

2)

===== Start of Answer 2 (1327 words) =====

1. What is the likely outcome of Ben's action

### **Non-possessory interest**

A non-possessory interest is one that someone that does not have actual title to the land possesses. These types of interests include easements, servitudes, and covenants.

### **Easements**

An easement is a non-possessory interest in a piece of land that burdens the servient estate. There are both negative and positive easements. A positive easement allows someone to do something on the burdened land. A negative easement prevents someone from doing something on the burdened land. Here, Ben asserts that he has an easement over the road along the north side of the farm owned by Polly.

### **Easement appurtenant**

An easement appurtenant is one that runs with the land. It must also touch and concern the land. Here, Ben is a neighbor and the easement touches and concerns the land because he uses the road along the north side of the farm to get to his land. Furthermore, Ben uses the land on a daily basis. This fact seems to suggest that the easement is one of necessity, however even if it is not, it is still one that runs with the land. Therefore, it is an easement appurtenant.

### **Easement of Necessity**

An easement of necessity is one that allows a party to enter their land. Commonly, these are found in landlocked estates or those that do not have reasonable access to public highways. Here, the facts do not indicate that Ben uses this easement out of necessity. Therefore, it is assumed that this easement is not one for necessity.

### **Creation of an Easement**

An easement can be expressly or implicitly created. The owner of the burdened estate should grant a deed to the user, but an easement can be created through implication. Easements can be created through adverse possession if the user's use is open and notorious, continuous, and adverse. Here, Al executed a deed to Ben which created the easement. Ben should have immediately recorded the deed in order to avoid future conflicts with future owners; however, lack of recording does not mean that the deed is invalid.

### **Improvements**

If an easement user improves and maintains the easement, the easement stays alive. This means that if an easement is not used daily, if the user improves the land, it can indicate that the easement is still in use. Here, there are not facts to indicate that the easement was not used for long periods of time. In fact, the

easement was used quite often. Ben graded and paved the road on the easement, but he did not do so in an excessive wasteful fashion. The road decreased the value of the farm, but not to an unnecessary amount.

### **Notice**

In order for an easement to survive conveyance of the burdened estate, the buyer must have notice of the easement. Notice can be either actual or implied. The deed was not immediately recorded, which would indicate that Carol did not have actual notice when she received the farm from Al in 2009. However, the facts indicate that Ben used the road on a daily basis. Thus, even though Ben did not record his deed until 2011, it is possible that even though Carol did not have actual notice of the easement, she had constructive notice through Ben's use of the road daily.

Polly received the written contract from Carol in 2012, which is after Ben recorded his deed. Buyers have a duty to inspect the property both physically and through documentation. Here, Polly failed to check the chain of title to see if there were any encumbrances on the land. If she would have checked, she would have seen that Ben had a deed, thus she would have actual notice of the easement. Thus, Ben will prevail because Polly had actual notice of the easement.

### **Implied/Constructive Notice**

Notice can be constructive or implied if the user is open about their use of the easement. Here, Ben used the easement daily when the property was conveyed to Carol. Furthermore, when Polly received the executed contract from Carol in 2012 she inspected the farm and observed Ben traveling on the road along the north side of the farm but said nothing. Polly should have raised any objection during this inspection. Thus, even if the gap in Ben's recording made the notice inadequate, Polly had constructive notice of the easement because Ben used the road daily.

In conclusion, Ben will prevail in his claim against Polly seeking declaratory relief that the farm is burdened by his easement because Polly had both actual and constructive notice that the appurtenant easement existed.

2.

### **Polly's breach of action against Carol**

In order to convey real property, one must enter into a contract which details the land to be conveyed and though equitable construction the property is the responsibility of the buyer once that conveyance is made, including the closing time. This means that a buyer is responsible for an occurrence anytime before the closing and after the conveyance of the deed. Here, Carol executed a written contract to sell the farm to Polly for 100k in 2012 but did not give her the deed until 2014. Polly should have requested the deed at an earlier time, but the lack of Polly's possession of the deed will not stop her from asserting the breach of contract claim against Carol.

Here, Carol did not breach her contract with Polly for the conveyance of the land.

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Polly had a duty to check the title chain and would have discovered the easement in 2012 had she. Furthermore, she was on notice that the land had an easement though implied notice.

However, the easement decreased the value of the land by 5k. It is not likely that Carol included this price deduction from the price. If she did not account for the 5k in the price of the farm, Polly may assert both compensatory and restitutionary damages in order to put her in a place she would have been had Carol not breached.

**Claim of the Breach of the Covenant under the Warranty deed.**

A warranty deed is one in which contains a covenant against all encumbrances. Here, Polly's deed contained a covenant which called for an exception for the water company easement. If that easement was created properly, then it would be protected.

**public easement**

A public easement is one in which is used for the greater benefit for the public. It is not specific to one person. For example, there may be a public easement over a piece of land to have a walkway to a lake. Here, the water company uses the land to provide water to the public. It is private in the essence that it is not granted to the entire public, just to the water co. However, it is used for public benefit. Therefore, it is a public easement.

**lack of authority to grant water company easement**

Here, Carol entered into the contract in 2012 and did not convey the deed to Polly until 2014. In the meantime, she deeded an easement for the water lines in 2012. When she deeded the land to Polly in 2012, she no longer had authority to then deed the property again. Thus, she did not have authority to grant the easement and thus she breached the warranty deed. If she would have granted the easement prior to 2012, it would have been fine. However, she did not have the proper authority to grant the deed. The water company is a BFP because they did not have notice of the deed since Carol failed to give Polly the deed until 2014

In conclusion, Polly will succeed on both the breach of contract and breach of covenant under the warranty deeds. She is entitled to compensatory and restitutionary damages. However, she will not be able to assert a claim for specific performance because the water company is not at fault and should not be punished for Carol's wrongdoing.

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(Question 2 continued)

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