



Institution of Civil Engineers

Examiners report 2018

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

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



ICE Law and Contract Management Examinations

Contents

Title	Page
Moderators' Report	3
Pass marks	5
Module 1	6
Module 2	12
Module 3	17
Module 1 Question Paper	21
Module 1 Points for Answer	29
Module 2 Question Paper	40
Module 2 Points for Answer	49
Module 3 Question Paper	62
Module 3 Points for Answer	76

Moderator's Report

The number of candidates sitting Modules 1 and 2 Papers was very slightly down on last year, but this is not viewed by the Moderators as an indication of reduced overall interest in the examinations. The percentage success rate for both the Module 1 and Module 2 Papers this year was very much in line with that achieved last year; these statistics are most encouraging. There were only two candidates sitting the Module 3 Paper but for the first time both candidates achieved a pass which is extremely encouraging.

The examiners make useful comments in their reports much of which merits repetition. For the Module 1 Paper, whilst the conclusions reached in response to the questions asked were generally reasonable, some candidates failed to achieve all marks available because they either: (i) failed to develop a point of law, or (ii) failed to apply the legal principle to the precise facts. The difficulties identified do not seem to reflect a lack of knowledge or understanding on the part of the candidates but, instead, a difficulty in applying a suitable technique in answering problem questions. In addition, some candidates appear to have unfortunately used up time dealing with responses to subsequent questions.

For the Module 2 Paper, those candidates looking back at past papers would be well advised to read the questions carefully and reflect on the 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.

For the Module 3 Paper, as mentioned above, the results are extremely encouraging. 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. It is also encouraging to note the increased number of approved Organisations offering the ICE Law and Contract Management Courses.



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.

Total Number of Candidates taking each Module and % Passing each Module								
	Module 1		Module 2 ICE		Module 2 NEC		Module 3	
	Nr	%	Nr	%	Nr	%	Nr	%
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	2	50	41	53	2	50
2010	34	83	1	100	36	67	7	29
2009	46	83	2	100	44	80	2	0
2008	45	84	2	100	43	83	2	0
2007	28	74	1	0	25	52	5	20
2006	47	74	21	100	25	76	3	33
2005	57	60	14	86	37	73	5	0

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

Copies of the current curriculum, the two case lists and a revised reading list are all available on the ICE website www.ice.org.uk/law or contact the Management Procurement and Law Department, Institution of Civil Engineers, One Great George Street, London SW1P 3AA t +44 (0)20 7665 2116, or e 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.

Examiner's Report

Module 1 Section 1

General comments

In general, the section was answered fairly well with the majority (c. 58%) of candidates achieving 50% and over in this section. Whilst the conclusions reached in response to the question asked were generally reasonable, some candidates failed to achieve all marks available because they either: (i) failed to develop a point of law (for example, where the facts of the question were very similar to a particular case, by failing to identify the similarities); or (ii) failed to apply the legal principle to the precise facts in the question (for example, by not completing their reproduction of the law / case law with a simple concluding statement applying the legal principles to the specific facts of the question. ❌

The difficulties identified above do not seem to reflect a lack of knowledge or understanding on the part of the candidates but, instead, a difficulty in applying a suitable technique in answering problem questions. I offer below some guidance in answering these problem questions in the hope that this may assist future candidates to achieve all (or close to, all) marks available:

When answering a problem question, candidates should:

- Begin with an opening remark identifying the area of the syllabus the question relates. For example. *“Whether or not XYZ is under a contractual obligation will depend on whether there is a legally binding contract in place between XYZ and ABC. For there to be a legally binding contract, there needs to be: a valid offer, acceptance, consideration, and an intention to create legal relations. I will now consider the facts in question in relation to these requirements ...”*. This ‘signposting’ will not only show that candidates have grasped what the question is asking (and there are often 1 – 2 marks available for this), it also should focus the candidates’ minds so that they produce a focused and relevant answer to the question being asked and do not stray into other areas of the syllabus. ‘
- **Not** repeat the facts of the question. Unlike ‘signposting’, this does not warrant any marks and is likely to waste the candidates time.
- For each aspect of the question, candidates should: (i) Set out the legal principle (e.g. *“For an acceptance to be valid, it must exactly fit the terms of the offer...”*); (ii) Consider whether there are any relevant case authorities and identify these (briefly – we do not need a full case summary!) - candidates should be aware that often the facts of these questions are based on the facts of a particular case; (iii) Apply the legal principle to the facts in question (e.g. *“Andrew’s reply*

- is not an acceptance because he does not agree to Richard's terms because he suggests an alternative price"); and (iv) Finally, consider whether there is any
- particular difference to the facts of the question to the case or legal authority that might lead a court to draw a distinction (e.g. *"However, unlike in Adams v Lindsell (1818), ABC Ltd and XYZ Ltd have not communicated by post in previous stages of the contractual negotiation and so the court may conclude that ABC Ltd's response by post was unreasonable..."*).
 - Always make concluding remarks (e.g. *"Therefore, if Jenny had waited until 4pm to send the email, there would be a valid contract."*). Even if the candidate isn't sure what decision a Judge / the court may reach, if the candidate can provide rationale for their conclusion, it ought to attract some marks.
 - For questions where there are many marks available and lots of sub-topics to consider, candidates should adopt "sub-headings".

As in previous years, some candidates showed some confusion between breach of contract and breach of duty of care in the tort of negligence. This was particularly the case when identifying the remedies available in breach of contract.

Question 1

This was the most popular question and was answered by 53 of the 60 candidates. This question was answered reasonably well with c. 57% of candidates achieving 12 marks or higher.

- a) Question 1(a): Candidates performed less well on this question. Many candidates focused on purely the implied terms by statute (e.g. the Sale of Goods Act 1979 or Consumer Rights Act 2015) and didn't consider whether the statements could be considered breach of express terms. There was a limit to how many marks could be awarded – even if candidates discussed the implied terms in detail. Some candidates only considered this question in relation to the Unfair Contract Terms Act and whether the exclusion clause would be considered reasonable.
- b) Question 1(b): This question was generally answered fairly well with most candidates accurately defining a representation and applying the definition to Hermione's statements in question. Some candidates lost marks by failing to consider the requirement that reliance had to be reasonable and also by failing to reference the Misrepresentation Act 1967.
- c) Question 1(c): Many candidates did not provide enough detail to be awarded the full marks available to this question, despite showing sound understanding on the remedies available for breach of contract. This was mainly because they focused purely on the aim of damages for breach of contract but failed to consider the

different remedies depending on whether the terms are conditions, warranties or innominate terms of the contract. Many candidates forgot to apply the facts to the question and did not come to a conclusion as to the type of remedy that would be most suitable and how the damages may be calculated

- d) Question 1(d): Candidates performed better in relation to the damages available for misrepresentation. However, as there were less marks available for this question, this ought to have been an indicator that more time should have been spent on 1(c). Most candidates accurately identified that the remedies available would depend on the type of misrepresentation and the remedies available for each. However, many candidates lost marks for failing to describe the remedy of rescission despite correctly identifying it as a possible remedy.

Question 2

The question was the second most popular question in this section as it was answered by 52 of the 60 candidates. This question was answered less well than question 1 with c. 48% of candidates achieving 12 marks or higher.

- a) Question 2(a): The responses to this answer were mixed, with many candidates failing to respond with the level of detail required for a 20-mark question. Most candidates answered the question of whether a valid contract was formed with good accuracy but failed to get the maximum marks on offer as they failed to discuss the formation of a contract step by step in relation to each stage of the negotiation or for failing to apply the legal principle to the facts. There was some misunderstanding of the case law in relation to when instantaneous communications are regarded to have been communicated (the distinction between received by the server and read by the individual). Some candidates also discussed the postal rule in relation to the posting of an offer which is not applicable. Some candidates failed to consider whether it made a difference that Andrew's wife communicated the withdrawal of the offer. It was encouraging to see strong candidates doing a step further and considering whether it was reasonable to expect Richard to pick up an email over lunch time and referring back to the facts that he had limited personnel working at his showroom.
- b) Question 2(b): This question was generally answered fairly well in terms of the conclusions reached but simple marks were lost by failing to explain their reasoning. Stronger candidates that achieved maximum marks for this question considered the requirements of acceptance by post and also whether acceptance by post would be deemed suitable in the circumstances.

Question 3

This was the least popular question answered by just 15 of the 60 candidates, with 9 of the 15 candidates achieving 12 marks or higher.

- a) Question 3(a): This question was generally answer very well by candidates with many receiving full marks. Some candidates failed to recognize that the marks available were limited to 4 (which ought to be an indication as to the level of detail required) and spoke at length about the formation of a contract and what constitutes valid consideration and the intention to create legal relations. A simple answer noting each requirement was sufficient for this question.
- b) Question 3(b): Many candidates provided a similar level of detail in question 3(a) and question 3(b) despite the latter attracting an additional 17 marks. Perhaps this was an indication that candidates spent too much time on question 3(a) and were running out of time when answering question 3(b). This question was answered best by candidates who considered each potential head of loss individually as against the limbs of *Hadley v Baxendale*, taking each loss in turn, as opposed to attempting to answer the question in generic terms. Most candidates recognised the potential failure to mitigate by turning down the replacement machine. It was encouraging to see that strong candidates went on to consider how a potential failure to mitigate might reduce the damages awarded.

Module 1 Section 2

General comments

In general, the section was answered well, with the majority (68%) of candidates achieving a pass mark or above in this section. Most candidates answered questions 4 (strict liability) and 6 (negligence) and did so well. One candidate answered all three questions. One candidate demonstrated a very good knowledge of tort law principles and their application.

Candidates lost marks because: (i) they failed to recognise what the question was asking them to consider and discussed points that carried no marks (in some cases discussing matters that were not included in the curriculum); and/or (ii) they failed to apply their knowledge of the relevant legal concept to the facts of the question. In addition, candidates appear to have unfortunately used up time dealing with responses to subsequent questions (for example, providing a response to question (b), (c), or (d) in question (a)).

Question 4

This was answered by 42 of the 60 candidates. It was answered well, with 31 of those candidates achieving 12 marks or higher. Two candidates achieved 22 marks out of the 25 available, and one achieved 21 marks.

- **Question a:** Candidates generally noted that this could be a private nuisance action, but that, given the requirement for Tom to have acted unreasonably, it would be more advantageous for Sally to prove liability under the strict liability rule in *Rylands v Fletcher*. Candidates missed out on marks by failing to identify that, under the rule in *Rylands v Fletcher*, Sally would need to demonstrate that (a) Tom brought something on to the land (ie. an accumulation); (b) that this was a non-natural use; (c) the thing (ie. the pesticide) was likely to cause mischief if it escaped; and (d) the thing did escape and cause damage; and (e) damage was foreseeable. In respect of foreseeability, stronger candidates correctly identified that damage to the organic crops was a foreseeable consequence of the pesticide escaping, but that the damage to the antique tools was not.
- **Question b:** Candidates generally observed that Tom could argue the wind was an Act of God. However, they were split fairly evenly as to whether this defence could succeed. The facts suggest not: the Act of God needs to be something that could not be anticipated or provided against. By contrast, Tom knew he lived in a windy valley (and he had lived there for years), and the weather forecast (which Tom did not check) predicted strong winds on the day in question. Most candidates also identified that a further defence may be if Sally consented to the pesticide being brought onto Tom's land and used – stronger candidates noted that, on the facts, Sally not only repeatedly pleaded with Tom not to use the pesticide but went further and suggested a reasonable alternative (ie. only spraying to within 20 metres of the boundary between the properties).
- **Question c:** Most candidates correctly noted that liability is strict under the rule in *Rylands v Fletcher*, meaning that Sally would not need to prove negligence on Tom's part. Some candidates went on to consider the value of Sally's losses – no marks were available for this discussion.

Question 5

This was the least popular question and was answered by 22 of the 60 candidates. 13 candidates who answered this question achieved 12 marks or higher.

- **Question a:** As an employer, CC owes Damien (an employee) a common law duty to take reasonable care for his safety at work. Most candidates correctly identified that this involves providing (a) competent staff; (b) adequate plant and equipment; and (c) safe system of working. Candidates missed out on marks by not applying these requirements to the facts before concluding that CC breached its common law duty.
- **Question b:** Most candidates correctly identified that CC may be vicariously liable for Christina's negligence, provided Damien can establish (a) Christian was

an employee; (b) Christian committed a tort; and (c) the tort was committed in the course of employment. As with question (a), candidates missed out on marks by not applying these requirements to the facts before stating their conclusion. Stronger candidates correctly noted that the defence of contributory negligence may apply given that Damien deliberately disobeyed Christian's instructions.

- Question c: A number of candidates broadly stated that Damien could bring a claim against CC for We Fix Ltd's negligence. However, the facts state that We Fix Ltd were independent contractors – accordingly, any claim against CC would fail under the first limb of the test for vicarious liability (ie. We Fix Ltd is not an employee of CC).

Question 6

This was the most popular question, with 57 of 60 candidates answering. Overall, it was answered well, with 42 candidates achieving 12 marks or higher.

- Question a: Most candidates correctly identified that this was a negligence question, Candidates missed out on marks for not identifying the requirements that Daniel would need to prove: duty, breach, causation, and loss. Some candidates made assumptions and therefore reached conclusions not based on the factual problem - for example, discussing whether or not Kirk was guilty of a criminal or road traffic offence or government policy behind road user rules. Such points are outside the scope of this exam, which is based only on tort law.
- Question b: Most candidates identified that Daniel's failure to wear a helmet amounted to contributory negligence. Stronger candidates correctly noted that this would only serve to reduce Kirk's liability and would not extinguish it completely. Candidates also generally identified that Dr Norton's actions may have amounted to a *Novus actus interveniens* – however, some candidates incorrectly asserted that Dr Norton's actions would discharge Kirk from liability altogether: Kirk would still be liable for the 2 weeks of the original injury.
- Question c: Daniel has a claim in negligence against Dr Norton. The majority of candidates identified that this would be a professional negligence claim, and that the doctor/patient relationship is an established duty of care. In respect of breach of that duty, a number of candidates did not mention that Dr Norton will be assessed against the skilled defendant in his field (*Bolam v Friern Hospital Management Committee* (1957)), although they nonetheless found Dr Norton breached his duty of care on more general principles. In terms of remoteness and loss, stronger candidates identified that (a) Dr Norton will not be liable for the initial 2 weeks off work, as that would happen in any event; and (b) Dr Norton must take his victim as he finds him (*Smith v Leech Brain* (1962)) – ie. Daniel's pre-existing concussion will not affect his ability to recover damages from Dr Norton.

Module 2 Section 1

General comments

This year the pass rate increased for section one, up from 80% to 89% which is really encouraging.

On the whole answers were well planned and presented. However, some scripts were challenging to mark for the same reasons raised in previous years. Please find a few (repeated) pointers below to keep examiners happy and maximise marks:

- Please start each new question on a new page. Putting answers to more than one question on the same page makes totalling marks difficult.
- Candidates are free to answer the questions in whichever order they wish. However, please keep the parts of a question together and in sequence. A couple of candidates split the questions and answered their parts out of sequence over consecutive pages.
- Follow the instructions on the front of the answer booklet. Several candidates answered all questions from both sections of the module in the same answer booklet.
- Please leave the right-hand margin clear for marking.
- Some scripts were illegible in places. If you are short of time it is better to write a brief answer plan covering the main points clearly, than volumes that cannot be deciphered.
- Use the index at the back of the contract to look up relevant actions, defined and identified terms. This can help guide and structure your answer.
- Use the right verbs, defined and identified terms in your answers.
- Don't copy out entire clauses or pages, directly from the contract. The clause numbers are there for easy referencing so please use them. Ensure you provide a summary of the relevant parts and their implications as required by the question. Simply citing clauses will not attract high marks.
- Don't repeat the question, this wastes time and attracts no marks. Ensure you include reasons and conclusions to your answers. Some candidates appeared to argue points several ways without conclusion.

