EXAMINERS REPORT 2026

ICE Adjudicators Qualifying Examination

Contents:

Pass Marks

The pass mark is set at 65%

Adjudicators Qualifying Examination					
	No. of candidates	No. of candidates Passed both papers	Pass %	Pass Paper 1 only	Pass Paper 2 only
2026	18	5	27%	6	2
2025	11	4	36%	2	0
2024	14	3	23%	2	6
2023	10	3	30%	0	2
2022	11	3	27%	0	3
2021	12	7	58%	1	2

To apply for the 2027 examination please email contractsanddisputes@ice.org.uk

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

The following pages are general comments on how the questions were answered and what the examiner was expecting. Each paper 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.

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Institution of Civil Engineers

Adjudicators' Qualifying Examination 2025

Tuesday 24th February 2026

Time permitted: Paper 1 - 10:00am to 1:00pm (3 hours)

The ICE Adjudicators' Qualifying Examination consists of two Papers, which carry equal marks. The pass mark is applied to the aggregate of the marks achieved in the two Papers. Paper 1 is a three- hour open book, Decision writing exam.

Candidates are permitted to use their own personal laptop. Upon completion of the exam candidates must submit their paper via email to contractsanddisputes@ice.org.uk**. The transfer of pro-formas is not permitted. Candidates must NOT copy and paste sections of the reference material into their answer.**

Reference to Documents during the Examination

Candidates for the Adjudicators Qualifying Paper may bring any documents into Paper 1 exam.

References to Cases and Acts should be quoted where possible.

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.

Question 1

INSTRUCTIONS TO CANDIDATES REGARDING PAPER 1

- 1 week before the Exam you are provided with the Notice of Adjudication and the Referral Notice.

- In the Exam you will also be provided with the Response.

- Everything you need to write an enforceable Decision is contained within the three documents provided. Accordingly, where, within one of the three documents, a Party relies on a document and/or judgment that has not been provided, for the purposes of the exam Candidates shall understand that the basis of the assertion is correct and/ or accurate.

- References to Cases and Acts should be quoted where possible.

- 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.

- Write a final Decision suitable to send to the parties in line with the following requirements:

    - for the purpose of the exam Candidates shall understand that the date of the Decision is 28 November 2023,
    - the parties have invited you to give reasons for your Decision, address:
    - any jurisdictional challenges and proceed, whether or not you conclude that you have jurisdiction,
    - all substantive issues, and
    - do not use your own name as the Adjudicator, use your Candidate number instead;
    - the maximum mark for this question is 50;
    - the preambles setting out your nomination and describing the submissions of the parties should be set out very briefly; and
    - if you think any further information is required for your Decision you should make the necessary assumptions, state them complete with an explanation as to why you consider such to be necessary, and explain, in your Decision, what steps you took during the adjudication to obtain this information.

Note: The Examiner is looking for a well-reasoned, well-structured and enforceable decision and this will be taken into account when marking.

N THE MATTER OF AN ADJUDICATION PURSUANT TO A CONSTRUCTION CONTRACT

B E T W E E N:

POPULAR CONSTRUCTION SERVICES LIMITED

Referring Party

- and -

ETON FIBRE LIMITED

Responding Party

INSTITUTION OF CIVIL ENGINEERS ADJUDICATORS' QUALIFYING EXAMINATION 2026 – PAPER 1
NOTICE OF ADJUDICATION

THE PARTIES

1. The '**Parties**' to this adjudication are:

   1.1. The Referring Party is Popular Construction Services Limited ("**PCS**") whose registered office is 3rd Floor, Great House, Marine Estate, Great City, England. PCS is represented by Q&P Solicitors LLP of Large Offices, 15 King Charles Road, London (ajones@Q&P.law).

   1.2. The Responding Party is Eton Fibre Limited ("**Eton Fibre**"), whose registered office is 35 Compton Street, London. Eton Fibre is represented by DGMC Law LLP of Grand Building, 37 King George Street, London (p.galton@DGMC.com).

THE NEC CONTRACT

2. A Framework Agreement, titled 'Eton Fibre FTTH Select Agreement 2/2020', was entered into between PCS (as contractor) and Eton Fibre (as employer) on or around 11 June 2020 (the "**Framework Agreement**"). The purpose of the Framework Agreement was for PCS to be considered as a supplier to Eton Fibre for the provision of civil engineering and telecoms infrastructure services in respect of future building of fibre to the home ("**FTTH**") networks in additional cities. PCS does not hold an executed copy of the Framework Agreement.

3. Under the Framework Agreement, each future network build in a city area was to be delivered under an individual contract (known as a "**City Specific Agreement**") to be agreed between Eton Fibre and PCS, with each incorporating the terms and conditions in the Framework Agreement.

4. On or around 12 October 2020, Eton Fibre engaged PCS to construct Eton Fibre's network to approximately 48,000 premises in Worchester, England ("**the Works**"), pursuant to a Form of Agreement ("**the Deed**") incorporating the NEC3 Engineering and Construction Contract (June 2005) with amendments June 2006 and April 2013 and further bespoke amendments ("**the NEC Contract**"). PCS does not hold executed copies of the Deed and the NEC Contract.

5. The NEC Contract includes a payment mechanism by way of Section 5 of the Core Clauses and Secondary Option Y(UK)2. As with all construction contracts, that mechanism is supplemented by the Housing Grants, Construction and Regeneration Act 1996 (as amended) ("**the Act**") where it is not fully compliant with the same.

6. On 11 August 2023, Eton Fibre issued a termination notice, terminating PCS's obligation to Provide the Works under the NEC Contract for convenience. The notified termination date was 18 August 2023. The Project Manager issued a termination certificate on 18 August 2023.

THE NEC CONTRACT DISPUTE RESOLUTION PROVISIONS

7. By Clause W2.1(1) of the NEC Contract:

A dispute arising under or in connection with this contract is referred to and decided by the Adjudicator. A Party may refer a dispute to the Adjudicator at any time.

A Notice of Adjudication can be issued at any time.

THE DISPUTE

8. The dispute concerns the failure by the Project Manager and Eton Fibre to issue any or any valid payment certificate / notice and / or a pay less notice (as the case may be) in respect of PCS's applications for payment numbered 33a and 33b (together "**AfP33**").

9. PCS uploaded a draft of AfP33 to CEMAR, the contract management system, on 18 August 2023. PCS also issued AfP33 to Eton Fibre by email on 21 August 2023.

10. PCS calculated the amount due for payment under AfP33 was £4,842,747.20 (exclusive of VAT). Included with AfP33 was a spreadsheet that set out the sum that PCS considered due for the August 2023 assessment cycle, supported by a calculation summary and breakdown.

11. AfP33 was issued in accordance with the timeframes set out in the NEC Contract.

12. As per Clauses 50, 51 and Y(UK)2 of the NEC Contract, the key dates in respect of AfP33 were as follows:

    12.1. Deadline for PCS's August applications for payment – On or before 25 August 2023;

    12.2. Project Manager's assessment date for August – 25 August 2023 (being the last Friday of August 2023);

    12.3. Deadline for Project Manager's certification of amount due – 1 September 2023 (being one week from the assessment date);

    12.4. Payment due date for August applications – 1 September 2023 (being seven days after the assessment date);

    12.5. Deadline for Eton Fibre's pay less notice – 25 September 2023 (being seven days before the final date for payment); and

    12.6. Final date for payment of August applications – 1 October 2023 (being thirty days from the payment due date).

13. As such, the Project Manager was to issue a payment certificate in respect of AfP33 on or before 1 September. He did not do so. Therefore, the value of PCS's AfP33 became due for payment by Eton Fibre by default as the 'notified sum' for the purposes of the Act (per ss.110A(3), 110B(4) and 111(2) of the Act).

14. Any pay less notice was required to be in respect of the 'notified sum' referred to above and issued on or before 25 September 2023 (based on a final date for payment of 1 October 2023). However, no pay less notice was issued by Eton Fibre in relation to AfP33 (either in time or at all). Therefore, payment of the notified sum in AfP33 of £4,842,747.20 (exclusive of VAT) became due for payment by default on or before 1 October 2023, this being the final date for payment.

15. Eton Fibre failed to make any payment to PCS in respect of AfP33 on or before 1 October 2023.

16. As such, PCS was and is entitled to the sum of £4,842,747.20 (exclusive of VAT) from Eton Fibre, which is the sum that became due by default on or before 1 October 2023 in respect of AfP33, but that was not paid.

17. Further, PCS is entitled to interest as provided in Clause 51.2 of the NEC Contract.

18. By the failures of the Project Manager and Eton Fibre (as the case may be) to issue the necessary assessments and notices and to pay the sum due in respect of AfP33, a dispute has arisen between PCS and Eton Fibre . That dispute arose in England on or around 1 October 2023.

19. This Notice of Adjudication and the jurisdiction that it shall confer on the Adjudicator when nominated relates specifically to AfP33. It does not extend to the consideration of any other issues arising in respect of the NEC Contract and the Framework Agreement.

REDRESS SOUGHT

20. Accordingly, PCS seeks the following decisions with reasons from the Adjudicator:

    20.1. A declaration that a valid payment certificate / notice has not been issued in respect of AfP33 such that AfP33 has become the default payment notice of the sums due to PCS in relation to the same.

    20.2. A declaration that Eton Fibre has failed to issue a pay less notice in respect of AfP33 within the contractual timescales, such that the full value of AfP33 should have been paid by the final date for payment.

    20.3. That Eton Fibre shall pay to PCS on delivery of the Adjudicator's decision (or such other timescale(s) as the Adjudicator shall determine) the sum of £4,842,747.20 and any applicable VAT in respect of AfP33 (or such other sum(s) as the Adjudicator shall determine).

    20.4. That Eton Fibre shall pay to PCS on delivery of the Adjudicator's decision (or such other timescale(s) as the Adjudicator shall determine) interest on the sum awarded by the Adjudicator in respect of AfP33, for such period, at such rate and in such total amount as the Adjudicator shall determine.

    20.5. That Eton Fibre shall pay the Adjudicator's fees and expenses in full (or such other sum(s) as the Adjudicator shall determine).

20.6. That Eton Fibre shall pay to PCS on delivery of the Adjudicator's decision (or such other timescale(s) as the Adjudicator shall determine), the administrative cost of an application for an ICE adjudicator of £420.00 (inclusive of VAT).

Served on 25 October 2023 for and on behalf of Popular Construction Services Limited.

IN THE MATTER OF AN ADJUDICATION PURSUANT TO A CONSTRUCTION CONTRACT

B E T W E E N:

POPULAR CONSTRUCTION SERVICES LIMITED

Referring Party

- and -

ETON FIBRE LIMITED

Responding Party

INSTITUTION OF CIVIL ENGINEERS ADJUDICATORS' QUALIFYING EXAMINATION 2026 –
PAPER 1
REFERRAL NOTICE

THE PARTIES

1. The '**Parties**' to this adjudication are:

1.1. The Referring Party is Popular Construction Services Limited ("**PCS**") whose registered office is 3rd Floor, Great House, Marine Estate, Great City, England. PCS is represented by Q&P Solicitors LLP of Large Offices, 15 King Charles Road, London (ajones@Q&P.law).

