



EXAMINERS REPORT 2023

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

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

EXAMINERS' REPORT 2023

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Moderator's Report

The Law and Contract Management Committee would like to thank all the examiners and exam centres for their support regarding the 2023 Examination that took place online.

The Module 1 Paper was answered very well this year with over 85% achieving a pass mark. It was very encouraging to see most students having a firm grasp of the basics of the formation of a contract: offer, acceptance, consideration and an intention to create legal intentions, and some of the intricacies involved in this and the nuances of contract formation and remedies.

In terms of exam technique, candidates often lost marks by not addressing the question in a methodical manner. This would include not providing full answers identifying the relevant legal principle, defining the principle, applying it to the facts, and then giving a reasoned conclusion. Candidates often missed one or multiple of these steps. In practice, identifying the correct legal principle but then not applying it accurately to the facts and coming to a reasoned conclusion can be unhelpful in terms of deciding an appropriate course of action.

For the Module 2 Paper, the paper this year had a decline in the pass rate with only 45% of candidates passing the exam. Those candidates looking back at past papers would be well advised to read the questions carefully and reflect on historical suggested answers which give an indication as to what the examiners are looking for. The examiner noted for Module 2 section 1 that this section was completed reasonably well by the candidates with a pass rate of 65%. Where candidates scored less well it would appear that time may have been an issue as some answers were incomplete. There were also several candidates who achieved a low score and their responses suggested that they did not possess a good working knowledge of the NEC4 ECC and seemed unprepared for the examination. There was a general failure to use the correct capitalisation and italics for defined and identified terms but this may have been due to time pressures. The advice to candidates would be to study past examiners report to better understand what is required and to brush up on their knowledge of NEC4 ECC before sitting the exam.

The Module 3 exam achieved a high pass rate with 75% of candidates achieving a pass mark. It is clear that candidates sitting this Paper are those to which the Module 3 Paper is targeted. Module 3 is aimed at those with both knowledge and some hands-on experience of civil engineering contract who may wish to further their knowledge or follow a career path in the direction of more challenging contract management and/or dispute management. It is very much hoped that a number of candidates who sat the Module 1 and/or Module 2 Papers will in time apply to sit the Module 3 Paper.

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

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

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

Pass marks

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

	Module 1		Module 2 NEC		Module 3	
	Nr	%	Nr	%	Nr	%
2023	55	85	79	45	16	75
2022	36	81	40	70	8	88
2021	39	84	48	81	5	100
2019	49	80	74	57	8	100
2018	60	77	74	74	2	100
2017	70	72	79	83	3	66
2016	74	51	91	74	3	33
2015	85	70	105	76	3	33
2014	68	62	72	79	4	0
2013	42	73	51	73	3	0
2012	36	83	42	82	6	33
2011	43	81	41	53	2	50

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

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

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



Module 1

Section 1

General comments

In general, this section was answered well, with the majority (82%) of candidates achieving a pass mark (40%) or above.

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

In terms of exam technique, candidates often lost marks by not addressing the question in a methodical manner. This would include not providing full answers identifying the relevant legal principle, defining the principle, applying it to the facts, and then giving a reasoned conclusion. Candidates often missed one or multiple of these steps. In practice, identifying the correct legal principle but then not applying it accurately to the facts and coming to a reasoned conclusion can be unhelpful in terms of deciding an appropriate course of action.

The majority of candidates were comfortable with explaining the principles of frustration and breach of contract and it was the most commonly attempted question. Many candidates also attempted the question and were reasonably successful in addressing the principles of misrepresentation. Candidates did not often attempt the question relating to breach of contract and when it was attempted, it was often not addressed with reference to *ParkingEye*.

There were mixed results across candidates with those that considered defences to claims as well as remedies as opposed to those who did not provide adequate explanation for various remedies available for findings of fraudulent, negligent, and innocent misrepresentation.



Question 1

This was one of the more popular questions and was answered by 38 of 55 candidates. This question was answered reasonably well with an average score of 14/25 (pass) and only 10 of the 38 candidates (26%) failing to receive the requisite passing percentage.