One further important point to note; Please do not labour on early warnings and clause 10 in every part to a question.

Read the whole of each question and consider its marking scheme. It may be a valid point to suggest an early warning is notified as part of your answer. But candidates

should refrain from repeating at length, the early warning procedure, in each part answer to a question (unless the question is clearly concerned with early warnings). Nearly half of the candidates did this to some extent for both questions answered in this section. It is a real waste of time that might otherwise be used to address the actual question being asked.

Giving early warning is not necessary where there is no uncertainty (e.g. an instruction has been given and a compensation event notified). There are occasions where it is still sensible for ongoing unknowns, but if there is no uncertainty and holding a meeting would not add value, then why notify an early warning? Remember - an early warning is not necessary as a prerequisite to a compensation event. The contract specifically states that early warning of a matter for which a compensation event has previously been notified is not required.

Clause 10 is extremely important, but mark schemes do not give large numbers of marks (if any) to its referencing. By demonstrating an understanding of the contract, you show how acting as stated in it (clause 10) is achieved. The questions will almost certainly not be looking for a dependency on mutual trust and cooperation alone, so pitching your answer on just this is likely to fall short and attract few, if any marks.

Question 1

This was the second most popular question attempted by 49 of the 74 candidates, averaging a mark of 17 out of 25. 40 candidates achieved a pass mark of 13 or higher; an 82% success rate.

In this question, candidates proposed main Options in pairs based on price or cost, rather than their schedules. For example, where Option A was suggested Option B was also often proposed. Options C and D were also offered as a pair. The question was in the main aiming to check understanding of how the Activity Schedule and Bill of Quantities may be suitable, based on the nature of the *works*, budget considerations and Site.

a) Some candidates suggested that Option C would provide the *Contractor* greater incentive than Option A to make savings, owing to the gain share arrangements. This is a flawed argument; under Option A the *Contractor* retains all the savings. Option C incentivises the *Employer's* team to collaborate. Where share ranges and percentages are balanced, Option C reduces financial risk to the *Contractor* in the case of overspends.

Few candidates suggested a *Contractor's share percentage* of 100 for a share range greater than 100.

Several thought that Option B was lump sum, probably a misinterpretation of the definition of Price for Work Done to Date under clause 11.2(30) [NEC4], second bullet point.

b) Answered well were candidates chose correctly in part a).

c) A couple of answers suggested transferring all risk to the *Contractor* in order to protect the *Employer* – hardly in the spirit of NEC and a little worrying to see. On the whole this part was not answered well. Marks were awarded for suggesting Option B or D. However, it seemed as though knowledge of how these options differed was not well understood with some citing Option D as a priced contract.

d) Many candidates forgot to mention the Schedule of Cost Components and the Shorter Schedule of Cost Components. Some mentioned Contract Data, Works Information and other parts that fall outside of the *conditions of contract*.

e) This was answered poorly by some candidates who felt that for Option A the *Project Manager* and *Supervisor* would have a reduced role in quality and scheduling aspects of the project compared with Option D. Few seemed to appreciate the requirements of remeasure or the increased role of Defined Cost in main Option D.

Question 2

This was the most popular question, attempted by 64 of the 74 candidates, averaging a mark of 17 out of 25. 78% of candidates achieved a pass mark of 13 or higher, but it was the least successfully answered question in section 1.

Please ensure use of the correct verbs – frequently candidates used ‘issued’ or ‘raised’ instead of ‘notify’. Accept was often replaced in answers with ‘agreed’ or ‘approved’ which are not caught by clause 14.1 and so could cause significant problems on a real contract.

a) This part was well answered with most candidates identifying the *Project Manager*, not the *Employer*, needed to give the instruction. Few explicitly made the link between constraints and Works Information which was worth a mark in this part.

b) Many candidates seemed unaware that the *Contractor* could notify a compensation event in this scenario and instead gave extended commentary on the early warning and risk reduction processes.

Some incorrectly concluded the *Contractor* could not proceed with the work given the compensation event ‘had not been notified’ and therefore the final sentence in clause 61.1 couldn’t take effect. They appeared to think clause 60.1(1) changed the Works Information, rather than correctly understanding that it is clause 14.3.

Others demonstrated further confusion with the word ‘implementation’, arguing that the event could not be progressed until notified as a compensation event and a quotation accepted. This appeared to stem from an incorrect interpretation of the use by NEC of the

word implementation in clause 65.1 – which in NEC is used to mark the commercial finality of a compensation event and has nothing to do with physical progress of the *works*.

c) Awareness of clause 20.1 and 27.3 was strong. Most knew the answer to this part. Of those that didn't, some fell into the same confusion around implementation as for part b) above.

d) Candidates need a better understanding of the separation between the *Contractor* progressing with the *works* and following instructions, and the commercial assessment of compensation events.

e) Many of the answers to this part confused the updating of the Activity Schedule, with the role of the Works Information. Some candidates incorrectly argued that work could not commence or be paid for under Option C until the Activity Schedule had been updated. Generally, the awareness and understanding of Price for Work Done to Date for Option C was poor.

Question 3

This question was answered by 23 of the 74 candidates. It attracted an average score of 16 out of 25. This was the most successfully answered question with 21 candidates achieving a pass mark, equivalent to 91% of those who attempted it.

a) This part was on the whole answered well. There was some confusion where answers sought to make suppliers 'Others'. This was then further confused with who had liability for Others.

b) This part was answered poorly with few candidates identifying the risk posed by the two fee percentages in NEC3. Few dealt with how wrongly identifying a Subcontractor as a supplier and the other way around, might lead to financial errors.

Several candidates incorrectly concluded that suppliers posed reduced liability for the *Contractor* compared with Subcontractors. They appeared to infer from clause 26.1 that by contrast to Subcontractors, suppliers performing works were somehow liable for their own work and this shielded the *Contractor* from future *Employer* claims.

The remainder of this question was answered well by the majority of candidates except for the wide use of 'defect' instead of 'Defect' and 'approve' in place of 'accept'. The latter is a commercially risky lack of attention to detail in light of clause 14.1.

Question 4

This was the least popular question, answered by just 12 of the 74 candidates. It attracted an average mark of 16. 10 candidates achieved a pass mark, a success rate of 83%.

Parts a) to d) of this question were answered well by the vast majority of candidates, who showed a good appreciation of how NEC3 has evolved to NEC4.

e) Several candidates did not attempt this part which reduced the overall average mark. It was not clear why. Where it was attempted, some missed the link with clause 63.5 and the Accepted Programme.

Module 2 Section 2

General comments

Those candidates looking back at past papers would be well advised to read the questions carefully and reflect on the 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.

For Q5, 28 candidates attempted this and the average mark was 11.4 out of 25. For Q6, this was the most popular with 57 candidates attempting this and the average mark was 11.6. Q7 had 42 candidates attempting this, returning the lowest average mark of 9.6. Finally, only 20 candidates attempted Q8, but they returned the highest average mark of 14.4.

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 offer up absolutely no answer for 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 a 'Defect' 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 *Supervisor* is not going to get you any marks.

- There is a column in the answer booklets titled ‘Marks’ – that is for the examiner to write in, not the candidate. 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.
- Candidates are clearly told to answer questions from Section 1 and 2 in separate booklets, yet this does not always happen. Make sure this happens.
- Take care to number the 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.
- Several candidates with Q7 assumed that the tenderer could just add in secondary Option X14 advanced payment into the tender document. This would be a qualification and cannot happen.
- For Q5, there is a difference between a *defect correction period* and the *defects date*. This needs to be better understood.
- Q5a was answered poorly by a number of candidates – there were 10 marks available and a few sentences would not grab many of these marks.
- It is becoming more difficult for most of us to write for a while, as opposed to the norm of typing, but please try and slow down a little and make the words more legible.

Module 3 Section 1

General comments

Only two candidates took the paper this year, which makes any sweeping or general deductions from performance difficult to make. The candidates seem not to have planned their time well. The Examiner had the impression that candidates were pressed for time. Both candidates seemed to struggle to focus on the key issues on the questions that they answered. This may reflect a lack of consideration of what was being asked of them and what the point raised in the question was, despite the two questions that were answered being structured to allow some indication of the areas in which the Examiner was interested.

Question 1

This was the compulsory question on the exam. It concerned dealing with programming and lump sums and accepted design in a practical situation.

- a) This dealt with the Project Manager’s authority where a Contractor’s programme is patently not in accordance with the contract. The candidates were asked to advise the Project Manager on his options, although neither candidate really focused on

what those options might be. Both candidates identified that clause 32 was relevant and that the Contractor had an obligation to obey the instructions given to him under clause 27.3. Neither candidate realised the importance of the Contract Data and that they were not actually given sufficient information in the question to identify if the programme was contained in the Contract Data. The candidates consequently did not identify that 25% of the Contract Sum should have been withheld under clause 50.3 if the programme was not in the Contract Data. The candidates struggled with the result of the failure by the Contractor. One correctly identified that the Project Manager would have to certify compensation events, which would be a practical outcome although, this was not done by any incisive reference to clause 64. One candidate suggested that failure to provide a programme might result in an R11 termination under clause 91, which seems extreme and did not flesh out the answer. The candidate also suggested a risk reduction meeting would be appropriate without linking the suggestion to the reasons to issue a calling for a risk reduction meeting, nor what proposals the Project Manager might bring under clause 16.3. Neither candidate dealt with what the Project Manager would need to do in terms of keeping his own programme to comply with clause 64.3 nor the practical issues that might fall from that.

- b) This dealt with the Project Manager's authority to assist the Contractor's cash flow by reducing the severity of strict lump sum payments. Both correctly identified that the Project Manager has no discretion under the contract to split lump sums and tended to focus on how the Project Manager could assist the Contractor despite this. Neither candidate suggested that there were implications for the Employer which it may want to consider, and both crafted their answers to suggest ways the severity of the contract could be reduced for the Contractor. The Project Manager must act impartially – that does not mean decisively in favour of the Contractor and an Employer could be rightly grieved to find the Project Manager certifying payments against an Activity Schedule around which its cash flow had been programmed to deal with lump sums. Neither candidate mentioned the implications of Y(UK)2 or Clause 51: 'Payment Requirements' and that the Project Manager would be obliged to deal with the payment certificate, even though there was no money to be paid.
- c) This dealt with the acceptance of the Contractor's design and changes within that design. The candidates both identified that the Project Manager would be required to accept the design or notify a compensation event if he failed to do so if the design complies with the Works Information. One candidate suggested an early warning meeting may be appropriate if the Project Manager was minded not to accept the design. Neither candidate really explored the implications of the change in design on other trades which may be arranged, nor the impropriety of the Contractor's demand that the design be accepted quickly.
- d) This dealt with the Supervisor's obligation to deal with works constructed by the Contractor but not in accordance with the Contractor's design. Both candidates

correctly identified that the Supervisor should notify a defect because the works were not in accordance with the accepted design.

Question 2

This question was answered by both candidates. It focuses on the options for dealing with a Contractor's design under varying circumstances and how acceleration is dealt with under the contract.

The scenario for the design approval elements was a value engineering proposal from a Subcontractor.

- a) The candidates identified that constructing the culvert other than by the Employer's design would be a defect. Neither candidate discussed the implications of value engineering under Option B and that there is no contractual mechanism for it. One candidate discussed the early warning system but did not develop the possibility of allowing for a quotation. Since the question asked for advice to the Contractor, it was disappointing to find that neither candidate actually provided direct advice to the Contractor, the overall position being either there was no benefit to him unless he could reach an agreement with the Employer extra contractually to allow for the saving.
- b) Part B dealt with the same facts but there was a Contractor's design element. Both candidates identified that the Contractor could change the design as long as it complied with the Works Information. Neither discussed the value engineering aspects as such and neither identified the costs arising under that circumstance would be a 100% benefit to the Contractor. One of the candidates wasted considerable time discussing the necessity to have the Subcontractor's design accepted, without drawing out the potential delay that might cause.
- c) Part C asked how the advice would differ if it was an Option C contract. This was not well answered by either candidate. Both identified that it was the actual defined cost that the Contractor would be paid but neither drew out the conclusion that this would mean an automatic saving to both the Employer and Contractor. Neither candidate mentioned clause 63.11 and the express value engineering provisions in Option C.
- d) The last part of the question dealt with acceleration and take over under the contract. One candidate answered it well and fully, the other less so. Both candidates identified that Clause 36 'Acceleration' was relevant and that it could not be instructed. Both candidates identified the importance of take over under clause 35 but one candidate did not develop it. The candidates missed the opportunity to deal with the possibility of instructing changes under clause 14 to the sequence of the works for the Contractor if acceleration could not be agreed and the possibility of proposed instructions on that was completed ignored by one of the candidates. The possibility for a risk reduction meeting was mentioned but not developed by either candidate.

Module 3 Section 2

General comments

In section 2, candidates answered question 5 (which was compulsory) and question 8. No-one answered question 6 or 7.

Question 5 was answered well by all candidates. Not all referred to appropriate case law (Bolam in England) but knowledge of the standard required under contract was clearly explained. None of the candidates mentioned the potential limitations of professional indemnity insurance for standards of performance greater than reasonable skill and care. The liability of the contractor was explained in a logical, engineering manner but occasionally there was a lack of legal analysis of the facts. Not all candidates referred to the case of Eon v MT Hojgaard which was directly relevant here. All candidates were correct in establishing that the 20 years life was the predominant obligation. The liability of the consultant was not well explained by all candidates. The disparity of the limit agreed in contract and the level of PI cover offered should have been commented on. None of the candidates mentioned the case of Ampleforth v Turner & Townsend which was relevant here. There was some reference to the Unfair Contract Terms Act but insufficient detail from Schedule 2 which sets out where liability limitation clauses may be ineffective.

Question 8 was answered very well by all candidates. All understood that the defects liability for the contractor survived the initial period after construction completion. None of the candidates mentioned the legislation that underpins these obligations in their respective jurisdictions, this was needed to earn full marks. All candidates understood the use of the label “without prejudice” but none explained (as required by the question) what effect it had in the scenario posed by the question. All candidates understood the issue of privity of contract and the need for a collateral warranty to create any liability. Only one candidate raised the potential impact of tort/delict and correctly ruled it out here. All candidates correctly explained the liability of the Contractor and the two limbs of Hadley v Baxendale. All candidates made a logical assessment of the problems of extrapolating from small statistical samples.



Institution of Civil Engineers

Examination for the ICE Certificate in Law and Contract Management (CLCM) 2018

Module 1: Law (English and Scots Law)

Monday 4th June 2018

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 from Section 1 in an answer book provided (Yellow book) and answer Section 2 questions in a **separate** answer book provided (Yellow book).

All questions carry equal marks.

