



EXAMINERS REPORT 2022

Examination for the ICE Certificate in Law and Contract Management (CLCM)

Examination for the Advanced ICE Certificate in Law and Contract Management (ACLCM)

EXAMINERS' REPORT 2022

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Moderator's Report

The Law and Contract Management Committee were pleased that the 2022 examinations went ahead in person and online successfully, thank you to all the examiners and exam centres for their support.

The Module 1 Paper, was answered very well this year with over 80% achieving a pass mark. The examiner however has outlined some areas where answers were not so well executed. To improve technique the examiner notes that candidates often lost marks by not providing full answers identifying the relevant legal principle, applying it to the facts and then giving a reasoned conclusion - with candidates sometimes missing out one or more of these steps. In practice, identifying the correct legal principle but then not providing a reasoned view can be rather unhelpful in terms of deciding which course to take.

On the other hand, It was encouraging that the majority for candidates were very comfortable with explaining the principles of contractual frustration and misrepresentation. Again, candidates were generally able to apply these principles to the facts and articulate their conclusions well.

For the Module 2 Paper, Overall, this section was completed well by the candidates with a pass rate of 80%. Where candidates scored less well it would appear that time may have been an issue as some answers were incomplete. Those candidates looking back at past papers would be well advised to read the questions carefully and reflect on historical suggested answers which give an indication as to what the examiners are looking for. The examiners are looking for well thought through answers to a range of questions using the contract as the basis for these answers, not some arbitrary opinion of fairness.

Candidates generally showed a good level of knowledge of the NEC4 ECC and provided correct clause numbers as references and identified the appropriate contractual processes to be followed. There was a general failure to use the correct capitalisation and italics for defined and identified terms but this may have been due to time pressures.

The Module 3 exam achieved a high pass rate with 88% of candidates achieving a pass mark. It is clear that candidates sitting this Paper are those to which the Module 3 Paper is targeted. Module 3 is aimed at those with both knowledge and some hands-on experience of civil engineering contract who may wish to further their knowledge or follow a career path in the direction of more challenging contract management and/or dispute management. It is very much hoped that a number of candidates who sat the Module 1 and/or Module 2 Papers will in time apply to sit the Module 3 Paper.

The examiners give a considerable amount of time to set and mark papers for a small honorarium and deserve our grateful thanks. The candidates evidently make a considerable effort to assimilate all the material and present commendable scripts whether they pass or not.

Finally, all the candidates, whether or not they were successful this year are to be congratulated for the hard work put into learning all the law and contract they have displayed. We hope that they will be able to put it into use in their daily work and will be encouraged to improve their knowledge and take it to a higher standard in years to come.

It is our belief that knowledge and understanding of civil engineering law and contract procedures are prerequisites to competent project administration and management. Consequently, it is hoped that all candidates will concur with these sentiments and do their part to encourage their colleagues to likewise commit to advancing their own understanding and knowledge of civil engineering construction law and contract.

Pass marks

The pass marks were set at 40% for Module 1, 50% for Module 2 and 65% for Module 3.

	Module 1		Module 2 NEC		Module 3	
	Nr	%	Nr	%	Nr	%
2022	36	81	40	70	8	88
2021	39	84	48	81	5	100
2019	49	80	74	57	8	100
2018	60	77	74	74	2	100
2017	70	72	79	83	3	66
2016	74	51	91	74	3	33
2015	85	70	105	76	3	33
2014	68	62	72	79	4	0
2013	42	73	51	73	3	0
2012	36	83	42	82	6	33
2011	43	81	41	53	2	50

A certificate is issued to a candidate who passes Module 1 and 2, or 3

Copies of the current curriculum, the two case lists and a revised reading list are all available on the ICE website <https://www.ice.org.uk/careers-learning/training/law-and-contracts/> or contact the Management Procurement and Law Department, Institution of Civil Engineers, One Great George Street, London SW1P 3AA, phone +44 (0)20 7665 2424 or email contractsanddisputes@ice.org.uk

The following pages are general comments on how the questions were answered and what the examiner was expecting. Each section of each module has a different examiner. Each exam script is then moderated by the LCMEC (Law and Contract Management Examination Committee) to ensure there is consistency between the examiners.



Module 1

Section 1

General comments

In general, this section was answered well, with the majority (83%) of candidates achieving a pass mark (40%) or above.

It was very encouraging to see most students having a firm grasp of the basics of the formation of a contract: offer, acceptance, consideration and an intention to create legal intentions, and some of the intricacies involved in this.

In terms of exam technique, candidates often lost marks by not providing full answers identifying the relevant legal principle, applying it to the facts and then giving a reasoned conclusion - with candidates sometimes missing out one or more of these steps. In practice, identifying the correct legal principle but then not providing a reasoned view can be rather unhelpful in terms of deciding which course to take.

It was encouraging that the majority for candidates were very comfortable with explaining the principles of frustration and breach of contract. It was also encouraging that most candidates correctly identified where there had been a misrepresentation and explain, with reference to the requirements for a claim for misrepresentation, why a finding for misrepresentation would be found.

One particular area that candidates struggled with was providing a reasoned explanation for the difference between an offer and an invitation to treat and the application of the postal rule in relation to the formation of contracts.

A further area where candidates did not achieve high marks was the consideration of what defences might be available in relation to a claim for misrepresentation and the applicable of the appropriate remedies for a finding of fraudulent, negligent or innocent misrepresentation.



Question 1

This was the most least popular question in Section 1, with only 7 of the 36 candidates answering this question. 4 students achieved a score of 10 (the overall pass mark) or above for this question. Students, in particular, had difficulties with question 1(c).

Question 1(a)

There was a mixed response to this question, with 4 of the 6 candidates who answered this question achieving more than 9 of the 12 marks available here. Most candidates were able to correctly identify that there had been a frustration of contract. Where candidates lost marks was failing to apply section 1(2) of the Law Reform (Frustrated Contracts) Act 1943 and explain that payments made before a frustrating event are recoverable (or sums payable cease to be

payable), subject to the discretion of the court, to allow the payee to retain sums paid or payable in order to defray expenses incurred for the purposes of performance of the contract.

Question 1(b)

There was generally a poor response to this question, with all candidates achieving 4 marks or less of the 8 marks available. Most candidates correctly identified that there was not a contractual frustration. Where candidates lost marks was in failing to explain the requirements and objectives of contractual damages. Furthermore, marks were lost in failing to identify the issue of remoteness and consider the two limbs of *Hadley v Baxendale* i.e., losses that rise naturally from the breach, or were in the reasonable contemplation of the parties - candidates should remember these are alternatives, and both limbs do not need to be fulfilled as some suggested.

Question 1(c)

This question was generally poorly answered with 4 candidates achieving 1 mark or less. Some candidates confused issues relevant to a claim for breach of contract and considered whether there had been a breach of specific contractual terms. Some candidates also considered the scenario of a claim for breach of condition and/or warranty.

Question 2

This was the most popular question in Section 1, with all but 3 of the 36 candidates answering this question. This was also the most well-answered question. About 80% of students achieved a score of 10 (the overall 40% pass mark).

Question 2(a)

Candidates generally did well on this question, considering whether there is a misrepresentation, with over three quarters of candidates achieving more than 5 marks of the 10 marks available for this question.

Candidates generally did well at identifying the ingredients of misrepresentation (i.e., a false statement of fact that induces another party to enter into a contract), although students lost marks by not always applying each of these ingredients to the facts of the question in order to fully answer whether there has been a misrepresentation or not.

Question 2(b)

Candidates generally did well to identify each of the types of misrepresentation: fraudulent, negligent and innocent, but again did not always apply these to the facts to consider which ones may or may not apply. It is always important to consider this in practice, as the remedies are different.

Question 2(c)

This question was generally poorly answered with only 5 of the candidates achieving the 4 marks available for this question. Candidates generally answered this question by explaining that the defences available for misrepresentation could be that (i) the statement made was only an opinion; and/or (ii) that silence does not constitute a misrepresentation. These are not defences to actionable misrepresentation. Furthermore, most candidates did not identify the low prospect of Joan succeeding with a defence to the misrepresentation. The higher performing candidates recognised this.

Question 2(d)

This question was generally well answered with most candidates achieving 2 of the 4 marks available for this question. Most candidates were able to identify that both damages and/or rescission can be available for claims for misrepresentation. Where candidates struggled was in identifying the different types of damages available depending on the specific type of misrepresentation (i.e., innocent, fraudulent, negligent) established.

Question 3

This question was also popular in Section 1, with 32 of the 36 candidates answering this question. This was the best answered question in Section 1, with the highest average score and 86% of students achieving a score of 10 (the overall pass mark) or above for this question.

Question 3(a)(i)

This question was generally answered well. Candidates generally identified the requirements for contract formation: offer, acceptance of that offer and consideration. Where candidates lost most was in failing to distinguish between an offer and an invitation to treat. Furthermore, some candidates incorrectly applied the postal rule with some candidates concluding that the postal rule would apply in this scenario.

Question 3(a)(ii)

Candidates answered this question well. Most candidates identified and applied the rules relating to counter-offers and the effect of a counter-offer is to kill the original offer (*Hyde v Wrench* (1840)). None of the candidates considered the two separate scenarios of whether Hamish' email was a counter-offer or request for information, and the differing outcomes associated with those scenarios.

Question 3(a)(iii)

This question was generally answered well, with most candidates (all but 6) achieving full marks for this question.

Question 3(b)

This answer was also generally answered well, with most candidates showing a good understanding of the remedies available for breach of contract. Only 7 candidates did not achieve full marks for this question.

Module 1

Section 2

General comments

In general, this section was answered well, with the majority (86%) of candidates achieving a pass mark (40%) or above.

It was encouraging to see the majority of students had a good grasp of the basics of a tort claim.

In terms of exam technique, candidates often lost marks by not providing full answers identifying the relevant tort and elements of that tort, applying it to the facts and then giving a reasoned conclusion - with candidates sometimes missing out one or more of these steps.

It was encouraging that most candidates were very comfortable with explaining the principles of vicarious liability and occupiers' liability and could easily identify and explain where there had been a possible break in the chain of causation or contributory negligence.

Particular areas that candidates struggled with were in relation to economic loss and psychiatric injury. Another area where some candidates struggled with was in relation to employers' liability.

Question 4

This was the most popular question in Section 2, with 29 of the 36 candidates answering this question. 86% of candidates who attempted this question achieved a score of 10 (the overall pass mark) or above for this question. Candidates did particularly well with answering question 4(b).

Question 4(a) – 13 marks

There was a mixed response to this question, with only 4 of the 29 candidates who answered this question achieving more than 10 of the 13 marks available here. However, 20 out of the 29 candidates did achieve at least 50% of the available marks.

The majority of candidates lost marks by failing to identify that the cost of the flights and the potential prize money were pure economic loss, which is not afforded the same level of protection as physical interests and can only be recovered where it is consequential upon physical damage. Despite missing out this analysis, most candidates were still able to come to a reasoned conclusion as to whether the losses were recoverable.

Question 4(b) – 5 marks

There was a generally good response to this question, with 13 of the candidates achieving full marks and 75% of the candidates achieving at least 4 marks out of the available 5. Most candidates correctly identified the relevant facts that may have broken the chain of causation or

amounted to contributory negligence. Where marks were lost was in failing to note that contributory negligence only reduces liability and does not extinguish it altogether. Marks were also lost where candidates failed to name the principles of contributory negligence or novus actus interveniens.

Question 4(c) – 7 marks

This question was generally poorly answered with 12 candidates achieving 2 marks or less out of the available 7 marks. Very few candidates identified that David's injuries were psychiatric rather than physical. It was encouraging to see that many candidates identified the principle of taking the victim as you find them (the eggshell rule) however, few candidates then applied this to the facts and concluded that Ruth could therefore not avoid liability for his losses. Most candidates mentioned foreseeability or remoteness but again, there was little application to the facts.

Question 5

This was the least popular question in Section 2, with 19 of the 36 candidates answering this question. Candidates seemed to struggle the most with question 5(a).

Question 5(a) – 5 marks

The question was generally poorly answered with 11 out of the 19 candidates that attempted this question achieving 2 marks or less out of the available 5. Candidates struggled to identify that Mr Brent might have a claim against El Mystico for negligence. Most marks were lost by candidates failing to structure their question and go through the various elements of the tort of negligence in order to fully advise whether Mr Brent might have a claim.

Question 5(b) – 11 marks

There was a generally good response to this question with only 14 out of the 19 candidates achieving more than 7 marks out of the available 11 marks. Candidates generally did well to identify that the question concerned the Occupiers' Liability Act 1957. Some marks were lost by failing to state that Bob was an occupier or Mr Clarke was a visitor. Most candidates were able to identify that breach of duty was likely but marks were lost by candidates failing to fully apply the facts in coming to that conclusion.

Question 5(c) – 9 marks

There was a mixed response to this question with only 9 of the 19 candidates achieving more than 50% of the marks available for this question. Almost all candidates were able to identify that the question related to the Occupiers' Liability Act 1984. Again, some marks were lost by failing to state that Bob was an occupier. Most candidates were able to identify the three conditions that must be satisfied before an occupier owes a duty to a trespasser. However, marks were lost where candidates failed to apply the three conditions to the facts to establish where a duty of care was owed. The majority of candidates correctly identified that occupiers are not liable for damage to the property of trespassers and so Bob was not liable for the damage to Darren's phone.

Question 6

This question was also popular in Section 2, with 24 of the 36 candidates answering this question. 75% of the candidates who attempted this question achieved 10 marks (the overall pass mark) or higher.

Question 6(a) – 10 marks

There was a mixed response to this question but 15 out of the 24 candidates did achieve more than 50% of the available marks. Most candidates identified that Todd might have a claim against his employer and identified that as his employer, Kingston & Adams, owed a duty of care for his safety at work. Marks were lost where candidates did not identify the requisite elements of the duty of care i.e. an employer must provide (1) competent staff (2) adequate plant and equipment and (3) safe system of working

Most candidates were able to identify that Dr Davies' actions could represent a novus actus interveniens but failed to note that Kingston & Adams would need to establish a reasonable doctor would not have made the same mistake in order for that action to break the chain of causation.

Question 6(b) – 10 marks

There was a mixed response to this question with 7 candidates who attempted this question achieving less than 4 out of the available 10 marks. Many failed to identify that this was a professional negligence claim. Most candidates identified that Dr Davies owed Todd a duty of care and had breached that duty of care by referring to rest and avoiding of contact sport being the usual advice (Watt v Hertfordshire CC). Few candidates identified that no allowance will be made for an inexperienced doctor – in fact, some candidates incorrectly stated that they would be held to a lower standard.

Question 6(c) – 5 marks

This question was generally answered well, with 11 out of the 24 candidates achieving over 4 marks out of the available 5 marks. Almost all candidates correctly identified that this question related to vicarious liability and were able to set out the various elements of vicarious liability. Where candidates lost marks was in failing to apply each element to the facts in the question.

Module 2

Section 1

Overall, this section was completed well by the candidates with a pass rate of 80%. Where candidates scored less well it would appear that time may have been an issue as some answers were incomplete.

Candidates generally showed a good level of knowledge of the NEC4 ECC and provided correct clause numbers as references and identified the appropriate contractual processes to be followed. There was a general failure to use the correct capitalisation and italics for defined and identified terms but this may have been due to time pressures.

There were two issues that a number of delegates struggled with. The first related to how to deal with errors in the Site Information and how this should be addressed and the second related to the ability of the *Client* via the *Project Manager* to be able to change the responsibility for design of a part of the *works* after the Contract Date. A number of delegates also failed to appreciate the default mechanism for assessing the change to the Prices due to a compensation event under main Option B

Question 1

This proved to be the most commonly answered question although only 48% of the delegates that answered this question managed to get 50% or more of the marks available.

Most delegates received full marks for part A of the question correctly identifying that the *Supervisor* could be changed after the Contract Date by the *Client* under clause 14.3.

A number of delegates struggled with part B, with some stating incorrectly the *Project Manager* had the power to change the Site Information. Others correctly identified that the Site Information could only be changed by the mutual agreement of the Parties under clause 12.3.

Part C was generally answered well with most candidates correctly outlining the early warning process.

Part D was also generally answered well with most candidates correctly identifying a compensation event under clause 60.1(12) and referencing clauses 60.2 and 60.3.

Responses to parts E & F were mixed with a number of candidates incorrectly stating that design responsibility can only be transferred with the agreement of the *Contractor* as opposed to the *Project Manager* having the power to do so under clause 14.3.

The responses to part G were also mixed with 40% of candidates achieving 4 out of 5 or more marks and correctly identifying how an impossible requirement in the Scope should be dealt with under clause 17.2, leading to a change in Scope and a compensation event. However, 52% of delegates failed to get more than 1 mark through either incomplete or incorrect answers.