Q1(a): On this question, there was a wide variety of answers from candidates with some candidates choosing to focus on the terms implied by statute while others considered whether the statements could be considered express terms and whether there was a breach of the same. Where candidates only answered in relation to one or the other, there were limited marks available. Some candidates only considered this question in relation to the Unfair Contract Terms Act and whether the exclusion clause would be considered reasonable.

Q1(b): This question was generally answered well with points available for simply defining misrepresentation and applying the definition to the statements made. Some candidates lost marks by failing to consider the requirement that reliance had to be reasonable and also by failing to reference the Misrepresentation Act 1967.

Q1(c) Candidates generally did well if they recognised the need to discuss the differences between conditions, warranties, and innominate terms. Candidates performed better in relation to the damages available for misrepresentation. However, as there were less marks available for this question, this ought to have been an indicator that more time should have been spent on 1(c). Most candidates accurately identified that the remedies available would depend on the type of misrepresentation and the remedies available for each. However, many candidates lost marks for failing to describe the remedy of rescission despite correctly identifying it as a possible remedy.

Question 2

This was the most popular question with 42 candidates attempting the question. It was also the most well-answered question, with only 4 of the 42 candidates (9%) failing to receive 10 points.

Q2(a) This question was answered well by almost all candidates. Many candidates identified that the contract had likely been frustrated and provided a reasoned explanation as to why they thought this was the case by applying the facts of the question. The majority of candidates also defined frustration correctly and identified the relevant caselaw.

Q2(b) This question was also answered well by almost all candidates. Most candidates accurately applied the calculation as to how much could be recovered by Tom. Where candidates failed to receive points, they did not cite the relevant statute, nor did they explain that the court has discretion to award recoverable sums.

Most candidates were successful in explaining that the effect of frustration is to discharge the parties from future performance and came to a reasoned conclusion given the facts of the question.

Q2(c) Candidates answered this question well and the majority of candidates identified the specific facts of the question that led to Mr. Kraft's statement being a misrepresentation. Where candidates failed to pick up points, it was usually due to candidates not defining misrepresentation. It is important for candidates to answer questions in isolation and re-define misrepresentation if necessary before coming to a reasoned conclusion, as it is usually a simple method to pick up points.

Q2(d) This question was most poorly answered for this factual scenario. Candidates who scored well made sure to identify the three types of misrepresentation and defined each type. Where candidates failed to pick up marks, they either did not define the type of misrepresentation or did not provide or

did not identify all three types. Most candidates accurately identified that Mr. Kraft's statement was likely to be fraudulent misrepresentation.

Many candidates missed out on points when discussing remedies available. Candidates should have identified the number of marks available for the question and identified the remedies available for each type of misrepresentation, notwithstanding the fact that most candidates identified that the misrepresentation was likely fraudulent.

Question 3

This was the least popular of the three questions, with only 29 candidates out of 55 attempting it. Of the 29, 6 candidates (21%) failed to achieve 10 points.

Q3(a) This question was the most poorly answered question in the section. Very few candidates referred to *ParkingEye*, with the majority of candidates making reference to outdated caselaw and not considering whether there were legitimate interests for the liquidated damages. Candidates did, however, come to a reasoned view of whether the liquidated damages were reasonable, picking up some points.

Q3(b) This question was generally answered well, with most candidates identifying that there was a common mistake between the parties and that demonstrated a good understanding of the requirement for consideration in the formation of a contract. Candidates often lost points by failing to list the requirements for rectification and whether they had been satisfied; but where this was done, most candidates recognised that the parole evidence rule did not apply to rectification.

Candidates were also often successful and many candidates succeeded in identifying that performance of an existing duty as generally not sufficient consideration, but it can constitute valid consideration if it confers a practical benefit to the other party and is agreed freely without duress or fraud.

Q3(c) This answer was also generally answered well, with most candidates showing a good understanding of consideration. Most candidates identified that consideration does not have to be financial or even adequate, provided it has some value - and therefore reasonably concluded that free karting would constitute good consideration.