Only un-annotated copies of Statutes and Statutory Instruments may be taken in to the Examination.

References to Cases and Acts should be quoted where possible.

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

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

Hermione owns a stud farm and has decided to sell one of her horses named “The Golden Snitch”. Hermione enters into negotiations with Ron who is an avid fan of horse racing but has never owned a race horse before. When Ron visits the stud farm to view The Golden Snitch, Hermione tells Ron that The Golden Snitch is in good health and that there was no need to get a vet to check him. She tells Ron he could rely on her word. Hermione also tells Ron that The Golden Snitch is a thoroughbred racing horse like his mother “Bellatrix” who had won the Champions Cup on four consecutive occasions. On hearing this, Ron agrees to buy The Golden Snitch for £25,000. Hermione hands Ron her terms and conditions which state:

“The seller does not accept any responsibility for any misdescription or inaccurate statement made in respect of the horse”.

In his first year under Ron’s ownership, The Golden Snitch loses all of his races. Ron calls a vet to look at The Golden Snitch and the vet confirms that he has a hereditary eye disease. Ron subsequently makes enquiries as to The Golden Snitch’s background and discovers that The Golden Snitch is neither a thoroughbred racing horse nor the son of Bellatrix. Ron visits Hermione on her stud farm and demands a full refund of his £25,000. Hermione refuses on the basis of the terms and conditions.

- a) Does Ron have a claim for breach of contract against Hermione? [9 marks]
- b) Does Ron have a claim for misrepresentation against Hermione? [9 marks]
- c) Briefly discuss what remedies would be available to Ron for: [7 marks]

Section 1
Question 2

Richard is a classic car dealer who imports cars from around the world. He advertises them online and has a showroom in Mayfair where he has just one employee.

On 3 March, Andrew, a collector of classic cars, meets with Richard at his showroom in Mayfair to view a 1956 Bentley. During the meeting, Richard hands Andrew the specification for the 1956 Bentley setting out the details of the car and quoting a special offer price of £68,000 if Andrew was to purchase the car before 30 March (Richard's financial year end).

On 12 March, Andrew sends a letter to Richard telling him that he would only be prepared to pay £58,000 to purchase the car on the basis that he had received a quote for an equivalent 1956 Bentley from a rival car dealership, Monty's Motors, at a lower price of £58,500.

Andrew's letter is misdirected by the postal service and does not reach Richard until 19 March. In the meantime, having not heard from Richard, Andrew telephones Monty's Motors and accepts their quote of £58,500.

On reading Andrew's letter on 19 March, Richard immediately replies by post the same day agreeing to accept the lower price of £58,000 for the car. Richard posts the letter at the post office at 2pm. However, earlier that day, at 1pm, Jenny, Andrew's wife, had emailed Richard on Andrew's behalf explaining that Andrew had decided to take up the quote from Monty's Motors instead. Richard, who had been busy dealing with customers, did not pick up the email until 4pm. Andrew received Richard's letter on 20 March.

- a) **Is Andrew legally bound to purchase the car from Richard?** [20 marks]
- b) **What difference might it have made if Jenny had waited until 4pm on 19 March to email Richard explaining Andrew had decided to take up the quote from Monty's Motors instead?** [5 marks]

Section 1

Question 3

Rosie is a self-employed dressmaker who specialises in designing and making wedding dresses. In the past, the average cost of a dress by Rosie is between £2,000 and £5,000. However, Rosie has recently been commissioned to make a wedding dress for a famous actress for £23,000. The dress is half complete when Rosie's industrial sewing machine breaks down on 1 April. Rosie engages Bobbin Limited to repair the machine. There is no written contract, but the cost of the repair is agreed over the phone and during this conversation Rosie explains to Bobbin Limited that the machine must be repaired by 15 April for her to complete the wedding dress in time for the actress' first fitting on 20 May. Bobbin Limited agree to repair the machine by 15 April.

There is a delay to Bobbin Limited in obtaining the parts required to repair the machine, and Bobbin is unable to repair the machine by 15 April. As a result, Rosie seeks to postpone the wedding dress fitting but, in her rage, the actress cancels the order completely. Due to the client being of such high profile, Rosie had not agreed her usual payment by instalments, but full payment on completion of the dress, and so received nothing of the £23,000. Bobbin Limited had offered to provide a replacement machine for the period of delay. The replacement machine was not of the same speed and quality of Rosie's machine. Rosie rejected this offer. The machine was not repaired until 1 June.

On 20 April, Rosie is contacted by the Princess of Denmark's personal assistant who informs Rosie that she has been selected by the Princess of Denmark to design and make her wedding dress for her royal wedding in July. She offers Rosie £100,000 and also mentions that Brides Denmark magazine wish to interview the chosen designer and feature Rosie's collection in their next edition. Rosie is forced to decline the offer due to the broken machine. Rosie calculates that she has lost c. £30,000 on lost profits due to missing the opportunity to be featured in Brides Denmark.

Rosie brings a claim against Bobbin Limited for breach of contract.

- a) **Advise Bobbin Limited whether they are in breach of contract.** [4 marks]
- b) **If Bobbin Limited were to be in breach of contract, what remedies might Rosie be entitled to? Your answer should discuss the recoverability of each of the potential heads of loss.** [21 marks]

Section 2

Question 4

Tom is a farmer who grows vegetables for market. For years, he has grown these organically using no pesticides or chemicals. Tom's neighbour, Sally, is also a farmer, whose crops are also organically grown.

Due to some sound investments, Tom recently acquired more land. His farm is now physically too large for him to continue growing organic vegetables. To combat this problem, he purchases a large amount of pesticide to spray.

As they live in a windy valley, Sally is concerned by this development and the risk of pesticide contaminating her crops. She repeatedly pleads with Tom not to use the pesticide or, as an alternative, only use it to within 20m of the boundary between their properties, in case any pesticide is caught by a gust of wind. Tom says he will think about it, but ultimately ignores Sally's pleas.

One day, Tom uses the pesticide to spray his vegetables. He uses it right up to the boundary with Sally's property. Unfortunately, while Tom is spraying, a violent gale sweeps across his property. The weather forecast had predicted extremely strong winds that day, but Tom had not checked this before he started spraying.

The strong winds carry pesticide onto Sally's property. Her organic crops are contaminated by the pesticide. She is now unable to sell them at the organic markets, where vegetables fetch considerably higher prices.

In addition, Sally later discovers that the pesticide Tom used has seeped through the earth and into an outbuilding where she had been storing her antique farming tools. Her most valuable tool had been damaged beyond recognition.

- a) **Advise Tom on any liability he may have to Sally.** [16 marks]
- b) **Consider any defences which may be available to Tom.** [7 marks]
- c) **Tom claims that he has not been negligent and therefore does not see why a claim against him can succeed and seeks your advice.** [2 marks]

Section 2

Question 5

Construction Components Ltd (“CC”) is a company specialising in the production of widgets. CC recently received a large order. To meet the purchaser’s demand, CC has had to employ additional staff to assist in the operation of its machinery.

CC employs Damien, a machine operator who has previous experience in the industry (although not previous experience at CC). Damien will be working in the factory as an operator of one of the machines. Damien informs CC that he thinks he has operated this machine in his previous job.

Damien’s assigned supervisor is Christian, who is also an employee of CC. As the factory is extremely busy, Christian informs CC that as Damien has previously used the machine, he can forego the training and full supervision on operating the machine to ensure CC don’t waste time/training days on this. In actual fact, Damien does not have any experience of the machine.

The machine was protected by a railing to guard against any dangerous contact with moving parts on the machine. The railing is removable and in order to access and operate the machine more freely, Damien removes the railing. Damien continues to follow this practice of removing the railing when operating the machine.

Christian notices Damien’s practice and tells him that the machine should only be used when the railing is in place. Damien however, continues to remove the railing as this makes accessing the machine easier and the output higher. Christian considers that as he has already warned Damien once, he does not need to continue to inform Damien that he should stop this practice.

One day, as Damien is operating the machine, he catches his hand in the machine causing severe injury. As a result, his hand will need to be amputated. Christian quits his job because of the incident and later becomes bankrupt.

It also turns out that the machine was recently serviced by a local contractor, We Fix Ltd, who negligently failed to notice that the guard rail removal alarm was not working.



Damien would like some advice.

- a) Is CC liable to Damien at common law in respect of his injuries? [13 marks]
- b) CC says that it is not responsible for Christian's supervisory actions. Is this correct? [9 marks]
- c) Can Damien make a claim against CC as a result of We Fix Ltd's actions? [3 marks]

Section 2

Question 6

To celebrate his birthday, Kirk purchases a new Ferrari. One night after he has had a number of drinks at the pub, he decides to take his Ferrari out for a spin.

While driving at high speeds in excess of the limit along narrow roads, Kirk is startled by a fox. He is momentarily distracted and takes his eyes off the road. As a result, he does not see Daniel riding his bicycle. Kirk hits Daniel, who falls off his bicycle and hits his head on the road. Unfortunately, Daniel was not wearing his helmet at the time.

Daniel is taken to hospital, where he is told by a nurse that he has a concussion and will be unable to work for 2 weeks. He is then seen by Dr Norton, a newly-qualified surgeon. Without having taken any scans of Daniel's head, Dr Norton decides that an experimental and risky surgical procedure is necessary to prevent swelling to the brain.

Dr Norton has not performed this procedure before, but recently read a blog post online written by a self-described 'alternative medical expert' stating that it is considerably better than conventional brain surgery. Dr Norton is unaware that, since that blog post, three respected and widely-circulated medical journals have published comprehensive studies completely debunking the science behind the alternative procedure and deeming it incredibly risky. One of those journals also noted that the so-called 'alternative medical expert' was in fact a notorious former doctor who is no longer allowed to practice medicine due to repeated negligence.

Unfortunately, the surgery does not go well. Daniel suffers severe brain damage.

- a) **Advise Daniel on any rights of claim he may have against Kirk.** [8 marks]
- b) **Does Kirk have any defences to avoid liability?** [7 marks]
- c) **Does Daniel have any rights of claim against Dr Norton?** [10 marks]

**Module 1 Section 1 Points for Answer
Question 1**

- a. Does Ron have a claim for breach of contract against Hermione? **9 marks**
- To have a claim for breach of contract, a term of the contract must have been breached. Such terms may be either express or implied. **1 mark**
- Express terms can be written or oral. In this case, there seems to be a mixture between oral (i.e. Hermione's reassurances about the horses health and parentage) and written (i.e. Hermione's terms and conditions). **1 mark**
- When deciding whether an oral statement may constitute a term, the court usually considers the degree of importance attached to the term by the innocent party. If it is clear that the innocent party would not have entered into the contract but for the statement made, it is likely to constitute a term of the contract (*Bannerman v White*). **2 marks**
- Credit (1 mark) also awarded for brief discussion of the Parol Evidence Rule.
- The two statements made by Hermione – i.e. (i) the representation as to the horse's health and (ii) the representation as to its breed and parentage - are arguably express terms of the contract. **1 mark**
- Candidates should draw parallels to *Schawel v Reade* - Hermione reassured Ron that he could rely on her word and understood the purpose for which the horse could be used (i.e. for racing). **1 mark**
- Ron's degree of knowledge (i.e. the fact that he had never purchased or owned a race horse before) would also be considered (*Dick Bentley Productions Limited v Harold Smith Motors Limited 1965*). **1 mark**
- Candidates should come to a reasoned conclusion as to whether the oral statements made by Hermione ought to be considered express terms. **1 mark**
- Candidates should also briefly discuss the fact that the sale falls under s.13 of the Sale of Goods Act 1979 or Consumer Rights Act 2015 if applicable, which implies into all contracts for sale of goods a term that the goods shall comply with their description. The Golden Snitch's parentage and breed are likely to be considered as part of the description and arguably constitute breaches of an implied term. **1 mark**
- Credit (1 mark) also awarded for discussion of the Unfair Contract Terms Act (if considered a business to business transaction) or the Consumer Rights Act (if considered a business to consumer transaction) and whether Hermione's exclusion of liability would be considered reasonable.



b. Does Ron have a claim for misrepresentation against Hermione? **9 marks**
A misrepresentation is a false statement of fact (or possibly law), (1 mark), made by one party to the contract to another party to the contract, before the contract is formed, (1 mark), with a view to inducing the other party to enter the contract, and that representation induces the other party to enter into the contract. (1 mark). **3 marks**

Smith v Land and House Property Corp 1884 – there must be a reasonable reliance on the statement. In this case, Ron has relied on Hermione’s statements re the health, parentage and use of the horse in proceeding with the purchase. **2 marks.**

Candidates should demonstrate an awareness of the different types of misrepresentation (fraudulent, negligent and innocent) and identify the most applicable type of misrepresentation given the facts (3 marks). There should be reference to the Misrepresentation Act 1967 (1 mark) **4 marks**

c. Briefly discuss what remedies would be available to Ron for: **7 marks**

Breach of contract; and
The calculation of damages would depend on whether the statements made by Hermione re the health and parentage of the horse are conditions, warranties or innominate terms of the contract. Candidates should briefly discuss the difference between: **2 marks**

- a condition as a major term of which goes to the heart of the contract which, if breached, entitles the innocent party to terminate the contract and claim damages;
- a warranty which is a minor term of the contract which is not central to the existence of the contract which, if breached, gives rise to damages and not termination; and
- innominate terms which look at the effect of the breach and whether the innocent party to the breach is deprived of substantially the whole benefit of the contract (Hong Kong Fir Shipping v Kawasaki Kisen Kaisha 1962).

The contract has already been performed – i.e. Ron now owns the horse and Hermione has been paid and so Ron’s remedy for any breach of contract appears to lie in damages. Alternatively, credit (1 mark) also given for discussion as to how damages might be calculated according to the limbs of Hadley v Baxendale. **1 mark**

The general principle when calculating damages for breach of contract is that damages should be assessed to put the claimant in the position it would have been in if the contract had been properly performed. **1 mark**



Misrepresentation.

The remedies will depend on the type of misrepresentation. For fraudulent and negligent misrepresentation, Ron may claim rescission and damages. For innocent misrepresentation, the court has a discretion to award damages in lieu of rescission; the court cannot award both (section 2(2) of the Misrepresentation Act 1967).

2 marks

Rescission is where the contract is set aside, and the parties are put back into the position in which they were before the contract was made.

1 mark

Question 2

a. Is Andrew legally bound to purchase the car from Richard? 20 marks

- Andrew will be legally bound to purchase the car from Richard if a legally binding contract has come into existence between Andrew and Richard. 1 mark
- This requires an agreement between the parties consisting of offer, acceptance, consideration and an intention to create legal relations. 1 mark

3 March

- The specification provided by Richard to Andrew appears to contain an offer. 2 marks
- There is a clear expression of willingness on the part of Richard to enter into a contract with Andrew for the sale of the car for a specific price.

12 March

- Andrew's reply is not an acceptance because he does not agree to Richard's terms. Acceptance must exactly fit the offer (Jones v Daniel 1894). 2 marks
- A counter-offer occurs where the offer attempts to vary the terms of the offer, or to introduce new terms which do not exactly match the original offer 1 mark
- Typically, a counter offer destroys the original offer (Hyde v Wrench (1840)). 1 mark
- Andrew's reply appears to constitute a counter offer to pay a lower price for the car and this in turn destroys Richard's original offer.