Question 2

This proved to be the least popular question but one that was generally answered well with 73% of the candidates that answered it achieving a mark of 50% or above.

Part A was generally answered well with delegates correctly identifying that the *Project Manager* assesses the amount due in accordance with clause 50.1 and 51.1.

The responses to Part B were generally OK but candidates commonly failed to identify the amount due and instead concentrated more on the Price for Work Done to Date.

Part C was generally responded to well with most candidates identifying the requirement for the *Contractor* to submit an application for payment and recognising the consequences if they failed to do so (clause 50.4).

The responses to Part D were generally good with most delegates identifying that the Working

Areas can be changed after the Contract Date with the acceptance of the *Project Manager* (clause 16.3).

Responses to part e, f, g and h were in many cases incomplete or incorrect this may have been due to time pressures during the exam.

Question 3

This was the second most commonly answered question and one that candidates scored well against with only 1 response failing to achieve 50% or more of the marks on offer and that was by 1 mark.

Part A was not well answered by most candidates who failed to grasp the need for the *Project Manager* to notify a compensation event resulting from a change in Scope (clause 61.1) and that the *Project Manager* would then need to inform the *Contractor* that a quotation was not required to be submitted under clause 61.2 as the event had no impact on time or cost.

Part B was well answered by most candidates who correctly identified that the *Contractor* could notify a compensation event and that they would not be time barred from doing so as the event arose through an action of the *Project Manager* (clause 61.3).

Part C was also well answered by most candidates who identified the fact that the *Project Manager* could instruct that a quotation was not to be submitted by the *Contractor* if the event had no effect on time or cost (clause 61.4).

Part D was generally well answered with most candidates confirming that the *Contractor's* approach to pricing the compensation event was incorrect and that the evaluation should be made on the basis of Defined Cost plus Fee (clause 61.3). Most delegates also identified the option for the *Project Manager* and the *Contractor* to mutually agree to use rates or lump sums (clause 63.2).

Part E appeared to confuse some delegates who incorrectly stated that the way to assess the change to the Prices was different under main Option B compared to main Option A when in fact the assessment processes should be the same in both Options.

Part F was commonly answered correctly by reference to clause 63.5.

Part G was generally answered well by the candidates with most recognising that a compensation event under main Option A would be added to the Activity Schedule (clause 61.14) and become due for payment as part of the Price for Work Done to Date when the relevant activity was complete (clause 111.2(29)).

Question 4

These was the third most commonly answered question with 84% of candidates achieving 50% or more against it.

Part A was answered well by the majority of delegates who correctly quoted clause 31.1 and the need for the *Contractor* to submit a first programme for acceptance with the period sated in the Contract Data regardless of whether physical work had started or not.

The responses to parts B, C, D and E were generally OK through few candidates scored full marks. Some candidates correctly described the term, others the “owner” and others identified the requirement to show the item on the programme.

Part F was generally answered well with candidates correctly identifying how long the *Project Manager* had to accept the programme in accordance with clause 31.3. A number of delegates also successfully identified that the period for response could be extended by the mutual agreement of the *Project Manager* and the *Contractor* under clause 13.5.

Part G was generally answered well with most delegates correctly stating that a valid reason to not accept the programme wat that it did not comply with the Scope (clause 31.3).

The responses to part H were mixed with no delegate scoring full marks. Most delegates correctly identified the need for the *Contractor* to submit a revised programme if they were to change the order and timing of the works. A number of delegates correctly referenced the definition of a Defect and that it would not be applicable in this case. Few delegates identified the fact that the *Project Manager* cannot notify a Defect unless that power has been delegated to them by the *Supervisor*.

Module 2

Section 2

Those candidates looking back at past papers would be well advised to read the questions carefully and reflect on historical suggested answers which give an indication as to what the examiners are looking for. The examiners are looking for well thought through answers to a range of questions using the contract as the basis for these answers, not some arbitrary opinion of fairness.

Q7 was the most popular with 39 candidates attempted this and the average mark was 11 out of 25. For Q5, 30 candidates attempted this and the average mark was 13.5. Q6 had 3 candidates attempting this, returning an average mark of 15. Finally, 7 candidates attempted Q8, returning an average mark of 7. These were lower marks than the resulting last year.

Some comments which may be in addition to, or replacing those in similar reports are:

- Please state clause numbers in with your answers, but there is no need to re-cite clauses. We know what they say and we want to know what part of the clause is relevant to the scenario you are answering, and why.
- If you do not answer a part or all of a question, which some candidates did, you will not score any marks.
- Surely candidates can identify that the issue is perhaps about an ‘inconsistency’ then use the index to point to the relevant parts of the contract? A quick read over the clause(s), even when time is against you, might help shape some sort of answer, at worst worth a few marks.
- This statement is made every year but please carefully read and re-read the question. Do not rush this. Where it says “What should the *Contractor* do next?”, then answering this from the perspective of the *Project Manager* is not going to get you any marks.
- There is plenty of paper in the booklets so use this. On a similar note, do not start b) immediately after a), leave a few lines. Better even, with the space generally available, start a), b) etc on separate pages. If you need to go back to add something in this will be easily accommodated.
- Take care to number the questions and parts of questions carefully, this is not always done.
- Do an essay plan, reflect on the question, look in the contents and the index, make sure you have considered the broad range of matters that may be affected.
- Don't just assume the early warning process is appropriate for every part of every question. It is not. Think about what you are saying.

A few particular points on these questions:

- For Q5a, realise that the early warning process is there to help to raise awareness and solve the problem, but there is an inconsistency in the Scope, which needs correcting. Look around the contract to see all relevant clauses, hence 10 marks were available.
- For Q6d, a good analysis of the insurance provisions in the contract was needed – turn the clauses around in an appropriate answer – the question was looking for a 3-part answer, again hence why this was 11 marks. A few lines will get you a few marks.
- For Q7a, go through what should have happened (61.1/61.2) and what now should happen under 61.3 mentioning why this will not be time barred.

- In Q8b, describe the process for obtaining alternative quotations and also for using Project Manager assumptions.



Module 3

Section 1

Overall the standard of answers received in paper 3 maintained the good standard of recent years, which is encouraging. Eight people sat the examination, answering questions 1, 2 and 4. We have not provided comments on question 3 due to the fact that it was not answered by any of the candidates.

We commend all of the candidates who sat this examination as it is a significant commitment and requires considerable preparation.

Three issues are worthy of comment.

- When a question asks what someone should do, or if the Contractor is correct then the candidate must conclude any discussion with an answer to that question. It is not sufficient to merely discuss the topic.
- The front page of the examination paper says, “References to cases and legislation should be quoted where possible.” This is a key requirement of paper 3 and one of the differentiators from paper 2. Answers scoring higher marks tend to include references to cases and to the law. For example, the issue of trespass appears in question 1 and required candidates to know that there are two Acts of a similar name, the Occupiers Liability Act 1957 and the Occupiers Liability Act 1984. Similar issues appeared in the question concerning HGCRA.
- This paper deliberately examines law and contract issues. This requires candidates to understand legal issues and apply them to the situations described. Those with experience of contractual matters alone, but without some legal study, are unlikely to be successful.

Question 1

This compulsory question was answered well with marks ranging from 13 to 24.

Part (a). The contract was formed without the costs of pumping being agreed as Shackleton's liability. The parol evidence rule (note correct spelling) was relevant here in respect of the tender and the meeting minutes. There was no conclusion from the minutes, albeit they are unlikely to be evidence of agreement. The statement re specification places a clear obligation on Harrison.

Part (b) – This question concerned the Occupier's Liability Act 1984 – liability for unauthorised visitors. Children can be expected to take less care than adults. The site should have been properly fenced preventing access. Probably breach of HSWA 1974 too with the unguarded excavation.

In part (c) we were looking for recognition of the different Act. Occupiers Liability Act 1957. The people in question were lawful visitors. Also likely to be a breach of HSWA 1974.

Part (d) sought a recognition that each Party had a right to refer a dispute to adjudication. We expected candidates to explain the issues of construction operations, construction contracts, excluded operations and the role of the Scheme under HGCRA. HGCRA s105(1)(b), s104(1)(a), s108(1), s108(5). Some candidates clearly knew these issues but failed to explain them. Marks are always available for correct references to statute and the HGCRA is one that is specifically allowed into the examination so there is no excuse for not being able to quote the relevant sections.

Question 2

Two candidates answered question two with marks of 20 and 22, both very good marks.

Part (a) expected a recognition that there was a breach of contract with a response agreed in contract.

In part (b) the deduction of £75k was incorrect, the contract stated £25k per occurrence, not per person. In respect of arguments re LADs we expected to see references to *Beavis v Parking Eye* and *Cavendish Square v Makdessi*. Was this a genuine pre-estimate of cleaning & administrative costs? A court is unlikely to intervene in the rate stated.

Part (c) cyber attacks are now a feature of business, but normal evidence rules apply. A cyber attack is unfortunate but proof needed on balance of probabilities.

In part (d) we were expecting to see reference to *Rylands & Fletcher*. Smyth is liable to the bus company but can probably pass the claim on to Hay if contractual liability can be established. Most candidates rightly identified the probably role of insurers in such a matter.

In part (e) Hay is liable to Smyth. See Limitation Act 1980, damage has been discovered within six years of completion. The 12 months defects period is irrelevant. The 50 years design life is irrelevant, it is not a warranty as to 50 years of life. See *Blackpool Council v Volker Fitzpatrick & Ors*. Based on the surveyor's report, this design and construction is unlikely to be sufficient to satisfy either Fitness For Purpose or Reasonable Skill & Care standards.

Question 4

Six candidates answered question four with marks of between 14 and 22.

In part (a) there was an obvious mistake in the starting date. But the contract still contained a duration and a completion date so time was not at large. The contract says that 9 weeks was the period for installation and therefore the start date would be 2 December 2020. The drafting error was made by Wilkinson so *contra proferentem* the interpretation should be in Sterland's favour. Time is not at large and the dates for starting/finishing work are contractual obligations.

In part (b) the contract is silent on quality so the obligation for satisfactory quality comes from the Sale of Goods Act. There was clearly a lack of compliance with this by Sterland in not following the manufacturer's requirements. Sterland is liable.

In part (c) the delay was caused by Wilkinson, see earlier conclusion on dates in the contract. Therefore Wilkinson is liable to pay for the storage costs as it was Sterland's breach which caused the costs to be incurred.

In part (d) the lack of reference to interest in the contract is irrelevant. Implied terms from LPCDA 1998 as amended. Interest at 8.00% above BoE per annum, not per week. £100 costs allowed too. Most candidates knew and understood this legislation.

Part (e) is a text book question which required candidates to explain that the WP label alone is usually insufficient. The email can't be produced in front of a Judge or Adjudicator as evidence if the email was a genuine offer to achieve settlement.

Module 3

Section 2

A total of eight candidates took the paper. The overall standard was good. Total marks for both questions ranged from 31 to 49. We have not provided comments on question 6 due to the fact that it was not answered by any of the candidates.

Question 5

This question was compulsory, all 8 candidates provided an answer. Marks awarded ranged from 19 to 25. The question was broken down into three parts and was about payment and dispute resolution

Part (a) required the candidates to explain what actions the Contractor should take on a Main Option C Engineering Construction Contract to ensure that the Project Manager accepts the Defined Cost of a completed activity. The objective was to test the candidates understanding of Defined Cost and the new requirement in NEC4 of the Contractor notifying the Project Manager pursuant to Clause 50.9. There was a wide range of answers to this part due mainly to some candidates failing to mention clause 50.9. This part carried 10 marks and the range was between 5 and 10. Two candidates scored 10.

Part (b) required the candidates to explain the payment provisions of an Option A ECC subcontract when the amount due to the subcontractor is zero. Most candidates answered the question correctly but a few failed to describe the payment provisions of Y(UK)2. This part carried 5 marks and the range was between 1 and 5. One candidate scored 5.

Part (c) required the candidates to explain the dispute resolution process using option W2. Most candidates described the reference of the matters in dispute to the senior representatives. Marks were gained if the details of the full procedure was described. Most candidates also stated that under the Housing Grants, Construction and Regeneration Act, as amended a dispute can be referred to adjudication at any time.

Question 7

Seven candidates chose to answer this question. Marks awarded ranged from 13 to 24. Many candidates failed to recognise that the question related to the engineering and construction subcontract and quoted time periods from the engineering and construction contract. The question was broken down into four parts and was about programme acceptance, early warnings and notification of a compensation event.

Part (a) required the candidates to explain what actions the subcontractor should take following the contractor's failure to accept or not accept submitted clause 32 programme. The majority of candidates quoted the notice requirements of clause 31.3 and deemed acceptance. This part carried 5 marks and the range was between 3 and 5. Three candidates scored 5.

Part (b) required the candidates to explain which programme was to be used in preparation of a compensation event quotation. Most confirmed that the last accepted programme was to be used, but only one candidate quoted the second bullet point of clause 63.5. This part

carried 10 marks and the range was between 5 and 10. One candidate scored 10.

Part (c) required the candidates to explain the notification of an early warning and attendance at an early warning meeting. This part carried 5 marks and the range was between 4 and 5. Three candidates scored 5.

Part (d) required the candidate to draft a notification of a compensation event pursuant to clause 61.3, This part carried 5 marks and the range was between 4 and 5. Three candidates scored 5.

Question 8

One candidate answered this question. The question was broken down into four parts.

Part (a) required the candidate to explain what action the project manager should take on receipt of an adjudicator's decision which changed the project manager's decision that an event notified by the Contractor was a compensation event.

Part (b) required the candidate to explain what action the project manager should take when advised by the Contractor that the Scope contained a requirement to work adjacent to a rail line which breached health and safety regulations.

Part (c) required the candidate to explain the early warning procedure following receipt of a notification of a compensation event from the contractor.

Part (d) required the candidate to explain the procedure open to the project manager if a contractor fails to achieve a key date

Institution of Civil Engineers

Examination for the ICE Certificate in Law and Contract Management (CLCM) 2022

Module 1: Law (English and Scots Law)

ICE Certificate in Law

Tuesday 14th June 2022

Time permitted: 14:00 to 17:20 (3 hours 20 minutes)

There are three questions in Section 1 and three questions in Section 2.

Answer any **two** questions from **each section**; a total of **four** questions.

Please answer questions in the yellow books provided, answer Section 1 and Section 2 in **separate** books.

All questions carry equal marks.

Please indicate on the outside of the answer books if your answers will be based on Scots Law.

References to cases and legislation should be quoted where possible.

Reference to documents during the examinations

Only unmarked copies of Statutes and Statutory Instruments may be taken into the Examination.

Institution of Civil Engineers disclaimer; all names and characters in the question papers are fictional and any resemblance to any actual persons or businesses is purely coincidental.

Module 1

Question 1

Applestock Council (AC) is the local authority in charge of the Applestock area. One of AC's responsibilities is keeping roads clean and, in severe weather, keeping roads clear of snow. In November 2021, AC entered into a contract with Derwent's Road Services (DRS). Under the terms of the contract, DRS was to provide a 2-year street-cleaning service using its street-cleaning vehicles for a total cost of £800,000, to commence on 1 March 2022. 50% of this sum was payable on 1 January 2022 and £100,000 of this sum was used by DRS to pay for workers and vehicles to fulfil the contract with AC.

In December 2021, particularly bad snowstorms were predicted throughout January and February 2022. Concerned that it had insufficient snow clearing capacity, AC entered into a contract with Great Ground Vehicles (GGV) to clear snow using its 'GreatGlobe' snowplough. AC also entered into a contract with Hitch Utilities (HU), which would clear snow using its 'Master' snowplough. Both contracts were for three months, each charged a fee of £40,000 each, payable on 1 March 2022.

GreatGlobe was designed to rely on a special chemical designed to melt snow and ice. However, GGV only had limited stocks of the chemical and was unable to purchase more. It allocated its existing stock of chemical to other snowploughs and was therefore unable to clear snow in Applestock.

HU use of the 'Master' snowplough was no longer lawful following the coming into force of the [fictitious] Climate Defence Regulations 2022, which introduced new emissions limits for vehicles in AC. HU was therefore unable to clear snow during January, February and March 2022.

On 28 February 2022, a major strike was called by street-cleaning workers, which is still ongoing. DRS has no workers to operate its vehicles and has therefore been unable to clean the streets of Applestock since that date. AC has refused to pay the £40,000 originally agreed to either GGV or HU.

Advise AC as to whether or not the following contracts will be frustrated, and what will be the resulting rights and obligations of the parties:

- | | |
|----------------------------|------------|
| (a) AC's contract with DRS | (12 marks) |
| (b) AC's contract with GGV | (8 marks) |
| (c) AC's contract with HU | (5 marks) |

Total (25 marks)

Module

Question 2

Vogue has recently had a big win on the lottery and has decided to purchase Esteem By Joan, a company selling luxury wellness and beauty products.