Module 1

Section 2

General comments

In general, the section was answered well, with the majority (approx. 82%) of candidates achieving a pass mark (40%) or above in this section. Most candidates answered questions 5 (negligence of an independent contractor, employer's vicarious liability) and 6 (negligence, private nuisance). Three candidates scored marks of 40/50 (80%) or higher overall, all of which completed question 5, and two of those three opted to do question 6. These candidates demonstrated a very good knowledge of tort law principles and their application.

The highest mark for question 4 (professional negligence, negligent misstatement) was 20/25 (80%), and only one candidate achieved this mark (and is one of the three top scoring candidates noted above).

Most candidates had a good grasp of the key elements of tortious claims, especially in negligence. Most were able to establish a duty of care was owed under the *Donoghue/Caparo Industries* line of authorities, apply the reasonable professional test in *Bolam* and apply the "but for" test in *Barnett*. Generally, candidates lost marks because: (i) they failed to recognise what the question was asking them to consider and discussed marks that carried no marks; and/or (ii) they lost some "easy" marks by failing to fully reference case names and the related legal test/principle applicable before reviewing the facts, or alternatively, only mentioning the case and legal test/principle but then not following through and applying to the facts. In addition, some candidates appear to have unfortunately not attempted questions at all, or only provided very brief bullet point answers worth very low marks. It is suspected that this is due to such candidates not managing their exam time correctly.

Question 4

This was the least popular question and answered by 23 of the 55 candidates. For those that did attempt the question, the results were quite varied. As noted above, the highest achieved mark for this was 20/25, and only one candidate achieved this. There was a wide spread of remaining results from 2/25 to 19/25.

Q4 (a): A common mistake shared by the candidates that scored lower on this question was they either answered this as a tort of negligence or negligent misstatement rather than a claim in professional negligence. They would then spend a significant amount of time going through the authorities and tests for these torts which yielded very little if any marks. However, most were able to gain some marks back by correctly stating a duty of care was owed under the *Donoghue/Caparo Industries* line of authorities and/or in applying the reasonable professional test in *Bolam* and the "but for" test in *Barnett*. As noted above, marks were lost in these areas by failing to properly reference the cases and explain the tests before considering the facts, or vice versa. Many candidates failed to fully consider the scope of what may be recoverable, e.g. but for the professional negligence, would Fields & Partners have accepted the full purchase price? Would the millions in repairs and planning appeal costs, plus the costs of

having to extend the previous leases and legal costs all be recoverable? These questions were not explored in detail by most candidates.

Q4(b): In line with the above, several candidates lost a substantial number of marks by not correctly identifying this as a negligent misstatement question and stating either a tort of negligence or professional negligence. Candidates would then explore the line of authorities for this which clearly incurred time but yielded very little marks. Again, candidates were able to gain some marks back by correctly stating a duty of care was owed under the *Donoghue/Caparo Industries* line of authorities and/or in applying the reasonable professional test in *Bolam* and the “but for” test in *Barnett*. Continuing the trend, marks were lost in these areas by failing to properly reference the cases and explaining the tests before considering the facts, or vice versa. Given the number of marks attributed to working through the tort of negligent misstatement, failing to properly identify this, unfortunately, meant the relevant candidate would not likely pass this question. Many candidates correctly identified the issue of Susan’s employer being potentially being liable via vicarious liability. However, there was a wide mix of responses, with some only mentioning this in passing (which would only be worth 1 mark) and others fully exploring the authorities and testing the scenario (a full 4 marks).

Question 5

This was the most popular question and was answered by 45 of the 55 candidates. This question was generally answered well, with 41 candidates who answered this question achieving 12 marks or higher.

Q5 (a): This question was worth the majority of the marks, and whilst there were a wide range of mistakes and/or answers failing to correctly identify all issues, the majority of candidates received a passing mark for question 5(a). Candidates were required to identify that Sebastian may have been negligent (and apply the facts) and that Chiltern Logistics could be liable for not properly supervising Sebastian as an independent contractor. Common mistakes included candidates thinking Sebastian was professionally negligent and spent time running through the authorities for establishing duty and breach for this tort, which did not yield marks. As an employer, Chiltern Logistics owes David (an employee) a common law duty to take reasonable care for his safety at work. Most candidates correctly identified that this involves providing (a) competent staff; (b) adequate plant and equipment; and (c) safe system of working. Most candidates were able to identify the potential defences of contributory negligence and *novus actus interveniens*, although in some cases marks were missed due to not fully applying the facts, or failing to state that contributory negligence would only reduce liability and not extinguish it.