19 March – Jenny's email

- Andrew's email appears to be an attempt to revoke the counter-offer. 1 mark
- 1 mark

- An offer can be validly withdrawn provided the withdrawal is unequivocal and communicated before acceptance takes place. 2 marks
- It does not make a difference that Jenny emailed Richard on Andrew's behalf as notification by a third party of an offer's withdrawal is effective (Dickinson v Dodds (1872)) 2 marks
- Notices sent to a business should be treated as having been communicated when they ought to have come to the attention of an appropriate member of staff who was acting in a normal and competent business-like manner (The Brimnes 1975). 2 marks
- Messages transmitted by instantaneous means during ordinary business hours would normally be regarded as having been communicated upon receipt (Brinkibon v Stahag Stal GmbH (1983)). 1 mark
- Strong candidates ought to discuss whether it is reasonable to expect Richard to have picked up the email over lunch time, particularly if he has limited personnel working at his showroom (The Brimnes 1975). 2 marks
- If Andrew validly withdrew his offer before acceptance took place, Andrew would not be legally bound to purchase the car from Richard.
- Credit also given to recognition that the Postal Rule does not apply to instantaneous communication.
-

b. What difference might it have made if Jenny had waited until 4pm on 19 March to email Richard explaining Andrew had decided to take up the quote from Monty's Motors instead?

- Provided Richard's letter of acceptance is correctly stamped and addressed, its content will be deemed to have been communicated to Andrew at the time of posting, i.e. at 2pm (Adams v Lindsell (1818)). 3 marks
- The postal rule ought to apply because Andrew's counter-offer was communicated by post and so Richard's response by post ought to be considered reasonable. 1 mark
- Therefore, if Jenny had waited until 4pm to send the email, there would be a valid contract between Andrew and Richard. 1 mark

25 marks

Question 3

- a. Advise Bobbin Limited whether they are in breach of contract. **4 marks**

A binding contract appears to have been agreed verbally between Rosie and Bobbin. There is no need for a contract to be in writing (unless it is to take effect as a deed). Provided there is an offer, acceptance, consideration (price has been agreed) and intention to create legal relations, it is likely that there is a verbal simple contract. 2 marks

Rosie has stated that the time for completing the contract. This appears to be an express term of the contract between Rosie and Bobbin. 1 mark

By failing to repair the machine in time, Bobbin are in breach of an express term of the contract. 1 mark

- b. If Bobbin Limited were to be in breach of contract, what remedies might Rosie be entitled to? Your answer should discuss the recoverability of each of the potential heads of loss. **21 marks**

Typical remedies are damages and specific performance. The equitable remedy of specific performance will not be available where damages are adequate and for contracts for personal services. In this case, damages appear to be the appropriate remedy. 2 marks

Contractual damages compensate the innocent party for the loss which he has suffered as long as they are reasonably foreseeable and not too remote. The objective is to put the innocent party in the position he would have been in if the contract had been performed. 2 mark

In order for Rosie to recover damages she must be able to prove that the loss was caused by Bobbin's breach and that her loss was not too remote. 2 marks

There appears to be a causal connection between Bobbin's breach (i.e. the late repair) and Rosie's loss (i.e. the loss of the cancelled dress, the lost opportunity in the commission from the Princess of Denmark, the loss of profits in relation to the magazine feature). 2 marks

In order to demonstrate that the loss is not too remote, Rosie must show that the loss is recoverable within the rule of Hadley v Baxendale (1854) – i.e. it must flow naturally from the breach and must have been in the contemplation of both parties. 2 marks

Cancelled wedding dress for the actress - £23,000 2 marks

It is arguable that the loss flows naturally from the breach. Under the second limb, this loss was also arguably in the contemplation of the parties at the time of contract formation because Rosie informed Bobbin why it was important to repair the machine by 15 April.

1 mark

Candidates should reference *Diamond v Campbell-Jones* and *Cottrill v Steyning & Littlehampton Building Society (1966)*: Partial knowledge – Parties will only be liable for so much of the loss as they could have anticipated on the basis of the facts known to them, but not for further loss which results from other circumstances of which he was unaware. In this case, Bobbin did not appear to have been told of the payment arrangements between Rosie and the actress.

Loss of profits / lost opportunity - £100,000 and £30,000

The fact that Rosie could not accept any new work whilst the machine was being repaired may have been in the contemplation of Bobbin. Therefore, some loss of profits may be recoverable. However, Rosie does not appear to be a high-end designer (her usual commissions are worth between £2,000 and £5,000) and so arguably the £100,000 commission may not have been in the contemplation of Bobbin and so the full amount may not be recoverable. 2 marks

It is unlikely that Bobbin would have envisaged the lost profits as a result of the lost magazine feature as being a likely consequence of not repairing the machine within the specified timeframe. 2 mark

Ultimately, whether Bobbin is liable will depend on its knowledge at the time of its engagement.

Rosie would also be under a duty to mitigate her loss - *British Westinghouse Co v Underground Electric Railway Co (1912)*. Unless Rosie can prove that she acted reasonably in rejecting Bobbin’s offer to provide a temporary machine, it is likely that the court would find that Rosie failed to mitigate her loss. The court may consider the quality of the replacement machine in making its assessment. 4 marks



**Module 1 Section 2 Points for Answer
Question 4**

This question concerns private nuisance, the rule in *Rylands v Fletcher* (1868), and Acts of God.

a) Sally v Tom

Candidates should first identify that Sally has an interest in the land (as owner) and so has standing to bring an action (*Charing Cross Electricity Supply Co v Hydraulic Power Co* (1914)) 1 mark

Candidates should note that this may be a simple case of private nuisance. Tom was warned of the danger, and knew he lived in a windy valley. Candidates should assess whether it was unreasonable for Tom to do nothing about that danger and draw a reasonable conclusion 2 marks

Given the requirement for Tom to have acted unreasonably for a private nuisance action, candidates should note that it would be more beneficial if Sally can prove he is liable under the strict liability rule in *Rylands v Fletcher* 1 mark

In order to bring a claim under the rule in *Rylands v Fletcher*, Sally would need to demonstrate the following:

Tom brought something onto the land (ie. an accumulation). Candidates to note that Tom brought pesticide onto the land 2 marks

Tom made a “non-natural use” of this. Candidates to consider whether Tom’s use of premises was non-natural 2 marks

The thing is likely to cause ‘mischief’ if it escapes although it need not be inherently dangerous. Candidates to consider whether pesticide is likely to cause mischief if it escapes 2 marks

The thing escaped and caused damage. Candidates to discuss whether, in fact, the pesticide escaped and caused damage to Sally’s organic crops 2 marks

Damage was foreseeable (*Cambridge Water Co Ltd v Eastern Counties Leather plc* (1994)). Candidates should consider whether escape of the pesticide was of a foreseeable type: on the facts, it would seem so 2 marks

Candidates should draw a distinction between the damage to Sally’s organic crops, and the damage to her antique tools: damage to the crops was a foreseeable consequence of the pesticide escaping, but, arguably, the damage to the antique tools was not 2 marks

Defences in Sally v Tom

Act of God – Candidates will need to show an occurrence which is exclusively the consequence of natural causes, such that it could not be anticipated or provided against by Tom (*Nichols v Marsland* (1876)). On the facts, Tom faces difficulties with this defence: while it was wind which caused the pesticide to blow onto Sally’s 1 mark

- property, Tom knew he lived in a windy valley (and he had lived there for years), and the weather forecast (which Tom did not check) predicted strong winds on the day in question. Candidates should note that *Nichols v Marsland* was doubted in *Greenock Corp v Caledonian Rly* (1917)) 3 marks
- A further defence may be if Sally consented to the pesticide being brought to Tom's land and being used (*Peters v Prince of Wales Theatre (Birmingham) Ltd* (1943)). Candidates should identify that Sally repeatedly pleaded with Tom not to use pesticide 2 marks
- Candidates should also note that Sally went further and suggested a reasonable alternative – ie. Tom only spraying to within 20 metres of the boundary 1 mark
- c) Strict Liability
- Candidates should note that liability is strict under the rule in *Rylands v Fletcher*, meaning that Sally would not need to prove negligence on Tom's part 2 marks

Question 5

This question concerns employer's liability at common law, vicarious liability, and an employer's liability for independent contractors.

a) Damien v CC: Employer's common law liability

Candidates should identify that CC (employer) owes Damien (an employee) a common law duty to take reasonable care for his safety at work 1 mark

This involves providing: (i) competent staff; (ii) adequate plant and equipment; and (iii) safe system of working (and safe workplace) 3 marks

Duty - Applying this to the facts: 2 marks

CC has not provided training to ensure Damien is equipped to operate the machine properly. CC is aware about this incompetence and has turned a blind eye to it. It is not sufficient if Damien says he knows how to operate the machinery. Training and supervision are ongoing

CC has not provided adequate material. Although CC has delegated the servicing of the machine to a local contractor its duty is non-delegable. We Fix Ltd.'s negligence will put CC in breach 2 marks

CC does not provide a safe system of working; the railing is removable, and CC have not taken reasonable steps to ensure it is installed whilst the machinery is in operation (e.g. making sure the railing was fixed) 2 marks

Breach - CC has therefore breached the common law duty to take reasonable care for Damien's safety at work 1 mark

Causation/Loss is established. Applying the 'but for' test, Damien's injury would not have been caused but for CC's negligence. The injury is foreseeable and not too remote 1 mark

Defence of contributory negligence may apply as Damien has deliberately disobeyed Christian's instructions 1 mark

Damien v CC: Vicarious liability for tort of Christian

Candidates should identify that CC may be vicariously liable for the negligence of Christian. Candidates should identify that the claim would be brought against CC as Christian is bankrupt 2 marks

Damien would need to establish three elements: (i) Christian was an employee; (ii) Christian committed a tort; and (iii) the tort was committed in the course of employment (see *Limpus v London General Omnibus Co* (1862)) 1 mark

Applying this test to the facts:

Christian is clearly an employee and not an independent contractor 1 mark

Christian has committed the tort of negligence: Christian owes Damien a duty of care as a colleague and supervisor. By failing to supervise Damien, Christian has breached this duty causing Damien to suffer injury. The injury is a foreseeable type and not remote 2 marks

Christian committed the tort during the course of his employment. 2 marks

Candidates should note that the defence of contributory negligence may apply in light of Damien deliberately disobeying Christian's instructions 1 mark

Damien v CC (We Fix Ltd)

Candidates should identify that Damien cannot bring a claim against CC for negligence by We Fix Ltd – We Fix Ltd are independent contractors. An independent contractor is an employee under a contract *for* services (rather than an employee under a contract of service) and would fail under the first limb of the test for vicarious liability 3 marks

Question 6

This question concerns negligence, contributory negligence, and causation

a) Daniel v Kirk

Candidates should identify that, prima facie, Daniel has a claim in negligence against Kirk 1 mark

In order to succeed in a claim for negligence, Daniel must demonstrate (i) duty; (ii) breach; (ii) causation; and (iv) loss 1 mark

Applying this to the facts:

Duty: Candidates to discuss the 'neighbour principle' and establish by reference to *Donoghue v Stevenson* (1932) and *Caparo Industries plc v Dickman* (1990) that Kirk owed a duty of care to Daniel as a fellow road-user 2 marks



Breach: Kirk breached the duty by driving recklessly and over the speed limit while intoxicated 2 marks
Causation and Loss: As a result of Kirk's breach, Daniel has suffered injury which is of a foreseeable type and not too remote 2 marks

b) Daniel v Kirk – Defences

Candidates should identify that Kirk may be able to claim that Daniel was at least partly to blame for the accident by raising the argument of contributory negligence (Law Reform (Contributory Negligence) Act 1945) 1 mark

Stronger candidates will identify that contributory negligence only reduces the extent of any damage payable, and not liability altogether (*Anderson v Newham College of Further Education* (2002)) 1 mark

Candidates should observe that a cyclist not wearing a safety helmet is analogous to a motor cyclist not wearing a helmet – which was held to amount to contributory negligence in *O'Connell v Jackson* (1971) 1 mark

Candidates should therefore conclude that it would seem Daniel is at least partly to blame 1 mark

Candidates should also note that Dr Norton's actions represent a *novus actus interveniens* that breaks the chain of causation in Kirk's negligence. Kirk would need to demonstrate that a reasonable surgeon would not have made this mistake 2 marks

Kirk may be able to avoid liability in respect of Daniel's severe brain damage, but not the initial accident 1 mark

c) Daniel v Dr Norton – Professional Negligence

Candidates should note that Daniel may have a professional negligence claim against Dr Norton 1 mark

To succeed in a claim for negligence, Daniel must demonstrate (i) duty; (ii) breach; (ii) causation; and (iv) loss 1 mark

Applying this to the facts:

Duty: Dr Norton owed Daniel a duty as his patient. This is an established duty of care 2 marks

Breach: Dr Norton will be assessed against the skilled defendant in his field (*Bolam v Friern Hospital Management Committee* (1957)). Dr Norton clearly fell below the standard of a reasonable doctor: fundamentally, he decided surgery was necessary without first taking any scans to confirm whether this view was appropriate. And in terms of the form of surgery, he relied upon a single blog post online to justify a risky and experimental surgical procedure. Furthermore, he did not check before surgery whether there was any other literature on the procedure – eg. whether



the science was appropriate, and who the author was. No allowance will be made for the inexperience of a junior doctor

2 marks

Causation and Loss: Dr Norton's liability will be for the severe brain damage and losses flowing from that. He is not liable for the initial 2 weeks off work, as that would have happened in any event.

2 marks

Stronger candidates will also note that, in respect of remoteness, Daniel's pre-existing concussion (caused by being hit by Kirk's car) will not affect his ability to recover damages from Dr Norton. Dr Norton must take his victim as he finds him (Smith v Leech Brain (1962))

2 marks

Institution of Civil Engineers

Examination for the ICE Certificate in Law and Contract Management (CLCM) 2018

Module 2: NEC (English and Scots Law)

Monday 11th June 2018

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 from Section 1 in an answer book provided (Green book) and answer Section 2 questions in a **separate** answer book provided (Green book).
All questions carry equal marks.

Candidates may consult unmarked copies of the, **NEC3 and NEC4 Engineering and Construction Contract (ECC)**, **NEC3 and NEC4 Engineering and Construction Subcontract (ECS)**, **Statutes, CDM Regulations and CESMM4**.

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

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

A water company is preparing to invite tenders for the construction of a new treatment works under NEC3 ECC. Fully detailed designs have been prepared and comprehensive Site Information shows the ground is favourable. The water company's budget is approximately £40m, but they would ideally like to realise savings and achieve better value for money.

- a) **Which ECC main Option would you suggest the water company adopts to achieve its aims?** [5 marks]
- b) **How would your answer above differ if predictability of overall spend on the project was the water company's key concern?** [4 marks]

Prior to inviting tenders, the ground investigation consultants finalise the Site Information which now shows the ground is poorer than first thought. It is not clear how much excavation and fill will be required to achieve the design. The water company is now concerned with attracting the best possible price from the market.

- c) **Which ECC main Option would you now suggest in light of the updated Site Information? Explain how your choice may reduce financial risk on the Contractor.** [5 marks]
- d) **Briefly explain how the *conditions of contract* under an NEC3 ECC are assembled. Include in your answer reference to main and secondary Options, whether or not they must be adopted and why the contract makes a distinction between X and Y clauses.** [5 marks]

Under NEC3 ECC, main Options A and D comprise *conditions of contract* that place very different obligations upon the *Project Manager*. The definition of Price for Work Done to Date is an example.