Vogue entered into a written contract with Joan for the purchase of the company on 7 April 2022. On 28 March 2022, during negotiations for the contract, Vogue asked of the accounts of the company and specifically, whether the company was profitable. In immediate response, Joan said:

“My opinion is that the company is profitable. However, I will check the accounts in the next week, if you do not hear from me you can assume all is well”.

On 29 March 2022, Joan flies to the south of France for a last-minute holiday with friends. Just before her flight, she checks the company accounts.

After a week, Vogue hears nothing and assumes that Joan has checked the accounts which have revealed that Esteem By Joan is a profitable company.

The contract is then signed on 7 April 2022, but when Vogue receives the accounts she is upset to find the company was not profitable in the last 6 months.

Vogue intends to contact Joan to discuss the situation. Before she does so, she seeks legal advice.

- | | | |
|----|---|-------------------|
| a) | Whether Joan’s conduct amounts to an actionable misrepresentation? | (10 marks) |
| b) | If so, what type of misrepresentation has been made? Please explain your answer. | (7 marks) |
| c) | Would any defences be available to Joan? Please explain your answer. | (4 marks) |
| d) | What remedies might be available to Vogue? Please explain your answer. | (4 marks) |
| | Total | (25 marks) |

Module 1

Question 3

Miller decided to sell his tractor. He placed an advertisement in 'Country Vehicles' magazine on 1 May 2022. The advertisement stated: 'For sale: tractor. In excellent condition and only 70,000 miles. Serious offers only. Price: £60,000.'

The advertisement went on to give a PO Box number and an email address. Sachin saw the advertisement and was very interested in purchasing the tractor. As his laptop was broken, he sent a letter on 4 May 2022 to Miller's PO Box, stating that he would be willing to purchase the tractor for the quoted £60,000.

The following day, 5 May 2022, Hamish also saw the advertisement. He immediately emailed Miller, asking him if he had sold the tractor yet, and suggested that if he had not, he would buy it for £50,000.

Later that day, Miller replied and told Hamish that he had not sold the tractor but would be willing to let him have it for £55,000. Hamish did not have the extra £5,000 that Miller had asked for, and so emailed him asking if he could pay £50,000 upfront and the remaining £5,000 next month.

On 6 May 2022, Theo emailed Miller at 11 am and enquired after the tractor. Miller replied, asking for £55,000.

At 3pm on 6 May 2022, Hamish found out that he had won £5,000 on a lottery ticket. He immediately emailed Miller, asking him to disregard his previous email and telling him he wanted to accept the price of £55,000.

At 5pm on 6 May 2022, Theo replied to Miller's email agreeing to buy the tractor for £55,000.

The next day, 7 May 2022, Sachin's letter arrived in Miller's PO Box.

3a) Advise Miller whether any valid contracts have been made for the sale of the tractor with:

- | | |
|------------------|------------|
| (i) Sachin | (12 marks) |
| (ii) Hamish; and | (9 marks) |
| (iii) Theo | (2 marks) |

3b) Advise Theo on what grounds he might have a claim for damages against Miller, if Miller sells the tractor to Hamish? (2 Marks)

Total (25 marks)

Module 1

Question 4

Ruth is driving to work along a residential road where the speed limit is 20mph. She has an important deadline at work and is driving over the speed limit at 35mph. The roads are quiet and she knows there are no speed cameras on this route so she doesn't think this will be an issue.

Rob, a professional cyclist, is also running late to training and reverses out of his driveway without looking. Ruth does not have time to stop and crashes into Rob's car. Rob suffers whiplash and a broken arm. David, who is some distance away along the road, thought that Ruth's car might hit him and he started running away screaming. It turns out that David has an underlying personality disorder and develops a fear of going out into the street for fear of another accident. As a result, he loses his job.

Rob goes to hospital to have an X-ray on his broken arm. As he walks into the hospital, he is concentrating on texting his trainer to let him know that he won't make it to training. As he is looking down at his phone, he trips over a step and lands on his injured arm. He tells the doctor about the car accident and the fact that he tripped and fell on his injured arm.

As a result of the broken arm, Rob is unable to train for 3 months and is therefore unable to compete in a competition in Japan which was due to take place the following month. He had already paid for the flights to Japan which were £1,000. The competition also had a potential prize money of £200,000. Rob had been training for a number of years for this race and was favourite to win.

- | | | |
|----|---|-------------------|
| a) | Advise Rob whether Ruth is liable for his injuries and if so, advise Rob on the likelihood of recovering the cost of the flights and/or the potential prize money. | (13 marks) |
| b) | What defences may Ruth have to avoid or reduce her liability for Rob's claim for losses? | (5 marks) |
| c) | Advise Ruth on whether she is liable for David's injuries. | (7 marks) |
| | Total | (25 marks) |

Module 1

Question 5

Hargreave Limited, a law firm in London is holding a summer party for its employees and clients at a top London hotel. One of the partners has heard great things about a new magician called El Mystico and Hargreave Limited hires him to entertain the guests throughout the evening.

During the event, El Mystico says that he would like to perform his “signature trick” which involves taking the watch from one of the party goers, putting it in a bag and smashing it with a hammer. The intended outcome of this magic trick is that the watch is revealed to be on El Mystico’s wrist. Mr Brent hands over his designer watch, worth £25,000, and El Mystico assures him that the watch will be unharmed. El Mystico puts the watch into the bag, smashes it with a hammer but instead of being on El Mystico’s wrist at the end of the trick, the watch is revealed to be smashed beyond repair. It turns out El Mystico has never attempted this “signature trick” before.

Later in the night Bob, the Managing Partner, decides to invite a number of key clients and colleagues back to his house. Bob jokes that the garden was “in a bit of a state and needed some TLC”. He comments that he had hired contractors to re-do the paving slabs, but they had “done a shoddy job and left it in a total mess”. One of the client’s, Mr Clarke, goes into the garden to get some air and trips over a loose paving stone and fractures his wrist. Darren, who sees the party from the road, climbs the high wall and sneaks in. He runs past the group surrounding Mr Clarke and, in his hurry, trips over a pile of broken paving slabs and drops his phone, which smashes.

- | | | |
|----|---|-------------------|
| a) | Advise Mr Brent whether he has a claim in tort against any of the parties for the broken watch | (5 marks) |
| b) | Advise Mr Clarke whether Bob is liable for his injuries. | (11 marks) |
| c) | Advise Bob whether he is liable for the damage to Darren’s phone | (9 marks) |

Total (25 marks)

Module 1

Question 6

Todd is a chartered surveyor and works at Kingston & Adams. In the office, the administration team have been undertaking an archiving exercise and there are boxes piled up throughout the office. Todd has warned them on multiple occasions of the dangers of leaving these boxes around the office like this. In some places, the boxes have been piled six boxes high and Todd has remarked that these piles look particularly unstable.

Todd's desk is located next to one of the piles of boxes. As he sits at his desk one day eating lunch, one of the piles collapses on top of his head. Todd develops a headache and starts to feel dizzy. He goes to hospital with suspected concussion. Dr Davies, a newly qualified junior doctor, knows that the usual treatment for a head injury is to rest and avoid any contact sports for a period of 3 weeks. However, Todd seems to be fine and as she is in a rush to see other patients in A&E, she prescribes him with some mild pain relief and tells him to go back to work.

Todd goes back to work and also agrees to play in a rugby match with his friends the following evening. Todd subsequently develops severe migraines as a result of the untreated concussion and has to take 6 months unpaid leave from work.

Todd's colleague and good friend, Jerry, overhears Tim laughing and saying that "*if Todd wasn't so lazy, he would have been out on a job rather than sat at his desk eating. He's probably just exaggerating his injury to get time off and avoid doing work as per usual*". Jerry becomes irate after hearing this and picks up a nearby plant pot, throwing it at Tim. Tim ducks just in time and the plant pot sails over his head and hits a delivery man who is stood at reception, breaking his jaw.

- a) **Advise Todd what he will be required to establish in any claim he has against Kingston & Adams for his loss of earnings** (10 marks)
- b) **Advise Todd what he will be required to establish in any claim he has against Dr Davies for his loss of earnings** (10 marks)
- c) **Advise Kingston & Adams whether they could be liable for Tim's injuring of the delivery man** (5 marks)

Total (25 marks)

Section 1

Question 1

Advise AC as to whether or not the following contracts will be frustrated, and, what will be the resulting rights and obligations of the parties:	
1(a) AC's contract with DRS (12 marks)	
Frustration occurs when, without the fault of either party, an event occurs which renders the performance of the contract radically different from that contemplated by the parties or makes the contract incapable of being performed – Taylor v Caldwell (1863), Condor v The Barron Knights Ltd (1966).	2 marks
The strike was not the fault of either party and the contract cannot now be performed.	1 mark
Candidates should conclude that the contract between AC and DRS has been frustrated.	1 mark
Under section 1(2) of the Law Reform (Frustrated Contracts) Act 1943, payments made before frustration are recoverable (or sums payable cease to be payable), subject to the discretion of the court, to allow the payee to retain sums paid or payable in order to defray expenses incurred for the purposes of performance of the contract. Under the principle from <i>Gamerco SA v ICM</i> (1995), the discretion is a broad one to mitigate the harshness of allowing the loss to lie where it falls.	3 marks

£100,000 was incurred by DRS to perform its obligations under the contract with AC. Candidates should conclude that AC will likely be entitled to recover £400,000 - £100,000 = £300,000.	2 marks
The effect of frustration of the contract is to discharge parties from future performance of it.	1 mark
As the second instalment of £400,000 under the contract fell due after the frustrating event, AC is therefore discharged from liability to pay it.	2 marks
1(b) AC's contract with GGV (8 marks)	
Candidates should identify that the contract cannot be performed due to the fault of GGV because GGV allocated existing stocks to other snowploughs.	1 mark
Candidates should conclude that the contract has not been frustrated.	1 mark
Candidates should identify that AC would have a claim for breach of contract.	1 mark
Contractual damages compensate the innocent party for the loss which it has suffered as a result of the breach of contract. The objective of damages in contract is to place the innocent party in the position they would have been in had the contract been performed.	1 mark
There needs to be a causal connection between the breach and the loss i.e., causation established.	1 mark
AC can recover damages for its losses: <ul style="list-style-type: none"> • Which arise naturally from the breach (the first limb); and/or • Were in the reasonable contemplation of the parties at the time of the contract as the probable result of the breach (the second limb) (<i>Hadley v Baxendale</i>) 	3 marks
1(c) AC's contract with HU (5 marks)	
Frustration occurs when, without the fault of either party, an event occurs which renders the performance of the contract radically different from that contemplated by the parties or makes the contract incapable of being performed – Taylor v Caldwell (1863), Condor v The Barron Knights Ltd (1966).	2 marks
Applying this to the facts, introduction of the Climate Protection Regulations was not the fault of either party, and the contract cannot now be performed.	1 mark
Candidates should conclude that the contract has been frustrated.	1 mark
As the £40,000 instalment under the contract fell due after the frustrating event, AC is therefore discharged from liability to pay it.	1 mark

Question 2

Explain	
2(a) Whether Joan's conduct amounts to an actionable misrepresentation? (10 marks)	
A misrepresentation is an unambiguous, false statement of fact, which induced the person to whom it is addressed to enter into the contract.	1 mark
Applying this to the facts, there is no question as to whether the statement is false, the representation that the company was profitable was not "substantially correct" as per <i>Avon Insurance plc v Swire Fraser Ltd.</i> , as the company has not been profitable in 6 months.	2 marks
As for whether it was a statement of fact, Joan did state that it was only her opinion that the company was profitable. However, this was <i>before</i> she had checked the accounts, which she had promised to do. A statement can only be considered an opinion if the statement maker holds themselves out as having no expertise related to the statement, but in this case, Joan has stated she will check the state of the accounts, therefore suggesting she will have expertise once she checks the accounts. Therefore, the actual misrepresentation in question (not contacting Vogue), could not amount to an opinion.	3 marks
Next, it needs to be considered whether the statement induced Vogue to enter into the contract. To do so, the statement must be material, made to the representee, and acted upon. It is clear the representation was objectively material. The accounts of a company will be one of the most important factors in a purchase, and there is no indication from Vogue that she had any other interest in the company. However, if Vogue was purchasing the company for reasons unrelated to the accounts, it representation would not be material (<i>JEB Fasteners Ltd v Marks Bloom & Co.</i> The fact that Vogue took positive action to query the accounts of the company suggests it was material.	3 marks
Candidates should conclude that the misrepresentation is actionable as it is a false statement of fact which induced Vogue to enter the contract.	1 mark
(b) If so, what type of misrepresentation has been made? Please explain your answer. (7 marks)	
A misrepresentation may be fraudulent, where it is made knowing it to be false, or made without belief in its truth, or made with reckless carelessness as to its truth - <i>Derry v Peek</i> (1889).	1 mark
A misrepresentation may be 'negligent', where it falls within section 2(1) of the Misrepresentation Act 1967, where the person making the representation cannot establish that they had reasonable grounds to believe the statement to be true, and that they did believe it to be true up to the time of the contract.	1 mark
Finally, a misrepresentation may be wholly innocent, where the person making the representation can establish reasonable grounds to believe the statement was true and belief in its truth up to the time of the contract.	1 mark

Joan had checked the accounts but decided to purposely withhold the relevant information from Vogue despite promising to inform Vogue if there was to be an issue with profitability. Therefore, a misrepresentation has been made knowing it to be false, or made without belief in its truth, or made with reckless carelessness as to its truth.	2 marks
Candidates should conclude that this would be fraudulent misrepresentation.	2 marks
(c) Would any defences be available to Joan? (4 marks)	
Under Section 2(1) of the Misrepresentation Act, we have already established that if the statement was made fraudulently, it would be actionable as fraudulent misrepresentation. Therefore, the only defence Joan will have, is to prove she had reasonable grounds to believe the statement was true.	2 marks
Applying this to the facts, given that Joan had checked the accounts of the company suggests she had no reasonable grounds to believe it was profitable	1 mark
Candidates should conclude that Joan is unlikely to have a defence to any claim for fraudulent misrepresentation.	1 mark
(d) What remedies might be available to Vogue? Please explain your answer. (4 marks)	
The remedies for misrepresentation are rescission and/or damages.	1 mark
For innocent misrepresentation, the court has a discretion to award damages in lieu of rescission; the court cannot award both (see section 2(2) of the Misrepresentation Act 1967).	1 mark
If a misrepresentation is fraudulent or negligent, a claimant may claim both rescission and damages under s2(1) of the Misrepresentation Act 1967 (the Act).	1 mark
As this is fraudulent misrepresentation, Vogue may claim rescission and damages.	1 mark

Question 3

Advise Miller whether any valid contracts have been made for the sale of the tractor with:	
3(a) (i) Sachin (12 marks);	
In order for a valid contract to be formed there must be evidence of an offer, acceptance of that offer, consideration (if answered under scots law – Look at previous paper – SW/ND), and an intention to create legal relations.	3 marks
An offer can be defined as a clear and certain statement of terms, made with the intention to be bound.	1 mark
An offer should be distinguished from an invitation to treat, which is merely an indication of a willingness to receive offers and has no legal force per se. The usual position in contract law is that advertisements only constitute an invitation to treat. This rule was explained in <i>Partridge v Crittenden</i> (1968), when the court noted that the fact that the person advertising the goods only has a limited number to sell precludes the advertisement being an offer. Otherwise, the advertiser could end up liable to sell more goods than he or she may possess. When Miller advertises his tractor in the magazine, this will constitute an invitation to treat. Miller only has one tractor and so cannot be bound to sell to everyone who may reply to his advert.	3 marks
Assuming Miller’s advertisement is an invitation to treat, Sachin’s letter is then an offer to buy the tractor. It is clear and contains certain terms (the price for the tractor).	2 marks
An offer must be communicated to the offeree, and the postal rule does not apply to offers. Thus, Sachin’s offer will be available for acceptance by Miller when he receives it. However, on the facts there is no point at which Miller purports to accept the offer.	2 marks
Candidates should conclude that no contract has been formed between Miller and Sachin.	1 mark
3(a) (ii) Hamish (9 marks)	
Hamish’s first email to Miller is also an offer. He has set out a certain price for the tractor which Miller is free to accept.	1 mark
However, rather than accepting, Miller replies asking for £55,000 rather than £50,000. When a party replies to an offer with different terms, this is a counter-offer. The effect of a counter-offer is to kill the original offer (<i>Hyde v Wrench</i> (1840)). Therefore the only offer available is that of Miller to Hamish.	2 marks
Hamish replies by asking whether he can pay in instalments. This could be seen as a counter-offer, as it is arguably changing the terms (i.e. payment over time rather than in a lump sum). However, it could be argued that it is merely a request for further information, as to how the payment can be made, and that as such it has not destroyed the offer Miller has made. This could be supported by the case of <i>Stevenson Jacques v McLean</i> (1880) where the offeree’s request for further information as to the time of delivery and payment was held not to constitute a counter-offer and so not to kill the original offer.	3 marks