1.2. The Responding Party is Eton Fibre Limited ("**Eton Fibre**"), whose registered office is 35 Compton Street, London. Eton Fibre is represented by DGMC Law LLP of Grand Building, 37 King George Street, London (p.galton@DGMC.com).

OVERVIEW OF THE CLAIM

2. A Framework Agreement, titled 'Eton Fibre FTTH Select Agreement 2/2020', was entered into between PCS (as contractor) and Eton Fibre (as employer) on or around 11 June 2020 (the "**Framework Agreement**"). The purpose of the Framework Agreement was for PCS to be considered as a supplier to Eton Fibre for the provision of civil engineering and telecoms infrastructure services in respect of future building of fibre to the home ("**FTTH**") networks in additional cities. PCS does not hold an executed copy of the Framework Agreement.

Institution of Civil Engineers

3. Under the Framework Agreement, each future network build in a city area was to be delivered under an individual contract (known as a "**City Specific Agreement**") to be agreed between Eton Fibre and PCS, with each incorporating the terms and conditions in the Framework Agreement.

4. On or around 12 October 2020, Eton Fibre engaged PCS to construct Eton Fibre's network to approximately 48,000 premises in Worchester, England ("**the Works**"), pursuant to a Form of Agreement ("**the Deed**") incorporating the NEC3 Engineering and Construction Contract (June 2005) with amendments June 2006 and April 2013 and further bespoke amendments ("**the NEC Contract**"). PCS does not hold executed copies of the Deed and the NEC Contract.

5. The NEC Contract includes a payment mechanism by way of Section 5 of the Core Clauses and Secondary Option Y(UK)2. As with all construction contracts, that mechanism is supplemented by the Housing Grants, Construction and Regeneration Act 1996 (as amended) ("**the Act**") where it is not fully compliant with the same.

6. On 11 August 2023, Eton Fibre issued a termination notice by email at 13:47, terminating PCS's obligation to Provide the Works under the NEC Contract for convenience. The email message stated:

Please see attached Notice of Termination which has also been sent on CEMAR (in "Private" mode) to your city Operations Manager and Delivery Manager and to the PM.

7. On 18 August 2023, the Project Manager wrote to the Referring Party by email (1259hrs) with the following message:

Please see attached my Certificate of Termination which has also been sent on CEMAR (in "Private" mode) to your city Operations Manager and Delivery Manager and to CF.

8. The same Cl.90.3 Certificate of Termination was uploaded to CEMAR on the same day at 1252hrs. The notified termination date was therefore 18 August 2023. The Project Manager had issued a termination certificate on 18 August 2023.

9. As set out in more detail herein, a dispute has arisen between the parties in respect of Eton Fibre's failure to follow the contractual payment mechanism in relation to PCS' applications for payment numbers 33a and 33b (together "AfP33").

10. In particular, the Project Manager and Eton Fibre have failed to issue any or any valid payment certificate/ notice and/ or a pay less notice (as the case may be) within the timescales

required under the NEC Contract, such that the full value of AfP33 has become due for payment as the 'notified sum' for the purposes of the Act.

11. Eton Fibre was obliged to pay the notified sum on or before the final date for payment and, in circumstances where Eton Fibre has not served a pay less notice, the notified sum in respect of AfP33 must be paid to PCS without any deduction.

12. Eton Fibre was made aware of PCS' entitlement by way of PCS' uploading of a draft of AfP33 to CEMAR, the contract management system, on 18 August 2023 at 15:57, and PCS' email to Eton Fibre attaching AfP33 sent on 21 August 2023 (09:35).

13. A dispute crystallised when payment in respect of the notified sum in AfP33 was not made by the final date for payment.

14. PCS served a Notice of Adjudication on 25 October 2023. An application to The Institute of Civil Engineers ("ICE") was made on 26 October 2023 for the nomination of an Adjudicator and the Adjudicator was appointed on 1 November 2023.

15. PCS seeks a decision from the Adjudicator that the Project Manager failed to issue a valid payment notice in respect of AfP33 such that AfP33 became the default payment notice of the sums due to PCS and that Eton Fibre failed to issue a pay less notice in respect of AfP33 such that the full value of AfP33 was to be paid by the final date for payment.

16. Further, PCS seeks a decision from the Adjudicator that due to the failures of the Project Manager and Eton Fibre, Eton Fibre is required to pay £4,842,747.20 and any applicable VAT (or such other sum(s) as the Adjudicator may decide) in respect of AfP33 immediately on delivery of the Adjudicator's decision (or such other timescale(s) as the Adjudicator shall determine). In addition, PCS seeks interest on the sums awarded.

THE NEC CONTRACT AND AfP33

17. As set out in the Deed, it and the following documents and their attachments constitute the contract between Eton Fibre and PCS:

__IT IS AGREED__ as follows

1. This Deed and the following documents only and their attachments, if any, shall together constitute the contract between the Employer and the Contractor and the term the "__Contract__" shall in all such documents be construed accordingly:

1.1 this Form of Agreement is duly executed by the parties as a deed;

1.2 the conditions of contract comprise of the NEC3 Engineering and Construction Contract (June 2005) with Amendments June 2006 and April 2013 and:

1.2.1 the core clauses and the clauses for main Option B;

1.2.2 dispute resolution clause Option W2;

1.2.3 the following secondary Option X clauses:

(a) Option X1: Price adjustment for inflation;

(b) Option X2: Changes in law;

(c) Option X4: Parent Company Guarantee;

(d) Option X5: Sectional Completion;

(e) Option X6: Bonus for early Completion;

(f) Option X7: Delay Damages;

(g) Option X16: Retention;

(h) Option X18: Limitation of Liability;

(i) Option X20 Key Performance Indicators; and

1.2.4 the following secondary Option Y clauses:

(a) Option Y(UK)2: The Housing Grant, Construction and Regeneration Act 1996;

(b) Option Y(UK)3: The Contracts (Rights of Third Parties) Act 1999; 1.2.5 Option Z: Additional conditions of contract referred to within Contract Data: Part one;

1.2.5 Option Z: Additional conditions of contract referred to within Contract Data: Part one.

1.2.6 the attached Contract Data: Part one - data provided by the Employer including the appendices;

1.2.7 the attached Contract Data: Part two - data provided by the Contractor including the appendices;

1.2.8 the other documents identified in the Contract Data.

2. *In the event of any inconsistency or contradictory information within the hierarchy of documents which make up this Contract, the following order of precedence shall apply:*

   (a) Form of Agreement;

   (b) NEC3 core clauses and option clauses;

   (c) Z clauses;

   (d) Works Information;

   (e) Contract Data Part 1 including appendices

   (f) Contract Data Part 2;

   No other documents shall form part of this Contract.

18. PCS relies on the full terms of the Deed and the NEC Contract and identifies below the key clauses relating to payment and adjudication.

Payment

19. Cl.50 provides for interim payment as follows (the green-coloured text represents the agreed amendments to the wording of the standard form of the Contract contained within either Z clause amendments or standalone Z clauses):

Assessing the amount due 50

50.1 The *Project Manager* assesses the amount due at each assessment date. The first assessment date is decided by the *Project Manager* to suit the procedures of the Parties and is not later than the *assessment interval* after the *starting date*. Later assessment dates occur

- at the end of each *assessment interval* until four weeks after the *Supervisor* issues the Defects Certificate and
- at Completion of the whole of the *works*.

50.2 The amount due is

- the Price for Work Done to Date,
- plus other amounts to be paid to the *Contractor*,
- less amounts to be paid by or retained from the *Contractor*.

Any tax which the law requires the *Employer* to pay to the *Contractor* is included in the amount due.

50.3 If no programme is identified in the Contract Data, one quarter of the Price for Work Done to Date is retained in assessments of the amount due until the *Contractor* has submitted a first programme to the *Project Manager* for acceptance showing the information which this contract requires.
If the *Contractor* fails to submit a revised programme to the *Project Manager* for acceptance in accordance with this contract, 10% (ten per cent) of the amount due to the *Contractor* under Clause 50.2 not yet paid is retained by the *Employer* in assessments of the amount due for so long as the *Contractor* is in default of submitting a revised programme to the *Project Manager* for acceptance in accordance with this contract.

50.4 In assessing the amount due, the *Project Manager* considers any application for payment the *Contractor* has submitted on or before the assessment date.
The *Project Manager* gives the *Contractor* details of how the amount due has been assessed.

50.5 The *Project Manager* corrects any wrongly assessed amount due in a later payment certificate.

20. Clause 51 of the NEC Contract (as amended) provides as follows:

Payment 51

51.1 The *Project Manager* certifies a payment within one week of each assessment date. The first payment is the amount due. Other payments are the change in the amount due since the last payment certificate. A payment is made by the *Contractor* to the *Employer* if the change reduces the amount due. Other payments are made by the *Employer* to the *Contractor*. Payments are in the *currency of this contract* unless otherwise stated in this contract.
The *Contractor* shall provide a VAT invoice to the *Employer* in accordance with the payment certificate issued under this sub-clause within seven calendar days of the payment certificate being issued to the *Contractor*.

51.2 Each certified payment is made within three weeks of the assessment date or, if a different period is stated in the Contract Data, within the period stated. If a certified payment is late, or if a payment is late because the *Project Manager* does not issue a certificate which he should issue, interest is paid on the late payment. Interest is assessed from the date by which the late payment should have been made until the date when the late payment is made, and is included in the first assessment after the late payment is made.

51.3 If an amount due is corrected in a later certificate either

- by the *Project Manager* in relation to a mistake or a compensation event

or

- following a decision of the *Adjudicator* or the *tribunal*,

interest on the correcting amount is paid. Interest is assessed from the date when the incorrect amount was certified until the date when the correcting amount is certified and is included in the assessment which includes the correcting amount.

51.4 Interest is calculated on a daily basis at the *interest rate* and is compounded annually

Z11 51.4 The *Project Manager* shall be entitled to deduct any KPI service credits due to the *Employer*, as determined in accordance with Part Two of the Works Information, from the next certified payment otherwise due to the *Contractor*.

The *Project Manager* shall credit any KPI incentives due to the *Contractor*, as determined in accordance with Part Two of the Works Information, in the next assessment.

21. Clause Y2.2 of the NEC Contract provides that:

The date on which a payment becomes due is seven days after the assessment date.

The final date for payment is fourteen days or a different period for payment if stated in the Contract Data after the date on which payment becomes due.

The Project Manager's certificate is the notice of payment to the Contractor specifying the amount due at the payment due date (the notified sum) and stating the basis on which the amount was calculated. [emphasis added]

22. Clause Y2.3 of the NEC Contract provides that:

If either Party intends to pay less than the notified sum, he notifies the other Party not later than seven days (the prescribed period) before the final date for payment by stating the amount considered to be due and the basis on which that sum is calculated. *A Party does not withhold payment of an amount due under this contract unless he has notified his intention to pay less than the notified sum as required by this contract. [emphasis added]*

23. The Contract Data (Part One) provides at "5. Payment", amongst other things, that:

The assessment interval is the period between the last Friday of each calendar month.