- e) **You are advising the water company regarding the skills and resources needed to administer the contract effectively. How would your advice differ depending on a choice between main Option A and main Option D?** [6 marks]

Section 1
Question 2

Several months into a building project under an NEC3 ECC with main Option C, the *Employer* wishes to limit the *Contractor's* working hours to between 8am and 7pm, Monday to Friday.

- a) **Can the *Employer* insist on this limitation to working hours after the Contract Date? Explain your answer.** [5 marks]

Later the *Project Manager* wants to change the *Employer's* design for lighting in the main entrance foyer. The revised lighting will cost more money but save on future maintenance.

- b) **The *Contractor* receives a clause 14.3 instruction to change the Works Information from the *Project Manager* detailing the change in lighting design. This is the only communication the *Contractor* receives. What should the *Contractor* do next?** [8 marks]

It is ten days since the instruction to change the Works Information was issued. The *Project Manager* is insisting that the lighting be progressed. The *Project Manager* has also instructed production of a revised programme. The *Contractor* has received no further communications from the *Project Manager*.

- c) **Does the *Contractor* have to proceed with the new lighting works?** [4 marks]
- d) **What can the *Contractor* do next to ensure they are compensated for the change?** [4 marks]
- e) **There is an assessment date in three days' time. Can the *Contractor* include the more expensive lighting and associated additional works in their application for assessment?** [4 marks]

Section 1
Question 3

The *Supervisor* is surprised to see precast concrete sections are already being stored on Site, much earlier than planned. The *Supervisor* is unaware of any Subcontractor acceptance and asks the *Contractor* for details. The contract is an NEC3 ECC with main Option E.

- a) **The *Contractor* advises the *Supervisor* that the organisation who supplied the floor sections are not installing them in the *works* and as such there is no need for them to be accepted as a Subcontractor. Is the *Contractor* correct?** [6 marks]
- b) **How might the incorrect treatment of a supplier as a Subcontractor and the other way round, cause problems under the *conditions of contract*?** [7 marks]

The Works Information states the *Contractor* is to design the drainage for the project and requires the design to be submitted to the *Project Manager* for acceptance. It also states ‘type A’ oil interceptors must be used in the case of vehicle bays.

- c) **Can the *Contractor* start the drainage works prior to the *Project Manager’s* acceptance of its design?** [3 marks]

The *Project Manager* accepts the design but doesn’t notice that ‘type B’ oil interceptors have been specified by the *Contractor*. Type B are more widely available and cost less. Later in the project the *Supervisor* inspects the drainage and sees the Type B oil interceptors and notifies a Defect.

- d) **The *Contractor* argues there is no Defect to correct and that the installed *works* comply with the design accepted by the *Project Manager*. Who is right?** [6 marks]
- e) **Briefly explain the two options available in this situation.** [3 marks]

Section 1
Question 4

Please read the whole question before answering. Repeating an answer for different parts of this question will not attract additional marks.

- a) **In NEC3 ECC the Risk Register is a management tool for tracking early warnings and their mitigation or avoidance. Explain what is different in NEC4 ECC.** [7 marks]
- b) **What additional obligations are placed on the *Project Manager* and *Contractor* under NEC4 ECC clause 15, compared with NEC3 ECC clause 16?** [6 marks]
- c) **NEC3 ECC has a clause entitled *Employer's risks*. Briefly explain how this compares to the approach in NEC4 ECC?** [4 marks]
- d) **Briefly name and explain two additional compensation events in NEC4 ECC compared with NEC3 ECC.** [4 marks]
- e) **Does NEC3 ECC have an equivalent to NEC4 ECC's 'dividing date'? How does NEC4 ECC use the 'dividing date'?** [4 marks]

Section 2
Question 5

You are preparing tender documents for an NEC3 ECC Option C *Employer*-designed contract. There is quite a large amount of landscaping included within the contract. The *Employer* has asked you to suggest a few ways of dealing with this element of the *works*, where the *Contractor* is to be responsible for the initial planting of the landscaping and then for the care/maintenance of the landscaping for 2 years after completion of planting.

- a) **How would you advise the *Employer* to provide for the care/maintenance of the landscaping element of the *works* in the contract documents if the landscaping works including the care/maintenance are to be completed;** **[10 marks]**
- (i) **before or,**
(ii) **after Completion of the rest of the *works*?**
- b) **Can you have more than one *defect correction period*, if so how, and why would you do this?** **[6 marks]**

A Defect was notified before Completion of the whole of the *works*. The *Contractor* is worried about both the cost and time associated with correcting this Defect.

- c) **What would you advise the *Contractor* to do here?** **[6 marks]**

It turns out that a deal could not be made to accept the Defect and this is listed on the Defects Certificate by the *Supervisor*. The *Employer* did not give the *Contractor* access to correct the Defect.

- d) **What would you advise the *Project Manager* to do here?** **[3 marks]**

Section 2

Question 6

A local authority awarded a contract for hard and soft landscaping works for £300,000. The contract was under NEC3 ECC Option B, with secondary Option W2, X20 and Y(UK)2. In the first week of the contract, the *Project Manager* instructs a change to the Works Information to add some imported shrubs. *The Project Manager* notified this as a compensation event and instructed the *Contractor* to submit a quotation.

The quotation of about £3,000 is quite a bit lower than the *Project Manager* expected.

- a) **As *Project Manager*, how might you deal with this?** [5 marks]

Some four weeks later, the *Project Manager* has still not responded to the *Contractor's* quotation.

- b) **What does the contract provide for here?** [6 marks]

In the meantime, an assessment date arises and the *Contractor* included an on account amount of £2,000 for these additional works, fearing the *Project Manager* was thinking it should be a lower amount.

- c) **Again, what does the contract provide for here?** [5 marks]

The *Employer* later launches a big public relations campaign, focusing on localism, and wants to know how this campaign can be accommodated in the contract.

- d) **What would you advise?** [5 marks]

Finally, in the assessment date after Completion, the *Contractor* suggests that they split the task of re-measuring the Bill of Quantities with the *Project Manager* to quickly arrive at the correct and final quantities. The *Project Manager* considers Option B to be a fixed price lump sum contract, where the quantities are re-measured only in assessments to determine on account payments.

- e) **Who is correct, and why?** [4 marks]

Section 2
Question 7

A contracting organisation is tendering for *works* under an NEC3 ECC Option A contract for a large highways project. The tenderer realises that many of the work items, such as excavation, bridges, pavement etc will be spread over several months as the *works* progress. The tenderer gets a good discount on some of the Plant and Materials for the *works* but has to pay up front and store them on the Site. However, the tenderer wants to make sure that the *Employer* pays for this Plant and Materials as soon as they are delivered to the Site or the adjacent land.

a) How can the tenderer ensure such payments are made? [4 marks]

The contract was awarded to that *Contractor* and in the *activity, schedule* was included some items with quite large amounts against them, effectively front-end loading. The *Project Manager* at the first assessment considers the payment of these not to be in the interest of the *Employer* as the *Employer* is at risk if the *Contractor* becomes insolvent.

b) What should the *Project Manager* do here? [5 marks]

c) How would your answer differ if the contract were an Option C contract? [4 marks]

The Option A contract includes secondary Option Y(UK)2 and the period for payment stated in the Contract Data part one is 21 days. The *Contractor* fails to submit an application for payment before the second assessment date.

d) What, if any, entitlement does the *Contractor* have to be paid for work carried out in the period since the last assessment date? [5 marks]

e) If an amount certified by the *Project Manager* is not paid by the final date for payment, what does the contract provide for? [7 marks]

Section 2
Question 8

A *Contractor* has recently been awarded an NEC4 ECC contract using Option A for a large civil engineering project. Secondary Option X21 is incorporated in the contract. The *Contractor* has submitted its first programme for acceptance within the time allowed. The *Project Manager* does not respond within the time allowed.

- a) **What measures can the *Contractor* take in NEC4 ECC that were not available in NEC3 ECC?** [5 marks]

The *Client* is not sure whether or not to ask for a change to a part of the *works* and the *Project Manager* suggests using the proposed instructions clause of the contract.

- b) **Explain this clause and what happens in NEC4 ECC if the quotation is not accepted?** [7 marks]
- c) **How would your answer differ if the contract were an Option C contract?** [2 marks]

The *Contractor* considers that some of the Scope provided by the *Client* could be improved. The *Contractor* believes that one part of the Scope can be improved through some simple value engineering and another part improved to give the *Client* better whole life costing.

- d) **Describe the clause that deals with value engineering for an Option A contract.** [5 marks]
- e) **Describe the clause that deals with *Contractor* proposals to improve whole life costing for an Option A contract, and what happens if this proposal is finally not adopted.** [6 marks]

Module 2 Section 1 Points for Answer

Question 1

- | | marks |
|--|--------------|
| a) Given the ground is favourable and the design is detailed, it is likely that a main Option with an Activity Schedule would be suitable. [2] | [2] |
| Option C would afford the sharing of any savings made through the contract and would provide better value for money than Option A in the event Defined Cost was lower than the total of the Prices. [2] | [2] |
| The <i>Employer</i> would decide on the <i>share ranges</i> and <i>share percentages</i> in Contract Data part one. [1] | [1] |
| b) Option A is most likely to be the best option here. [1] | [1] |
| Option A is a priced contract giving certainty to the Prices, except where compensation events occur. [2] | [2] |
| Unlike Option B, it is not remeasurable. [1] | [1] |
| c) Either Option B or D. [2] | [2] |
| Both use a Bill of Quantities. This reduces the <i>Contractor's</i> risk in that they do not have to make an assumption on quantity of excavation or fill. [2] | [2] |
| The <i>Contractor</i> tenders' rates but the quantities are subject to remeasure. [1] | [1] |
| d) The core clauses are always used. The <i>Employer</i> then specifies one main Option and as many or as few of the secondary options as they wish under Contract Data Part 1. [2] | [2] |
| Depending on the choice of main Option, the Schedule of Cost Components, the Shorter Schedule of Cost Components or both will apply. [1] | [1] |
| The choice of W1 or W2 is decided by whether or not the HGCR Act 1996 applies. [1] | [1] |
| X clauses have international application, Y clauses are jurisdiction specific. [1] | [1] |
| e) Option A – assessing which activities are complete in accordance with clause 11.2(27) is 'relatively simple'. [1] | [1] |
| Option D – the focus is on what the <i>Contractor</i> will have paid by the next assessment date. This requires 'commercial accountancy' skills and also the need to maintain the target through traditional measurement. [2] | [2] |
| Option D requires greater competency in the scrutiny of Defined Cost and the rules of the Schedule of Cost Components. The Company's personnel will also need to be competent in applying commercial / technical judgement in the identification of Disallowed Cost. [2] | [2] |
| Both demand some estimating skills due to the use of Defined Cost in the assessment of compensation events, however under Option A this is simplified due to the use of the Shorter Schedule of Cost Components. [1] | [1] |

Question 2

- a) Yes, but it is the *Project Manager* not the *Employer* that will need to administer this requirement. [1]
 Adding these time restrictions are 'constraints. Constraints are stated in the Works Information. [2]
 The *Project Manager* may give an instruction that changes the Works Information under clause 14.3. [2]
- b) If the *Project Manager* gives an instruction to change the Works Information, this is a compensation event – clause 60.1(1). [2]
 In accordance with clause 61.1, the *Project Manager* must also notify a compensation event and instruct quotations. [2]
 It appears the *Project Manager* has not done so. In this case the *Contractor* should notify the instruction as a compensation event under clause 61.3. [2]
 The eight-week timebar will not apply since this is an event the *Project Manager* should have notified. [2]
- c) Yes. They must obey an instruction given to them that is in accordance with the contract – clause 27.3 [2]
 Clause 14.3 allows the *Project Manager* to change the Works Information. [1]
 Clause 20.1 requires the *Contractor* to Provide the Works in accordance with the Works Information. [1]
- d) Assuming the *Contractor* notified the compensation event under clause 61.3 (following part b)), then the *Project Manager* must reply within one week. [2]
 If the *Project Manager* does not reply, the *Contractor* may notify the *Project Manager* of this failure to reply – clause 61.4. [1]
 If there is no reply for a further two weeks, then the *Contractor* may submit quotations and the event is treated as a compensation event. [1]
- e) Yes [1]
 This is an ECC with main Option C. The PWDD is therefore the forecast Defined Cost + Fee to the next assessment date. [2]
 The compensation event will update the target but won't affect the *Contractor's* short-term cash flow. [1]

Question 3

- a) Subcontractor is a defined term – clause 11.2(17) [1]
 Whether the *Contractor* is right will depend on the nature of the contractual relationships. [1]
 If the organisation has wholly or partly designed the precast concrete sections specifically for the *works*, then they are a Subcontractor. [2]
 If the floor sections are off a catalogue and the organisation is not installing or providing any associated services, then they are a supplier. [2]
- b) NEC3 ECC uses two fee percentages – the *direct fee percentage* and the *subcontracted fee percentage*. The Contract Data may show them as being different to each other. [2]
 This may lead to major mistakes in the assessment of Defined Cost and store up a financial shock, which may be corrected at a future assessment date. [2]
 Clause 26.2 requires the acceptance of proposed Subcontractors prior to their appointment. To not do so is a breach of contract by the *Contractor*. This could also result in a Disallowed Cost. [3]
- c) No. [1]
 In this case the Works Information required the submission of design for acceptance. This in turn means the final sentence of clause 21.2 also applies. [2]
- d) The *Supervisor* is correct to notify a Defect – see clause 11.2(5). [2]
 The *Contractor* Provides the Works in accordance with the Works Information – clause 20.1. The Works Information has not been changed. [2]
 Clause 14.1 states that acceptance by the *Project Manager* of a *Contractor's* submission does not change their obligation to Provide the Works, or liability for their design. [2]
- e) (1) The Defect is corrected. [1]
 (2) Either the *Contractor* or *Project Manager* may propose to the other that the Works Information is changed so that the Defect does not have to be corrected. – see clause 44. [2]



- Question 4**
- a) The Risk Register in NEC3 ECC has become the Early Warning Register in NEC4 ECC [2]
Clause 11.2(14) / 11.2(8) respectively. [1]
It has not fundamentally changed in concept.
- It is still a management tool and not a contract document. [2]
- It uses the word 'matters' in place of 'risk'. [1]
- It can still be the same way as NEC3 ECC, where matters can be provided pre-contract in NEC4 ECC Contract Data for later inclusion on the Early Warning Register through Contract Data part one and part two. [1]
- b) It is compulsory in NEC4 ECC to hold early warning meetings (risk reduction meeting in NEC3 ECC) at no less frequently than the interval stated in Contract Data part one. [2]
A Subcontractor attends if this assists. This infers they are to be kept informed. [1]
The agenda has become a little more prescriptive. [1]
Either the *Project Manager* or *Contractor* may give an early warning for matters that could increase the *Contractor's* cost. [1]
- c) *Employer's* risks in NEC3 ECC are entitled *Client's* liabilities in NEC4 ECC. [1]
Contract Data part one is the same for both in that pre-contract, additional risks/liabilities can be added and are brought into clause 80.1 by the final bullet point. [2]
This now fits better with language used by insurers and further reduces the potential for confusion with early warnings. [1]
- d) Two marks for identifying two compensation events that are new to NEC4 ECC, e.g. 60.1(20), (21), X10.5. [2]
One mark for explaining briefly either 'why' or 'how' for each. [2]
- e) NEC3 ECC does not have an equivalent label for NEC4 ECC's 'dividing date', but clause 63.1 of NEC3 ECC identifies a point in time that divides the work done from the work not yet done. [2]
As in NEC3 ECC, NEC4 ECC uses this point in time for assessment of compensation events. However, NEC4 ECC also uses it to determine which Accepted Programme to use in the assessment of delay. [2]



**Module 2 Section 2 Points for Answer
Question 5**

a)

If it is possible to complete the landscaping works including the care/maintenance, two years before completion of the rest of the *works* there are a few ways of dealing with this:

- 1) By writing a constraint in the Works Information.
- 2) By adding in secondary Option X5 sectional Completion and including the care/maintenance specification in the Works Information.
- 3) By adding in a Key Date.