If the court finds that Hamish's email is another counter-offer, then his last email at 3pm has no effect, as Miller's offer is dead and Hamish cannot accept his own offer. Therefore, a contract has not been formed between Hamish and Miller.	1 mark
However, if it was merely a request for further information, then Hamish's 3pm email will be an acceptance of Miller's offer, communicated at the point it arrives and could reasonably be read (<i>Brinkibon v Stahag Stahl und Stahlwarenhandels-gesellschaft</i> (1983)).	1 mark
Therefore, in this scenario, a contract is likely to be formed with Hamish at just after 3pm.	1 mark
3(a) (iii) Theo (2 marks)	
If the court finds that Hamish's email is another counter-offer, then a contract will not have been formed between Miller and Hamish. If Theo then accepts Miller's offer to him at 5pm via email and has a valid contract to purchase the tractor for £55,000.	2 marks
3(b) Advise Theo on what grounds he might have a claim for damages against Miller if Miller sells the tractor to Hamish? (2 marks)	
Candidates who conclude that a contract has been formed between Theo and Miller in question 3(a)(iii) may then go on to conclude that if Miller then supplies the tractor to Hamish, Theo will have a claim for breach of contract against Miller and may potentially recover his expectation loss if the tractor is worth more than £55,000.	2 marks

Section 2
Question 4

a) Advise Rob whether Ruth is liable for his injuries and if so, advise Rob on the likelihood of recovering the cost of the flights and/or the potential prize money.	
Candidates should identify that Rob has a claim in negligence against Ruth.	1 mark
In order to succeed in a claim for negligence, Rob must demonstrate (i) duty; (ii) breach; (iii) causation; and (iv) loss.	1 mark
<u>Duty</u> Ruth owed Rob a duty of care pursuant to the <i>Donoghue v Stevenson (1932)</i> / <i>Caparo Industries plc v Dickman (1990)</i> line of authorities; a duty of care to other road users is an established category.	1 mark
<u>Breach</u> The question is whether Ruth exercised reasonable care by driving to the standard of a competent and experienced driver. Driving over the speed limit suggests a standard of driving which falls below the threshold of a competent and experienced driver.	2 marks
<u>Causation / loss</u> Ruth caused Rob's injuries and subsequent losses (1 mark). In order to be recoverable, losses must be (1) foreseeable and (2) not too remote (1 mark). Candidates should recognise that the two losses (cost of flights and potential prize money) are pure economic loss (2 marks). The law of negligence does not give the same level of protection to economic interests as it does to physical interests (<i>Hedley Byrne v Heller</i>). Economic losses can be recovered where they are consequential upon physical damage (2 marks). Candidates should discuss whether the cost of the flights were of a foreseeable type and not too remote and come to a reasoned conclusion (1 mark). Candidates should recognise that the potential prize money is not foreseeable and is too remote to be claimed (1 mark).	8 marks
b) What defences may Ruth have to avoid or reduce her liability for Rob's claim for losses?	
Candidates should identify that Ruth can claim that Rob was at least partly to blame for his losses by raising the argument of contributory negligence (Law Reform (Contributory Negligence) Act 1945) (1 mark). Rob failed to look where he was going when driving which could amount to contributory negligence (1 mark). However, contributory negligence would only reduce Ruth's liability and not extinguish it altogether (1 mark).	3 marks
Candidates should also note that Rob's actions (i.e. texting while walking into the hospital and falling onto his arm) could represent a <i>novus actus interveniens</i> that breaks the chain of causation of Ruth's negligence for at least some of the losses, if it were found that his injury had been worsened as a result of falling onto his arm (2 marks).	2 marks
c) Advise Ruth on whether she is liable for David's injuries.	

Candidates should identify that David has a potential claim in negligence against Ruth. The elements of duty and breach are as set out above and there is no need for candidates to repeat these.	1 mark
<p><u>Causation / Loss</u> Applying the 'but for' test (<i>Barnett v Chelsea & Kensington Hospital Management Committee (1969)</i>), Ruth will be liable for David's injuries because but for Ruth's breach of duty, it is likely David would not have suffered his injuries (1 mark).</p> <p>Pursuant to the "eggshell skull rule", a defendant must take the victim as they find him (<i>Smith v Leech Brain (1962)</i>) (1 mark). Ruth must therefore take David as he is with his condition and cannot therefore avoid liability for his losses (1 mark).</p> <p>Candidates should note that this is a psychiatric injury rather than a physical injury (1 mark).</p> <p>Candidates should discuss the facts which will include discussion of "some distance away", "might hit him", and the "underlying personality disorder". Candidates should come to a reasoned conclusion as to whether the losses are reasonably foreseeable and not too remote (2 marks).</p>	6 marks

Question 5

a) Advise Mr Brent whether he has a claim in tort against any of the parties for the broken watch.	
Candidates should identify that Mr Brent may have a claim against El Mystico for negligence.	1 mark
In order to succeed in a claim for negligence, Mr Brent must demonstrate (i) duty; (ii) breach; (iii) causation; and (iv) loss.	1 mark
<p><u>Duty</u> El Mystico owes a duty of care pursuant to the <i>Donoghue v Stevenson (1932)</i>/<i>Caparo Industries plc v Dickman (1990)</i> line of authorities.</p>	1 mark
<p><u>Breach</u> El Mystico breached this duty by failing to take reasonable care of the watch. He performed the trick without any reasonable hope of success, having never tried the trick before.</p>	1 mark
<p><u>Causation / loss</u> El Mystico caused Mr Clarke's losses and those losses were of a foreseeable type and not too remote.</p>	1 mark
b) Advise Mr Clarke whether Bob is liable for his injuries.	
This question concerns occupiers' liability to visitors under the Occupier's Liability Act 1957 ("OLA 1957").	1 mark
Bob is an "occupier" under the Act, as someone who has sufficient degree of control over the premises.	1 mark
Mr Clarke is a "visitor" as he has permission to be on Bob's premises and the OLA 1957 therefore applies.	1 mark
<p><u>Duty</u> Under s.2 of OLA 1957, Bob owed Mr Clarke a "common duty of care" as a visitor, namely to take such care as is reasonable in all the circumstances to see that a visitor is reasonably safe in using the premises for which he is permitted to be there.</p>	1 mark

<p>Breach</p> <p>Candidates should consider whether Bob breached his duty of care:</p> <ul style="list-style-type: none"> - Section 2(4)(a) of OLA 1957 provides that regard should be had to any warning, though that the warning is not to be treated as absolving the occupier from liability unless in all the circumstances it was enough to enable the visitor to be reasonably safe (1 mark). - Candidates should consider whether Bob's warning that the garden was "in a bit of state and needed some TLC" was sufficient - unlikely given this did not identify what the danger was (1 mark). - Section 2(4)(b) of OLA 1957 provides that, where damage is caused to a visitor by a danger due to the faulty work of an independent contractor employed by the occupier, the occupier is not in breach of duty if the occupier in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps as they reasonably ought to in order to satisfy themselves that the contractor was competent and that the work had been properly done (1 mark). - Candidates should consider whether Bob did enough – unlikely, given he was aware of the fact that the work had not been done properly but did not do anything. He could have easily told people not to use the garden (1 mark) <p>Breach of duty is therefore likely overall (1 mark).</p>	<p>5 marks</p>
<p>Causation / Loss</p> <p>Applying the 'but for' test (<i>Barnett v Chelsea & Kensington Hospital Management Committee (1969)</i>), Bob will be liable for Mr Clarke's injuries because but for Bob's breaches of duty it is likely Mr Clarke would not have suffered his injuries (1 mark) and Mr Clarke's losses were of a foreseeable type and not too remote (1 mark).</p>	<p>2 marks</p>
<p>c) Advise Bob whether he is liable for the damage to Darren's phone.</p>	
<p>Bob is an "occupier" under the Acts, as someone who has sufficient degree of control over the premises.</p>	<p>1 mark</p>
<p>Darren is not a "visitor" but a trespasser, as he does not permission to enter the Bob's house and so OLA 1984 applies.</p>	<p>1 mark</p>
<p>Duty</p> <p>Section 1(3) of the OLA 1984 sets out the three conditions, all of which must be satisfied, before an occupier owes a duty to a trespasser (1 mark). Applying these requirements to the facts, candidates should consider:</p> <ul style="list-style-type: none"> - Whether Bob is aware of the danger, or has reasonable grounds to believe that it exists (s.1(3)(a))? Yes - Bob is aware of the danger that the garden is a mess and the contractor has done a bad job in repairing the broken paving slabs (1 mark). - Whether Bob had reasonable grounds to believe that a trespasser may come into the vicinity of the danger, whether or not he had lawful authority to do so (s.1(3)(b))? No – Bob was not aware that a passer-by would try to gain access to his garden (1 mark). - Whether the risk is one against which Bob, in all the circumstances of the case, may reasonably be expected to provide some protection (s.1(3)(c))? Unlikely (1 mark) <p>A duty of care is therefore unlikely to be owed to Darren (1 mark).</p>	<p>5 marks</p>
<p>Causation / Loss</p>	<p>2 marks</p>

If candidates find that a duty of care is owed. They should highlight that Section 1(8) OLA 1984 provides that occupiers are not liable for damage to property of trespassers (**1 mark**). Accordingly, Bob is not liable for the costs of replacing the phone (**1 mark**).

Question 6

a) Advise Todd what he will be required to establish in any claim he has against Kingston & Adams for his loss of earnings.	
Candidates should identify that Todd has a potential claim against Kingston & Adams in negligence.	1 mark
<u>Duty of care</u> As his employer, Kingston & Adams owes Todd, as an employee, a duty of care to take reasonable care for his safety at work (1 mark). This constitutes providing the following: (i) Competent staff; (ii) Adequate plant and equipment; and (iii) Safe system of working (2 marks).	3 marks
<u>Breach of duty</u> Candidates should provide a reasoned response as to whether Kingston & Adams may have breached this duty. This may include consideration of the height of the piles of boxes and Todd's repeated warnings that they were not safe.	2 marks
<u>Causation / Loss</u> Applying the 'but for' test (<i>Barnett v Chelsea & Kensington Hospital Management Committee (1969)</i>), any breach of duty by Kingston & Adams has caused Todd's injuries (1 mark). The concussion was of a foreseeable type and not too remote (1 mark). Candidates should also note that Dr Davies' actions could represent a novus actus interveniens that breaks the chain of causation of Kingston & Adams' negligence for at least some of the losses (1 mark). Kingston & Adams would need to establish that a reasonable doctor would not have made the same mistake – on the facts this is likely because Dr Davies has gone against usual advice. Kingston & Adams seem to have a reasonable defence to the development of severe migraines and 6 months loss of earnings, albeit not the initial injury (1 mark).	4 marks
b) Advise Todd what he will be required to establish in any claim he has against Dr Davies for his loss of earnings.	
Candidates should identify that Todd appears to have a professional negligence claim against Dr Davies.	1 mark
In order to succeed in a claim for negligence, Todd must demonstrate (i) duty; (ii) breach; (iii) causation; and (iv) loss.	1 mark
<u>Duty</u> Dr Davies owes Todd a duty as his patient - this is an established duty of care.	1 mark
<u>Breach</u> Dr Davies will have breached his duty of care if he acted outside a reasonable body of professional opinion, as per the test in <i>Bolam v Friern Hospital Management Committee (1957)</i> (1 mark). Candidates should provide a reasoned opinion, which may include the fact that the question refers to rest and avoiding of contact sport being the usual advice (<i>Watt v Hertfordshire CC (1952)</i>); and no allowance will be made for an inexperienced doctor – breach of duty is therefore likely (4 marks).	5 marks

<p><u>Causation / loss</u> Dr Davies' negligence caused Todd's additional 6 months' loss of earnings.</p>	<p>2 marks</p>
<p>c) Advise Kingston & Adams whether they could be liable for Jerry's injuring the delivery man.</p>	
<p>Candidates should identify that Kingston & Adams may also be vicariously liable for Jerry's actions.</p>	<p>1 mark</p>
<p>For there to be vicarious liability, the delivery man would need to prove three elements: (i) Jerry was an employee, (ii) Jerry committed a tort; and (iii) The tort was committed during the course of Jerry's employment. (<i>Limpus v London General Omnibus Co</i> (1862)) (1 mark). Candidates should then apply this to the facts and give reasoned opinions (3 marks):</p> <ul style="list-style-type: none"> (i) Jerry was an employee; (ii) Jerry undoubtedly committed a tort, causing the delivery man's losses; (iii) However, query whether the tort was committed during the course of Jerry's employment. In particular, whilst it was on the premises of Kingston & Adams, it could be said to be so outside the course of his employment to be a frolic of his own (<i>Hilton v Thomas Burton (Rhodes) Ltd</i> (1961)). 	<p>4 marks</p>

Institution of Civil Engineers

Examination for the ICE Certificate in Law and Contract Management (CLCM) 2022

Module 2: NEC 4 (English and Scots Law)

Tuesday 21st June 2022

Time permitted: 14:00 to 17.20 (3 hours 20 minutes)

There are four questions in Section 1 and four questions in Section 2.

Answer any **two** questions from **each Section**; a total of **four** questions.

Please answer questions in the green books provided, answer Section 1 and Section 2 in **separate** books.

All questions carry equal marks.

References to cases and legislation should be quoted where possible.

Please indicate on the outside of the answer books if your answers will be based on Scots Law.

Reference to documents during the examinations

Only unmarked copies of NEC4 Engineering and Construction Contract (ECC), NEC4 Engineering and Construction Subcontract (ECS), Statutes, CDM Regulations and CESMM4 may be taken into the Examination.

Institution of Civil Engineers disclaimer; all names and characters in the question papers are fictional and any resemblance to any actual persons or businesses is purely coincidental.

Module 2

Question 1

A contract for the new rail line has been awarded under an NEC4 ECC and the *starting date* has passed. Unfortunately, the person identified as the *Supervisor* is no longer able to undertake the role.

- a) **Can the *Supervisor* be replaced and if so, who by and under what contractual provisions?** [2 marks]

An error is discovered in the Site Information which shows a gas main that crosses the Site being in the wrong location.

- b) **Can the Site Information be changed after the Contract Date?** [4 marks]
- c) **What should the *Project Manager* do if they become aware of this error?** [4 marks]
- d) **If the gas main is found to be in a different position to that shown in the Site Information what will this likely result in?** [4 marks]

The *Client* would like to transfer design responsibility for foundations for the overhead gantry's that will supply power to the trains to the *Contractor*.

- e) **Can the *Client* transfer design responsibility after the Contract Date and if so, how?** [3 marks]
- f) **The *Contractor* does not want to accept design responsibility for this work, under the provision of the contract can they refuse to do so?** [2 marks]

The Scope states the *Contractor* will connect to an existing power supply located at the boundary of the Site, however when the *Contractor* attempts to make the connection the power supply is not present.

- g) **Other than notifying an early warning, what should the *Contractor* do when they discover a part of the *Client's* Scope that cannot be complied with and what procedure should the *Project Manager* follow as a result?** [6 marks]

Total [25 marks]

Module 2

Question 2

The contract is an Option C NEC4 ECC with secondary Option Y(UK)2. The assessment date is the first day of each calendar month. The *Contractor* submits an application for payment on the 30th June for the assessment date of the 1st July.

- a) **Who assesses the amount due for payment and how long do they have to make that assessment?** [3 marks]
- b) **What is the amount due under main Option C for an interim assessment?** [5 marks]
- c) **Does the *Contractor* have to submit an application for payment and if they do not, what impact would a failure by the *Contractor* to submit an application for payment have on the assessment of the amount due?** [3 marks]

The *Contractor* has a large amount of steel being delivered to the Site, however they do not have enough room to store it in their current site compound. They have identified a warehouse near to the Site that they could use to store the steel and have an agreement in principle with the owner to rent it for a period of 2 months.

- d) **How can the *Contractor* add this area under the contract and claim payment for costs of the rent of the warehouse and the people who will be unloading and handling the steel?** [5 marks]

The *Contractor* includes in its application for payment the following items, of these which are payable as part of Defined Cost and which will be covered by the Fee?