The interest rate is 3% per annum above the base rate in force from time to time of the Bank of England.

24. The Contract Data (Part One) provides at "Optional Statements", amongst other things, that:

If Y(UK)2 is used and the final date for payment is not 14 days after the date when payment is due*:*

- ***The period within which payments are made is 30 days from the payment due date or 30 days from receipt of a valid invoice whichever is the later****. [emphasis added]*

25. Save for Clause 51.2 referred to above, the NEC Contract is silent as to the impact of a failure to issue a payment certificate/ notice in accordance with the contractual timings.

26. As such, the necessary provisions of the Act are incorporated into the NEC Contract:

26.1. By way of Section 110B(4) of the Act, if the paying party or a specified person fails to issue the payment notice, any notice issued under the contract by the payee setting out the sum considered due and the basis on which the sum is calculated becomes the relevant notice under Section 110A(3) of the Act. This includes any application for payment.

26.2. The relevant notice under Section 110A(3) of the Act and the amount set out therein becomes the notified sum under Section 111(2) of the Act.

26.3. By Section 111(1) of the Act, the payer is obliged to pay the notified sum on or before the final date for payment.

27. The Project Manager's failure to issue a valid payment certificate / notice does not impact on the contractual final date for payment (nor, by extension, the date by which Eton Fibre is to issue any pay less notice).

Termination

28. Clause 90 of the NEC Contract provides as follows:

Termination 90

90.1 If either Party wishes to terminate the *Contractor*'s obligation to Provide the Works he notifies the *Project Manager* and the other Party giving details of his reason for terminating. The *Project Manager* issues a termination certificate to both Parties promptly if the reason complies with this contract.

90.2 The *Contractor* may terminate only for a reason identified in the Termination Table. The *Employer* may terminate for any reason. The procedures followed and the amounts due on termination are in accordance with the Termination Table.

TERMINATION TABLE

Terminating Party	Reason	Procedure	Amount due
The *Employer*	A reason other than R1–R21	P1 and P2	A1, ~~A2~~ and A4
	R1–R[illegible]R18	P1, P2 a[illegible]3	A[illegible]nd A2[illegible]

90.3 The procedures for termination are implemented immediately after the *Project Manager* has issued a termination certificate.

90.4 Within thirteen weeks of termination, the *Project Manager* certifies a final payment to or from the *Contractor* which is the *Project Manager*'s assessment of the amount due on termination less the total of previous payments. Payment is made within three weeks of the *Project Manager*'s certificate.

90.5 After a termination certificate has been issued, the *Contractor* does no further work necessary to Provide the Works.

29. Clause 93 of the NEC Contract provides as follows:

Payment on termination 93

93.1 The amount due on termination includes (A1)

- an amount due assessed as for normal payments,
- ~~the Defined Cost for Plant and Materials~~
  - ~~within the Working Areas or~~
  - ~~to which the *Employer* has title and of which the *Contractor* has to accept delivery,~~
- ~~other Defined Cost reasonably incurred in expectation of completing the whole of the *works*,~~
- any amounts retained by the *Employer* and
- ~~a deduction of any un-repaid balance of an advanced payment.~~

93.2 The amount due on termination also includes one or more of the following as set out in the Termination Table.

~~A2 The forecast Defined Cost of removing the Equipment.~~

A3 A deduction of the forecast of the additional cost to the *Employer* of completing the whole of the *works*.

A4 ~~The *direct fee percentage* applied to any excess of the total of the Prices at the Contract Date over the Price for Work Done to Date.~~

The lesser of:

- the losses suffered by the *Contractor* arising from termination to the extent they have been properly mitigated and are evidenced to the *Employer* on an open book basis; and
- the 'prescribed percentage' of the total of the Price for Work Done to Date in the 12 months immediately preceding the issue of the termination certificate where the 'prescribed percentage' is:
  - where the period between the Advanced Termination Notice and the Notified Termination Date is less than 90 days, 5% (five per cent);
  - where the period between the Advanced Termination Notice and the Notified Termination Date is 90 days or more but less than 180 days, 3.5% (three and a half per cent);
  - where the period between the Advanced Termination Notice and the Notified Termination Date is 180 days or more, 2.5% (two and a half per cent); and
  - where the *Contractor* has terminated for reasons R1-R10, R16 or R19, 5% (five per cent).

Adjudication

30. The Contract Data (Part One) to the NEC Contract provides that dispute resolution Option W2 applies. Thus, the adjudication procedure is that set out in Option W2.

31. Clause W2.1(1) of the NEC Contract provides that:

A dispute arising under or in connection with this contract is referred to and decided by the Adjudicator. A Party may refer a dispute to the Adjudicator at any time.

32. Clause W2.2(3) provides that:

If the Adjudicator is not identified in the Contract Data or if the Adjudicator resigns or becomes unable to act

- *the Parties may choose an adjudicator jointly or*
- *a Party may ask the Adjudicator nominating body to choose an adjudicator.*

The Adjudicator nominating body chooses an adjudicator within four days of the request. The chosen adjudicator becomes the Adjudicator.

33. The Adjudicator is not identified in the Contract Data and the parties have not chosen an adjudicator jointly. Therefore, PCS is entitled to ask ICE, being the *Adjudicator nominating body* identified in the Contract Data (Part One), to choose the Adjudicator

34. An application to ICE was made on 26 October 2023 for the nomination of an Adjudicator and the Adjudicator was appointed on 1 November 2023.

AfP33

35. As referred to above, the NEC Contract contains several provisions setting out the relevant dates for applications for payment, the certification of payments, and the dates on which payments must be made.

36. For AfP33, the relevant dates are as follows:

    36.1. Deadline for PCS' August applications for payment – On or before 25 August 2023;

    36.2. Project Manager's assessment date for August – 25 August 2023 (being the last Friday of August 2023);

    36.3. Deadline for Project Manager's certification of amount due – 1 September 2023 (being one week from the assessment date);

    36.4. Payment due date for August applications – 1 September 2023 (being seven days after the assessment date);

    36.5. Deadline for Eton Fibre's pay less notice – 25 September 2023 (being seven days before the final date for payment); and

    36.6. Final date for payment of August applications – 1 October 2023 (being thirty days from the payment due date).

37. PCS uploaded a draft of AfP33 to CEMAR on 18 August 2023 and sent AfP33 to Eton Fibre by email on 21 August 2023. Both the payment due date and the date by which the Project Manager was to certify the payment due to PCS under AfP33 were 1 September 2023.

38. It will be noted that the version of AfP33 that was uploaded to CEMAR on 18 August 2023 was a draft. The reason for this is that, on or around the time of its upload, PCS noticed that CEMAR was showing that its AfP33 was an 'Application for Assessment Date' of 17 November 2023. For the reasons set out herein, it would be inconsistent with the NEC Contract for this to be the assessment date in respect of AfP33. Moreover, it would not be consistent with the parties' behaviour in respect of previous applications for payment.

39. It will also be noted that AfP33 is a combination of two separate applications for payment. This is a consequence of the application for payment template (supplied/ stipulated by Eton Fibre) that PCS used in respect of AfP33, which only has capacity to refer to 100 Primary Nodes ("PNs")17. AfP33 is based on works in 102 PNs, therefore it was necessary to spread the calculations across two applications for payment.

40. AfP33 is headed 'Payment Certificate' and there is reference therein to (amongst other things) a 'Gross Certified Amount'. For the avoidance of doubt, no sums have been certified in respect of AfP33. Reference to the same is due to the application for payment template that Eton Fibre supplied/ stipulated that PCS use in respect of the Works.

41. AfP33 clearly set out the sum that PCS considered due for the August 2023 assessment cycle. This was £4,842,747.20 (exclusive of VAT). AfP33 also set out the basis for how that assessed sum had been calculated.

42. It was clear on the face of AfP33 that it was intended to be treated as an application for payment. Eton Fibre and the Project Manager were aware that AfP33 had been issued and that an assessment and payment certificate/ notice were required.

43. The Project Manager did not issue a payment certificate/ notice by 1 September 2023. Therefore, by default, AfP33 became the 'notified sum' for the purposes of the Act (see Sections 110A(3), 110B(4) and 111(2) of the Act).

44. Any pay less notice (which, based on a final date for payment of 1 October 2023, Eton Fibre had until 25 September 2023 to issue), was required to be in respect of that notified sum. But, in any event, no pay less notice was issued by Eton Fibre in relation to AfP33 (either in time or at all).

45. As such, payment of the notified sum in AfP33 of £4,842,747.20 (exclusive of VAT) had to be made by the final date for payment without any deduction (Section 111(1) of the Act).

46. It will be noted that the Contract Data (Part One) states that the final date for payment is thirty days from the later of the payment due date and receipt of a valid invoice. However, recent judicial authority has confirmed that drafting which provides for the calculation of the final date for payment other than by reference to a specified period between the due date and the final date for payment (e.g. tied to receipt of a valid invoice), is not compliant with the Act (see *Lidl Great Britain Ltd v Closed Circuit Cooling Ltd (t/a 3CL)* [2023] EWHC 2243 (TCC)). Therefore, PCS submits that the reference to receipt of a valid invoice in the final date for payment drafting in the NEC Contract is invalid, such that the final date for payment of AfP33 was 1 October 2023, this being thirty days from the payment due date.

47. Notwithstanding the above, PCS issued an invoice in respect of AfP33 on 15 September 2023 (the "**Invoice**"). Thirty days from that date was 15 October 2023. Even if 15 October 2023 is taken as the final date for payment of AfP33, that date has now passed without payment of the notified sum having been made and/ or a pay less notice having been issued.

48. Whilst the Invoice refers to (amongst other things) "Certified Payment Assessment PA-35", this is a typographical error only. The Invoice was submitted with the intention that it was for AfP33, and no sum has been certified in respect of AfP33.

49. Having failed to follow the payment procedure for AfP33 and to pay the notified sum, Eton Fibre must be ordered to pay the notified sum in full in this adjudication.

50. Further, PCS is entitled to interest as provided in Clause 51.2 of the NEC Contract. The calculation of such interest is set out below.

INTEREST

51. The final date for payment in respect of AfP33 was 1 October 2023. No pay less notice was issued and so the full value as set out in AfP33 should have been paid by Eton Fibre on that date.

52. With no payment having been made, PCS is entitled to interest in accordance was Clauses 51.2 and 51.4 of the NEC Contract from the date the payment for AfP33 should have been made to the date for payment. Clause 51.4 states that the applicable rate is the 'interest rate'.

53. As such, PCS claims interest based on the 'interest rate' set out in the Contract Data (Part One), which is 3% per annum above the base rate in force from time to time of the Bank of England, which has been 5.25% since this dispute arose.

54. Up to and including 26 October 2023, the interest accrued was £27,364.75 and this interest continues to accrue at £1,094.59 per day until payment, calculated as follows:

54.1. £4,842,747.20 x 8.25% = £399,526.64.

54.2. £399,526.64 / 365 = £1,094.59 (to calculate daily interest).