Q5 (b): Most candidates answered this question well by correctly identifying that this is another potential vicarious liability question. Most answers took the time to fully apply the facts of the scenario alongside the requirements for establishing vicarious liability. Common areas for marks being lost was not fully exploring whether the tort occurred during the course of Austin’s employment, and therefore did not give a reasoned assessment.

Question 6

This was the second most popular question, with 37 of 55 candidates answering. Overall, it was answered reasonably well, with 26 candidates achieving 12 marks or higher.

Q6 (a): Most candidates correctly identified that this was a negligence question. Some candidates also assessed this as a *Rylands v Fletcher* strict liability issue. Those who did this ran through the authorities at length and applied the facts, but this was unfortunately not the correct issue this question required candidates to explore and as a result these candidates missed out on marks as they focussed on the wrong issue. On the issue of causation and loss, many candidates lost a point by failing to state whether or not the losses were foreseeable and not too remote. Some candidates raised the issue of personal injury liability, which was outside of the scope of this question.

Q6 (b): Most candidates identified that Emily could have a claim in negligence, and that this was an “eggshell skull rule” (*Smith v Leech Brain* (1962)) question. Most candidates failed to highlight that Emily’s injury was a psychiatric injury and not a physical one, and therefore missed out on the point for this. Most candidates did a reasonably good job of applying the facts to come to a reasoned conclusion. However, several candidates answered this question very abruptly, stating Emily was too far away and therefore too remote, without exploring the rest of the issues. In this instance they would only receive a point or two for this whole question.

Q6 (c): This was unfortunately another question where several candidates explore the issue of *Rylands v Fletcher* strict liability, which was not the correct issue to explore and therefore a lot of time was spent on this issue with no marks. The candidates that did correctly identify this as a private nuisance issue answered this question reasonably well. However, all candidates failed to consider if the owner had developed a right to commit a private nuisance by prescription as an easement (*Fay v Prentice* (1845) 1 CB 828). One candidate briefly referred to the owner potentially “having a right” to use the spot for the heap in passing, but they did not explore this fully and therefore did not acquire full marks. Most candidates were able to properly identify the potential remedies of damages and an injunction being available to Mrs Willis, but some candidates lost a point for not fully exploring what the injunctions would seek to do i.e. stopping the nuisance and moving the heap to another location.

Module 2

Section 1

Overall this section was completed reasonably well by the candidates with a pass rate of 65%. Where candidates scored less well it would appear that time may have been an issue as some answers were incomplete. There were also several candidates who achieved a low score and their responses suggested that they did not possess a good working knowledge of the NEC4 ECC and seemed unprepared for the examination.

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

Question 1

This proved to be the least popular question and one for which the marks were generally low with an average of 13 marks out of 25 being achieved. However, out of the 20 candidates that answered the question 55% managed to get 50% or more of the marks available.

Most candidates achieved 2 out of the 3 marks available for part A of the question correctly identifying that the responsibility for design allocation was dealt with in the Scope, though very few correctly stated that the default allocation of design resided with the *Client*.

Part B was generally well responded to with candidates correctly identifying that clause 21.2 could be used in conjunction with entries in the Scope to require design to be submitted by the *Contractor* for acceptance by the *Project Manager* before work could be commenced. However, not every candidate correctly referenced clause 14.1 as providing protection to the *Project Manager* in respect of any design acceptance.

The response to part C was mixed with a number of secondary Options being proposed but few delegates correctly identifying secondary Options X15 and X18 and stating the reasons for their selection.

Part D was generally answered well with most candidates correctly identifying that the *Contractor* owned the rights to their design in accordance with clause 22.1. However, a more limited number correctly identified that this could be changed by the selection of secondary Option X9.