If it is not possible to complete the landscaping works including the care/maintenance, 2 years before Completion of the rest of the *works*, then there are a few more ways of dealing with this:

- 4) By having a 2-year period between Completion of the whole of the *works* and the *defects date*. The downside here for the *Contractor* is a responsibility for Defects arising from all of the *works* for a longer period, not just the landscaping works.
- 5) By introducing a Z clause to allow for more than one *defects date*. You could then have all of the *works* except the landscaping works as section 1 using secondary Option X5 sectional Completion. The landscaping works would then be section 2. The *defects date* for section 1 can then be the usual 1 year after Completion of this *section* and 2 years for *section 2*.

There are too many things not known here to be able to be definitive in the advice to be given but if there is time then 2) above is probably the best way to deal with this. If there is not time, then 4) above gives the clearest answer but may come with a price premium in the target.

Total

marks

[4 marks]

[4 marks]

[2 marks]

[10 marks]

b)

Yes, you can have more than one *defect correction period*. The Contract Data part one allows for multiple entries to be made.

You would do this by completing the relevant generic provisions in Contract Data part one, at time of tender. You will need to create some clear grounds that distinguish between e.g. Defect type A and a Defect type B, so the Parties know what type of Defect are associated with each *defect correction period*.

marks

[2 marks]

[2 marks]

	As for why, different types of Defects often will have different needs in terms of criticality for safe and continued use of an asset by the <i>Employer</i> .	[2 marks]
	Total	[6 marks]
c)	First of all, the <i>Contractor</i> should notify an early warning as planned Completion may well be delayed. This would be under clause 16.1.	marks [1 mark]
	The <i>Contractor</i> can instruct the <i>Project Manager</i> to attend a risk reduction meeting and other people, if this is appropriate (clause 16.2).	[1 mark]
	At the risk reduction meeting, the Defect should be tabled and the correction implications discussed. All would then be aware of these implications which might help in further discussions at the meeting. The <i>Contractor</i> could suggest leaving the Defect in place and the parties agreeing a reduction in the Prices and/or the Completion Date under clause 44.	[2 marks]
	If accepting a Defect is possible, and assuming that was the action to be taken following the risk reduction meeting, then this should be proposed under clause 44.1 and a quotation prepared by the <i>Contractor</i> and submitted to the <i>Project Manager</i> under clause 44.2. If this was acceptable, the <i>Project Manager</i> would formalise under clause 44.2.	[2 marks]
	Total	[6 marks]
d)		marks
	The <i>Project Manager</i> would have to follow the provisions in clause 45.2 and assess the cost to the <i>Contractor</i> of correcting the Defect. This amount would be retained from the <i>Contractor</i> (see third bullet of clause 50.2) in the <i>Project Manager's</i> certificate that follows the <i>Supervisor</i> issuing the Defects Certificate (see clause 50.1).	[3 marks]
	Total	[3 marks]
	Total marks for question 5	[25 marks]



Question 6	
a)	marks
Just because the quotation is less than anticipated, it does not mean it is wrong. The <i>Project Manager</i> should spend some time trying to understand why it is in the amount that the <i>Contractor</i> considers is correct. Maybe the <i>Contractor</i> has misunderstood the extent of additional works; maybe the <i>Project Manager</i> was mis-informed. So, talk to the <i>Contractor</i> and try and understand the quotation from the <i>Contractor's</i> perspective.	[2 marks]
If the <i>Project Manager</i> is not satisfied that the <i>Contractor</i> has assessed this correctly, then the <i>Project Manager</i> should reply in accordance with clause 62.3, within two weeks of the <i>Contractor's</i> submission.	[1 mark]
In this case there are three replies the <i>Project Manager</i> can make. The <i>Project Manager</i> could instruct the <i>Contractor</i> to submit a revised quotation, but, as clause 62.4 demands, only after explaining the reasons for doing so to the <i>Contractor</i> . The <i>Project Manager</i> could accept the quotation. Finally, the <i>Project Manager</i> could notify the <i>Contractor</i> that the <i>Project Manager</i> will be making its own assessment.	[2 marks]
Total	[5 marks]
b)	marks
Clause 62.3 gives the <i>Project Manager</i> two weeks only to reply to the <i>Contractor's</i> submission. If the <i>Project Manager</i> needed more time to reply to the quotation, the <i>Project Manager</i> should have spoken with the <i>Contractor</i> before the two weeks had elapsed, as required by clause 62.5. There could be an extension but only if agreed between the <i>Project Manager</i> and the <i>Contractor</i> .	[2 marks]
As the <i>Project Manager</i> has not replied to a communication from the <i>Contractor</i> within the time allowed by the contract, then a compensation event arises under clause 60.1(6). It is difficult in this instance to see what the cost effect of the delayed reply will be, but that would be something for the <i>Contractor</i> to demonstrate.	[1 mark]

What the *Contractor* most likely really wants at this moment, is to progress the quotation to the point it becomes an implemented compensation event. Only when it has been implemented will it become part of the Bill of Quantities and fall for payment. [1 mark]

The *Contractor* can use the provisions of clause 62.6 to have the quotation treated as accepted. For this to happen, the *Contractor* needs to notify under this clause that the *Project Manager* has not replied to the quotation within the time allowed. If the *Project Manager* does not reply to the notification within two weeks, the *Contractor's* notification is treated as acceptance of the quotation by the *Project Manager*. [2 marks]

Total [6 marks]

c) As *Contractor*, there are a few provisions available to it. This would appear to be something the *Contractor* could notify as a dispute and refer it to adjudication through Option W2. This would seem to be a bit of a drastic step, especially for the amount involved, but is the sort of issue that adjudication was most likely created for. [1 mark]

Clause 50.2 refers to calculating the amount due which in turn points to the Price for Work Done to Date, clause 11.2(28). This definition refers you back to the Bill of Quantities. As this item is not an implemented compensation event (clause 65.1) there is no mechanism for an on-account payment. [2 marks]

The *Project Manager* cannot therefore certify an on-account payment but the *Project Manager* is the person not acting as provided for in the contract and causing payment to be delayed, if indeed the additional works were completed by the assessment date. [2 marks]

Total [5 marks]

d) The *Contractor* may have a similar push internally and maybe nothing else is needed other than a discussion. Considerations such as to complying with procurement law will be observed. [1 mark]

Failing that, the *Project Manager* could instruct a change to the Works Information under clause 14.3, for which a compensation event would arise under clause 60.1(1). [1 mark]



Alternatively, the Parties could agree to change the contract itself under clause 12.3. [1 mark]

Finally, and most logically here, Option X20 Key Performance Indicators has been included and within this Option the Employer, under clause X20.5, can add a Key Performance Indicator and associated payment to the Incentive Schedule. [2 marks]

Total [5 marks]

e) marks [2 marks]

The Contractor is correct in this instance in that clause 50.2 deals with calculating the amount due. This in turn points to the Price for Work Done to Date, clause 11.2(28) which refers to the Bill of Quantities.

In this definition, you should determine the quantity of work which the Contractor has completed for each item in the Bill of Quantities along with a proportion of each lump sum. So, re-measurement is not a specific term used but that is what the definition amounts to. [2 marks]

Total [4 marks]

Total marks for question 6 [25 marks]

Question 7

a) marks [2 marks]

The tenderer should carefully review the Instructions for Tendering to check if there are any rules on front end loading of the activity schedule, or any other restrictions such as maximum/minimum amount for each activity on the activity schedule, and so on.

If there are no such restrictions, then the tenderer is free to add in as many or as few activities as it chooses, in whatever amounts for each they may choose. This might lead to positive, neutral or negative cash flow for the tenderer. [2 marks]

Total [4 marks]

b) marks [1 marks]

The chance to address the risk of front end loading in the activity schedule has now gone. Clause 11.2(20) says that the Activity Schedule is the activity schedule unless later changed in accordance with the contract.

So, when determining the amount due as required in clause 50.2, [2 marks]
 the Price for Work Done to Date in clause 11.2(27) will use the
 Activity Schedule to determine this.

Assuming there are no groups on the Activity Schedule, each [2 marks]
 completed activity in the Activity Schedule falls for payment in
 the assessment in which it is completed. There is nothing stated
 about whether or not these amounts should be reasonable or not
 so the *Project Manager* should include in the certificate payment
 for all such completed activities.

Total [5 marks]

c) marks
 Different rules apply for Option C. The Activity Schedule is now [1 mark]
 only used to help assess the *Contractor's* share, so the amounts
 against each activity are irrelevant at each assessment date
 where the share is not to be calculated.

Clause 50.2 is still used to determine the amount due and again, [2 marks]
 in turn, the Price for Work Done to Date will need to be
 calculated. But the definition is different in that it relies upon
 Defined Cost being paid to the *Contractor* before the next
 assessment date, to which is added the Fee.

So, the *Contractor* will have to have set up payment terms with [1 marks]
 its suppliers for the early supply of Plant and Materials in order to
 recover such sums from the *Employer*. Effectively, the 'real' cost
 paid or to be paid will be passed through to the *Employer*, so this
 is more a neutral cash flow outcome.

Total [4 marks]

d) marks
 The *Project Manager* is still obliged to assess the amount due at [1 mark]
 each assessment date, clause 50.1, with or without an application
 for payment from the *Contractor*.

So, the *Project Manager* will go through the process as described [1 mark]
 in b) above to determine the amount due to the *Contractor*.

The *Project Manager* should still produce a certificate for [1 mark]
 payment within one week of the assessment date, as required in
 clause 51.1.

Y2.2 states that the date on which payment becomes due is [1 mark]
 seven days after the assessment date.

Y2.2 also states that the final date for payment is 21 days in this [1 mark]
 instance after the date on which payment becomes due. So that's
 a 28-day overall period from the assessment date in which



	payment should be made by <i>Employer</i> to <i>Contractor</i> , assuming the certificate shows such monies being owed.	
	Total	[5 marks]
e)		marks
	The contract provides a number of remedies here. Firstly, the payment should still be made. Just because the payment date is missed, the obligation of payment is not invalidated.	[1 mark]
	So, the <i>Project Manager</i> will go through the process as described in b) above to determine the amount due to the <i>Contractor</i> (clause 51.2).	[1 mark]
	If a certified payment is late then interest will be due as stated in clause 51.2. This is calculated on a daily basis at the interest rate (stated in the Contract Data) and is compounded annually (clause 51.4).	[2 marks]
	Under Y2.4 the <i>Contractor</i> may exercise its right under the Act and if so, a compensation event arises.	[1 mark]
	The <i>Contractor</i> may terminate if the <i>Employer</i> has not paid an amount due under the contract within eleven weeks of the date that it should have been paid. This is Reason 16 as stated in clause 91.4.	[2 marks]
	Total	[7 marks]
	Total marks for question 7	[25 marks]
	Question 8	
a)		marks
	Clause 31.3 provides that if the <i>Project Manager</i> does not notify acceptance or non-acceptance within the time allowed, the <i>Contractor</i> may notify the <i>Project Manager</i> of that failure.	[2 marks]
	If the failure continues for a further one week after the <i>Contractor's</i> notification, it is treated as acceptance of the programme by the <i>Project Manager</i> .	[2 marks]
	This will become the latest Accepted Programme as stated in clause 11.2(1).	[1 mark]
	Total	[5 marks]
b)		marks
	Proposed instructions are now dealt with as a standalone clause 65 in NEC4 ECC.	[1 mark]
	The <i>Project Manager</i> may instruct the <i>Contractor</i> to submit a quotation for a proposed instruction (clause 65.1). Importantly,	[1 mark]

	the <i>Contractor</i> does not put a proposed instruction into effect (clause 65.1).	
	The <i>Contractor</i> submits a quotation for a proposed instruction as it would do for a compensation event (clause 65.2).	[1 mark]
	The <i>Contractor</i> submits the quotation within the time allowed and the <i>Project Manager</i> replies by the date when the proposed instruction may be given, which was stated in the instruction to submit a quotation (clause 65.2 and 65.1).	[1 mark]
	The <i>Project Manager</i> responds asking for a revised quotation, a basic acceptance of the quotation or notification of non - acceptance (clause 65.2).	[1 mark]
	If the quotation is not accepted, the <i>Project Manager</i> is able to issue this as an instruction under clause 14.3 and a compensation event arises under clause 60.1(20).	[2 marks]
	Total	[7 marks]
c)		marks
	It makes no difference if the contract were an Option C contract. The same process is used to change the Prices for all main Options.	[2 marks]
	Total	[2 marks]
d)		marks
	Clause 16 deals with <i>Contractor's</i> proposals, which provide for value engineering type submissions.	[1 mark]
	Clause 16.1 allows for the <i>Contractor</i> , not the <i>Project Manager</i> , to propose that the Scope provided by the <i>Client</i> is changed in order to reduce the amount the <i>Client</i> pays to the <i>Contractor</i> for the <i>Contractor</i> Providing the Works.	[1 mark]
	There is consultation between the <i>Project Manager</i> , <i>Contractor</i> and <i>Client</i> to see if the proposal has merits.	[1 mark]
	Within four weeks of the <i>Contractor</i> making the proposal the <i>Project Manager</i> makes one of 3 choices from clause 16.2.	[1 mark]
	If the proposal is of interest then this goes through the clause 65 proposed instruction route and in clause 63.12 the Prices would be reduced by an amount calculated by multiplying the assessed effect of the compensation event by the <i>value engineering percentage</i> , which is stated in the Contract Data.	[1 mark]
	Total	[5 marks]
e)		marks

X21 deals with whole life cost proposals. X21.1 provides for *Contractor* proposals, not *Project Manager* proposals, to change the Scope. [1 mark]

The change to the Scope can be Scope provided by the *Client* or the *Contractor*, but the proposal needs to be about reducing the cost of operating and maintaining the *Client's* asset. [1 mark]

Should the proposal be of interest, the *Contractor* submits a quotation containing 5 things as stated in clause X21.2. [1 mark]

The proposed changes to the Prices are suggested by the *Contractor*. These are not assessed using the compensation event rules and can reflect the proposed whole life savings to the *Client*. [1 mark]

Under X21.3 the *Project Manager* consults with the *Contractor* about the quotation and either accepts the quotation or does not accept it. [1 mark]

If the quotation is not accepted, the *Project Manager* cannot later change the Scope as proposed by the *Contractor*. [1 mark]

Total [6 marks]

Total marks for question 8 [25 marks]



Institution of Civil Engineers

Examination for the ICE Advanced Certificate in Law and Contract Management (ACLCM) 2018

Module 3: (English and Scots Law)

Monday 11th June 2018

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

There are four questions in Section 1 based on NEC3 Contracts and four questions in Section 2 based on “sample” contractual provisions from non NEC contracts.