SUMMARY AND REDRESS SOUGHT

55. For the reasons above, Eton Fibre must make payment of the sum as calculated in AfP33 of £4,842,747.20 and any applicable VAT due to the Project Manager's failure to issue a payment certificate/ notice in the time allowed such that AfP33 became the default notice and the value therein the notified sum, and Eton Fibre's failure to issue any pay less notice and make the payment of the notified sum by the final date for payment.

56. Pursuant to Clauses 51.2 and 51.4 of the NEC Contract, PCS is also entitled to interest on the unpaid sum arising from AfP33. PCS calculates this to be £27,364.75 up to and including 26 October 2023 and this interest continues to accrue at £1,094.59 per day until payment

57. Accordingly, PCS seeks the following decisions with reasons from the Adjudicator:

57.1. A declaration that a valid payment certificate / notice has not been issued in respect of AfP33 such that AfP33 has become the default payment notice of the sums due to PCS in relation to the same.

57.2. A declaration that Eton Fibre has failed to issue a pay less notice in respect of AfP33 within the contractual timescales, such that the full value of AfP33 should have been paid by the final date for payment.

57.3. That Eton Fibre shall pay to PCS on delivery of the Adjudicator's decision (or such other timescale(s) as the Adjudicator shall determine) the sum of £4,842,747.20 and any applicable VAT in respect of AfP33 (or such other sum(s) as the Adjudicator shall determine).

57.4. That Eton Fibre shall pay to PCS on delivery of the Adjudicator's decision (or such other timescale(s) as the Adjudicator shall determine) interest on the sum awarded by the Adjudicator in respect of AfP33, for such period, at such rate and in such total amount as the Adjudicator shall determine.

57.5. That Eton Fibre shall pay the Adjudicator's fees and expenses in full (or such other sum(s) as the Adjudicator shall determine).

57.6. That Eton Fibre shall pay to PCS on delivery of the Adjudicator's decision (or such other timescale(s) as the Adjudicator shall determine), the administrative cost of an application for an ICE adjudicator of £420.00 (inclusive of VAT).

Served on 1 November 2023 for and on behalf of Popular Construction Services Limited.

IN THE MATTER OF AN ADJUDICATION PURSUANT TO A CONSTRUCTION CONTRACT

B E T W E E N:

POPULAR CONSTRUCTION SERVICES LIMITED

Referring Party

- and -

ETON FIBRE LIMITED

Responding Party

INSTITUTION OF CIVIL ENGINEERS ADJUDICATORS' QUALIFYING EXAMINATION 2026 – PAPER 1 RESPONSE

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1. INTRODUCTION

1. This document, together with the legal opinion of senior Leading Counsel James Felton-Davis KC of Schleiter Chambers (Appendix 1), the factual statements of Robert Mark Monkhouse (Appendix 2) and of Thomas Edward Cooper (Appendix 3), plus all other supporting documentation, is Eton Fibre Limited's ("**Eton Fibre**") Response (the "**Response**") to Popular Construction Services Limited's ("**PCS**") Referral received on 1 November 2023.

2. The Adjudicator is invited to read the appendices to this document carefully. James Felton-Davis KC is one of the most eminent construction silks in the country and he provides a legal view on the relevant facts and matters central to this dispute. The witness testimony confirms the relevant facts and relevant communications with PCS. Read together with the supporting documentation, it is submitted Eton Fibre has a strong defence to the claim made.

3. Whilst Eton Fibre replies, where necessary, to the points in the order in which they appear in the Referral, Eton Fibre does not respond to each and every paragraph or sentence in the Referral. Accordingly, unless expressly stated, the mere fact that a matter, contention or assertion made by PCS in the Referral is not addressed in this Response does not mean that the matter, contention or assertion is accepted by Eton Fibre. The burden of proof remains with PCS, as the party who asserts that it is automatically entitled to the money applied for, to prove its case based

upon the law and sound evidence. If the assertion is not proved by the Referral the claim advanced in this reference must fail.

4. Eton Fibre does not intend to duplicate documents already provided to the Adjudicator and has attached to this Response only those documents on which it specifically relies which are not already included in the Referral bundle.

2. EXECUTIVE SUMMARY

5. PCS has instituted adjudication proceedings against Eton Fibre. PCS claims that it is entitled to the payment of a large sum of money applied for because Eton Fibre failed to serve a payment notice or a pay less notice in answer to its application for payment 33a and 33b ("Purported AfP33"). It is therefore what is conventionally known as a "smash and grab" adjudication claim[1].

6. However, the entire basis of the PCS adjudication claim is premised on the flawed notion that PCS had a legal right/ entitlement to make the Purported AfP33, following the lawful and valid termination of the NEC3 Contract (as defined below). PCS's right to payment does not depend on the mere making of a claim for payment by PCS (as is PCS's position). Instead, the right to payment for sums alleged to be due under a contract for work and services depends on the terms of the contract itself. As will be seen in this Response, the apparent legal basis of the PCS claim is heavily contested by Eton Fibre. The Purported AfP33 has no legal or contractual basis following termination of the NEC3 Contract and therefore it cannot in law establish any liability on Eton Fibre as alleged, or at all.

7. Eton Fibre's case is that in circumstances in which the NEC3 Contract with PCS had been terminated, PCS had no right to any further payment other than under the terms of Clause 90 of the NEC3 Contract[2]. Clause 90.4 of the NEC3 Contract stipulates that within 13 weeks of termination the Project Manager is to certify "a final payment to or from the Contractor which is the Project Manager's assessment of the amount due on termination less the previous payments."

8. Pursuant to Clause 90.4 of the NEC3 Contract, the parties agreed that PCS's entitlement to further payment arose on the Project Manager's certificate and the said certificate is a condition

[1] If the basis for such a claim were made out, it would avoid the need for PCS to prove the substance of its application. The true value of PCS's alleged entitlement is not, therefore, part of this adjudication. That is why this is referred to as a 'smash and grab" claim.
[2] PCS's claim is not based on Clause 90; instead it is based on Clause 50 of the NEC3 Contract.

precedent to the right to payment arising. No certificate has yet been issued because the 13-week period has not yet concluded. PCS has no entitlement to payment as alleged[3], or at all[4].

9. Eton Fibre's case is that the provisions of Clauses 90 to 93 of the NEC3 Contract apply in the event of termination and PCS's right to further payment is prescribed exclusively by these post-termination payment provisions; the interim Clause 50 payment regime (which is the basis of the 'smash and grab' claim made) was replaced by the Clause 90 payment regime and does not survive the termination of PCS.

10. After termination, PCS has no right to payment other than as set out by the terms of the NEC3 Contract. It is the Project Manager's certificate, issued within 13 weeks of termination, that gives PCS entitlement to further payment[5]. PCS's Purported AfP33 was therefore not a legally valid application for payment under the terms of the NEC3 Contract and no sum was due in respect of the application. PCS has no entitlement to further payment other than under the Project Manager's certificate.

11. Accordingly, central to the resolution of this dispute is a proper analysis of the contractual regime in respect of the right to payment in circumstances of PCS's termination. This is an issue of contractual interpretation[6].

12. The key issue for the Adjudicator to decide is a relatively narrow one: properly construed, what is PCS's right to payment following the termination of its performance obligations under the NEC3 Contract – is it a right to further interim payments under Clause 50 (and if so, how) or is it a right to a further final payment under Clause 90 of the NEC3 Contract?

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[3] The PCS claim is based upon an alleged (but under specified) entitlement following an application for payment after termination of the NEC3 Contract.

[4] In _*Henry Boot Construction Ltd v Alstom Combined Cycles Ltd*_ [2005] EWCA Civ 814, the issue for the Court of Appeal was when the contractor's right to payment accrued under cl. 60 the contract in question (ICE Standard Form (6th ed)). That clause provided that the employer was to make payment in the amount certified by the engineer as being due. Dyson LJ (in whose judgment Sir Andrew Morritt VC and Thomas LJ concurred) held, at [23], that the issue of a certificate was a condition precedent to the contractor's entitlement to payment with the effect that the right to payment arose when a certificate was issued or should have been issued – it was not when the work was completed by the contractor. That had the consequence that the contractor's right to payment arose only when a certificate was issued.

[5] See _*Henry Boot*_, above. Various further aspects of the ICE contract and the judgment are of note for present purposes. First, under the terms of the ICE contract *"the contract price was not fixed at the outset but was to be ascertained by the engineer by the application of the contractual provisions in the light of the work that was actually done and the events that occurred during the carrying out of the works."* (see at [17]). Under the NEC3 Contract, Option B was chosen. Second, Dyson LJ's analysis was concerned with determining when the contractor's "entitlement" or "right" to payment arose. The case and the authority of the lead judge (Dyson LJ was a construction law specialist and went on to the Supreme Court. He was also Master of the Rolls). The judgement commands respect and carries weight.

[6] As Lambert J explained in _*ICE Architects Ltd v Empowering People Inspiring Communities*_ [2018] EWHC 281 (QB) the court seeks to arrive at *"the objective interpretation of the intentions of the parties"* (see at [12]) in the light of the documents.

13. The answer, in Eton Fibre's respectful submission, is a simple and straightforward one – following termination (which is not in issue), the parties' rights and obligations concerning payment are fully set out in Clauses 90 to 93 of the NEC3 Contract and it is these provisions that are in play. The obligations to assess and certify payment under Clauses 50 and 51 of the NEC3 Contract do not survive termination. This is based upon an ordinary reading of the terms of the NEC3 Contract and Eton Fibre's interpretation is supported by the independent views of an eminent and senior construction King's Counsel[7] as well as standard practitioner texts. The PCS claim in this reference is made under Clause 50, not Clause 90. The PCS claim is invalid legally, pending a Project Manager's certificate. A valid payment application must be issued before any sum can become due. Evidently, PCS's claim is an untenable one and must fail.

14. Following termination, PCS's entitlement to payment is regulated exclusively by the provisions of Clause 90 of the NEC3 Contract which provides for a final payment under the Project Manager's certificate, within 13 weeks of termination. It is the Project Manager's certificate that entitles PCS to further payment, not a purported interim application for payment under the Clause 50 payment regime. PCS has no entitlement to seek payment under Clause 50 of the NEC3 Contract in circumstances of its termination[8].

15. In the circumstances, Eton Fibre submits that PCS's claim is predicated on the misconceived notion that PCS has a right to interim payment for the sums applied for in its Purported AfP33 issued to Eton Fibre <u>after</u> termination, and that Eton Fibre's alleged "failure" to have served requisite notices following Purported AfP33 gives rise to an alleged 'notified sum' under Clause 50. Ordinarily, a valid payment application must be issued by PCS before any sum could become due. But Purported AfP33 is not valid and no 'notified sum' can become due in light of the express terms of the NEC3 Contract. PCS's attempt to rely on Clause 50 for a right to payment post-termination is evidently misconceived and wrong in law.

