obtain an engineer’s certificate of final completion, a condition under its contract. H&J argued that it completed all the work it contracted to do.

H&J is not entitled to the final payment on the contract because it did not comply with the condition to obtain the engineer’s certificate. This condition preceded the obligation under the contract to make the final payment. Even assuming that H&J “completed all the work it contracted to do,” the final payment is not subject to disbursal without the certificate.

In the actual case on which this problem is based, the court issued a judgment in the bank’s favor. A state intermediate appellate court affirmed. “No certificate of substantial completion was ever issued, a condition precedent to final payment.”

1. **Substantial Performance.** Melissa Gallegos bought a used 1996 Saturn automobile for $2,155 from Raul Quintero, doing business as JR’s Motors. Their written contract focused primarily on the transfer of physical possession of the vehicle and did not mention who would pay the taxes on the sale. Gallegos paid Quintero $2,200, believing that this amount included the taxes. When she asked him for the title to the vehicle, he told her that only the state could provide the title and only after the taxes were paid. Quintero added that they had orally agreed Gallegos would pay the taxes. Without the title, Gallegos could not obtain license plates and legally operate the vehicle. More than six years later, she filed a suit in a Texas state court against Quintero, alleging breach of contract. Did Quintero substantially perform his obligation under the contract? Explain. [*Gallegos v. Quintero*, 2018 WL 655539 (Tex.App.—Corpus Christi-Edinburg 2018)] (See *Discharge by Performance*.)

Solution

Yes. Quintero substantially performed his part of the deal for the sale of the Saturn to Gallegos. The requirements for performance to qualify as substantial are:

1. Good faith.
2. Different or missing performance easily remedied by damages.
3. Performance that creates substantially the same benefits as promised.

In this problem, Gallegos bought a used Saturn from Quintero. Their contract did not indicate who would pay the taxes on the vehicle. Gallegos believed that the sale price included the amount of the taxes. When she asked Quintero for the title, however, he told her that the state could provide it only after the taxes were paid. He also told her that they had orally agreed she would pay the taxes. Of course, without the title, she could not obtain license plates and legally operate the vehicle.

Importantly, the contract did not state who would pay the taxes on the sale of the car. Instead, the contract primarily considered the transfer of physical possession of the vehicle from Quintero to Gallegos. By the time of the suit for breach, Gallegos had been in possession of the car for over six years. This supports a conclusion that Quintero fulfilled the essential terms of the contract or, in other words, that he substantially performed. The court might order him to pay Gallegos the costs of the taxes and title to make the performance complete.

In the actual case on which this problem is based, the court found that Quintero substantially performed and ordered him to pay Gallegos the costs as stated. A state intermediate appellate court affirmed, on the reasoning set out above.

1. **A Question of Ethics—The IDDR Approach and Discharge by Operation of Law.** Lisa Goldstein reserved space for a marriage ceremony in a building owned by Orensanz Events, LLC, in New York City. The rental agreement provided that on cancellation of the event “for any reason beyond Owner’s control,” the client’s sole remedy was another date for the event or a refund. Shortly before the wedding, the New York City Department of Buildings found Orensanz’s building to be structurally unstable and ordered it vacated. The owner closed it and told Goldstein to find another venue. She filed a suit in a New York state court against Orensanz for breach of contract, arguing that the city’s order had been for a cause within the defendant’s control. [ *Goldstein v. Orensanz Events, LLC,* 146 A.D.3d 492, 44 N.Y.S.3d 437 (1 Dept. 2017)] (See *Discharge by Operation of Law*.)
2. Is the owner of a commercial building ethically obligated to keep it structurally sound? Apply the IDDR approach in the context of the *Goldstein* case to answer this question.

Solution

Yes. The owner of a commercial building is under an ethical duty to keep it structurally sound—at least to the extent the owner is legally obligated to its occupants. That legal obligation, which may arise from a contract, is subject to a standard of foreseeability and hence something within the owner’s control.

In this case, Lisa Goldstein rented space for a wedding in a building owned by Orensanz Events. The rental agreement provided that if the event was canceled “for any reason beyond Owner’s control,” Goldstein’s sole remedy was another date or a refund. Just before the wedding, the city found the building to be structurally unstable and ordered it vacated. Orensanz closed it and told Goldstein to find another venue.She filed a suit against Orensanz, arguing that the city’s order had been for a cause within the defendant’s control.

The question poses an ethical issue that could arise from these facts— whether the owner of a commercial building is ethically obligated to keep it structurally sound. In this case, the immediate stakeholders include the parties to the contract. Others who could be affected by such a duty include persons who reserved or might reserve the venue, other property owners, those who enacted or enforce the city’s building code, and parties who are expected to respond to an emergency in the building.