- e) **The cost of a Subcontractor constructing piled foundations** [2 marks]
- f) **The cost of the Site based Engineer attending a progress meeting at the *Client's* head office** [3 marks]
- g) **The cost of the *Contractor's* personnel undertaking the design of temporary works at the *Contractor's* head office** [2 marks]
- h) **The cost of the *Contractor* providing a performance bond required under secondary Option X13** [2 marks]

Total [25 marks]

Module 2

Question 3

On an Option A NEC4 ECC to construct a new school the *Client* decides to change the paint scheme for the classrooms from that in the Scope. The *Project Manager* issues a change to the Scope to change the paint colours. The *Contractor* states the *Project Manager* should notify the change as a compensation event, but the *Project Manager* disagrees as the only thing that has changed is the paint colour and the type of paint, its cost and delivery date remain the same. The disagreement over the *Project Manager's* refusal to notify a compensation event has continued for over 3 months.

- a) **Is the *Project Manager* correct?** [5 marks]
- b) **If the *Project Manager* does not notify the event as a compensation event can the *Contractor* do so?** [4 marks]
- c) **Assuming the compensation event is correctly notified by the *Contractor* how should the *Project Manager* respond if they believe the compensation event has no effect on time or cost?** [3 marks]

The *Project Manager* instructs another change to the Scope to extend the car park to accommodate an additional 10 car parking spaces. The event is notified as a compensation event and the *Contractor* is instructed to submit a quotation. There is an item in the Activity Schedule for the car park as follows “Activity 45 - Construction of car park with space for 20 cars £60,000”.

- d) **The *Contractor* submits their quotation and assesses the change to the Prices based on the Activity Schedule with the following calculation “Activity 45 £60,000 for 20 spaces, divide by 20 x 10 = £30,000”. Is this assessment correct and if not how should it be assessed?** [5 marks]
- e) **Would the response to question (d) be different if the contract was under main Option B?** [2 marks]
- f) **How should any delay to the Completion Date as a result of the compensation event be assessed?** [2 marks]
- g) **When a compensation event is implemented under main Option A how does the change to the Prices become due for payment?** [4 marks]

Total [25 marks]

Module 2

Question 4

Under an NEC4 ECC the *Project Manager* is concerned that no programme has been issued for acceptance by the *Contractor* even though the *works* have started and has contacted the *Contractor* to raise their concerns. The *Contractor* has responded by stating that as only design work and Site set up is taking place a programme does not need to be submitted until construction works start.

- a) **When does a *Contractor* have to submit a first programme for acceptance? Does it matter that no construction works have taken place?** [3 marks]

Describe the following information to be shown on a programme submitted for acceptance and identify where appropriate how the issue is used to assess a delay due to a compensation event

- b) **Float - generally** [3 marks]
 c) **Float – between planned Completion and Completion Date** [3 marks]
 d) **Time risk allowance** [3 marks]
 e) **Planned Completion** [3 marks]

The *Contractor* submits a programme for acceptance to the *Project Manager*.

- f) **How long does the *Project Manager* have to accept a programme for acceptance? Can this period be extended?** [3 marks]

The *Project Manager* reviews the programme submitted by the *Contractor* and is unhappy with a time period allowed for the *Client* to arrange the diversion of a gas main crossing the Site. The *Contractor* has allowed 6 weeks, but the Scope states a period of 8 weeks should be allowed.

- g) **Is this a valid reason for the *Project Manager* to not accept a programme?** [2 marks]

A programme is eventually accepted by the *Project Manager* however, the *Contractor* then decides to change the order and timing of their work. The *Project Manager* is unhappy with this and notifies it as a Defect.

- h) **Is the *Project Manager* able to notify a Defect for this reason, and what should the *Contractor* do, if it changes the order and timing of the work from that shown on the Accepted Programme** [5 marks]

Total Marks [25 marks]

Section 2

Question 5

A local authority awarded a £5m NEC4 ECC Option C contract for some major asset refurbishment works. Secondary Option X7 delay damages is incorporated. The Scope requires some painting works with colour code 1234 to match the corporate image. However, in a different part of the Scope, colour code 1243 was stated. The *Contractor* spots the problem before ordering the supply of paint, just as well because the painting work is on the critical path and needs ordering in the next few days so not as to delay progress.

- a) **What procedure does the contract provide to resolve this issue?** [10 marks]

The *Project Manager* decides to change the Scope, the correct colour code being 1234.

- b) **How does the *Project Manager* put this into effect?** [2 marks]

The *Project Manager* notifies a compensation event under clause 61.1. The *Project Manager* is unsure if there is any additional cost or potential delay but instructs the *Contractor* to submit a quotation under clause 61.2. 3 weeks later the *Contractor* fails to submit a quotation.

- c) **What does the *Project Manager* do next and by when?** [5 marks]

By accident, the *Contractor* orders the wrong colour paint. It arrives in time and the walls are painted in the wrong colour, the first person to notice is the *Client* when they come to inspect the *works* just a few days before Completion.

- d) **How does the contract deal with this matter?** [6 marks]

The *Contractor* decides to quickly re-paint this part of the *works* and this causes Completion to be delayed by a few days.

- e) **How does the contract deal with this matter?** [2 marks]

Total [25 marks]

Section 2

Question 6

A 78-week contract is awarded under an NEC4 ECC Option B contract for a large highways project. Secondary X16 was incorporated in the contract. Six weeks after the Contract Date and three weeks after the first assessment, the *Contractor* proposes the use of a retention bond instead of the *Client* retaining money.

- a) **Can the *Contractor* do this?** [2 marks]

A week later, the *Client* does not agree to this, and the original cash retention clauses continued to apply.

- b) **Explain how the *retention free amount* provisions work.** [6 marks]

- c) **Explain when retention money is released.** [4 marks]

After the second assessment, the *Project Manager* realises that the *Contractor* has not submitted insurance certificates stating that the insurance required by the contract is in force.

- d) **What should the *Contractor* and *Project Manager* have done; what should the *Project Manager* do now and what options are available to the *Client*?** [11 marks]

The company the *Contractor* uses for their insurance provision goes into liquidation.

- e) **What should the *Contractor* do now?** [2 marks]

Total [25 points]

Section 2

Question 7

A *Contractor* has recently been awarded an NEC4 ECC contract using Option A. The *Project Manager* gives an instruction under clause 14.3 to change the Scope to add in some additional works but forgets to notify this as a compensation event.

- a) **What should the *Contractor* do next and is there a time limit?** [6 marks]

Three weeks later the *Contractor* has not heard back from the *Project Manager*.

- b) **What happens next?** [5 marks]

This matter gets back on track and the *Contractor* submits a quotation for the compensation event.

- c) **The *Project Manager* thinks it looks a bit too low, what should the *Project Manager* do next?** [5 marks]

- d) **Does the *Contractor* have to wait until the compensation event is implemented before carrying out the additional works?** [5 marks]

The compensation event is implemented, but later records show the quotation that this was significantly lower than the actual cost

- e) **How does implementation occur in this case and what is the effect?** [4 marks]

Total [25 marks]

Section 2

Question 8

A *Contractor* has recently been awarded an NEC4 ECC contract using Option A together with secondary Option X21. The *Client* has run into a bit of financial trouble and needs the Prices to be reduced by around 10% due to internal Board pressure. The *Contractor* is aware of this and at a meeting is asked to prepare some thoughts on this. The *Project Manager* and the *Client* discuss a few options for changing the Scope provided by the *Client* and the *Project Manager* is asked to progress matters.

a) **Where the *Client* decided to change the Scope, how is this put into effect, is the *Contractor* obliged to comply and how is the value of the new scope assessed? And does a compensation event occur?** [7 marks]

b) **What procedures does the contract provide for investigating and implementing different ways of achieving the required change in Scope?** [8 marks]

The *Contractor* then comes up with what looks to be a good value engineering proposal for a different part of the *works*.

c) **Assuming the *Client* is interested and wants the change made as quickly as possible, how does the contract deal with this?** [7 marks]

The *Contractor* then comes up with what looks to be a whole life proposal which may be of interest to the *Client*.

d) **How does the contract deal with this proposal if the *Client* has no interest in it?** [3 marks]

Total [25 marks]

Law & Contracts Examination Module 2 Points for Answer

Section 1

Question 1

a) Can the <i>Supervisor</i> be replaced and if so, who by and under what contractual provisions? [2 marks]	
Relevant points include <ul style="list-style-type: none"> • <i>Client</i> can change the <i>Supervisor</i> • In accordance with Clause 14.4 • Notification to the <i>Contractor</i> must comply with Clauses 13.1 and 13.7 	2 marks
b) Can the Site Information be changed after the Contract Date? [3 marks]	
Relevant points include <ul style="list-style-type: none"> • No the Site Information cannot be changed after the Contract Date • As there is no clause that gives the <i>Project Manager</i> or <i>Supervisor</i> the power to do so • Site Information could only be changed by agreement of the Parties as an amendment to the contract under Clause 12.3 • Site Information should not be changed after the Contract Date as it is a reference document used during the tender period for the <i>Contractor</i> to assess the risk of unforeseen physical conditions • To change it after the Contract Date would be to change the risk allocation under the contract 	4 marks
c) What should the <i>Project Manager</i> do if they become aware of this error? [5 marks]	
Relevant points include <ul style="list-style-type: none"> • Notify an early warning • Under clause 15.1 • Notification in accordance with clause 13.1 and 13.7 • Follow the early warning process <ul style="list-style-type: none"> ○ <i>Project Manager</i> adds the early warning to the Early Warning Register clause 15.1 ○ Hold an early warning meeting to discuss the issue either as part of a regular early warning meeting or call a specific early warning meeting, probably the later, clause 15.2 ○ Seek solutions to mitigate the impact such as undertake investigative actions – trial pits, boreholes, CAT scans etc, clause 15.3 ○ Record the actions as part of the update of the Early Warning Register Clause 15.4 	5 marks
d) If the gas main is found to be in a different position to that shown in the Site Information what will this likely result in? [3 marks]	
Relevant points include	4 marks

<ul style="list-style-type: none"> • A compensation event • For unforeseen physical conditions • Clause 60.1(12) • Compensation event judged in accordance with Clause 60.2 • If the Site Information is wrong the <i>Contractor</i> is assumed to have allowed for the physical condition more favourable to it Clause 60.3 	
e) Can the <i>Client</i> transfer design responsibility after the Contract Date and if so, how? [3 marks]	
<p>Relevant points include</p> <ul style="list-style-type: none"> • Yes, via a change to Scope • Scope changed by the instruction of the <i>Project Manager</i> Clause 14.3 • <i>Contractor's</i> design responsibility set out in Clause 21.1 • <i>Contractor</i> designs the parts of the <i>works</i> the Scope states it is to design 	3 marks
f) The <i>Contractor</i> does not want to accept design responsibility for this work, under the provision of the contract can they refuse to do so? [2 marks]	
<p>Relevant points include</p> <ul style="list-style-type: none"> • <i>Contractor</i> must obey an instruction given in accordance with the contract by the <i>Project Manager</i> • Clause 27.3 • <i>Contractor</i> has to comply • Could challenge the validity of the instruction under the chosen dispute process under the contract 	2 marks
g) Other than notifying an early warning, what should the <i>Contractor</i> do when they discover a part of the <i>Client's</i> Scope that cannot be complied with and what procedure should the <i>Project Manager</i> follow as a result? [6 marks]	
<p>Relevant points include</p> <ul style="list-style-type: none"> • Impossible requirement in the Scope • <i>Contractor</i> should notify the <i>Project Manager</i> clause 17.2 • Notification in accordance with clause 13.1 and 13.7 • <i>Project Manager</i> has to change the Scope appropriately Clause 17.2 • <i>Project Manager</i> issues a change to the Scope under Clause 14.3 • This will be a compensation event Clause 60.1(1) • <i>Project Manager</i> should notify the event as a compensation event Clause 61.1 • <i>Project Manager</i> should instruct the <i>Contractor</i> to submit a quotation Clause 61.2 	6 marks
Total	25 marks

Question 2

a) Who assesses the amount due for payment and how long do they have to make that assessment? [3 marks]	
Relevant points include <ul style="list-style-type: none"> • <i>Project Manager</i> assesses the amount due • Clause 50.1 • <i>Project Manager</i> has to certify a payment within one week of the assessment date • Clause 51.1 	3 marks
b) What is the amount due under main Option C for an interim assessment? [5 marks]	
Relevant points include <ul style="list-style-type: none"> • Amount due is the Price for Work Done to Date plus amounts to be paid to or paid by retained from the <i>Contractor</i> • Clause 50.3 • Examples of amounts to be paid include interest or late payments, X6 bonus for early Completion, KPI's under X12 or X20 • Examples of amounts to be paid by or retained from the <i>Contractor</i> include X7 delay damages, X16 retention, X17 low performance damages • Price for Work Done Date to Date under Option C is the total Defined Cost the <i>Project Manger</i> forecasts will have been paid by the next assessment date plus the Fee • Clause 11.2(31) • Defined Cost is the cost of the components in the Schedule of Cost Components less Disallowed Cost • Clause 11.2(24) • Disallowed Cost is defined in clause 11.2(26) 	5 marks
c) Does the <i>Contractor</i> have to submit an application for payment and if they do not, what impact would a failure by the <i>Contractor</i> to submit an application for payment have on the assessment of the amount due? [3 marks]	
Relevant points include <ul style="list-style-type: none"> • The <i>Contractor</i> is obligated to submit an application for payment before the assessment date • Clause 50.2 • Clause 10.1 • The <i>Project Manager</i> has to consider an application submitted by the <i>Contractor</i>, clause 50.2 • If the <i>Contractor</i> fails to submit an application for payment they will not be entitled to a positive payment in the month • However if a negative payment is due, a payment from the <i>Contractor</i> to the <i>Client</i> this will be certified and payable • Clause 50.4 	[3 marks]

d) How can the *Contractor* add this area under the contract and claim payment for costs of the rent of the warehouse the people who will be unloading and handling the steel? [5 marks]

<p>Relevant points include</p> <ul style="list-style-type: none"> • Area can be added as part of the Working Areas • Clause 16.3 • Definition of Working Areas clause 11.2(20) • <i>Contractor</i> proposes an areas is added as part of the Working Areas • <i>Project Manager</i> either accepts or does not accept • Stated reasons for non acceptance • Area proposed will meet the requirements of the contract and the <i>Project Manager</i> should therefore be added to the Working Areas • <i>Project Manager</i> does not accept for a reason not stated in the contract this will be a compensation event • Clauses 13.8, 60.1(9) • Once an area is added as part of the Working Areas costs incurred within it can be claimed as part of the Price for Work Done to Date, which is Defined Cost plus Fee under main Option C • Amounts will be claimed as part of Defined Cost in accordance with the Schedule of Cost Components • The cost of people within the Working Areas can be recovered under cost components 1 • The cost of the rent can be recovered under cost component 53 (b) 	<p>5 marks</p>
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e) The cost of a Subcontractor constructing piled foundations

<p>Relevant points include</p> <ul style="list-style-type: none"> • This will form part of Defined Cost • Clause 11.2(24) • Schedule of Cost Components • Cost component 4, 41 • Any amounts that do form part of Defined Cost are deemed to be covered by the Fee • Clause 52.1 	<p>2 marks</p>
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f) The cost of the Site based Engineer attending a progress meeting at the *Client's* head office [3 marks]

<p>Relevant points include</p> <ul style="list-style-type: none"> • This will form part of Defined Cost • Clause 11.2(24) • Schedule of Cost Components • Cost component 1, first bullet point • People who are directly employed by the <i>Contractor</i> and who's normal place of working is within the Working Areas can be included as part of Defined Cost even if they are working outside of the Working Areas 	<p>3 marks</p>
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<ul style="list-style-type: none"> • Cost component 11, 12 & 13 • Any amounts that do form part of Defined Cost are deemed to be covered by the Fee • Clause 52.1 	
g) The cost of the <i>Contractor's</i> personnel undertaking the design of temporary works at the <i>Contractor's</i> head office [2 marks]	
Relevant points include <ul style="list-style-type: none"> • This will form part of Defined Cost • Clause 11.2(24) • Schedule of Cost Components • Cost component 7, 71 • Any amounts that do form part of Defined Cost are deemed to be covered by the Fee • Clause 52.1 	2 marks
h) The cost of the <i>Contractor</i> providing a performance bond required under secondary Option X13 [2 marks]	
Relevant points include <ul style="list-style-type: none"> • This will be covered by the Fee • It will not form part of Defined Cost • Clause 11.2(24) • There is no item for this cost in the Schedule of Cost Components • Any amounts that do form part of Defined Cost are deemed to be covered by the Fee • Clause 52.1 	2 marks
Total	25 marks

Question 3 – Points for Answer

a) Is the <i>Project Manager</i> correct? [5 marks]	
Relevant points include <ul style="list-style-type: none"> • No the <i>Project Manager</i> is not correct • The <i>Project Manager</i> has to notify a compensation event if the event arises from their instruction • Clause 61.1 • Clause 10.1 • Notification in accordance with clause 13.1 and 13.7 • The <i>Project Manager</i> would normally then instruct the <i>Contractor</i> to submit a quotation but does not have to if the event will have no effect upon Defined Cost Completion or meeting a Key Date • Clause 61.2 	5 marks
b) If the <i>Project Manager</i> does not notify the event as a compensation event can the <i>Contractor</i> do so? [4 marks]	