16. On a proper interpretation of the relevant express terms of the NEC3 Contract (as set out below), and as confirmed by the Opinion of a senior construction King's Counsel[9], PCS's entitlement to

[7] James Felton-Davis KC is an eminent and senior construction silk at Schleiter Chambers. His considered opinion at paragraph 25 of the Opinion is that PCS does not have any right to the payment of the sum which it claims in this adjudication.
[8] Other standard form contracts following a similar regime. For instance, in the JCT suite of contracts, following determination of the contractor's employment, a different payment regime takes effect. The notion of standard form contracts having a different payment regime applicable to post-termination of contractors is not something that is novel or unusual.
[9] James Felton-Davis KC is an eminent and senior construction silk at Schleiter Chambers. His considered conclusion at paragraph 25 of the Opinion is that PCS does not have any right to the payment of the sum which it claims in this adjudication. James Felton-Davis KC's view is one that accords with the DGMC Law LLP considered view of the merits given to Eton Fibre.

payment post-termination is regulated by Clause 90. In accordance with Clause 90, it is for the Project Manager to assess the final payment within 13 weeks of termination, with payment (if any) following within 3 weeks. In other words, post-termination, PCS is entitled to one payment, this being the final payment under Clause 90. That is the sole legal basis for further payment under the NEC3 Contract.

17. After termination, any purported interim application for payment under Clause 50 made by PCS is therefore invalid and has no legal or contractual effect. A 'notified sum' cannot arise from an invalid interim payment application and as such, there was no need for Eton Fibre to have served any pay less notice in these circumstances.

18. Putting this single disputed claim into the wider context, this adjudication is one of five adjudications that PCS has commenced concurrently against Eton Fibre on five different projects. In each of these adjudications, PCS relies on the same misguided (or opportunistic) "smash and grab" argument to wrongfully claim that a total notified sum of nearly £14.7 million is due across the five adjudications. PCS has also submitted further interim payment applications for payment for September and October, leading to a total alleged claim of £35.7 million across these further interim applications, notwithstanding the obvious application of the Clause 90 regime. The importance of the narrow point being debated is therefore significant.

19. Although the other four adjudications and further payment applications are not directly relevant to this reference in a strict sense, it does demonstrate the extent to which PCS is seeking to circumvent the pre-agreed and contractual final payment mechanism under Clause 90, in an unsubtle attempt to get a significant (but likely very temporary) cash-flow windfall. Of course, the irony is that the NEC3 Contract provides an adequate mechanism for deciding entitlement to payment following termination and Eton Fibre is the one that is invoking the terms of the NEC3 Contract for the purpose of concluding the payment issue, all in accordance with Clause 90.4.

20. The remainder of this Response is structured as follows:

20.1. '**Section 3**' addresses the Parties' contract, considering in turn (A) the scope of the contractual agreements; (B) court's approach to contract interpretation and the dual payment process in the NEC3 Contract; and (C) Eton Fibre's response to PCS's flawed and misguided case that interim payment provisions survive termination.

20.2. '**Section 4**' without prejudice to Eton Fibre's primary position, applies the relevant contractual provisions and legal authorities to set out Eton Fibre's secondary case that the draft Purported AfP33 (as defined below) is not in substance, form and intent free from ambiguity.

20.3. '**Section 5**' requests that the Adjudicator provides reasons for his Decision.

3. ETON FIBRE'S PRIMARY CASE: PCS'S FLAWED APPLICATION OF THE EXPRESS CONTRACTUAL TERMS

(A) SCOPE OF THE AGREEMENT BETWEEN PCS AND ETON FIBRE

21. Contrary to PCS's contention at Referral paragraphs 2 and 3, PCS and Eton Fibre did not enter into the framework agreement or the city delivery agreement. These draft agreements do not form part of the agreement between the parties.

22. The parties instead entered into the Form of Agreement dated 12 October 2020 (the "**Form of Agreement**") for the supply and construction of ductwork, cabling and connectivity to the fibre optic infrastructure and installation work on its fibre network in Worchester, England.

23. The Form of Agreement incorporates the following terms into the agreement between the parties:

23.1. core clauses and the following option clauses in NEC3 Engineering and Construction Contract Option B with amendments June 2006 and April 2013

23.1.1. clauses for main Option B;

23.1.2. Option W2 clause;

23.1.3. secondary Option X clauses: Option X1, Option X2, Option X4, Option X5, Option X6, Option X7, Option X16, Option X18 and Option X20; and

23.1.4. secondary Option Y clauses: Option Y(UK)2 and Option Y(UK)(3);

23.1.5. Option Z clauses in the Contract Data Part One;

23.2. Works Information Part One

23.3. Works Information Part Two;

23.4. Contract Data Part One (including appendices);

23.5. Contract Data Part Two; and

23.6. the other documents identified in the Contract Data.

(the "**NEC3 Contract**")[10].

(B) CONTRACT INTERPRETATION: EXPRESS TERMS

24. For the reasons detailed below, PCS's case is based upon a flawed misreading and/ or flawed application of the payment provisions in the NEC3 Contract.

25. On PCS's misconceived case, it seems the iterative interim payment process somehow continues under Clause 50 after the termination of its performance obligations, thereby making the final payment process under Clause 90.4 surplus to requirements and pointless. When applying the court's well-established guidance on contract interpretation (detailed below), PCS's interpretation of the relevant payment clauses fails upon closer inspection.

26. As to contract interpretation, the courts have confirmed that:

    26.1. they will apply the terms of a contract strictly based on the words in them[11]. In that, the court "*must give effect to that intention as expressed, that is, it must ascertain the meaning of the words actually used*"[12] and that "[t]he *purpose of interpretation is to identify what the parties have agreed, not what the court [or indeed, one of the parties] thinks that they should have agreed*"[13]; and

    26.2. when interpreting a contract, "*all parts of the contract must be given effect where possible, and no part of it should be treated as inoperative or surplus*"[14].

27. Applying the Court's guidance on contract interpretation[15], it is clear the NEC3 Contact's express terms provide for two distinct payment regimes: (1) if works are ongoing, interim payment under Clause 50; or (2) if the parties' performance obligations under the NEC3 Contract are terminated, PCS is entitled to final payment under Clause 90.

[10] The above contractual documents are appended to the Response.
[11] This principle is confirmed by Lord Wright in the House of Lord's decision in *Inland Revenue Commissioners v Raphael* [1935] A.C. 96 HL at [142] and Lord Neuberger in the Supreme Court's decision in *Arnold v Britton* [2015] AC 1619 at [20].
[12] *Inland Revenue Commissioners v Raphael* [1935] A.C. 96 HL at [142].
[13] *Arnold v Britton* [2015] AC 1619 at [20].
[14] Lord Justice Coulson confirmed in the Court of Appeal's decision in *A & V Building Solutions Limited v J & B Hopkins Limited* [2023] EWCA Civ 54 at [46].
[15] The general rules governing the construction of contractual terms have been enunciated in *Rainy Sky v Kookmin Bank* [2011] UKSC 50, and *Arnold v Britton* (above) as explained in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24. The general rules place an emphasis on the language actually used and requires the court to construe the contract to give effect to the parties' intention as disclosed by that language when read in context.

28. In effect, once termination is validly triggered, the interim payment provisions in Clause 50 are replaced with the final payment regime in Clause 90[16]. In other words, the assessment and certification obligations under Clauses 50 and 51 of the NEC3 Contract do not survive termination. Instead, Clauses 90 to 93 provide the parties' rights and obligations in relation to termination and its consequences, including the requirement that all sums due on termination is subject to the Project Manager's assessment within 13 weeks of termination under Clause 93 and the payment of that amount[17].

29. Clause 50 of the NEC3 Contract provides, amongst other things, that pursuant to Clauses 50.1 and 50.4, under the heading "**Assessing the amount due**":

> *"50.1 The Project Manager assesses the amount due at each assessment date assesses the amount due at each assessment date. The first assessment date is decided by the Project Manager to suit the procedures of the Parties and is not later than the assessment interval after the starting date. Later assessment dates occur:*
>
> - *at the end of each assessment interval **until four weeks after the Supervisor issues the Defects Certificate** and (emphasis added)*
> - *at **Completion of the whole of the works** (emphasis added).*
>
> *...*
>
> *50.4 In assessing the amount due, the Project Manager considers any application for payment the Contractor has submitted on or before the assessment date. The Project Manager gives the Contractor details of how the amount due has been assessed."*

30. Clause 90 of the NEC3 Contract sets out, amongst other things, the payment process following termination pursuant to Clause 90, under the heading **"Termination"**:

> *"90.1 If either Party wishes to terminate the Contractor's obligation to Provide the Works he notifies the Project Manager and the other Party giving details of his reason for terminating. The Project Manager issues a termination certificate to both Parties promptly if the reason complies with this contract.*

[16] This analysis is supported by paragraph 10-015 of Keating on NEC, 2nd edition (page 531), which provides: "*The Project Manager's assessment of the final amount due under clause 90.4 marks a real departure from the normal assessment process under NEC. The normal process is to avoid a final account and to allow amounts due to be continually reassessed long after completion until shortly after the defects date. Where the Contract is terminated, however, the defects period would appear not to apply and the assessment 13 weeks after termination would seem to be final and binding on the Employer (save presumably as to any latent defects).*"
[17] This is supported by Paragraph 10-067 of Keating on NEC, 2nd edition, which confirms "*all the sums due under clause 93 are assessed by the Project Manager within 13 weeks of termination*" (emphasis added).

...

*90.3 The procedures for termination are **<u>implemented immediately</u>** after the Project Manager has issued a termination certificate. (Emphasis added)*

*90.4 **<u>Within thirteen weeks of termination, the Project Manager certifies a final payment to or from the Contractor which is the Project Manager's assessment of the amount due on termination less the total of previous payments</u>**. Payment is made within three weeks of the Project Manager's certificate (emphasis added)*

90.5 After a termination certificate has been issued, the Contractor does no further work necessary to Provide the Works."

31. Properly construed and applying the Court's guidance on contract interpretation, the following points emerge from the above express payment provisions:

31.1. It is common ground that payment provisions in NEC3 Contract complies with the Housing Grants, Construction and Regeneration Act 1996 (as amended) (the "**Act**"). As such, there is no need to incorporate an implied term from Scheme for Construction Contracts (England and Wales) Regulations 2018 (the "**Scheme**"). The NEC3 Contract is Act compliant.

31.2. During the period of the ongoing works, Clause 50.1 regulates PCS's entitlement to payment such that the assessment interval for interim payments is from the first assessment date to 4 weeks after the Supervisor issues the Defects Certificate.

31.3. Once the Project Manager issues the termination certificate:

31.3.1. procedures for termination are implemented "immediately" after the Project Manager issues the termination certificate under Clause 90.3. These include the Employer having the right to complete the works;

31.3.2. the final payment mechanism is triggered under Clause 90.4. This is where the Project Manager assesses and then certifies a final payment to or from PCS within 13 weeks of the termination certificate, final payment is within 3 weeks of this final assessment. This assessment serves as a de facto final account[18]; and

[18] In setting out the final payment mechanism at Clause 90.4, the NEC3 Contract has adopted the same orthodox approach taken by the drafters of other standard form contracts; for example, see Clauses 8.12.3 and 8.12.5 of the JCT Contract Design and Build Contract 2016.