Responses to parts E & F were mixed with a number of candidates failing to recognise how the insurable liability for design was allocated between the Parties and how this would not be affected by the design being undertaken by a Subcontractor. Very few candidates identified the ability to select secondary Option X8 to create a contractual link between the *Client* and a Subcontractor.

Question 2

This proved to be the second least popular question and one that was generally answered badly with an average of 8 marks out of 25 being achieved by the candidates. Only 2 candidates out of the 27 who answered the question achieved a passing mark.

The responses to part A were mixed with a number of candidates suggesting that the nomination or naming of Subcontractors or suppliers was possible. Very few candidates identified that requirements for Subcontractors or suppliers could be stated in the Scope. Most candidates correctly identified the process under clause 26.2 and 26.3 for appointing Subcontractors. Few candidates identified that appointing a Subcontractor for substantial work before the *Project Manager* has accepted them is grounds for termination under clause 91.2.

The responses to Part B were generally OK but candidates commonly failed to identify the protection afforded to the *Project Manager* under clause 14.1.

Part C was generally responded to well with most candidates identifying the need to notify an early warning and correctly describing the process to follow under clause 15.

The responses to Part D were generally poor with most candidates providing short and incomplete answers. A number of candidates believed that the *Project Manager* could instruct the removal of a Subcontractor and that this would result in a compensation event. A number of candidates incorrectly referred to clause 24.2 as a way of removing a Subcontractor. Most candidates did identify that the *Contractor* would carry the financial risk of engaging a replacement Subcontractor, however few then addressed that this would still form part of Defined Cost under main Option C.

Question 3

This was by far the most popular question with 72 of the 79 candidates answering the question. Candidates also generally scored well on the question with an average mark of 16 out of 25 and a pass rate of 81%.

The response to parts A & B were generally good with most candidates correctly identifying the requirement for communications to comply with clause 13.1 and that the *Supervisor* as opposed to the *Project Manager* should notify a Defect under clause 43.2. In response to part B most candidates correctly identified that the *Contractor* has an obligation to correct a Defect even if not notified of it under clause 44.1.

Part C was also well answered by most candidates who identified that the *Supervisor* could issue an instruction to search for a Defect under clause 43.1 and that this would lead to a compensation event under clause 60.1(10) if no Defect was found.

Part D was generally well answered with most candidates correctly identifying that the issue would result in an ambiguity of inconsistency which the *Project Manager* would be required to resolve under clause 17.1 and 14.3 leading to a change in Scope and a compensation event under clause 60.1(1).

Part E appeared to confuse some candidates who failed to recognise that Scope provided by the *Contractor* for its design would have been included in the contract at the Contract Date. Many candidates incorrectly referred to design submission by the *Contractor* under clause 21.2. Most candidates did however conclude that the *Contractor* would be liable for errors in their own design.

Part F was commonly answered correctly by reference to clause 63.0

Question 4

These was the second most commonly answered question with 40 of the candidates answering the question. Candidates also generally scored well on the question with an average mark of 14 out of 25 and a pass rate of 58%.

Part A was answered well by the majority of delegates who correctly identified that a Defect can only be accepted by mutual agreement in accordance with clause 45. However, only a few delegates identified that the reference to clause 10.2 by the *Contractor* was irrelevant and secondary to clause 10.1.

The responses to part B were mixed and whilst most candidates correctly identified that under main Option A the Price for Work Done to Date includes only completed activities, there was some confusion over how materials on Site were to be dealt with. Some answers were also incomplete and did not explain clearly why some items in the application were not due for payment.

The responses to part C were generally good, however some candidates repeated part of the response to part B and did not distinguish between the Price for Work Done to Date and the amount due assessed under clause 50.3.

The responses to part D were generally good with most candidates recognising that the Price for Work Done to Date under main Option C would be based on Defined Cost. Most candidates also identified the requirement to consider Disallowed Cost, however few identified that payment for the defective piles would not be considered a Disallowed Cost.

Module 2

Section 2

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

Q7 was the most popular with 70 candidates attempted this and the average mark was 11 out of 25. For Q5, 19 candidates attempted this and the average mark was 9. Q6 had 48 candidates attempting this, returning an average mark of 9. Finally, 18 candidates attempted Q8, also returning an average mark of 9. These were overall quite disappointing marks.

