Professional Practice Examination -- Study Guide -- Part "B" -- December 5th, 2015

ppeStdyGdeB2015Dec05

The purpose of Part "B" is to examine an elementary knowledge of law as it may apply to an engineer's working experience. Question 1. is definitions, with 8 options, and to answer only 5.

Questions 2., 3. and 4. are case studies. Each answer should include the names of relevant legal terms and principles, and how each term or principle applies to one or more elements of the case. This Study Guide may contain more material than could be included within a 20 minute answer.

Page numbers as given below are for the Marston text, 4th edition. Page references are for study purposes only, and are not anticipated in an answer. Case precedent names can benefit an answer.

Repeat note: for question 1., answer only 5 of the 8 options given here.

1. (i) Equal treatment employment rights - are without discrimination regardless of {list 5 of 15} ancestry, race, place of origin, colour, ethnic origin, citizenship, creed / religion, sex, sexual orientation, age, marital status, family status, record of offences, handicap, and to be free from sexual harassment, page 322.

1. (ii) Fiduciary duty of a director - is always to act honestly and in good faith in the best interests of the corporation and not in a manner that is in the of personal interest of the director, pages 20 - 24.

1. (iii) Discoverability concept - relates to a limitation period being placed on a claim. The basic limitation period is 2 years, from when a defect is discovered or ought reasonably to have been discovered. The ultimate limitation period is 15 years, from when the work was completed. If an action for loss is not filed within these periods it will be 'statute barred'. A contract may specify different limits, pages 71 - 75.

1. (iv) Difference between mediation and arbitration - in mediation the parties to a dispute may be assisted by a mediator to resolve their differences but the result is not legally binding. The difference in arbitration is the parties are legally bound by the adjudication of the arbitrator or arbitration board. A board is of 3 people, 1 selected by each party, plus a chair appointed by the first 2 people, pages 30, 235 - 239.

1. (v) Contra proferentem - where a clause in a contract is ambiguous, the determination of liability for damages, if any, will be against the party that drafted the contract, page 136.

1. (vi) Secret commission - a bribe offered to a party, to deceive another party to a contract. The person offering the bribe and also the recipient, can be both charged with an indictable offence, pages 179 - 180.

1. (vii) New York Convention - an agreement signed in 1958 by over 135 countries including Canada. The courts in those signing countries will enforce arbitration decisions from other countries. The purpose is to minimize costs of foreign litigation. A foreign work contract should be with a signing country, page 30.

1. (viii) Statutory holdback - a percentage of the value of work done as construction proceeds. In case the prime contractor is not making payments to sub-contractor(s) as scheduled in a contract, the holdback is money the owner is obligated to set aside to pay sub-contractors. If lien claims are made, these amounts are held back in addition to the holdback. In Ontario the holdback is 10% for 45 days, pages 249 - 260.

2. Tort, potential liabilities - are to Ever Works Limited (EWL) for the failure of the contact system, and to Live Rail Inc (LRI) for failing to manage the project to minimize problems. The suit is in tort because the British Columbia Municipality (BCM) did not have a contract with EWL.

The purpose of tort law is to compensate an aggrieved party, so far as money may relieve a loss.

All three principles of tort law can be proven relevant here. They are -
1) a duty of care, 2) a breach of that duty, and 3) damage or loss as a result of the breach, text 37 - 70.

Tort principle 1) applies because BCM could expect a duty of care from EWL, even though there was not a contract between them. There were contracts between BCM and LRI, and between LRI and EWL.

Tort principle 2) applies because the contact system failed and therefore EWL breached a duty of care.

Tort principle 3) applies because there was damage and substantial expense needed to recover from the failure. If there were clauses to cover this loss, BCM may obtain damages from LRI in contract, but if not, or not completely, then in tort. If this were the case, LRI would be sued in tort and in contract.

LRI and EWL could be concurrent tortfeasors. LRI should have passed all information to EWL. EWL should have been aware of possible corrosion problems and looked at existing reports, as professionals in this technology. 'Expert testimony' may be used to establish the responsibilities of EWL and LRI.

A likely outcome is EWL would be 80% responsible and LRI would be 20% responsible.

A similar case precedent is Unit Farm Concrete vs. Eckerlea Acres, text page 46.

3. Contract, breach of and liability - ACE can make a claim against Rock Busters Ltd (RBL) for 'fundamental breach' of contract. Based on a history of these cases, a clause to limit liability is not normally enforceable. The party at fault has to pay the full amount of loss, which will be well beyond the liability limit set at $400,000. The equipment was guaranteed to be capable of 175 tons per hour but was never able to crush more than 30 tons per hour. The breach was clearly going to the root of the contract.

ACE had paid $350,000 to RBL and also paid another supplier $500,000 to replace the cone crusher. ACE had expected to pay $400,000 for a working system but instead had paid a total of $850,000. The claim against RBL would be for $450,000 plus costs for lost production, etc., well over the $400,000 limit.

An approach being taken by Canadian courts concerning limited liability clauses, is that parties of more or less equal bargaining power should have the freedom to negotiate their 'breach of contract' clauses. If the construction of the wording, about the amount of money in a limited liability clause, is clear and true, and the liquidated damages provisions are supported in detail by a genuine pre-estimate of the costs of a breach, then the legal principle of 'true construction approach' is said to have taken place and the clause is enforceable. About 1990, the law changed from just 'fundamental breach' to 'true construction approach'.

The contract as it was signed by ACE, provided that RBL's maximum liability would be $400,000. With the true construction approach, ACE would be successful only for $400,000 and sustain a loss of at least $50,000 plus costs. Similar case precedents are Harbutt's Plasticene vs. Wayne Tank and Pump where the clause was not enforceable, and Hunter Engineering vs. Syncrude where it was, pages 155 - 164.

4. Equitable estoppel and gratuitous promise - the information technology firm (ITF) was not entitled to terminate the contract. A 'gratuitous promise' had been made by ITF to the international courier company (ICC) finance department to provide additional information prior to the third progress payment. The gratuitous promise was not in writing and no consideration was given or was it requested. ICC was clearly relying on the promise but ITF never did provide the information.

ITF was faced with a serious loss and was trying to get out of the contract. If ITF insists on the express wording of the contract, ICC could invoke the relevant legal principle of 'promissory' or 'equitable estoppel'. This is an 'exception remedy' to the contract as written, and will ensure the result would be equitable for ICC. This is a situation where an agreement not in writing can be enforced, and ITF will take the loss.
A similar case precedent is Conwest Exploration vs. Letain, pages 92 through to 97.