31.3.3. the contractor is excused from performing its primary obligation to provide the works under the NEC3 Contract under Clause 90.5.

31.4. For the reasons stated at paragraphs 23 and 25 of the legal opinion of James Felton-Davis KC, it is not possible to deduce from the express wording of Clause 50 that the interim payment regime survives termination. In fact, Leading Counsel is of the view that Clause 50 of the NEC3 Contract does not survive termination and Clause 90 sets out the rights and obligations in relation to termination and its consequences.

31.5. The conclusion reached by James Felton-Davis KC, at paragraph 25, is:

"In consequence, it is my view that PCS does not have any right to the payment of the sums which it claims in these adjudications."

31.6. In the absence of an express and unequivocal provision confirming the interim payment regime should continue to operate for the entirety of the works and/or survives termination, it is not possible to construe the language of the NEC3 Contract in a way that supports PCS's case. Nor is it possible to imply a term (via the Scheme or otherwise) into the NEC3 Contract to support a claim by PCS that it is entitled to make further interim applications for payment throughout the entirety of the contract period. This principle was confirmed in the analogous Court of Appeal decision in *Grove Developments Ltd v Balfour Beatty Regional Construction Ltd* [2016] EWCA Civ 990[19], where the judge concluded that the contract did not provide for interim payments to the contractor after the interim payment dates (set out in a schedule) came to an end and as such, the contractor would have to wait for final payment pursuant to the express terms. Given that, the contract did not contain an express term for the contractor to be entitled to interim applications beyond the agreed payment dates in the schedule and that, a term could not be implied to allow the contractor to receive payment between interim payment applications and final payment. As "*the court will not, indeed cannot, use the canons of construction to rescue one party from the consequences of what that party has clearly agreed*"[20].

(C) ETON FIBRE'S RESPONSE TO THE REFERRAL

32. For the reasons detailed above and below, Paragraphs 10 and 11 of the Referral are misconceived. It is irrelevant that Eton Fibre has not issued a payment certificate, notice and/or a pay less notice against PCS's Purported AfP33. Given that, as accepted by PCS and as evidenced by the timeline

[19] Judgment is appended to the Response.
[20] *Grove Developments Ltd v Balfour Beatty Regional Construction Ltd* [2016] EWCA Civ 990 at [39].

immediately below, Purported AfP33 was issued to Eton Fibre after the Project Manager issued the termination certificate to terminate PCS's obligation to provide the works under the NEC3 Contract.

32.1. In accordance with Clause 90.1 of the NEC3 Contract, Eton Fibre notified the Project Manager on 11 August 2023 that it sought to terminate the NEC3 Contract under Clauses 90.2 and Z9 of the NEC3 Contract[21].

32.2. In accordance with Clause 90.1 of the NEC3 Contract, the Project Manager validly issued the termination certificate by way of the parties' electronic communication system for all contractual communications, CEMAR, at 12:52pm on 18 August 2023[22] and by e-mail to PCS at 12:59pm on 18 August 2023[23] to terminate the parties' contractual performance obligations. PCS has not provided any further works following receipt of the termination certificate.

32.3. PCS issued Purported AfP33 by CEMAR at 15:58 on 18 August 2023[24].

32.4. PCS issued Purported AfP33, by e-mail, at 9:35am on 21 August 2023[25].

32.5. As confirmed in the witness statement of Alexander Spencer, Eton Fibre responded to PCS on Purported AfP33 on 22 August 2023[26] to confirm that *"as of the termination date of 18th August 2023 there were no outstanding payment assessments, the last assessment being made on 28th July 2023. Eton Fibre confirms in this e-mail that Clause 90.4 regulates PCS's entitlement to payment following termination"*. PCS did not raise any queries with Eton Fibre following receipt of this e-mail.

33. For the reasons detailed above and below, PCS's case at Section 3 of the Referral is flawed. It is common ground between the parties that the NEC3 Contract was terminated in accordance with the NEC3 Contract. Notwithstanding this important factual event, PCS conveniently omits to address the operation of Clause 90 and seemingly ignores the consequences of termination re certifying the amount due on termination and the payment of that amount. PCS has given no explanation whatsoever as to why it says Clause 90.4 does not apply in respect of payment.

[21] See paragraph 2.1 of witness statement of Robert Monkhouse at Appendix 2 to this Response and Response/Appendix 1/Annex 10.
[22] See paragraph 2.3 of witness statement of Robert Monkhouse at Appendix 2 to this Response and Referral/ Appendix 1/ Referral Document 3.
[23] See paragraph 2.4 of witness statement of Robert Monkhouse at Appendix 2 to this Response and Referral/ Appendix 1/ Referral Document 4.
[24] Response/Appendix 2/Exhibit RM2.
[25] Referral/Appendix 1/Referral Document 8.
[26] Response/Appendix 3/Exhibit TEC2

34. In summary, applying the case law and express contractual provisions detailed above to the facts:

34.1. On proper interpretation of the terms of the express terms, and for the reasons detailed in the legal opinion of James Felton-Davis KC, a valid termination certificate triggers the movement from the interim payment process under Clause 50 to the final payment process under Clause 90. PCS's entitlement to be paid anything further post-termination is therefore regulated by the final payment regime in Clause 90. Clauses 50 and 51 for payment of Purported AfP33 does not survive termination.

34.2. Purported AfP33 is invalid and ineffective as an interim payment application as PCS issued it to Eton Fibre after termination. A notified sum cannot arise from an invalid payment application so there was no requirement for Eton Fibre to serve a payment or pay less notice.

34.3. There is no express term to suggest that the parties intended the interim payment process to survive termination. As the Court of Appeal's decision in *Grove Developments Ltd v Balfour Beatty Regional Construction Ltd*[27] evidences, the courts will not impose an implied term for the extension of the interim payment process to extend beyond termination. In practice, any such implied term would cause the: (A) Project Manager confusion and uncertainty as to its responsibilities in relation to each interim and final payment assessment during the same short period; and (B) final payment process would become redundant if the iterative interim payment process continued beyond termination.

4. ETON FIBRE'S SECONDARY CASE: INVALID PURPORTED AfP33

35. Without prejudice to Eton Fibre's principal position that no notified sum arises from Purported AfP33 for the reasons detailed above, if the Adjudicator disagreed with Eton Fibre's analysis of the contractual provisions and instead believed that pre and post-termination payment regimes of interim and final payment provisions somehow run in parallel after termination, it is submitted that no notified sum is payable under the ambiguous Purported AfP33 in any event.

(A) LEGAL TEST FOR VALID INTERIM APPLICATION FOR PAYMENT

36. Given the potentially serious consequences to an employer that flows from receipt of a valid interim application, the courts have established that a contractor must meet "*a high threshold*"[28] to take advantage of a notified sum automatically becoming payable from a valid application for

[27] *Grove Developments Ltd v Balfour Beatty Regional Construction Ltd* [2016] EWCA Civ 990.
[28] *Surrey and Sussex Healthcare NHS Trust v Logan Construction (South East) Limited* [2017] EWHC 17 (TCC) at [37].

payment if a timely employer's notice is not served. The burden is on the contractor to discharge the 'form, substance and intent' tests of its application for payment if it wishes to take advantage of the draconian effects on employer. If there is any room for ambiguity around dates, form, substance or intent of an interim application for payment, the courts have decided that the contractor's 'smash and grab' claim will usually not be successful. Adjudicators are likewise becoming more discerning around such claims made by contractors.

37. The legal burden is on PCS to prove that Purported AfP33 is in substance, form and intent free from ambiguity and has the degree of specificity required. In other words, it must be clear what the application for payment purports to be in the context of the relevant facts and matters of the project so that the *"parties know what to do about it and when"*[29] and for it to be a valid interim application, "*the sum considered by the contractor as due at the relevant due date and it must be free from ambiguity"*[30]. At the very least, the legal basis of PCS's Purported AfP33 lacked the degree of specificity required because Eton Fibre did not know what it was nor did PCS attempt to justify it at the time.

(B) INVALID PURPORTED AfP33: DEFECTIVE FORM AND SERVICE

38. As PCS states at paragraph 38 of the Referral, Purported AfP33 was uploaded to CEMAR as a draft at 15:58 on 18 August 2023. It is only a 'final' version of a compliant application which could achieve the high threshold required to trigger the draconian consequences of a valid application for payment. Anything less than 'final' creates uncertainty and ambiguity from a payer's perspective and this is something that a payee cannot then seek to take advantage of in a 'smash and grab' adjudication.

39. Three days after termination, PCS attempted to issue Purported AfP33 by e-mail[31]. There is no agreement for PCS to issue an application for payment by e-mail. Indeed, as confirmed in the witness statement of Robert Monkhouse, the express contractual terms at Section 4.1 of Works Information Part 1 of the NEC3 Contract prevents PCS from serving a valid application for payment by email[32]. It is a basic legal concept that a party cannot benefit from its own breach. Here, PCS was in breach of contract by serving an apparent payment application by email.

[29] *Henia Investments Inc v Beck Interiors Limited* [2015] EWHC 2433 (TCC) at [17].
[30] *Jawaby Property Investment Limited v The Interiors Group Limited* [2016] EWHC 557 (TCC) at [59]. Similarly, as summarised by Coulson J (as he was then) in *Caledonian Modular Ltd v Mar City Developments Ltd* [2015] EWHC 1855 (TCC): "*If the employer is to be put at risk that a failure to serve a payless notice at the appropriate time during the payment period will render him liable in full for the amount claimed, he must be given reasonable notice that the payment period has been triggered in the first place".*
[31] Referral/Appendix 1/ Referral Document 8.
[32] Referral/Appendix 1/Referral Document [2]/App 1 Works Information Part One at page 22.

Notwithstanding the fact that Eton Fibre's personnel responded to PCS to challenge the application and seeking a response[33], none came[34]. PCS then stayed silent until the time for serving notional payment or pay less notices came and went. PCS then commenced smash and grab adjudications, in an attempt to benefit from its own breach.

40. Whilst any rational observer might well question PCS's tactics, what is clear is that the said application would fall foul of the 'form, substance and intent' legal hurdles.

5. REDRESS AND REASONS

41. For the reasons set out in this Response, it is denied that PCS is entitled to the relief sought in the Referral and Eton Fibre seeks from the Adjudicator:

41.1. An order and/or declaration that Purported AfP33 was not a valid application for payment as alleged, or at all.

41.2. An order and/or declaration that PCS has no entitlement or right to payment of the sum(s) which it claims or any sum or any relief sought in this reference.

41.3. An order and/or declaration that PCS's right to payment is in accordance with Clauses 90 to 93 of the NEC3 Contract and not Clause 50.

41.4. An order and/or declaration that PCS shall pay all the Adjudicator's costs, fees and/or expenses.

42. The Adjudicator is requested to provide reasons for his Decision.

Served on 15 November 2023 for and on behalf of Eton Fibre Limited.