Answer **Question 1** and **one other** from section 1 in the answer book provided (Blue book) *and* answer **Question 5** and **one other** from Section 2 in a **separate** answer book provided (Blue book).

All questions carry equal marks.

Module 3: You may consult un-annotated copies of Statutes, NEC3 Engineering and Construction Contract (ECC), NEC3 Engineering and Construction Subcontract (ECS), NEC3 Engineering and Construction Short Subcontract (ECSS) and other standard forms of building contracts.

References to Cases and Acts should be quoted where possible.

Please indicate on the outside of the answer booklets if your answers are given under Scots Law.

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 question

Mr Rush-it has asked the *Project Manager* to procure the construction of a warehouse in Kent using the NEC 3 Option A and is keen to get the work finished quickly so the tenderers were asked to provide programmes. Four tenderers returned prices, each of them including programmes. The successful tenderer's programme consisted of four lines in a Gantt chart indicating when he will work on and finish the foundations, the superstructure, cladding and the internal fit out. Not only was he the cheapest, but he also indicated that he would finish the soonest.

The *Project Manager* included in the Contract Data that the period for the *Contractor* to submit revised programmes is four weeks. In addition, as soon as the successful *contractor* began work, he asked him to provide a revised programme because there was so little detail in the one included in the tender. A month and a half have now gone by and the *Project Manager* has only received a photocopy of the original programme with a line marking where the *Contractor* believes his progress has got to with the foundation work.

- a) **Advise the *Project Manager* on his options for dealing with the situation and the implications of failing to provide an acceptable programme.** [8 marks]

The activity schedule for the works is equally as lacking in detail as the programme. It consisted only of the four activities plus a fifth activity for "commissioning". The Contract price is equally divided between the five activities. The *Project Manager* found this odd given the vast amount of work in the earlier activities. The *Contractor* has issued a payment application for work up to the end of the first month. This is a detailed application indicating percentages complete against the foundations and some elements of the superstructure which he has commenced. His programme indicates that he will finish the foundation work in another three months and the superstructure should be completed in a further four. During one of his discussions with the *Contractor*, the *Project Manager* has become convinced that the *Contractor* will be running the risk of becoming insolvent if he does not receive stage payments.

- b) **What options and duties does the *Project Manager* have in dealing with the payment and what should he consider in assessing the payment due to the *Contractor*?** [8 marks]

The superstructure elements of the works are designated as *Contractor* designed elements. The *Contractor* provided an original proposal that the superstructure should be all in structural steelwork. This was accepted by the *Project Manager*. The *Contractor* has now provided revised drawings showing elements of the steel structure to be in pre-stressed

concrete. The *Contractor* has asked that the *Project Manager* accepts these drawings immediately since the subcontractor will be commencing work in a week's time and the pre-cast concrete is already being formed. The *Contractor* has warned the *Project Manager* if there is any delay to the superstructure it will hold up all of the works and Mr Rush-it will potentially miss the completion date that the *Contractor* included

- c) **Advise the *Project Manager* on his options and the implications of decisions on the *Contractor*.** [7 marks]
- d) **If the *Contractor* commences installing the pre-cast concrete elements of the structure before the *Project Manager* can accept them, how should the supervisor react on inspecting the site?** [2 marks]

Section 1
Question 2

The new Ballygobackwards bypass is well underway. The Contract is an NEC3 Option B and the works have been progressing well. The *Contractor* has been approached by the subcontractor responsible for building a number of substantial culverts along the line of the works, with a proposal to change the concrete box section culverts to plastic culverts designed using space age technology. These are substantially lighter, and the subcontractor is offering a significant cost saving.

Advise the *Contractor* how he could proceed in accordance with the main contract if:

- a) **The culverts are an Employer-designed element. [7 marks]**
- b) **The culverts are a Contractor-designed element. [5 marks]**
- c) **How would your advice differ if the Contract was an NEC3 Option C? [3 marks]**

The client for the motorway is the local Ballygobackwards authority. The authority has just received notification that it will be receiving a royal visit and that the Queen is prepared to open the new bypass. However, this is ahead of the actual Completion Date in the Contract. Having discussed this with the appropriate authorities, the *Project Manager* realises that the road need not necessarily be complete as long as there is a sufficient proportion of it to be opened. Although, the local authority are keen to impress, it does not want to dramatically change the Contract price.

- d) **What is the appropriate course of action for the *Project Manager*, and what are the implications if the *Contractor* objects to bringing forward completion of elements of the works? [10 marks]**

Section 1
Question 3

In a NEC3 contract the *Contractor* has emailed the *Project Manager* requesting an early warning meeting to discuss “*the cladding subcontractor going bust*”. The *Project Manager* was aware that there were difficulties on site and significant delays around the installation of the cladding system. It seems that things have come to a head. He checks the press and discovers that the cladding subcontractor has indeed run into difficulties. The project has one month to run before its original completion date, but the progress against the accepted programme indicates that it is three months behind. The Employer is furious, and the *Project Manager* has been reminded of the extensive delay damages provisions which are included in X7 in this Contract.

- a) **How should the *Project Manager* prepare for the early warning meeting, and what likely actions will he have to take at its conclusion?** **[10 marks]**

The *Contractor* had certified payments to the subcontractor three days ago in accordance with the NEC3 Option A Subcontract.

- b) **What actions should the *Contractor* take immediately in dealing with the subcontractor?** **[10 marks]**

The *Project Manager* has asked the *Contractor* to provide a programme for the conclusion of the works. The *Contractor* knows that he will be three months late.

- c) **What are the implications for the *Contractor* in producing a programme for acceptance?** **[5 marks]**

Section 1
Question 4

In an NEC3 Option B Contract, the *Contractor* has identified that the Bill of Quantities doesn't seem to cover all the aspects of the Works Information. The number of windows is wrong, the items for concrete stairs do not include the correct angle of the underside, and the works information for roof felt is not the same description as that in the Bill of Quantities. It is very clear from the Works Information how all the work is to be constructed.

- a) **Advise the *Contractor* on his options.** [5 marks]

As the works progress, there is a serious flood. This emanated from another part of the Employer's sewage treatment works and has caused significant damage. The *Contractor* had taken out all risks insurance which covers the event. The all risks insurance has paid everything but the excess of £20,000.

- b) **Advise the *Contractor* on how he should deal with this event and how he should quote for rectification work** [13 marks]

In excavating the works, the *Contractor* has discovered extremely valuable, high quality sand which could be used as aggregate. There is enough of it to sell and he has got all the necessary licenses for it. However, he doesn't know whether to trouble the *Project Manager* with his plans.

- c) **Advise the *Contractor* on his entitlement to the material and what steps he needs to take under the Contract.** [7 marks]

Section 2

Question 5 – Compulsory question

Bremner, a contractor, constructed the new £250m Lowfields waste treatment facility, an in-vessel composting plant, for employer Lowfields City Council. The facility takes food and garden waste and accelerates the composting process to create a material suitable for landscaping works.

Bremner's scope of works includes the design, construction, testing and commissioning of the plant. It is employed under a bespoke contract. The facility passed its commissioning and handover tests as required under the contract.

Clause 15 of the contract states, *"the Contractor design services shall be provided with the reasonable skill and care to be expected of designers working in this market."*

Clause 63 states, *"all elements on the building shall be designed and constructed so as to ensure a life of at least 20 years."*

Bremner subcontracted the design of the facility to Reaney Consultants under a brief, 2 pages-long letter of appointment provided by Reaney to Bremner. The design services are priced as a lump sum of £6m. The letter contained a limit of liability clause limiting Reaney's liability to £100k and was accompanied by a professional indemnity insurance certificate showing that £15m of cover was in place.

Reaney produced drawings and a written specification for the structural steel frame of the facility. The drawings contain a statement requiring the steelwork to be *"appropriately coated with a suitable material."* In the written specification it states that, *"all steelwork to be painted with Sprake Coatings Optiseal 320, factory spray-applied as per data sheet."* Shortly after opening the facility's steelwork shows signs of decay. Secondary steelwork, such as cladding purlins, starts disintegrating and the primary steelwork is discolouring. Investigations by a metallurgist show that the aggressive acidic environment in the facility has attacked the steelwork's galvanising and its protective coating has been of little use. Further checks of the quality system show that Optiseal 120, a cheaper version of Optiseal 320, has been used. Furthermore it was applied manually on site, not factory sprayed. The facility is forced to close and Lowfields City Council has been forced to divert waste to landfill, costing it an additional £60k per week whilst the diversion is in place. Lowfields City Council says that Bremner has breached its contract by not ensuring a life of 20 years. Bremner states that its design has been provided with reasonable skill and care.



- a) **What does the term “reasonable skill and care” mean?** [5 marks]
- b) **What is Bremner’s liability here?** [10 marks]

The remedial works cost £3m and Reaney denies all liability. In the alternative, it says that even if liability can be proved, this will be limited to the £100k figure in the cap. Bremner says that there is £15m of insurance cover in place and it expects a full payment of £3m. In addition, Bremner states that the £100k is a ridiculously low figure and conflicts with statute law.

- c) **What considerations will be relevant in establishing Reaney’s liability here? Your answer should include statute and relevant case law.** [10 marks]

Section 2
Question 6

Jones Contracting plc is constructing a new leisure centre for Employer Gelderd Fitness Clubs plc. Things are not going well; the project is running late and Jones is rumoured to be preparing a large claim for additional payment based on a number of alleged incidents. Relationships aren't good between the various people on site.

Melanie Fairclough, a graduate trainee with Gelderd, noted on her LinkedIn account that *"here's yet another quality failure from Jones Contracting"* alongside a picture of some concrete works.

The contract contains clause 12.7, *"Neither party shall issue press releases, publicity materials and the like concerning the project without the express written consent of the other."* The following day Jones' share price falls removing £3m of value from the company's market value.

Jones blames Melanie's posting for the fall and notifies Gelderd that it will seek to recover the £3m in full in respect of Melanie's actions being a *"clear and flagrant breach of contract"*.

- a) Has Gelderd committed a breach of clause 12.7 here? If this can be demonstrated, is a payment of £3m due? [7 marks]**

Jones purchases a drone to undertake survey works and photography on the site. It is handed to Melanie to obtain some progress photographs for the company's website. Melanie has no training in how to use the drone and struggles to operate it. Unfortunately the drone crash lands into the adjacent railway damaging overhead power lines and signalling equipment at the same time. The line is closed for rectification and safety works for 48 hours. The railway infrastructure company has to pay train operating companies £800k in compensation for the effects of the closure.

- b) Is the railway company owed a duty of care by any of the project's participants? [6 marks]**

- c) To maintain good relations, Gelderd makes a payment of £800k to the railway company and now seeks to recover it from Jones. How might it do this? [4 marks]**

Gelderd's payment record is poor; most payments have been made more than 30 days later than the 30 days period in the contract. The Contract contains a clause requiring interest to be paid at 1% above the Bank of England base rate on all late payments. Jones' repeated complaints make no impact, so it blocks access to the BIM files and the project data which are all hosted on Jones' systems. Consequently, Gelderd and its advisors can no longer access the files. Jones sends a blunt email to Gelderd, demanding immediate payment of all outstanding monies, following which it will re-activate access to the files. It also demands

payment of unspecified costs of £25,000 as is states that the interest payment does not properly compensate it for late payment.

- d) **Are Jones entitled to a payment in addition to the 1% interest above the Bank of England base rate?** [4 marks]
- e) **What might be the consequences of Jones blocking Gelderd's access to the online systems?** [4 marks]

Section 2

Question 7

Ormsby, a contractor, is refurbishing a large secondary school for a local authority when its electrical subcontractor encounters asbestos. Snodin, the subcontractor, is engaged under a simple purchase order and has no obligation to tell Ormsby of the issue. However, due to the health and safety obligations, it sends an email to Ormsby's site manager saying, *"we have encountered asbestos today in block H and accordingly we have stopped work whilst you arrange for its removal."*

The main contract contains provisions for a "Time and Cost Event" whereby the contractor can obtain an extension of time and additional payments for the effects of, amongst other things, the removal of asbestos.

Clause 19 of the Contract states, "Claims for a Time and Cost Event shall be notified by the Contractor to the Employer's Project Director together with brief particulars within 3 weeks of the Contractor becoming aware of such an incident. Such notifications shall comply with clause 92."

Clause 22 states, *"where a Contractor's claim for a Time and Cost Event has not fully complied with clause 19 then the Contractor shall not be entitled to an extension of time or additional payment."*

Clause 92 states, *"notices issued under this clause shall be in writing, sent to the town hall address, shall be copied to the Council's Head of Legal Services and shall be issued by first class recorded delivery mail and shall be deemed to be received two working days following their posting."*

Ormsby's site manager forwards the electrical subcontractor's email to the Council's Project Director. The covering email says, *"Here's an email from my subby, we've found asbestos and will do our utmost to remove it without too much delay to the programme."*

The possible delay leads to many meetings, some of which were attended by the Council's Chief Executive.

The asbestos causes 16 weeks delay, costs £120k to remove and the contractor seeks another £480k in time-related overheads.

The Council refuses to pay for the effect of the asbestos. It says;

1. It was not properly notified of the Time and Cost Event.
2. The email sent by the Contractor was not "in writing", nor was it posted first class.
3. No notification was sent to the Head of Legal Services.
4. Therefore, nothing is due.

Ormsby responds by saying;

- A. We sent a notice to the Project Director as required by the Contract.
- B. Surely, nowadays, an email is classified as "writing"?
- C. We have looked on the website and there isn't a position called "Head of Legal Services". In fact, legal services are now procured via a consortium of 5 local councils and it isn't clear who is responsible for such things.

D. We have held meetings with the Council and senior people have attended, proving that they all know about this.

a) Is Ormsby entitled to payment for the removal of the asbestos? [10 marks]

Ormsby threatens adjudication to recover the sums it claims are due. No adjudication provisions are contained in the contract but the Contractor refers to the Housing Grants, Construction and Regeneration Act 1996 (HGCRA) saying that The Scheme for Construction Contracts applies and therefore the right to adjudicate exists.

The Council responds by stating that the removal of asbestos can't possibly be classed as a construction contract, so HGCRA doesn't apply and that litigation is the sole route for dispute resolution.

b) Is Ormsby able to refer the dispute to adjudication? [8 marks]

The project finishes 28 weeks late and the Council has to pay over £3m for alternative school accommodation and coach travel for students. This figure is quoted in an open Council meeting and is reported online. Liquidated damages were included in the contract for £200,000 per week or part thereof. The Council deducted £5.6m in respect of liquidated damages for late completion. Ormsby says that the Council is profiteering and it will challenge the deduction in court. The liquidated damages provisions are unenforceable it says.

c) Is the liquidated damages clause enforceable? [7 marks]

Section 2
Question 8

Varadi, a contractor, constructed and completed a “clever highways” scheme for the national highways authority. This involved installing various equipment on the highway for detecting traffic volumes and regulating the speed of traffic. New signals, signage and gantries were installed. The project also included the installation of a concrete central reservation barrier for 12 miles of the route.