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

- Please state clause numbers in with your answers, but there is no need to re-cite clauses. We know what they say and we want to know what part of the clause is relevant to the scenario you are answering, and why.
- If you do not answer a part or all of a question, which some candidates did, you will not score any marks.
- Surely candidates can identify that the issue is perhaps about an ‘inconsistency’ then use the index to point to the relevant parts of the contract? A quick read over the clause(s), even when time is against you, might help shape some sort of answer, at worst worth a few marks.
- This statement is made every year but please carefully read and re-read the question. Do not rush this. Where it says “What should the *Contractor* do next?”, then answering this from the perspective of the *Project Manager* is not going to get you any marks.
- Do an essay plan, reflect on the question, look in the contents and the index, make sure you have considered the broad range of matters that may be affected.

A few particular points on these questions:

- For Q5a, 12 marks were available and just think logically about improving cash flow opportunities like shorting payment periods, using a project bank account, not having retention, using secondary Option X14 and so on.
- For Q6, this required a good knowledge of take over and Completion. They are quite different things and the resulting impact on liabilities and reducing delay damages were relevant.
- For Q7b, a proposed instruction needed to be discussed here to meet the Client’s requirements of knowledge of time/cost implications in advance of requiring the additional work.
- In Q8d, describe when Defects need to be corrected by, discuss accepting Defects and uncorrected Defects.
- For Q7a, go through what should have happened (61.1/61.2) and what now should happen under 61.3 mentioning why this will not be time barred.
- In Q8b, describe the process for obtaining alternative quotations and also for using Project Manager assumptions.

Module 3

Section 1

16 people sat paper 3 this year, a good number based on recent years and contributing to an encouraging long-term trend.

The marks for the papers submitted varied considerably, which is expected from past experience.

This paper represents a significant commitment from the candidates, spending 4 hours responding to challenging questions. It is therefore disappointing to see that some candidates sat the examination with little knowledge of the syllabus. Whilst some candidates failed by a respectable margin, suggesting they should try again next year, some of those answering the paper demonstrated almost no knowledge of the syllabus. We reiterate our advice that those sitting this paper, unless legally qualified, need to undertake training and preparation. All candidates, regardless of professional background should test themselves against the past papers freely available on the ICE website.

That said, we recognise the work put in by all candidates and congratulate them for their efforts.

Question 1

This being the compulsory question, all 16 candidates answered it with scores ranging from 7 to 21 out of 25 with over half scoring at the pass mark level.

The contract in question contained potentially conflicting provisions which called for an analysis of *contra proferentem* and whether the main contractor was liable based on using its own standard form. Several candidates also scored marks for mentioning *Eon v MT Hojgaard*.

The subject of without prejudice correspondence is a regular feature of this examination and most scored well on this part. It is important to mention that the use of the WP label in isolation has no effect when the words in the document do not clearly indicate an offer to settle.

Set-off is a regular feature of contracts in construction and we were looking for knowledge of where it is applicable particularly here where cross-contract set-off was being proposed.

The error in the settlement agreement was a conflict between words and numbers. It is established law that the words prevail in this situation.

Question 2

Only 2 answered this question with marks of 8 and 12, each below the pass mark.

The contract in this question is typical of many encountered from purchasing departments responsible for a wide range of categories. Possibly not written for the application in this question, the parties had to use it. There are no goods being supplied here so only the mention of services is relevant with the consequent obligations.

The issue of interim payments could be address using the *Balfour Beatty v Grove* case. No further payment is due until completion.

We often remind candidates in these reports that they need to ensure they answer the question. Where the question asks about establishing liability (as 2(c) did), you must address the question of liability. Neither candidate did this.

Question (c) could be addressed by the case of *Ampleforth v Turner & Townsend*. Here, unlike *Ampleforth*, there was an experienced procurer of construction type activities so on balance the limit of liability would be assessed at £50k. Reference to UCTA also helpful for additional marks.