[33] See paragraph 2.3 of Witness Statement of Thomas Edward Cooper at Appendix 3.
[34] As a reasonable recipient of the application for payment, Eton Fibre understood the AfP33 as invalid. In considering the true construction of a purported application for payment notice the issue is how a reasonable recipient like Eton Fibre would have understood the notice. Eton Fibre did not see AfP33 as a valid contractual application and this is a relevant factor as part of the consideration as to its meaning. It is to be noted that PCS took no steps to explain or justify the legal basis of the application. And PCS's intention is a matter to be assessed, considering the context of the application (*Jawaby* at [43], [59] and [63] (Response/Annex 13).

Institution of Civil Engineers

Adjudicator's Qualifying Examination 2026

Tuesday 3rd March 2026

Time permitted: Paper 2 - 10:00pm to 12:00pm (2 hours)

The ICE Adjudicator's Qualifying Examination consists of two Papers, which carry equal marks. The pass mark is applied to the aggregate of the marks achieved in the two Papers. Paper 2 is a 2-hour, closed-book, Adjudication Law and Procedure exam.

Candidates are permitted to use their own personal laptop. Upon completion of the exam candidates must submit via email to contractsanddisputes@ice.org.uk The transfer of pro-formas is not permitted.

Reference to Documents during the Examination

- Housing Grants, Construction and Regeneration Act 1996, as amended by the Local Democracy, Economic Development and Construction Act 2009 and equivalent legislation in Northern Ireland

- The Scheme for Construction Contracts (England and Wales) Regulations 1998, as amended by the Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011 and equivalent legislation in Wales, Scotland and Northern Ireland

- NEC4 Engineering and Construction Contract (June 2017) (as amended)

No other reference documents are permitted.

ANSWER ALL QUESTIONS AND ALL PARTS OF EACH QUESTION.

All questions carry equal marks. You are required to give reasons for all your answers.

References to Cases and Acts should be quoted where possible.

Candidates should indicate which legal jurisdiction they are referring to if that is not England and Wales.

Question 1

City Council employed Ability Builders to construct a surface car park in Littletown. The Contract is based on the NEC4 Engineering and Construction Contract Option B and includes dispute avoidance and resolution Option W2.

When Ability Builders was demolishing the existing building on the Site, it was found that the foundations were deeper than expected. Ability Builders believed the event was a compensation event in accordance with 60.1(12) due to the extra excavation and imported stone to backfill the excavation. Ability Builders duly notified the Project Manager of a compensation event in accordance with Cl 61.3.

The Project Manager instructed Ability Builders to submit a quotation. The Project Manager did not accept the quotation and assessed the compensation event itself. The compensation event was implemented in accordance with Cl 66.1.

Ability Builders did not agree with the Project Managers assessment.

Ability Builders referred the dispute to adjudication for a true value of the compensation event. You were nominated by the ICE DRS to act as the Adjudicator.

All answers should reference the NEC4 ECC, Dispute Resolution Services Contract (DRSC), legal principles and case law.

a)	In the Referral Notice, Ability Builders included the minutes of a Senior Representatives Meeting held 3 weeks before the Notice was served. Is this significant?	**7 marks**
b)	Ability Builders include a document marked "Without Prejudice". City Council claim it cannot be considered. Ability Builders claim that it is not actually a without prejudice document. Discuss the meaning of without prejudice, and how would you deal with this document?	**7 marks**
c)	City Council claim that in accordance with Clause 66.3 of the contract, the compensation event has been implemented by the Project Manager, therefore it cannot be changed. Is this correct?	**7 marks**
d)	You have seen a social media post about the Director of Ability Builders. It states that he has not been paying staff or suppliers, and is currently the subject of an investigation into tax evasion and potential fraud. What do you do, and does this affect your position?	**4 marks**
	Total marks	**25 Marks**

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Question 2

A dispute has been referred to adjudication under the NEC4 Engineering and Construction Contract, which includes option W2.

You are nominated as the adjudicator by the ICE DRS.

Reindeer Contracting (Reindeer) are the Referring Party.

Gnome Ltd (Gnome) are the Responding Party.

You should answer each of the scenarios independently, and not cumulatively.

a) You have received a nomination from ICE DRS to adjudicate on the dispute. The Notice is dated 6 December; see calendar extract below. You receive the Referral from Reindeer on 9 December. It is a relatively simple dispute, which you are confident that you can decide within the standard 28 days. What timetable would set in your Directions? Provide reasons for the dates you have chosen. **3 marks**

December						
M	T	W	T	F	S	S
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

January						
S	M	T	W	T	F	S
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	31					

b) The Referral was served 7 days after the Notice, and you set your timetable, which is as follows: **6 marks**

- Response may be served by Day 7
- Reply may be served by Day 14
- Decision will be issued by Day 28.

Gnome write to you stating that they **will not** be issuing their Response until Day 14.

With reference to the contract and case law, explain how you would deal with this statement.

c) Following service of the Referral and the Response, you conclude that due to the volume of information submitted, you will require more time. You write to the Parties requesting an extension to the timetable as follows: **5 marks**

- Reply may be served by Day 21
- Decision will be issued by Day 42.

Reindeer state that they do not agree to the extension of the timetable, because for business reasons they need a Decision within 28 days.

Explain, with reference to the contract and case law, what you would do?

d) You write to the Parties and state that after considering the Referral, you decide that the timetable is as follows: **7 marks**

- Response may be served by Day 7
- Reply may be served by Day 14
- Decision will be issued by Day 28.

Gnome state that you have not given them adequate time to prepare a Response to the Referral, and so you are in breach of the rules of natural justice, and your Decision will not be enforceable.

Are Gnome correct? Explain how you would respond to this correspondence, with reference to the contract and case law.

e) Following the service of the Reply on Day 14, Gnome request permission to serve a Rejoinder so they can respond to new arguments introduced in the Reply. You have briefly read the Reply and cannot see any new arguments. **4 marks**

Do you allow the Rejoinder? What other instructions might you issue to the Parties, if any?

Total marks 25 Marks

Question 3

Chelsea Contractors have referred a dispute to adjudication. You have been appointed by ICE DRS to act as an Adjudicator in a dispute between Chelsea Contractors (the Contractor) and Everton Ltd (the Client).

Chelsea Contractors is constructing a large apartment block on a city centre site under an NEC4 Engineering and Construction Contract with Main Option C incorporating Resolving and Avoiding Disputes Option W2.

Chelsea Contractors claims £2.1million in respect of 750 compensation events, assessed as follows:

Largest (CE401) - £750,000

Second largest - £300,000

Third largest - £200,000

50 CE's are assessed at around £7500

697 CE's are assessed at less than £1000.

There are also numerous revisions of the programme, and it is not clear on the face of it, which are Accepted Programmes and which are not, in accordance with the Contract.

Your answers should reference the contract, legal principles and case law.

a) Immediately following your nomination, the Parties write to you and state that due to the complex nature of the dispute, they have agreed a timetable of 16 weeks from the date of the Referral to the date of your Decision being issued. **3 marks**

   In the Contract Data of the Dispute Resolvers Service Contract (DRSC), an advanced payment of £10,000 is stated.

   Chelsea Contractors respond saying that you are not entitled to the advanced payment because they have not signed the DRSC. Is this correct?

b) Due to the volume of records, you feel that you need assistance to collate the information. Can you do this? Explain your answer. **3 marks**

c) The Parties have also asked you to propose an expeditious method of assessing the total amount due for the compensation events. **8 marks**

   What proposals could you make, if any? Reference the contract and case law.

d) The information submitted by the Parties contain some complex programmes. Both Parties have employed Experts but neither of the Experts agree on any points, and therefore their reports are not assisting you. What might you do to overcome this issue, and how would you ensure there was no bias or breach of natural justice? **8 marks**

e) One week after the issue of your Decision, the Chelsea Contractors write to you. They explain that they believe that you have made an arithmetical error when calculating the interest due. They ask you to either correct the error or explain why you believe that your calculation is correct. **2 marks**

   What should you do?

f) After issuing your Decision, Everton Ltd claim that they are not happy with the way that you managed the Adjudication, and that you have been biased against them in the manner that you assessed the compensation events. They state that because of this **1 mark**

they will be making a complaint to the Institution of Civil Engineers and will be asking that you are removed from the Register. What do you do?

Total marks 25 marks

Question 4

You are nominated by ICE DRS to act as an adjudicator in the adjudication between Yummy Vegetables Ltd (Referring Party) and Evans Processing Equipment (Responding Party). The contract is NEC4 Engineering and Construction Contract with Option W2.

The project involves the construction of a piled slab, the erection of steelwork, and the installation of equipment for the processing and production of food.

The dispute involves a defect associated with the installation of the holding down bolts for the food processing plant. Yummy Vegetables Ltd claim that the holding down bolts do not meet the specification and so are defective. Due to the defect, it cannot install the food processing equipment. It is claiming delay damages amounting to £50,000.

Your answers should reference the contract, legal principles and case law.

a) Evans Processing Equipment writes to you stating that you do not have jurisdiction because it is not a construction contract in accordance with s105 (2) c, which states that: **5 marks**

"*The following operations are not construction operations within the meaning of this Part ….*

(c) assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is…….

(ii)the production, transmission, processing or bulk storage (other than warehousing) of chemicals, pharmaceuticals, oil, gas, steel or food and drink;"

What do you do next? Is Evans Processing Equipment correct?

b) Assume that you did not resign, and Evans Processing Equipment writes to you again stating that you do not have jurisdiction because there is more than one dispute; the declaration that the bolts are not within specification and the value of the delay damages. Therefore, you should resign. **5 marks**

Is Evans Processing correct?

c) On Day 25, Evans Processing serve an unsolicited Rejoinder, which contains new evidence to support their claim. Your Decision is due to be issued on Day 28. How do you deal with this information? **5 marks**

d) In your Decision, you decide that Evans Processing should pay your fees. The day after receiving your Decision, it argues that your fees should be shared 50/50 in accordance with clause 2.11 of the NEC4 dispute resolvers service contract, which states that " *Unless otherwise agreed, the Parties pay the Dispute Resolver the amount due in equal shares*." **4 marks**

Explain, with reference to the NEC4 Engineering and Construction Contract and the NEC4 Dispute Resolution Service Contract and to the law, how the adjudicator should allocate its fees.

e) Three days after your Decision has been issued, Evans Processing Equipment writes to you to inform you that you have made an error. They claim that in Appendix Y of the Reply is evidence that they have made a part-payment of the delay damages to the Yummy Vegetables Ltd some one month before the adjudication commenced. This is not clearly stated in the submissions. They ask you to re-calculate the sum to be paid. **6 marks**

Should you do this? Explain with reference to the contract, legal principles and case law.

