

Question 1

- Duty to disclose

Whether Mr Kim committed an act of deception will depend on whether Mr Kim has a duty to disclose and whether Mr Kim had the requisite intent to deceive and to induce Ms Lee to conclude the contract.

If it can be concluded that a road plan affecting a portion of the garden is not something which has a substantial impact on the buyer's decision, there cannot be any duty to disclose on the part of Mr Kim.

- Ms Lee's first notice of termination

Assuming that Mr Kim has no duty to disclose, Ms Lee's first notice of termination shall be invalid. Ms Lee shall be in repudiatory breach. Ms Lee shall also be in mora creditoris.

- Mr Kim's impossibility of performance

On or after the closing, both parties' contractual obligations shall remain obligations without a due date. As Ms Lee is in mora creditoris, Mr Kim shall only be liable for intentional or grossly negligent breach. Mr Kim's failure to pay interest on his loan, which led to the foreclosure of M Bank, shall be assessed as Mr Kim's **intentional** breach of contract. Mr Kim shall thus be held liable for his impossibility of performance. Ms Lee's second termination notice shall therefore be valid.

- Damage

Ms Lee shall be entitled to damage award (in addition to termination). But the amount shall be reduced taking account of the parties' comparative negligence.

- Alternatively, in the event Mr Kim is found to have a duty to disclose

If the court or the tribunal finds that the road plan which affects a portion of the garden has a **substantial** impact on Ms Lee's decision to purchase the property, then Mr Kim shall have a good faith duty to disclose the road plan. Mr Kim's failure can, in such a case, amount to a deception if Mr Kim had the requisite intent. Ms Lee's first 'termination' notice can in that case be interpreted as a notice of rescission (voidance). If Mr Kim did not have the requisite intent to deceive and to induce Ms Lee to conclude the contract, Mr Kim's failure to disclose can still constitute a breach of contract. In such a case, Ms Lee's first termination notice can most probably be valid (assuming that the road plan is found to have a **substantial** impact on Ms Lee's decision to purchase the property, Mr Kim's failure to disclose will be assessed to be a 'material' breach).

Question 2

- If Y does not terminate the contract, but seek damages in lieu of performance

Then the amount of Y's damage entitlement must be assessed as of the date of impossibility (1 Jan 2018). Y shall be entitled to the market value of the property as of 1 Jan 2018, which is 1.4 billion KRW plus interest from 2 Jan 2018.

X shall not have any defence. X shall be entitled to keep the money received from Y.

- If Y terminates the contract and seeks damage (which is not a wise step for Y to take)

Both parties must restore everything. Additionally, X has also to pay interest on the purchase price he received from the date he received the money. Y has also to pay market rate of rent for the property from the date he took the delivery.

Additionally, Y can choose between performance measure damage (0.4 billion KRW) or reliance measure damage.

X can have a defence of simultaneous performance to refuse (i.e., delay) payment of damage until Y disgorges the benefit of using the property (assuming Y has not done so to Z, see 2016Da240).

- If X did not know, at the time of the contract, that the property did not belong to him [however, this point was not considered in grading as it was not covered by this semester's syllabus]

X can terminate the contract (Art, 571(1)). Then all the consequences of termination and the defence of simultaneous performance explained above shall apply.

X shall have to pay damage to Y (but Y can choose between performance measure damage and reliance measure damage).