Surface blemishes appeared in the concrete barrier 16 months after the works were completed. Inspections and core samples have indicated that the concrete used had insufficient strength caused by inadequate cement and admixtures. In isolated instances (26 of the 200 core samples) there was insufficient cover to reinforcement.

Varadi has informally accepted that the problems with reinforcement cover relate to quality of installation and has agreed to rectify the problems in the 26 locations. But it denies responsibility for the other issues and has told the authority to speak directly to the concrete supplier.

Varadi sent a message via the project’s online platform to the authority saying, *“the defects period for this project are long gone, it expired a year after completion. So we have no liability for these things any more. But without prejudice we offer to rectify the cover problems at the 26 locations specified provided you do the traffic management.”*

Traffic management is estimated to cost £35k to set up, £35k to remove and £5k per week to maintain. The works would take 4 weeks to complete.

- a) **Is Varadi correct to say that it has no obligation to rectify defects once the 12 months defects provisions have elapsed? Explain your answer** **[6 marks]**

- b) **What does the phrase “without prejudice” mean? What effect, if any, does it have here?** **[5 marks]**

- c) **Does the concrete supplier owe any obligations to the authority for the faulty concrete?** **[4 marks]**

The highways authority responds to Varadi in writing, via its solicitors, saying, “*we hold you responsible for all of these defects and require that you rectify them immediately. The core samples suggest that by extrapolating the 26 defects across the whole project then most of it is defective and not fit for purpose. We therefore require you to replace all of the barriers.*”

- d) Can the authority use a sample approach to pursue a case that the entire length of barrier should be replaced? What does it need to do to prove such a case to an adjudicator or other legal tribunal? [4 marks]**

The authority accepts Varadi’s offer to remedy the sections of barrier with insufficient reinforcement cover, but an argument ensues about the costs of traffic management. The contractor estimates that the costs of the remedial works alone will be £25k, so says that having to pay another £100k for traffic management is ridiculous.

- e) Who should pay for the costs of the traffic management? [6 marks]**



**Module 3 Section 1 Points for answer
Question 1**

Part (a)

The Project Manager faces considerable difficulties in accepting a programme that clearly does not comply with Clause 31. The implications touch on the compensation event mechanism and candidates should identify that a Project Manager must value the works if there is no accepted programme, or the last one is not accepted (Clause 64.1 and there is an opportunity to discuss Clause 63). However, the tender programme may be treated as the accepted programme per Clause 31.1 if it is in the Contract Data and so the Project Manager will have little to work on. Once the time has come to replace that programme, then the Project Manager can reject the programme from the Contractor under Clause 31.3. Candidates should develop this. The importance of rejecting the last programme are the implications with the compensation event system. Candidates should examine the difficulties that the Project Manager will have in notifying the Contractor of all the information the programme normally requires to comply with Clause 31. They should also draw out the distinction between proof of cost and the acceptance of a programme in compensation events.

Marks

[8 marks]

Part (b)

The payment process with an activity schedule is clearly defined by the Contract and the Project Manager has little discretion (see PWDD definition and Clause 50.2). The Price for Work Done to Date is only completed activities and so the Project Manager has no discretion in amending the activity schedule to allow payments for the Contractor. However, he could discuss it with his client and subsequently reach an agreement with the Contractor on different payment mechanisms. Where the Contractor has made an application, candidates should point out that the Project Manager is obliged to make an assessment even if it is zero and to include all the detail necessary in Clause Y(UK)2 and clause 51. In assessing the payment, the Project Manager should also consider retaining sums (e.g. per clause 50.3) but conclude that he cannot because there will be nothing to pay in the first place and the deductions are related to percentages that can be retained.

[8 marks]

Part (c)

This part of the question provides candidates an opportunity to detail the acceptance process for Contractor Design (Clause 21) and identify that until the design is accepted, the Contractor is obliged by the Contract not to progress with the work involved. Candidates might identify that a breach of this by the Contractor, by him pressing on, could happen and the effect would be to put the Contractor at risk for carrying out the works if there was

a problem with them. Candidates may examine the authority of the Project Manager to instruct the Contractor to stop and identify that as a separate compensation event although it may be simply to comply with the Contract (Clauses 14 and 27.3). A delay to completion should be the subject of a risk reduction meeting, which the Project Manager Should notify.

[7 marks]

Part (d)

The Supervisor's obligation would be to notify the Contractor that the works were defective (Clause 42.1).

[2 marks]
25 marks

Total

Question 2

1.

Marks

Part 1(a) This gives candidates an opportunity to discuss the difficulties in an Option B Contract with value engineering and that there is little or no incentive to allow for value engineering under Clause 63.10. Candidates should discuss the early warning process and that the change would require an instruction from the Project Manager, and probably some additional information to allow it to become a Contractor design element. It will also require changes to the Bill of Quantities.

7 marks

Part 1(b) Candidates should identify that, as long as the design complies with the Employer provided Works Information, then the Contractor need only propose the design in accordance with Clause 21 and wait for the Project Manager to accept. The Contractor can therefore take advantage of all the saving himself. Candidates can develop the implications of the design change on other permanent works and what would happen if the PM refused to accept the design.

[5 marks]

Part 1(c) Candidates should discuss NEC3 Clause 63.11 which exists in the Option C Contract, but not Option B and that this would change the answer to 1(a). The answer to 1(b) will only change to the extent of the pain/gain share improvement.

[3 marks]

Part 2

(d) This part of the question touches on acceleration (Clause 36) and take over (Clause 35), and the limitations on the Project Manager to order acceleration in the face of a Contractor objecting to it. The Project Manager cannot instruct acceleration but can instruct constraints on the Contractor (Clause 14 and 11.2(19)). These constraints would all be compensation



events which would potentially create delay. Candidates should conclude that the Project Manager has little ability to unilaterally create acceleration. Therefore, use of the risk reduction progress and some incentives for the Contractor should be considered.

[10 marks]
25 marks

Total

Question 3

Part (a)

Marks

The apparent insolvency of the subcontractor will create significant problems for the Contractor. The Project Manager needs to understand the implications for the Contractor and consider of solutions which could assist him (Clause 16.3). However, the Project Manager has no authority to change the Contract and so the Contractor will be stuck with the completion date which he cannot meet, unless there is a compensation event. Candidates should refer to Clauses 19 and 60.1(19), and how the Project Manager should deal with that considering Clause 26.1. Differing opinions are possible as long as they are well supported. The actions the Project Manager may have to take include deciding if a Compensation Event has occurred per Clause 61.4, instructing a revised programme, and (if the Contract is Option C or D) dealing with the valuation implications of the subcontractor change. The answer may include the importance of checking the actual status of the subcontractor.

[10 marks]

Part (b)

The answer should include discussion of Core Clause 9. The Contractor must terminate the subcontractor for Reason R1 to R10. The answer should explain that the reason needs to be specific and better answers will make clear that a thorough investigation is sensible. Termination is a serious step and it needs to be taken both correctly and quickly or the contractor may run the risk of confirming the contract or improperly terminating. The Contractor should also issue an immediate withholding notice preventing the payment of the subcontract certified sum. The contractor should also identifying materials and equipment on site in order to comply with the procedural requirement under Clause 92. This will include discussion of Clause 92 and YUK 2 and then preparing to deal with the procedures on termination, all of which may be discussed.

[10 marks]

Part (c)

The programme cannot be in accordance with the Contract. It will either not comply with the contract or it will not represent the contractor's plans. So the Contractor would have to agree a new completion date or accept that his programme will be rejected. The Contractor's cashflow would need to make

allowances for the delay damages which he would be obliged to pay under X7. The answer should discuss the implication of this in the Project Manager having to assess all Compensation Event under Clause 64.1.

[5 marks]
25 marks

Total

Question 4

Part a)

The Contractor seems likely to be entitled to a CE under Clause 60.4, 60.5 and 60.6. The answer should explore this. The application of Clause 60.7 and 63.13 should be discussed and which choice the Contractor may wish to make in valuation by defined costs or rates. He will need the Project Manager's agreement to use rates. The difficulties the Contractor may have in pricing this change in defined cost should be discussed especially on the in situ concrete formwork issue. The answer should point out that the Contractor must build to the Works Information per Clause 20.1. candidates should dismiss the use of risk reduction since the works are already fixed in the Works Information.

Marks

Part b)

This part allows candidates to discuss the CE notification process. They should identify the event is likely to be a CE under Clause 60.1(19) and the implications of Clause 19 and possibly a breach of contract by the Employer (although a term in the contract would have to be identified). Candidates should discuss the schedule of cost components and saving money through the schedule of cost components paragraph 7 and how this would impact on the quotation. Answers may also include exploring any Contractor default in the level of damage and identifying the problem with the assumption in Clause 63.7 and/or that the damage was caused by the default if there is one rather than the event. This possibility should be discredited. Candidates may also discuss programming and changes to the completion date

[5 marks]

Part c)

Candidates should discuss Clause 73 and what the Works Information says. They should identify the obligations under Clause 73.1 for things of value and 73.2 for excavated material. Answers may include reference to Clause 10.1 and the need to notify the Project Manager to change the Works Information if it does not give the contractor title. Candidates should discuss value engineering under Option B and the lack of a clear incentive for it and also the difficulty the Project Manager and/or Employer would have in forcing the Contractor to account for the sums he receives in payment.

[13 marks]

Total

[7 marks]
25 marks



Question 5

a)

Explanation of reasonable skill and care needed with reference to Bola v Friern Barnet. [3 marks]

Reaney has to work with the same level of skill that other consultants do in this situation. [1 mark]

Reference to likely professional indemnity insurance restrictions on cover for more onerous obligations such as fit for purpose. [1 mark]

Marks

[5 marks]

b)

Reference to MT Hojgaard v Eon needed here [3 marks]

and an explanation of how the contract might be interpreted given the apparently conflicting obligations in clauses 15 and 63. Conclusion in the MTH v Eon case was that such obligations aren't necessarily incompatible and that the contractor could & should satisfy both. [3 marks]

With an obligation for 20 years' life it is insufficient for the Contractor to say that it has used reasonable skill and care and therefore it's done its job. Its designers must look further than that. Marks to be allocated here for the arguments and case law, not necessarily the final outcome which, in the real world, could go either way. [4 marks]

[10 marks]

c)

Reaney's liability will be established looking at a number of factors. The starting point is the statement in the design contract. Is £100k a reasonable amount given the value of (i) the design services and (ii) the construction works? [3 marks]

Reference to UCTA Schedule 2. [3 marks]

Would a design consultant be of equal bargaining power as the contractor? [2 marks]

Also look at the disparity between the limit of liability and the proof of PII put forward. Reference to suitable case, eg Ampleforth v Turner & Townsend. In the event of the limit of liability being shown to be unreasonably low, what might a court decide? Limit may be unenforceable and liability then at large. [2 marks]

[10 marks]

Total

25 marks



Module 3 Section 2 points for answer
Question 6

a)

Deal with principle and quantum separately.

Jones is vicariously liable for the acts of Melanie and therefore the company is responsible for her actions in its contract with Gelderd.

[2 marks]

Clause 12.7 was probably drafted in the days before social media and doesn't seem to recognise the possibility of internet communications.

But its intent is clear, the parties should not be communicating publicly without the other's clear consent. Melanie's actions are a breach of this requirement. [2 marks]

Reference to ejusdem generis in respect of interpreting the clause regarding publications. [1 mark]

With regard to a fall in the share price, reference to Hadley v

Baxendale and the probable lack of a causal link between Melanie's actions and the share price fall. Mention remoteness too. [2 marks]

Likely answer is no liability for the share price fall. Whilst the question hasn't mentioned an entire agreement clause, answers may do so.

Marks

[7 marks]

b)

The railway company is owed a duty of care here – reference to Donoghue v Stevenson [2 marks]

and possibly Rylands v Fletcher [2 marks].

Explain neighbour principle [marks gained under D v S]

Explain Duty of Care. [2 marks].

[6 marks]

c)

Is this a reasonable cost to pay to the railway company? Is it reasonably apparent that the railway company would have to pay compensation to train operators in these circumstances? Is maintaining good relations sufficient grounds to make such payments? Gelderd will need to show that the £800k was a reasonable sum and that a liability existed. [2 marks]

Explain the obligations of Gelderd to the railway company and how it may expect Jones to indemnify it against such liabilities. Mention that this will be an insurance issue, most probably a third-party liability claim. [2 marks]

[4 marks]

- d) Explain that where interest is included in a contract that is the parties' agreed remedy for late payment. [2 marks]
 For projects in UK, the late payments legislation allows the receiving party to charge its reasonable costs in addition to the interest due on debts (but not damages). [2 marks]
- [4 marks]
- e) Blocking the access is a breach of contract, probably a repudiatory breach, entitling Gelderd to termination. Where late payment is sufficiently poor then the HGCRA provisions allow suspension. [3 marks]
 Reference to *Trant v Mott MacDonald*. [1 mark]
- [4 marks]
- Total 25 marks

Question 7

- a) Marks
- The parties have agreed to noticing obligations which have not been complied with here. The test in the contract is whether Ormsby has notified, not whether the council was aware of the incident which clearly it was. [3 marks]
 The reference to the Head of Legal Services no longer existing is irrelevant, the notice could and should have been posted to the town hall in accordance with clause 92. [2 marks]
 Clauses 19, 22 and 92 must be read together, contract to be interpreted as a whole. To give effect to the objective intentions of the party [3 marks]
 Clause 22 is a clause excluding liability so would be interpreted contra proferentem against the council which is seeking to rely on it. [2 marks]
- [10 marks]
- b) Yes, Ormsby is able to refer this to adjudication. The refurbishment of a school clearly falls within s105(1)(b) of HGCRA as amended. Explain s108(1) [3 marks] and s108(5) [3 marks] and how the Scheme now applies. [2 marks]
- [8 marks]
- c) LAD's are almost certainly enforceable. Reference to *Makdessi* and *Parking Eye* needed [3 marks] and the judgment's reference to the legitimate business interests of the non-breaching party. Effect of an extension of time on the ultimate enforceability of the LAD's



provisions. [4 marks] References to genuine pre-estimate etc will not gain full marks without correct case law (see above).

[7 marks]

Question 8

- a) Varadi is incorrect. Defects provisions, post-completion, allow the contractor to rectify his own defects, presumably at lower cost than the employer could arrange. [2 marks]
But obligations remain for longer, typically 6 or 12 years after completion. Reference to Limitation Act [2 marks]
and relevance of the contract being a deed or not. [2 marks] **[6 marks]**
- b) Text book answer on WP needed. WP label on its own has no effect, wording of the message is key. Is it seeking to resolve the matter? If so, it can't be presented to a tribunal in subsequent proceedings. **[5 marks]**
- c) Without a provision such as a collateral warranty, privity of contract is likely to prevent any such liability existing. **[4 marks]**
- d) The authority would need to prove that the sample was statistically relevant and would need a statistician as an expert witness to demonstrate this. [3 marks]
Reference to Amey LG v Cumbria CC. [1 mark] **[4 marks]**
- e) Varadi should pay. These are a clear consequence of the breaches committed in respect of the quality failure. [3 marks]
Reference to Hadley v Baxendale and that traffic management must have been in the parties' reasonable contemplation at the time of forming the contract. [3 marks] **[6 marks]**
- Total **25 marks**