Total marks 25 marks

Points for Answers

Question 1

a)	SRM is a meeting to try to resolve the dispute Reference to the clause W2.1(1) No evidence of the statement of case or discussions to be disclosed in subsequent proceedings. Reference to clause W2.1(4) Affords same legal protection as without prejudice since includes offers to settle	**7 marks**
b)	Define without prejudice i.e containing offer to settle, and why document should not be included. AZ v BY [2023] EWHC 2388 (TCC) sight of without prejudice material Ask Parties permission for a colleague to look at it and see if it is a WP document. 1.Normally a Party writes saying – DON'T LOOK AT DOC… it is WoP!!. Often it is withdrawn. A colleague can look at it and tell me – if not it is withdrawn or disputed that it is WoP. And just because it is labelled WoP does not mean it is and vice-versa. Recently: Mornington 2000 LLP (t/a Sterilab Services) & Anor v SoS for Health and Social Care [2025] EWHC 540. 1. Ellis Building Contractors Ltd v Vincent Goldstein, [2011] EWHC 269 (TCC) Mr Justice Akenhead had to look at whether an adjudicator's decision should be enforced given the disclosure of without prejudice material to the adjudicator during the course of the adjudication which, the employer alleged, gave rise to apparent bias against him. 2. In this case, although it was improper that the without prejudice material had been used in the adjudication, there was no bias as it had not influenced the Adjudicator. The Adjudicator had not mentioned the letter in his decision, despite saying that he had taken account of all submissions made whether or not specifically mentioned in the decision. This suggested it was not part of, and did not influence, his decision. The Adjudicator did not appear to base his decision on the content of, the fact or inferences drawn from what was, or was not, in the without prejudice letter. Further, Goldstein/his solicitors did not object to the use of the letter between the service of the Reply and the issue of the decision. 3. Akenhead J said at [25]: "Whilst if "without prejudice" communications surface in a court, the judge being legally qualified and experienced can usually put it out of his or her mind, it is a more pernicious practice in adjudication because most adjudicators are not legally qualified and there will often be a greater feeling of unease that the "without prejudice" material may have really influenced the adjudicator. This Court can only strongly discourage parties from deploying "without prejudice" communications in adjudication." 4. If I spot it, I flag it to the Parties and ask for the Parties comments. 5. In order to qualify for the without prejudice privilege a number of criteria must be satisfied; namely:-	**7 marks**

	There must be a genuine dispute. Court proceedings need not be started, however it is important that the parties are either considering or may reasonably be considering litigation. There must be a genuine attempt to settle the matter; the rule does not apply if the contents of the letter merely re-iterate the party's position. If the document is challenged, the Court will consider the substance over the form. Correspondingly, whilst a document may be labelled "without prejudice", this may indicate that the intention was to benefit from the privilege. The Court may view on a proper construction of the document that it does not qualify for this rule. Equally, if a document is clearly intended to be for the purpose of negotiation, even without being correctly headed, the document may qualify for the without prejudice rule.	
c)	Cl 66.3 states "except as stated in the contract". Reference to Cl W2.3 (4) Adjudicator can revise or review any action or inaction of the PM. Cl W2.3(7) Adjudicator makes assessment in same way as a compensation event.	**7 marks**
d)	Just because something has been posted in social media, it does not mean that it is true. Write to the Parties to tell them you have seen the post, and that you will not be influenced by it. Discuss bias and whether hearing this may make you biased. Discuss how as an adjudicator do you remain impartial. Porter v Magill [2001] UKHL 67– test for perceived bias - "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.".	**4 marks**

Question 2

a)	W2.2(2) time periods exclude Christmas Day, Good Friday and bank holidays. Banking and Financial Dealings Act 1971 (Schedule 1) – Bank holidays – Monday 27th since Christmas Day is a Saturday. Boxing Day if it is not a Sunday (Act) – which it is, so bank holiday is 28 Dec New Years Day is on a Saturday and it is not excluded, but the bank holiday is the following Monday, which is excluded. <u>Timetable:</u> Referral 9 Dec Response 16 Dec Reply 23 Dec Decision 10 Jan	**3 Marks**
b)	If Response served on Day 14, need time for Reply. CJP Builders v William Verry [2008] EWHC 2025 (TCC), "that each party has a right to be heard and to have its evidence and arguments considered by the tribunal".	**6 Marks**

	Adjudicator can ask for more time to allow for the late Response. But the Referring Party has to agree to the additional time, up to 14 days. If more time is not given then write to the Parties first explaining that you might need to resign if more time is not allowed. This would normally convince the Referring Party to change its mind. A later decision is better than no decision. GPS Marine Contractors Ltd v Ringway Infrastructure Services Ltd [2010] EWHC 283 and Amec Group Ltd v Thames Water Utilities Ltd [2010] EWHC 419 found that Adjudicator was not in breach of natural justice by not considering further submission issued late. Perhaps a meeting with the Parties to try to resolve. Home Group Ltd v MPS Housing Ltd [2023] EWHC 1946 (TCC) – Parties are expected to engage proactively. Ultimately, W2.3 (5) – "if any party does not comply with any instruction within the time stated by the Adjudicator, then the Adjudicator may continue the adjudication and make a decision based upon the information and evidence received."	
c)	W2.3 (8) states 28 days for a Decision. Can be extended by 14 days if Referring Party agrees, or any other period if the Parties both agree. Parties signed the contract, so unless parties agree then timetable remains as 28 days. If you feel that there is inadequate time for you to make a fair and reasoned Decision, then you should write to the Parties explaining that you might need to resign and explain why.	**5 Marks**
d)	Cantillon Ltd v Urvasco Ltd [2008] EWHC 282 (TCC) – test for the rules of natural justice. Detail the rules of natural justice and discuss the high bar set by the courts as follows, no statutory right exists. The HGCRA and Scheme leave procedure to the adjudicators' discretion. • Courts emphasise contextual fairness: • Discain Project Services Ltd v Opecprime Development Ltd [2001] BLR 285 [22]: adjudicators have wide discretion. • Cantillon Ltd v Urvasco Ltd [2008] EWHC 282 (TCC): Akenhead J explained that fairness requires only a reasonable opportunity to respond on material points, not litigation-style exchanges ([27, 29, 70]). • Balfour Beatty Construction Ltd v Lambeth LBC [2002] EWHC 597 (TCC) [29]: procedural fairness is required but adjudication is not bound by court-like rules. W2.3(8) again, parties signed the contract so they knew what would happen in a dispute, so no breach.	**7 Marks**
e)	Ask Responding Party to explain what the new arguments are.	**4 marks**

	If you are satisfied they are new, then you could allow the Rejoinder. Ask the Referring Party to agree to an extension of the timetable. If less than additional 14 days, then only Referring Party needs to agree to the extension. If no new argument, then you can refuse the Rejoinder GPS Marine Contractors vs Ringway Infrastructure Services – Adjudicator can limit rounds of submissions.	

Question 3

a)	W2.2(3) states that the Adjudicator shall be appointed under the DRSC current at the starting date. DRSC 2.9 Advanced payments if included in the Contract data. Explain how advanced payments work – Each time dispute referred, the referring party pays the dispute resolver the amount stated. The advanced payment is repaid to the referring party as stated in the Decision.	**3 marks**
b)	Yes, you can but you need to write to the Parties, explaining very specifically exactly what the assistant would be doing, and ask their permission first. If they do not give permission, you cannot have an assistant. Discuss confidentiality of the Adjudication process.	**3 marks**
c)	W2.1(1) – the Adjudicator decides the dispute referred. W2.3(2) – the Adjudicator may “take the initiative in ascertaining the facts and the law.” This gives the adjudicator inquisitorial powers, but not freedom to invent a new contractual mechanism for valuation. Crucially: • The assessment of compensation events is governed by clause 63, not by adjudicator discretion. • The adjudicator cannot rewrite the contract but may adopt a procedurally efficient way of applying it. Building Design Partnership Ltd v Standard Life Assurance Ltd [2021] EWCA Civ 1793, Cable v Liverpool Victoria Insurance Co Ltd [2020] EWCA Civ 1015, Amey LG v Cumbria County Council [2016] EWHC 2856 (TCC) and Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd [2017] EWHC 1763 (TCC) (If candidate refers to any other cases, check case and if correct award the mark) Adjudicators prioritise efficiency while ensuring fairness, particularly in disputes involving numerous small-value claims. NEC emphasises timely and proportionate assessments of compensation events. Carillion Construction Ltd v Devonport Royal Dockyard Ltd [2005] EWHC 778 (TCC) Cantillon Ltd v Urvasco Ltd [2008] EWHC 282 (TCC) Amey LG Ltd v Cumbria County Council [2016] EWHC 2856 (TCC) HS Works Ltd v Enterprise Managed Services Ltd [2009] EWHC 729 (TCC) Building Design Partnership Ltd v Standard Life Assurance Ltd [2021] EWCA Civ 1793	**8 marks**

	Sampling Approach – representative sub-set Focus on high value CE's Agreement between the parties on some CE's – direct parties to agree on uncontested or minimally contested claims for example, those under say £500. Could decide on common principals which affect a number of CE's	
d)	Request a meeting – explain how you would do that, who would be present. Use your own expert to assist – explain what you would do to do this – write to Parties to get their agreement to the expert, give name of proposed expert, give details of charge-out rate for expert. Critical to share your expert report with the parties to allow them to comment. Balfour Beatty Construction Limited -v- The Mayor & Burgesses of the London Borough of Lambeth [2002] EWHC 597 (TCC) DMC Group Contractors Limited v Guy's and St Thomas' NHS Foundation Trust [2025] (TCC) (unreported)	**8 marks**
e)	No jurisdiction after the Decision has been issued and the 5 day slip rule (W2.3 (11)) has passed. Politely reply stating so, and do not explain or change your Decision.	**2 marks**
f)	Do not engage. Co-operate with the ICE if contacted.	**1 mark**

<u>Question 4</u>

a)	Obtain comments from Evans Processing. Review both Parties comments and before making your non-binding decision on jurisdiction. No, it is not correct. Option W2 provides for Adjudication as a matter of contract. The Scheme does not apply.	**5 marks**
b)	What does the notice ask you to determine? Do you need to answer a number of questions to answer the main question? If so then it is not multiple disputes. Witney Town Council v Beam Construction (Cheltenham) Ltd [2011] EWHC 2332 (TCC) – rule of thumb if claim 1 cannot be decided without decided parts of claim 2, then one dispute. Prater Limited v John Sisk and Son (Holdings) Limited [2021] EWHC 1113 (TCC) – single dispute may contain several distinct issues	**5 marks**
c)	Difficult for adjudicator to refuse to look at evidence. Late submissions create difficulties Ask for more time – perhaps ask the Referring Party if they would like to serve a Surrejoinder, then they are more likely to agree to the extension of time. Only Referring Party needs to agree for up to 42 days (W2.3(8)) If refused, then write to the Parties stating that you will have insufficient time to consider the new evidence in full.	**5 marks**

d)	Costs follow the event. It is stated in W2 .3(8) states that the adjudicator may allocate its fees and expenses.	**4 marks**
e)	Slip rule W2.3(12) allows 5 days to make a change to typo or arithmetical error. This could be considered to be an arithmetical error because you have not made the deduction which was evidenced. Bloor Construction (UK) Limited v Bowmer & Kirkland (London) Limited [2000] EWHC 183 (TCC) However need to be careful when amending an "arithmetical error" becomes changing your Decision, which is not allowed. Decision still enforceable even if it contains mistakes - Bouygues UK Ltd v Dahl-Jenson UK Ltd [2000] EWCA Civ 507	**6 marks**