<p>Relevant points include</p> <ul style="list-style-type: none"> • Yes, the <i>Contractor</i> can notify the compensation event • Clause 61.3 • There is however an eight week time bar on notifying compensation events by the <i>Contractor</i> • However this time bar does apply to events that arise from a <i>Project Manager's</i> instruction • As the <i>Project Manager</i> was at fault for not notifying the compensation event • Notification in accordance with clause 13.1 and 13.7 	4 marks
<p>c) Assuming the compensation event is correctly notified by the <i>Contractor</i> how should the <i>Project Manager</i> respond if they believe the compensation event has no effect on time or cost? [3 marks]</p>	
<p>Relevant points include</p> <ul style="list-style-type: none"> • The <i>Project Manager</i> should not instruct the <i>Contractor</i> to submit a quotation if the event will have no effect upon Defined Cost, Completion or meeting a Key Date • Clause 61.4 • The <i>Project Manager</i> should notify the <i>Contractor</i> that the Prices, Completion Date and Key Dates are not to be changed and state the reasons in the notification Clause 61.4 • Notification in accordance with clause 13.1 and 13.7 	3 marks
<p>(d) The <i>Contractor</i> submits their quotation and assesses the change to the Prices based on the Activity Schedule with the following calculation “Activity 45 £60,000 for 20 spaces, divide by 20 x 10 = £30,000. Is this assessment correct and if not how should it be assessed? [5 marks]</p>	
<p>Relevant points include</p> <ul style="list-style-type: none"> • The assessment is incorrect • The change to the Prices as result of a compensation event are assessed based upon Defined Cost plus Fee • Clause 63.1 • Defined Cost under Option A is cost calculated in accordance with the Short Schedule of Cost Components • Clause 11.2(23) • The Fee is defined in clause 11.2(10) • If the <i>Project Manager</i> and the <i>Contractor</i> agreed rates or lump sums can be used, but only by mutual agreement, clause 63.2 	5 marks
<p>e) Would the response to question (d) be different if the contract was under main Option B? [2 marks]</p>	
<p>Relevant points include</p> <ul style="list-style-type: none"> • No even under main Option B the assessment is made on the basis of Defined Cost plus Fee • Clause 63.1 	2 marks

<ul style="list-style-type: none"> Rates and prices including those in the BQ can only be used by the mutual agreement of the <i>Project Manager</i> and the <i>Contractor</i>, clause 63.2 	
f) How should any delay to the Completion Date be assessed as a result of the compensation event? [2 marks]	
<p>Relevant points include</p> <ul style="list-style-type: none"> In accordance with clause 63.5 A delay to the Completion Date is assessed as the length of time that, due to the compensation event, planned Completion is later than planned Completion as shown on the Accepted Programme current at the dividing date Dividing date is defined in clause 63.1 	2 marks
g) When a compensation event is implemented under main Option A how does the change to the Prices become due for payment? [4 marks]	
<p>Relevant points include</p> <ul style="list-style-type: none"> Assessments for changed Prices for compensation events are in the form of changes to the Activity Schedule Clause 63.14 The implemented value of the change to the Prices will be added into the Activity Schedule as a new activity or an amendment to an existing activity The amount will be become due for payment as part of the Price for Work Done to Date Price for Work Done to Date in Option A is The Price for Work Done to Date is the total of the Prices for <ul style="list-style-type: none"> each group of completed activities and each completed activity which is not in a group. <p>A completed activity is one without notified Defects the correction of which will delay following work</p> <ul style="list-style-type: none"> Clause 11.2(29) 	4 marks
Total	25 marks

Question 4

a) When does a <i>Contractor</i> have to submit a first programme for acceptance? Does it matter that no construction works have taken place? [3 marks]	
<p>Relevant points include</p> <ul style="list-style-type: none"> If no programme in the Contract Data <i>Contractor</i> submits a first programme within the period stated in the Contract Data Clause 31.1 It is irrelevant whether construction work has started 	3 marks
b) Float - generally [3 marks]	

Relevant points include <ul style="list-style-type: none"> • Float is non working period in the programme • It is not terminal float • It does not form part of the critical path • It can be used by either the <i>Client</i> or <i>Contractor</i> to mitigate the effects of a delay due to a compensation event or a <i>Contractor's</i> risk event • It belongs to whoever gets to it first • Clause 31.2 and 63.5 	3 marks
c) Float – between planned Completion and Completion Date [3 marks]	
Relevant points include <ul style="list-style-type: none"> • Terminal float is the period between planned Completion and the Completion Date • It is a period when no work is planned to take place • It belongs the <i>Contractor</i> • It can be used by the <i>Contractor</i> to mitigate the effects of a delay due to a <i>Contractor's</i> risk event • Clause 31.2 and 63.5 	3 marks
d) Time risk allowance [3 marks]	
Relevant points include <ul style="list-style-type: none"> • It is an allowance for the <i>Contractor's</i> risks • It cannot be used to reduce the impact of a compensation event • It belongs the <i>Contractor</i> • It has to be shown on a programme submitted for acceptance • Clause 31.2 and 63.5 	3 marks
e) Planned Completion [3 marks]	
Relevant points include <ul style="list-style-type: none"> • It the date by which the <i>Contractor</i> believes it will / is planning to achieve Completion • It is the date which is used to assess the impact on the Completion Date due to a compensation event • It has to be shown on a programme submitted for acceptance • Clause 31.2 and 63.5 	3 marks
f) How long does the <i>Project Manager</i> have to accept a programme for acceptance? Can this period be extended? [3 marks]	
Relevant points include <ul style="list-style-type: none"> • The <i>Project Manager</i> has to accept or not accept a programme submitted for acceptance in two weeks • Clause 31.3 • The period can be extended by the <i>Project Manager</i> • Requires the mutual consent of the <i>Project Manager</i> and the <i>Contractor</i> • Clause 13.5 	3 marks

g) Is this a valid reason for the <i>Project Manager</i> to not accept a programme? [2 marks]	
Relevant points include <ul style="list-style-type: none"> • Yes it is, the programme has to comply with the Scope • Clause 31.3 	2 marks
h) Is the <i>Project Manager</i> able to notify a Defect for this reason, and what should the <i>Contractor</i> do, if it changes the order and timing of the work from that shown on the Accepted Programme [5 marks]	
Relevant points include <ul style="list-style-type: none"> • A Defect is as defined in clause 11.2(6) • A failure to not comply with the programme is not one of the grounds identified • <i>Project Manager</i> does not have the power to notify a Defect only the <i>Supervisor</i> and <i>Contractor</i> • Clause 43.2 • Unless the power has been delegated, clause 14.2 • <i>Contractor</i> can change the order and timing of their work as long as it complies with the Scope • <i>Contractor</i> should resubmit a programme or <i>Project Manager</i> can ask for a revised programme to be submitted for acceptance, clause 32.2 	5 marks
Total	25 marks

Question 5

What procedure does the contract provide to resolve this issue?		
a)	The <i>Contractor</i> should notify an early warning to the <i>Project Manager</i> under clause 15.1 as Completion could be delayed.	[2 marks]
	The <i>Contractor</i> should also notify an inconsistency to the <i>Project Manager</i> under clause 17.1.	[1 mark]
	These should both be in a form that can be read, copied and recorded (13.1) and separate from any other communications (13.7)	[2 marks]
	The <i>Project Manager</i> should enter this matter on the Early Warning Register (15.1)	[1 mark]
	Either can instruct the other to attend an early warning meeting (15.2)	[1 mark]
	Candidates to discuss what should happen at the early warning meeting (15.3) and what happens next (15.4).	[2 marks]
	The <i>Project Manager</i> states how the inconsistency should be resolved.	[1 mark]
	Total	[10 marks]

b) How does the *Project Manager* put this into effect?

	Under clause 14.3 the <i>Project Manager</i> should give an instruction to the <i>Contractor</i> which changes the Scope.	[1 mark]
	Again, follow the requirements of clause 13.1	[1 mark]
	Total	[2 marks]

c) What does the *Project Manager* do next and by when?

	The first bullet of clause 64.1 requires the <i>Project Manager</i> to assess this compensation event, the reason is that the <i>Contractor</i> has not submitted the quotation and details of its assessment within the time allowed.	[2 marks]
	Clause 64.3 provides that the <i>Project Manager</i> should notify the <i>Contractor</i> of the assessment of this compensation event, starting from when the need for the <i>Project Manager's</i> assessment becomes apparent. And gives details of the assessment within the period allowed for the <i>Contractor's</i> submission of its' quotation for the same compensation event.	[2 marks]
	Clause 62.3 gives the <i>Contractor</i> 3 weeks to submit the quotation and that same period applies to the <i>Project Manager</i> .	[1 mark]
	Total	[5 marks]

d) How does the contract deal with this matter?

	This is a Defect under clause 11.2(6).	[1 mark]
	Either the <i>Supervisor</i> notifies the Defect to the <i>Contractor</i> , or the <i>Contractor</i> to the <i>Supervisor</i> , as clause 43.2.	[1 mark]
	The <i>Contractor</i> corrects a notified Defect before the end of the <i>defect correction period</i> .	[1 mark]
	The <i>defect correction period</i> begins at Completion for Defects notified before Completion, clause 44.2.	[1 mark]
	Under clause 11.2(2) the definition provides that notified Defects must be corrected for Completion to occur if it prevents the <i>Client</i> from using the <i>works</i> . That seems unlikely in this case so the <i>Contractor</i> can correct the Defect before Completion or within the first <i>defect correction period</i> .	[2 marks]
	Total	[6 marks]

e) How does the contract deal with this matter?

	X7.1 states that the Contractor pays delay damages at the rate stated in the Contract Data for each day from the Completion Date until Completion, in this case.	[2 marks]
	Total	[2 marks]

	Total marks	[25 marks]
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Question 6

Can the <i>Contractor</i> do this?		
a)	Yes, they can propose this but it would need agreement by the <i>Client</i> , as per clause X16.3.	[2 marks]
	Total	[2 marks]

b) Explain how the <i>retention free amount</i> provisions work		
	The amount due will usually be calculated in accordance with clause 50.3.	[1 mark]
	Part of this calculation will be of the Price for Work Done to Date (PWDD). For Option B this is defined in clause 11.2(30).	[1 mark]
	A <i>retention free amount</i> , if used, will be stated in the Contract Data part one.	[1 mark]
	Once the PWDD exceeds the retention free amount then retention money is retained usually until Completion of the whole of the <i>works</i> .	[1 mark]
	The actual amount retained is the retention <i>percentage</i> (stated in the Contract Data part one) applied to the excess of the PWDD above the retention free amount.	[2 marks]
	Total	[6 marks]

c) Explain when retention money is released		
	The retaining of retention monies is continues for future assessments usually until the next assessment made after Completion of the whole of the <i>works</i> (X16.2). That is unless the whole of the <i>works</i> occurs if this is before Completion of the whole of the <i>works</i> (X16.2).	[2 marks]
	The amount is halved at the earlier of this point (X16.2).	[1 mark]
	The amount retained remains at this amount until the date when the Defects Certificate is due to be issued (X16.2).	[1 mark]
	Total	[4 marks]

d) What should the <i>Contractor</i> and <i>Project Manager</i> have done; what should the <i>Project Manager</i> do now and what options are available to the <i>Client</i> ?		
	The <i>Contractor</i> is obliged to submit certificates to the <i>Project Manager</i> for acceptance stating that the insurance required by the contract is in force (Clause 84.1).	[1 mark]
	This should have happened before the <i>starting date</i> (Clause 84.1).	[1 mark]
	The certificates need to be signed by the <i>Contractor's</i> insurer or insurance broker (Clause 84.1).	[1 mark]

	The <i>Project Manager</i> accepts the certificates if the insurance complies with the contract and if the insurer's commercial position is strong enough to carry the insured liabilities.	[2 marks]
	The <i>Contractor</i> has not submitted the required certificate and it would be sensible for the <i>Project Manager</i> to remind the <i>Contractor</i> urgently, perhaps it has been done but the <i>Contractor</i> just forgot to send the certificates.	[2 marks]
	Or the <i>Client</i> may insure an event or liability which the contract requires the <i>Contractor</i> to insure (Clause 85.1).	[1 mark]
	The cost of this insurance to the <i>Client</i> would then be paid by the <i>Contractor</i> (Clause 85.1).	[1 mark]
	This would be retained via the third bullet of clause 50.3 when calculating the amount due.	[2 marks]
	Total	[11 marks]

e) What should the *Contractor* do now?

	The <i>Contractor</i> would still have to provide the insurances stated in the Insurance Table, from an alternative company, except any insurance which the <i>Client</i> is to provide as stated in the Contract Data (Clause 83.2).	[2 marks]
	Total	[2 marks]

	Total marks	[25 marks]
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Question 7

a) What should the <i>Contractor</i> do next and is there a time limit?		
	The <i>Contractor</i> should notify a compensation event under clause 61.3, the event itself being under 60.1(1).	[2 marks]
	The <i>Project Manager</i> should have notified this as a compensation event under clause 61.1 and instructed a quotation to be submitted under clause 61.2	[2 marks]
	The <i>Contractor</i> should notify this as a compensation event under clause 61.3 but this will not be time barred as it is a compensation event that the <i>Project Manager</i> should have notified, but did not.	[1 mark]
	However, no compensation events can be notified after issue of the Defects Certificate (61.7)	[1 mark]
	Total	[6 marks]

b) What happens next?		
	The <i>Project Manager</i> should have responded to the <i>Contractor's</i> clause 61.3 notification within one week (61.4).	[1 mark]
	As this did not happen, the <i>Contractor</i> can notify another compensation event (60.1(6)) under clause 61.3, but that doesn't really help the <i>Contractor</i> here.	[2 mark]
	The <i>Contractor</i> is also able to notify the <i>Project Manager</i> of the failure to respond within one week and, if the failure continues for a further two weeks after the <i>Contractor's</i> notification, then it is treated as acceptance by the <i>Project Manager</i> that the event is a compensation event and an instruction to submit a quotation.	[2 marks]
	Total	[5 marks]

c) The <i>Project Manager</i> thinks it looks a bit too low, what should the <i>Project Manager</i> do next?		
	Under clause 62.3, the <i>Project Manager</i> should either give an instruction to the <i>Contractor</i> to submit a revised quotation or reply that the <i>Project Manager</i> will be making the assessment.	[2 marks]
	This communication should follow the provisions of clause 13, in particular clause 13.4 for the revised quotation where the reason for not accepting needs to be in sufficient detail to enable the <i>Contractor</i> to correct the matter.	[1 mark]
	If a revised quotation is sought, the provisions of clause 62.3 are followed again.	[1 mark]
	If the <i>Project Manager</i> decides to make the assessment, then the provisions of clause 64 must be followed.	[1 mark]
	Total	[5 marks]

d) Does the <i>Contractor</i> have to wait until the compensation event is implemented before carrying out the additional works?		
	The <i>Contractor</i> needs to Provide the Works as stated in the Scope, 20.1.	[1 mark]
	The <i>Project Manager</i> has the power to give an instruction to change the Scope, 14.3.	[1 mark]
	The <i>Contractor</i> must obey an instruction give by the <i>Project Manager</i> that is in accordance with the contract.	[1 mark]
	A compensation event is assessed based on the assumptions that the <i>Contractor</i> reacts competently and promptly to the event and that any Defined Cost and time due to the event are reasonably incurred (63.9).	[1 mark]
	So no, the <i>Contractor</i> cannot wait until the compensation event is implemented.	[1 mark]
	Total	[5 marks]

e) How does implementation occur in this case and what is the effect?		
	In this case implementation occurred when the <i>Project Manager</i> notified acceptance of the <i>Contractor's</i> quotation, or the <i>Project Manager</i> notified the <i>Contractor</i> of an assessment made by the <i>Project Manager</i> (66.1).	[2 marks]
	When a compensation event is implemented the Prices, the Completion Date and the Key Dates are changed accordingly (66.2)	[1 mark]
	The assessment of an implemented compensation event is not revised except as stated in the <i>conditions of contract</i> (66.3).	[1 mark]
	Total	[4 marks]