With respect to the circumstances of the *Goldstein* case, Orensanz was under an ethical duty to keep the building structurally sound, at least to the extent of its legal obligation under the parties’ contract. That obligation was subject to a standard of foreseeability and hence something within the owner’s control. Orensanz could have had the building inspected periodically and should have kept it in good repair. This would have benefited all of the stakeholders. The owner’s choice not to pursue this course of action worked to their detriment.

A party may sometimes be excused from performing a contract under the doctrine of commercial impracticability. Performance is commercially impracticablewhen it is significantly more difficult than anticipated. The difficulty must have been unforeseeable at the time the contract was made or due to forces the party could not control. Here, if the lack of structural integrity of Orensanz’s building had been unforeseeable—such as structural damage from a catastrophic windstorm—it would have been beyond the owner’s control. This would satisfy both the legal standard of excuse for contract performance and the ethical standard to benefit the stakeholders.

In the actual case on which this problem is based, the court issued a summary judgment dismissing Goldstein’s complaint. A state intermediate appellate court reversed the dismissal. The appellate court cited “issues of fact whether the failure was foreseeable or within defendants’ control.”

1. Is a contracting party ethically obligated to “relax” the terms of the deal if the other party encounters “trouble” in performing them? Discuss.

Solution

A contracting party is not legally obligated to “relax” the terms of a contract if the other party has difficulty performing its side of the bargain. From an ethical perspective, however, what that difficulty means for both parties should reasonably be taken into account.

The difficulty of the performing party should reasonably be taken into account by the other party to the contract, for that party’s own interest. There are costs associated with insisting on strict compliance—the time and effort to manage that goal, as well as litigation costs and negative publicity if it is not met. And the costs associated with the performing party’s failure to strictly comply might be recouped in other ways, such as the other party’s tailoring its own conduct to the same standard or renegotiating some of the terms.

Of course, there is no ethical duty for contracting parties to act to their own detriment to benefit the other parties to the deal. This is an aspect of reasonably considering the performing party’s difficulty. The strength or weakness of an excuse, its subjective or objective nature, and the credibility of the performing party are other factors to weigh in the balance.

And contracting parties should expect good faith and legal and ethical behavior in all of their dealings. Illegal, unethical, or abusive conduct is not something that should be anticipated in any circumstance.

Critical Thinking and Writing Assignments

1. **Critical Legal Thinking.** The concept of substantial performance permits a party to be discharged from a contract even though the party has not fully performed all obligations according to the contract’s terms. Is this fair? Why or why not? What policy interests are at issue here? (See *Discharge by Performance*.)

Solution

The fairness of the doctrine of substantial performance arises from human nature, which dictates that performance will not always fully satisfy all of the parties to a contract. Perfection is also impossible, given human nature, and thus, generally, something less than perfection is possible in the performance of a contract under the doctrine of substantial performance.

The doctrine looks to the good faith of the parties in their efforts to perform. When disputes arise, a court may impose on the parties whatever is reasonable in the circumstances. In part, the policy behind the doctrine is to enforce the contract that the parties made—that is, to prevent one party from using a minor deviation from the contract to avoid performance.

1. **Time-Limited Group Assignment—Anticipatory Repudiation.** ABC Clothiers, Inc., has a contract with John Taylor, owner of Taylor & Sons, a retailer, to deliver one thousand summer suits to Taylor’s place of business on or before May 1. On April 1, John receives a letter from ABC informing him that ABC will not be able to make the delivery as scheduled. John is very upset, as he had planned a big ad campaign. (See *Discharge by Performance.*)
2. The first group will decide whether John Taylor can immediately sue ABC for breach of contract (on April 2).

Solution

When either party repudiates the contract with respect to a performance not yet due, the party’s repudiation constitutes an anticipatory breach. An anticipatory breach legally permits the nonbreaching party to suspend performance without legal liability, and to treat the contract as in breach and immediately pursue a remedy.

1. Now suppose that John Taylor’s son, Tom, tells his father that they cannot file a lawsuit until ABC actually fails to deliver the suits on May 1. The second group will determine who is correct, John or Tom.

Solution

Taylor senior is correct. He can immediately file suit for breach of contract, even though actual performance is not due until May 1. He does not have to wait until May 1, as Tom insists. An anticipatory breach legally permits the nonbreaching party to suspend performance without legal liability, and to take a choice of either waiting until the performance date to treat the contract as in breach or immediately pursuing a remedy.

1. Assume that Taylor & Sons can either file immediately or wait until ABC fails to deliver the goods. The third group will evaluate which course of action is better, given the circumstances.

Solution

From Taylor & Sons’s perspective, the chief consideration is the effect that their choice of action will have on their business. Should they cut their losses by immediately finding another party to suit their needs and suing ABC for breach? Could they obtain damages? Should they instead attempt to obtain their order more quickly from ABC by working with the supplier? Generally, until a nonbreaching party does actually pursue a remedy, the repudiating party can, with notice, retract the repudiation, reinstating that party’s rights under the contract.