

EXAMINERS' ANALYSIS OF QUESTION NO. 14

1. The issue is, what are the terms of the contract when the acceptance by Beverly Florist, Inc. did not mirror the offer made by Cottage Gardens.

The first issue is to determine whether UCC or common law applies. The UCC applies to the sale of goods. Goods are defined as all things which are movable at the time of the contract. MCL 440.2105. Here the contract pertains to the sale of flowers. Flowers are moveable and therefore considered goods. Article 2 of the UCC applies.

The next issue is to determine the terms of the contract. Under the UCC, the general rule is that additional terms are to be construed as proposals for addition to the contract if one of the parties is a non-merchant. MCL 440.2207(2). However, if the transaction is between merchants, such terms become part of the contract unless the offer expressly limits acceptance to the terms of the offer; they materially alter it; or notification of objection to them has already been given or is given within a reasonable time after notice of them is received. MCL 440.2207(2)(a), (b) and (c).

Here it must be determined whether the parties are merchants. A merchant is defined as a person who deals in goods of the kind involved in the transaction. MCL 440.2104(1). Cottage Gardens is in the business of growing and selling plants. Beverly Florist, Inc. is a florist that sells flower arrangements. Each party deals with flowers--the goods involved in this transaction--therefore, both parties are merchants.

Cottage Gardens sent a written offer to sell 1,000 white roses to Beverly Florist, Inc. at \$3.00 each, plus delivery. Beverly Florist's response accepted the offer, but changed the terms indicating that the price was \$3.10 and that delivery was included. Pursuant to MCL 440.2207(2), the terms suggested by Beverly Florist become part of the contract unless one of the sub-rules applies. Under these facts, the only applicable sub-rule is that the new terms materially alter the original contract. MCL 440.2207(2)(b). An alteration will not be included if it materially alters the bargain. MCL 440.2207, Note 3.

Here, Beverly Florist increased the contract price by \$100 and that increase in price included delivery. This does not materially alter the original contract because the increased cost paid for the delivery. Further, this increase in price arguably did not increase the risk of Cottage Gardens or limit any remedies available to it in the event of a breach of contract. Therefore, the terms proposed by Beverly Florist will become part of the contract (1,000 white roses at \$3.10 and delivery is included).

2. The issue is whether Beverly Florist must accept tender of the white roses that were delivered on March 11, 2015, when the initial delivery was not a perfect tender.

In a single delivery contract, if the goods or the tender fail in any respect to conform to the contract, the buyer may reject all, accept all, or accept any commercial units and reject the rest. MCL 440.2601. Here, the delivery by Cottage Gardens on March 10, 2015 contained 250 red roses. These were the wrong color as the contract specified that they should be white. Beverly Florist, Inc. kept the 750 conforming white roses and rejected the 250 non-conforming red roses. This was a single delivery contract and because all of the roses were not white as per the contract, the delivery was not a perfect tender. Beverly Florist, Inc. was within its rights to accept the conforming flowers and reject the non-conforming flowers.

However, where any tender or delivery by the seller is rejected because the goods were non-conforming and time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery. MCL 440.2508(1). An action is taken seasonably if it is taken at or within the time agreed or, if there is no agreed time, at or within a reasonable time. MCL 440.1205. The performance deadline for the contract was March 11, 2015. There was still one day left for Cottage Gardens to cure the defect in the delivery. Further, the facts indicate that upon receipt of the rejection, Cottage Gardens immediately faxed a notice to Beverly Florist, Inc. indicating that it intended to supply the 250 remaining white roses by March 11, 2015. Taking action without any delay shows intent to act promptly to cure a problem within the performance time set by the contract. Therefore, there was

time left for performing and the notice to cure was sent within a reasonable time.

The facts further indicate that Cottage Gardens delivered the 250 white flowers by 9:00 a.m. on March 11, 2015. The new tender was made within performance deadline set in the contract. Cottage Gardens sent the notice to cure within a reasonable time, and supplied the 250 white roses before the expiration of the contract deadline. Since Cottage Gardens complied with the statutory requirements, Beverly Florist, Inc. is required to accept the tender of the 250 white roses that were delivered on March 11, 2015.