	Total marks	[25 marks]
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Question 8

a) Where the <i>Client</i> decided to change the Scope, how is this put into effect, is the <i>Contractor</i> obliged to comply and how is the value of the new scope assessed? And does a compensation event occur?		
	The <i>Project Manager</i> should give an instruction to change the Scope under clause 14.3	[1 mark]
	Each communication should be in a form that can be read, copied and recorded Clause 13.1	[1 mark]
	The <i>Contractor</i> must comply with the instruction Clause 27.3.	[1 mark]
	The <i>Contractor</i> is obliged to Provide the Works in accordance with the Scope Clause 20.1	[1 mark]
	The <i>Project Manager</i> should notify this 60.1(1) compensation event under clause 61.1 and instruct the <i>Contractor</i> to submit a quotation under clause 61.2.	[3 marks]
	Total	[7 marks]

b) What procedures does the contract provide for investigating and implementing different ways of achieving the required change in Scope?		
	After discussing with the <i>Contractor</i> different ways of dealing with the compensation event which are practicable, the <i>Project Manager</i> may instruct the <i>Contractor</i> to submit alternative quotations clause 62.1.	[2 marks]
	The <i>Contractor</i> submits the required quotations to the <i>Project Manager</i> and may submit quotations for other methods of dealing with the compensation event which it considers practicable clause 62.1	[1 mark]
	The <i>Project Manager</i> could state assumptions about the compensation event in the instruction to the <i>Contractor</i> to submit quotations (61.6).	[1 mark]
	If any of these assumptions are later found to be wrong, the <i>Project Manager</i> notifies a correction Clause 61.6.	[1 mark]
	A compensation event then occurs under Clause 60.1(17) which the <i>Project Manager</i> should notify under clause 61.1 and instruct a quotation to be provided under clause 61.2.	[3 marks]
	Total	[8 marks]

c) Assuming the <i>Client</i> is interested and wants the change made as quickly as possible, how does the contract deal with this?		
	The <i>Contractor</i> may propose to the <i>Project Manager</i> that the Scope provided by the <i>Client</i> is changed in order to reduce the	[1 mark]

	amount the <i>Client</i> pays to the <i>Contractor</i> for Providing the Works (16.)	
	The <i>Project Manager</i> consults with the <i>Client</i> and the <i>Contractor</i> about the change.	[1 mark]
	One of three replies is given by the <i>Project Manager</i> to the <i>Contractor</i> within four weeks of the <i>Contractor</i> making the proposal.	[1 mark]
	Assuming the proposal is of interest and an instruction is given, the normal rules of assessing compensation events applies.	[1 mark]
	As this is an Option A contract, If the effect of a compensation event is to reduce the total Defined Cost and the event is a change to the Scope provided by the <i>Client</i> , which the <i>Contractor</i> proposed and the <i>Project Manager</i> accepted, the Prices are reduced by an amount calculated by multiplying the assessed effect of the compensation event by the <i>value engineering percentage</i> (63.12)	[2 marks]
	The <i>value engineering percentage</i> is stated in the Contract Data.	[1 mark]
	Total	[7 marks]

d) How does the contract deal with this proposal if the <i>Client</i> has no interest in it?		
	The <i>Contractor</i> may propose to the <i>Project Manager</i> that the Scope is changed in order to reduce the cost of operating and maintaining an asset (X21.1).	[1 mark]
	The <i>Project Manager</i> should consult with the <i>Client</i> as this doesn't fit the <i>Client's</i> requirements to reduce the Prices.	[1 mark]
	It seems that the <i>Client</i> is not prepared to consider the change, the <i>Contractor</i> would be informed and should not submit a quotation (X21.2).	[1 mark]
	Total	[3 marks]

	Total marks	[25 marks]
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Institution of Civil Engineers

Examination for the ICE Certificate in Law and Contract Management (CLCM) 2022

Module 3: (English and Scots Law)

ICE Certificate in Law

Tuesday 21st June 2022

Time permitted: 14:00 to 18.00 (4 hours)

Section 1 is based on “sample” contractual provisions from non-NEC contracts and Section 2 is based on NEC4.

Answer **Question 1** and **one other** from section 1 *and* answer **Question 5** and **one other** from Section 2.

Please answer questions in the blue books provided, answer Section 1 and Section 2 in **separate** books.

All questions carry equal marks.

References to cases and legislation should be quoted where possible.

Please indicate on the outside of the answer books if your answers will be based on Scots Law.

Reference to documents during the examinations

Only unmarked copies of Statutes, NEC4 Engineering and Construction Contract (ECC), NEC4 Engineering and Construction Subcontract (ECS), NEC4 Engineering and Construction Short Subcontract (ECSS) and other standard forms of building contracts may be taken into the Examination.

Institution of Civil Engineers disclaimer; all names and characters in the question papers are fictional and any resemblance to any actual persons or businesses is purely coincidental.

Section 1

Question 1 - Compulsory

Harrison Contracting has been appointed to install new pipework for the transfer of water from a water treatment works to a reservoir. Its works include excavation, installation of pipework and the reinstatement of ground after successful installation. The pipes are provided to Harrison by the Employer, Shackleton, free of charge.

The contract has been formed using a purchase order, issued by Shackleton. It contains few details that would assist parties to a construction contract. A few pages have been added to the purchase order detailing issues such as delivery details for the pipes and a simple bill of quantities detailing unit rates for the works.

The works are halted at one location where the ingress of water is significant and heavy duty pumps will be required, together with a settlement tank to treat the water prior to its discharge to a nearby stream. This equipment and obtaining the necessary discharge consents is estimated by Harrison to cost £24,000. Harrison says that that it excluded such items from its prices and that Shackleton's site manager agreed this at the meeting of 4 March. That meeting took place after the tender was submitted but prior to the contract being signed. The minutes of that meeting, prepared by Shackleton's site manager, record some discussion on these matters, but no conclusion.

Harrison now says that its tender was conditional upon pumping and discharge consents being provided by Shackleton and therefore expects to be paid the £24,000 plus 30% overheads and profit (OH&P).

Shackleton says (correctly) that the written contract contains no such provisions but it does require Harrison to *"provide and do everything to install the pipes to the specification"* and that includes pumping.

- a) Who should pay for the additional costs of the pumping and discharge consents? [8 marks]**

Over the course of a bank holiday weekend a child playing on one of the sites falls into an unguarded excavation and severely injures herself. The child, through her parents' appointed solicitors, notifies Harrison and Shackleton that they intend to take legal action for damages unless an immediate payment of £50,000 is made to compensate the child, for her pain and suffering.

The site contained a few notices saying that children should keep out, but only rudimentary fencing that was easily bypassed by the child.

- b) Do Shackleton or Harrison have any liability here? [6 marks]**
- c) Would your answer differ if a similar accident happened to a member of the Employer's project team on a site visit? [3 marks]**

Following several months of arguments about the pumping problems, Harrison have installed the pumps and obtained the necessary consents. The actual costs have accumulated to £43,000 plus OH&P. Shackleton refuses to pay any of this amount and has also refused to pay

any amount in additional payments for OH&P saying that 30% is ridiculous. Harrison has threatened to take the dispute to adjudication, but Shackleton points out the lack of reference to adjudication in the contract.

d) Can Harrison refer this dispute to adjudication?

[8 marks]

Total [25 marks]

Section 1

Question 2

Hay Contracting has a design and build contract to construct a new extension to an existing factory for a pharmaceutical company. The Employer, Smyth, is keen that the site remains bio-secure.

The specification says, “*no person is allowed to smoke anywhere within the site as defined in drawing X-1654-9876*”.

Separately in the conditions of contract it states that, “*Smoking is banned anywhere on site. Anyone found smoking will no longer be allowed to work on site. A charge of £25,000 will apply on each occasion smoking is discovered to offset the Employer’s cleaning and administrative costs.*” Three employees of Hay are seen by Smyth’s CCTV system to have been smoking together in a lunch break in the car park.

The following morning the three people cannot access the site as their biometric access cards have been cancelled by Smyth. Hay’s manager is told by email that the three people may no longer work on the site and that a £75,000 charge will be deducted from the next monthly valuation.

- a) **Is Smyth correct to prevent access to the site for the three people in question?** [2 marks]
- b) **Hay says that the £75,000 deduction is ridiculous and can’t be justified. Is Smyth correct to deduct the £75,000 from the next valuation?** [7 marks]

Part way through the project Hay is the victim of a major IT cyber attack and loses access to its email, document control and cost management systems. It either refuses or cannot afford to pay the ransom demanded by the criminals. Consequently it is unable to provide documentary evidence in support of several claims for additional payment due to the additional requirements of working through the Covid-19 pandemic.

- c) **How should Smyth treat the claims made by Hay, given that many are unsubstantiated by records?** [3 marks]

The specification says, “*the roofing and cladding components should be designed with a design life of 50 years.*” 5 years after completion the roofing has discoloured in places and has deteriorated, with several leaks appearing inside the roof. On one occasion a roofing sheet blew off in high winds and badly damaged a passing bus.

- d) **The bus company has demanded payment from Smyth for the repairs to the bus. Is Smyth liable here? Or is Hay liable?** [4 marks]

Smyth claims £12m from Hay for completely replacing the cladding and the roofing of the building saying that it is clearly failing to last the 50 years required. The estimate has been provided by an independent building surveyor who has blamed Hay's design and construction. Hay says that as the claim wasn't made in the 12 months' defects period after completion then it has no further liability.

- e) **Does Hay have any liability to Smyth in respect of the remedial work? If so, how should that liability be established? What does Smyth need to prove?** [9 marks]

Total [25 marks]

Section 1

Question 3

Strike Contractors (“Strike”) have been appointed by Lowfields City Council (“Lowfields”) to design and replace street lighting in several residential areas. The Contract contains the following requirements;

- i. Design should be undertaken following BS5489.
- ii. Streets should be designed to lighting standard P4 which requires
 - a. A minimum average level of illuminance of 5 lux
 - b. A minimum point illuminance level of 1 lux
- iii. Superlite-10 LED lanterns with a maximum energy consumption of 24w should be deployed wherever possible onto existing lighting columns.
- iv. Where lanterns consuming more energy are installed, a fixed charge of £450 per lantern will be deducted from the Contractor’s payments to compensate Lowfields for the additional energy cost over the lifetime of the lantern.

Following initial design and installation work in one location, site surveys show that the required lighting levels are not being achieved, an average level of 4 lux and a minimum point of 0.8 lux have been measured on site through independent certification.

Strike blames the prescriptive specification and says that the required lighting levels cannot be achieved with the Superlite-10 lanterns and therefore the lower lighting levels are all that the Lowfields is entitled to because it specified the lanterns.

Lowfields says that it is entitled to the higher level of light specified in the contract however that is achieved.

- (a) With reference to statute and case law explain what does the contract require Strike to provide. [8 marks]**

The design problems require the installation of 100 bigger lanterns which consume more electricity than the Superlite-10. Consequently Lowfields deducts £56,000 for additional energy costs. It says that the contract figure of £450/light is insufficient as the price of electricity has risen since the contract was signed, so it needs to increase the deduction to £560/light.

Strike protests and says that it has calculated the additional electricity to cost only £214 and that is all it is willing to pay. It provides a spreadsheet showing its calculation.

- (b) Is Lowfields correct here? Can it deduct £560/light? Or should the Parties use Strike’s figure? [7 marks]**

The contract provides additional time for the contractor to reach completion when, “*the activities of the providers of telecoms, gas, water, Cable TV, electricity and other bodies obstruct the works...*” Two days’ work are disrupted in one location when environmental activists superglue themselves to the road and the Police seal off the area.

Lowfields refuses to extend the time for completion saying that the clause clearly wasn't aimed at protesters. Strike disagrees and says that the works were obstructed so they are entitled to more time.

(c) Is Strike entitled to more time here? Explain your answer. [4 marks]

The works eventually appear to be approaching completion. The contract requires the works to be certified complete by, "*The Director of Highways and Regeneration or her nominee*". The Leader of Lowfields announces on her social media account, "*We have successfully installed 10,000 new low energy lights showing that my party can be trusted to deliver efficient public services and reduce carbon emissions.*"

Strike demands a completion certificate that would allow it to demobilise its resources but the Lowfields street lighting engineer refuses, citing many significant defects. The engineer also says that Lowfields cannot afford to pay for everything at completion and needs to push the expenditure into the next financial year. Strike says that Lowfields leader has publicly stated the works to be complete so that's good enough for them and they are entitled to a certificate.

(d) Is Strike entitled to a completion certificate and, if so, who should issue it? What is the effect of Lowfields budgetary problems? [6 marks]

Total

[25 marks]

Section 1

Question 4

Sterland Steel has been awarded a subcontract from main contractor Wilkinson to fabricate and erect the steel frame for a new warehouse building. The Parties met prior to the subcontract being formed and the minutes of that meeting now form part of the subcontract. The subcontract was drafted by Wilkinson, agreed and signed on 1 September 2020 with 9 weeks allowed for site installation. The start date for site installation was stated as “2 December 2002” and completion by “3 February 2021”. The subcontract is a 2-page order with few details of the works and no provision for the quality standards required.

The steelwork was fabricated and ready to be transported to site on 31 November 2020. Wilkinson suffers delays occur to the preceding works on site and Sterland is forced to store the fabricated steelwork on trailers in its factory car park for 6 weeks until the site was ready to accept the deliveries. Whilst stored on the trailers, some of the members’ protective paintwork deteriorates. The paint’s data sheet says, “*the paint is designed for interior use only and should not have prolonged exposure to sunlight or moisture.*”

Sterland has to repair the damaged paintwork in its factory and that takes 3 weeks. The total delay is therefore 9 weeks; 6 weeks caused by Wilkinson’s late preceding works, and 3 weeks for the remedial painting. The installation works finished on 7 April 2021, 9 weeks late.

Sterland seeks the following additional payments from Wilkinson;

Cleaning & repainting of steelwork	£31,500
Storage costs (trailer hire)	<u>£13,700</u>
Total	£45,200

Wilkinson refuses to pay either of these amounts. It says that the start date for site installation is clearly wrong as it predates the contract by 18 years. Therefore, it says, time is at large and no costs are due for the alleged delays.

Sterland says that the start date should have been 2 December 2020, “that’s obvious to anyone”. The delays were all caused by Wilkinson’s delays and therefore the additional costs should be paid.

(a) Is time at large? Or does the contract contain a time obligation? [5 marks]

(b) Who should be responsible for the delay and costs caused by the repainting? [5 marks]

(c) Who should be responsible for the storage costs? [5 marks]

The parties resolve their differences on this issue but relationships are strained by repeated late payment by Wilkinson. Sterland now seeks interest, “*at 8.1% per week and our costs in accordance with the late payment laws*”. Wilkinson says that this is nonsense as the contract contains no such provisions.

(d) What, if any, interest and costs are due for late payment? [5 marks]

Wilkinson sends an email to Sterland offering, “*without prejudice a payment of £5,000 to settle all of the claims on this contract including your demand for interest and costs.*”

- | | | |
|------------|---|-------------------|
| (e) | What effect do the words ‘without prejudice’ have in terms of future adjudication or litigation? | [5 marks] |
| | Total | [25 marks] |

Section 2

Question 5 - Compulsory

You are the *Contractor* on a major highway project. The contract is the NEC4 Engineering and Construction Contract Option C. All the site clearance works are complete, and you have agreed the final account with your *Subcontractor*.

- (a) Describe the steps you need to take to get the *Project Manager* to accept the Defined Cost as correct. [10 marks]

You have subcontracted the drainage works to Highway Drains Ltd (HDL) on a Main Option A ECC Subcontract. This element of the contract has not gone well. There are disputes between you and HDL. On a £3.5m subcontract there is a difference of £2.0m between your assessment and HDL's application. The drainage works are complete, and HDL have submitted their account. There is no money due.

- (b) What actions should you take and by when. [5 marks]

Needless to say, HDL are unhappy with your assessment.

- b) Describe the steps available to HDL [10 marks]

Total [25 marks]

Section 6

Question 6

You are the *Contractor* on a major infrastructure project, which is adjacent to a non operational RAF airfield (RAF Wodbury). The contract is the NEC4 Engineering and Construction Contract Option C. Contract Data Part 1 includes secondary Option X22.

The Scope includes the following: -

Stage One	(Detailed design and mobilization)	26 weeks
Stage Two	(Construction)	136 weeks
<i>Client</i> Budget		£140m

You are ten weeks into Stage One and progress is good. Your secretary phones you to say that on the news there is a report on the outcome of the government's Defence review. The key element is the formation of a new squadron of A400M heavy lift aircraft to be based at RAF Wodbury which is to be made operational within the next 12 months. You then receive by e-mail a Clause 34 stop work notice from the *Project Manager*.

- a) Describe what actions you take on receiving the stop notice. [10 marks]**

You are called to a meeting with the *Client* and the *Project Manager*. At the meeting you are told that the disused 600mm Aviation Fuel Line to the airfield that crosses your site, which under the contract was to be sealed and grouted is now to be made operational. This Fuel Line will now be lowered and protected by a reinforced concrete slab. This work will be done by Others but must be completed within the first 12 months of the commencement of Stage Two. You are instructed to update your programme to reflect this change.

Four weeks after the meeting you receive a Stage One compensation event confirming this change to the Scope and the lifting of the stop notice. You hold a collaborative planning meeting with the *Client*, *Project Manager*, *Supervisor* and key *Subcontractors*. The outcome is that the Stage One duration is increased to 38 weeks. Stage Two duration is increased to 150 weeks with an increase in the Budget to £150m. You complete all the work defined in the revised Scope for Stage One.

- b) Describe what you are required to provide to the *Project Manager* [10 marks] and what else must happen to allow him to issue the Notice to proceed to Stage Two.**
- c) If the *Contractor* and *Project Manager* are unable to agree the [5 marks] Prices for Stage Two what actions are taken and by whom.**
- Total [25 marks]**

Section 2

Question 7

You are the *subcontractor*. The contract is the NEC4 Engineering and Construction Subcontract main option A. Contract Data part 1 requires the programmes to be submitted monthly. Your clause 31 programme has been accepted by the *Contractor*; however, you have not had any of your Clause 32 programmes accepted or rejected. The reason given by the *Contractor* is that the *Client's Project Manager* has not accepted or rejected his Clause 32 programme. You have submitted rev 5 to the *Contractor* on time and the acceptance period has expired.

(a) Describe what measures you can take to gain acceptance [5 marks]

Rev 5 is now accepted. You have submitted rev 6. One week after submission the contractor issues a compensation event which changes the Scope. The effect of the compensation event on your programme is if included in rev 5 then no change to planned Completion. However, if included in Rev 6 there is a two week delay to planned Completion.

(b) Which programme do you use for the compensation event quotation and why. [10 marks]

To complete your subcontract works other trade subcontractors have to complete theirs. The extent of this other work is stated in the Scope. They are running late with the effect that you will run out of work in two weeks time.

(c) What action should you take when you become aware of this [5 marks]

Your work comes to a standstill and you have men and machines standing. You notify the *Contractor* of the event and consider this to be a compensation event

(d) Describe what you would write to the *Contractor* [5 marks]

Total [25 marks]

Section 2

Question 8

You are the *Project Manager*. The works are the construction of a park and ride facility adjacent to a local railway line. There are two contracts both are the NEC4 Engineering and Construction Contract Option C. Contract 1 is for the carpark and access roads. Contract 2 is for the new station platforms and rail infrastructure.

Contract 1

The *Contractor* has referred a rejected Notification of a Compensation event to adjudication.

The *Adjudicator* has decided that the event is a compensation event.

- (a) **What should you do in respect of the *adjudicator's* decision and why** [10 marks]

The Scope requires the *Contractor* to carry out work next to the live rail line in a particular manner. You receive notification from the *Contractor* that this would breach Health and Safety Regulations.

- (b) **What action should you take as the *Project Manager*** [5 marks]

The completion of the access road to the park and ride is included in Contract Data Part 1 as a Key Date. This is because the access road is intended to be used by the Contract 2 *Contractor*. The Contract 2 *Contractor* has mobilized with the *starting date* being a week after the Contract 1 *key date*. The Key Date is not achieved. The access road is completed three weeks after the *key date*. You receive a Notification of Compensation Event from the Contract 2 *Contractor* stating he has not been granted access and is standing a weekly cost of £15,000/week

- (c) **What actions should you take with respect to Contract 2** [5 marks]

- (d) **What actions should you take with respect to Contract 1** [5 marks]

Total [25 marks]

Law & Contracts Examination Module 3 Points for Answer

Section 1

Question 1 Compulsory

a) Who should pay for the additional costs of the pumping and discharge consents?	
the contract was formed without the costs of pumping being agreed as Shackleton's liability. Parol evidence rule. No conclusion from the minutes, albeit they are unlikely to be evidence of agreement. Statement re specification places a clear obligation on Harrison.	[8 marks]
b) Do Shackleton or Harrison have any liability	
Occupier's Liability Act 1984 – liability for unauthorised visitors. Children can be expected to take less care than adults. Site should have been properly fenced preventing access. Probably breach of HSWA 1974 too with unguarded excavation.	[6 marks]
c) Would your answer differ if a similar accident happened to a member of the Employer's project team on a site visit?	
yes – different Act. Occupiers Liability Act 1957. Lawful visitors. Breach of HSWA 1974.	[3 marks]
c) Can Harrison refer this dispute to Adjudication?	
Yes, it can. These are construction operations – HGCRA s105(1)(b). Therefore a construction contract – s104(1)(a). Right to adjudicate – s108(1). Scheme to apply – s108(5).	[8 marks]
Total	[25 marks]

Question 2

a) Is Smyth correct to prevent access to the site for the three people in question?	
yes. Breach of contract and agreed in contract.	[2 marks]
b) Do Shackleton or Harrison have any liability	
No – It's £25k per occurrence, not per person. Arguments re LADs. Beavis v Parking Eye, Cavendish Sqr v Makdessi. Genuine pre-estimate of cleaning & admin costs? Court unlikely to intervene in the rate stated.	[7 marks]
c) How should Smyth treat the claims made by Hay, given that many are unsubstantiated by records?	
normal evidence rule apply. Cyber attack is unfortunate but proof needed on balance of probabilities.	[3 marks]
d) The bus company has demanded payment from Smyth for the repairs to the bus. Is Smyth liable here? Or is Hay liable?	
Liability exists due to Rylands & Fletcher rule. Smyth liable to bus company but can probably pass claim on to Hay if contractual liability can be established	[4 marks]
e) Does Hay have any liability to Smyth in respect of the remedial work? If so, how	

should that liability be established? What does Smyth need to prove?	
Yes to liability. Limitation Act 1980, damage has been discovered within six years of completion. 12 months defects period irrelevant. 50 years design life irrelevant, it is not a warranty. See Blackpool Council v Volker Fitzpatrick & Ors. What does contract say about liability? Based on surveyor's report, this design and construction unlikely to be either Fitness For Purpose or Reasonable Skill & Care.	[9 marks]
Total	[25 marks]

Question 3

a) With reference to statute and case law explain what does the contract require Strike to provide.	
Sale of Goods Act 1979 – must match the description in the contract. MT Hojgaard v Eon.	[8 marks]
b) Do Shackleton or Harrison have any liability	
LADs theory. Council cannot raise the amount post-contract. Parking Eye v Beavis & Makdessi v Cavendish likely to suggest that the agreed figure will apply.	[7 marks]
c) Would your answer differ if a similar accident happened to a member of the Employer's project team on a site visit?	
eiusdem generis. Environmental protesters are not the same class of person as the utilities companies named so claim is invalid.	[4 marks]
d) Is Strike entitled to a completion certificate and, if so, who should issue it? What is the effect of Lowfields budgetary problems?	
If there are defects then completion certificate isn't due. It should be issued by the named person or a nominee of hers. The certifier must act fairly & impartially. Sutcliffe v Thackrah 1974. So Council cannot withhold certificate merely because it would be inconvenient.	[6 marks]
Total	[25 marks]

Question 4

a) Is time at large? Or does the contract contain a time obligation?	
The contract says that 9 weeks was the period for installation and therefore the start date would be 2 December 2020. The drafting error was made by Wilkinson so contra proferentem the interpretation should be in Sterland's favour. Time is not at large and the dates for starting/finishing work are contractual obligations.	[5 marks]
b) Who should be responsible for the delay and costs caused by the repainting?	
Contract is silent on quality so obligation for RS&C implied from Supply of Goods and Services Act 1982. Clearly a lack of RS&C by Sterland in not following the manufacturer's requirements. Sterland is responsible.	[5 marks]

c) Who should be responsible for the storage costs?	
Delay was caused by Wilkinson, see earlier conclusion on dates in the contract. Wilkinson to pay for the storage costs as it was the breach which caused the costs to be incurred.	[5 marks]
d) What, if any, interest and costs are due for late payment?	
Lack of reference in contract is irrelevant. Implied terms from LPCDA 1998 as amended. Interest at 8.00% above BoE per annum, not per week. £100 costs allowed too.	[5 marks]
e) What effect do the words 'without prejudice' have in terms of future adjudication or litigation?	
An email cannot be produced in front of a Judge or Adjudicator if the email was a genuine offer to achieve settlement	[5 marks]
Total	[25 marks]

Law & Contracts Examination Module 3 Points for Answer

Section 2

Question 5 Compulsory

a) Describe the steps you need to take to get the Project Manager to accept the Defined Cost as correct.	
<ul style="list-style-type: none"> • Clause 50.9 requires the Contractor to notify the Project Manager when the Defined Cost for a part of the works has been finalised. • Defined Cost is the cost of the components in the Schedule of Cost Components less Disallowed Cost • The notice should set out which part of the works is available, in this case site clearance. The Contractor should make available all the financial records he has relating to site clearance. • The financial records would include for Subcontracts <ul style="list-style-type: none"> - The signed subcontract for subcontractors - Copies of interim valuations submitted by the subcontractor - Copies of the Contractor's payment certificates for each valuation - Copy of the Contractor's final assessment pursuant to Clause 53 of the engineering and construction subcontract - Copies of all compensation events, their quotations, including back-up records and confirmation of being implemented. • For the Contractor's own costs, these ideally should follow the Schedule of Cost Components, (Note if any of the categories of the SCC are Nil this should be stated) <ul style="list-style-type: none"> - People Costs - Plant and Materials - Charges - Manufacture and fabrication - Design - Insurance • Records should include <ul style="list-style-type: none"> - Time sheets - Staff charge out rates (This may require a confidentiality agreement to be signed and a visit to the Contractor's head office by the Project Manager) - Operative charge out rates - Invoices for all other costs - Confirmation that all rebates / discounts have been deducted from the Defined Cost 	[10 marks]
b) What actions should you take and by when.	
<p>The drainage subcontractor has submitted his final account and no money is due. There is a difference of £2.0m.</p>	[5 marks]

	<ul style="list-style-type: none"> - Payment is subject to the provisions of Secondary Option Y(UK)2. - The date when payment is due is fourteen days after the assessment date. - The <i>Contractor</i> must issue a certificate of payment stating the amount due on or before the date when payment is due. This is the notified sum and can be zero or negative. - The certificate must include a statement of how the notified sum has been calculated. - The final date for payment is fourteen days after the date when payment becomes due, or a different period if stated in Contract Data Part 1. 	
c) Describe the steps available to HDL		
	<p>HDL are unhappy with the Contractor's assessment.</p> <ul style="list-style-type: none"> - A dispute has crystallised as HDL have made an application and this has been rejected by the Contractor. - The provisions of Main Option W2 applies. - If both parties agree a dispute is referred to the Senior Representatives. - In this case HDL would notify the Senior Representatives and the Contractor of the dispute. - HDL and the Contractor submit their statement of case to each other within one week of the notification. - The statement of case is limited to ten sides of A4 paper together with supporting evidence. - Following receipt of the statement of case the Senior Representatives have three weeks in which to find a resolution. - At the end of this period the Senior Representatives prepare a list of agreed issues and those not agreed. - The discussions of the Senior Representatives are confidential and cannot be referred to in any subsequent Adjudication or a reference to the tribunal. <ul style="list-style-type: none"> • In the alternative HDL have the right to refer their dispute to Adjudication without reference to the Senior Representatives. 	[10 marks]
	Total	[25 marks]

Question 6

a) Describe what actions you take on receiving the stop notice		
	<ul style="list-style-type: none"> • The Project Manager issues a stop notice pursuant to Clause 34.1 • The Contractor must comply with the notice within a reasonable time following receipt, this means:- <ul style="list-style-type: none"> - Issuing a similar stop notice to any Subcontractors. - Identify what work is being undertaken and assess the consequences of the Notice on this work, e.g. it may be cost effective to continue some work if it is likely to be completed 	[10 marks]

<p>within a couple of days</p> <ul style="list-style-type: none"> - Ensure detailed records are maintained of lost time and other costs, e.g. accommodation, computer hire, mobile phones, vehicles, electric costs etc. • The Contractor should notify an early warning as the stop notice will have an impact on the Prices and Completion and convene an early warning meeting including Sub contractors to agree with the Project Manger the likely consequences of the stop notice is a compensation event pursuant to Clause 60.1 (4). Before relocating staff and other resources to other projects, if possible. • If the Project Manager does not issue a CE within a few days of issuing the stop notice then the Contractor should issue a notice of a CE pursuant to Clause 61.3. The eight week time bar does not apply as the CE is a consequence of a Project Manager’s instruction. • The Contractor should agree with the Project Manager the likely consequences of the stop notice. 	
<p>b) Describe what you are required to provide to the Project Manager to allow him to issue the Notice to proceed to Stage Two</p>	
<ul style="list-style-type: none"> • Secondary Option X22 sets down the procedure that allows the Project Manager to issue the Notice to proceed to Stage Two. • At the end of Stage One the Contractor is required to submit to the Project Manager X22.3(2) <ul style="list-style-type: none"> - Its proposals for Stage Two - Revised programme - Revisions to Access Dates, Key Dates and the Completion Date - The total of the Prices - Revised Activity Schedule – including the Price for Works Done to Date in Stage One • To allow the Project Manager to issue the Notice to proceed to Stage Two the Contractor also submits <ul style="list-style-type: none"> - Approvals and consents from Others • The Project Manager and Contractor have agreed the Project Budget or it has been assessed by the Project Manager. • The Project Manager and Contractor have agreed the Prices and Access Dates, Key Dates and the Completion Date. • Additionally the Client has confirmed the works are to proceed. 	<p>[10 marks]</p>
<p>c) If the Contractor and Project Manager are unable to agree the Prices for Stage Two what actions are taken and by whom.</p>	
<ul style="list-style-type: none"> • If there is no agreement then the Project Manager is unable to issue the notice to proceed. The agreement is in effect a condition precedent on whether the notice can be issued. • The Project Manager issues an instruction removing Stage Two from the Scope. This instruction is not a compensation event. 	<p>[5 marks]</p>

<ul style="list-style-type: none"> • Once the instruction is issued then as the Stage One works are complete the Project Manager should certify Completion • At Completion the Project Manager is required to undertake a preliminary assessment of the Contractor's share. 	
Total	[25 marks]

Question 7

a) Describe what measures you can take to gain acceptance	
<ul style="list-style-type: none"> • Inaction in the main contract is not a justifiable reason not to accept the subcontractor's programme • The subcontractor should issue a notice to the Contractor pursuant to clause 31.1. • If Contractor does not respond to the notice after two weeks the programme is deemed accepted 	[5 marks]
b) Which programme do you use for the compensation event quotation and why.	
<ul style="list-style-type: none"> • The assessment of a compensation event is governed by Clause 63. • Clause 63.1 states that cost and time is dependent on the dividing date. • The dividing date is the date of notification of the compensation event. • At the dividing date rev 5 programme had been accepted but rev 6 had not. • Clause 65.5 states that the effect on planned completion is assessed using the Accepted Programme current at the time. 	[10 marks]
c) What action should you take when you become aware of this	
<ul style="list-style-type: none"> • Issue an early warning notice to the Contractor on the basis of increase in the Prices and delay Completion. • Call an early warning meeting 	[5 marks]
d) Describe what you would write to the Contractor	
<ul style="list-style-type: none"> • Give notice to the Contractor of a compensation event pursuant to Clause 63.3 • The other trade contractors are Others • Compensation event falls under 60.1 (5) Others not working within times shown on your Accepted Programme.. 	[5 marks]
Total	[25 marks]

Question 8

a) What should you do in respect of the adjudicator's decision and why.	
<ul style="list-style-type: none"> • The Project Manager must comply with the decision of the Adjudicator. • Clause W2.3 (8) Adjudicator informs the Parties and the Project Manager of his decision • The Project Manager should now issue a compensation event. 	[10 marks]

<ul style="list-style-type: none"> • The compensation event is a consequence of the Project Manager changing his earlier decision to reject the compensation event notification. • The dividing date is the date of the change in the Project Manager's decision and / or the date of notification of a compensation event to the Contractor by the Project Manager, 	
b) What action should you take as <i>Project Manager</i>	
<ul style="list-style-type: none"> • The notification from the Contractor falls under Clause 17.2 • The Project Manager must investigate to determine if the Scope does require the Contractor to do something illegal. • If found to be correct the Project Manager must issue an instruction amending the Scope, this will be a compensation event.. 	[5 marks]
c) What actions should you take with respect to Contract 2.	
<ul style="list-style-type: none"> • The Project Manager must reply to the notification within one week • The Project Manager must consider if the event is a consequence of any the last 5 bullet points of Clause 61.4 • If the Project Manager concludes that none of these bullet points apply, then he must issue a compensation event. • The compensation event would fall under clause 60.1 (2) lack of access 	[5 marks]
d) What actions can you take with respect to Contract 1.	
<ul style="list-style-type: none"> • Failure to meet a Condition by a key date the requirements of Clause 25.3 apply • The additional cost to the Client will be the value of the compensation event issued on Contract 2. 	[5 marks]
Total	[25 marks]