There was a contract in place between the Parties, despite Cooper’s claim to the contrary. The Parties’ conduct had demonstrated that.

Question 3

8 candidates answered this question with marks varying from 16 to 24. So the responses were at or close to the pass mark and therefore of a good standard.

The first part of this question was answered well with reference to LADs case law; *Parking Eye, Makdessi* and *Dunlop*. Most candidates concluded that the rate was not within the range of being unenforceable having been agreed in contract by parties of equal bargaining power. Marks were available for explaining the conclusions of the Supreme Court in *Parking Eye* and *Makdessi*.

Most candidates understood that in the event the LADs clause was shown to be unenforceable, there would still be a liability for breach.

Despite the cyber-attack, a regular feature of adjudications, a party still has an obligation to prove its case to the normal standards. Most candidates mentioned the ability of the adjudicator to direct the production of documents from the other party and an ability to draw an inference if they are not produced.

Question (d) could be answered by reference to *Trant v Mott MacDonald*. Again, the adjudicator has the authority to direct production of documents.

Question 4

6 candidates sat this question with marks ranging from 5 to 25.

Ejusdem generis is a principle on the syllabus that must be understood as clauses of this nature are common in engineering contracts. Many didn’t know this, it is stated in the syllabus.

Most candidates were aware of the requirements of the two Occupiers Liability Acts (1957 and 1984) and how these applied to trespassers and legitimate visitors.

The contractor was not able to evade liability for defective culverts, the Limitation Act 1980 is relevant to this question which most candidates knew.

The chemical discharge would almost certainly be a criminal offence for which Tyler and his employer would be liable so should not be done. The contractor would have vicarious liability for Tyler's acts. As a professionally qualified (and regulated) person Tyler would probably be breaching his rules of professional conduct.

Module 3

Section 2

A total of 16 candidates took the paper. The overall standard was good. Total marks for both questions ranged from 27 to 45. With the exception of two candidates, the remaining candidates' marks were in the range 35 to 45, thus a high standard was achieved.

Question 5

This question was compulsory, all 16 candidates provided an answer. Marks awarded ranged from 9 to 25. The question was broken down into three parts and was about the impact of events on the Contractor's accepted programme and particularly any changes to planned Completion or the Completion Date.

Part (a) required the candidates to consider the impact of a compensation event of three weeks duration on the follow on activities. Six candidates obtained full marks by answering correctly, however a surprising number of candidates identified that the compensation event moved planned Completion by a week but failed to state that this meant that the Completion Date moved by one week as well.

Part (b) required the candidates to consider the impact of two events on the Accepted Programme, one a compensation event and the other a delay due to a Defect. Eight candidates received full marks.

Part (c) required the candidates to consider the impact of a compensation event which was not on the critical path. 13 candidates obtained full marks by recognising there was no impact on planned Completion.

Part (d) required the candidates to consider the impact of three consecutive events on the Accepted Programme. Only one candidate obtained full marks.

Question 6

Four candidates attempted this question, which related to the operation of a project bank account pursuant to Option Y(UK)1. Marks ranged between 20 and 25, with only one candidate obtaining full marks by providing a detailed analysis of the option.

Question 7

Three candidates attempted this question, which was the preparation of a compensation event quotation for a Main Option A contract. Marks ranged between 22 and 20. There were some school boy errors in the calculations but overall the submissions were of a high standard.

Question 8

Nine candidates attempted this question, which was related to revisions to the Activity Schedule and the Project Manager's determination of the final amount due pursuant to clause 53. Marks ranged from 16 to 24, with six candidates obtaining 20 or more marks.

Institution of Civil Engineers

Examination for the ICE Certificate in Law and Contract Management (CLCM) 2023

Module 1: Law (English and Scots Law)

ICE Certificate in Law

Tuesday 13th June 2023

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

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

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

Please answer Section 1 and Section 2 Word (unless agreed otherwise) using separate headings for each section.

All questions carry equal marks.

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

References to cases and legislation should be quoted where possible.

Reference to documents during the examinations

Copies of Statutes and Statutory Instruments may be taken into the Examination.

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

Module 1

Question 1

Von owns a farm that has multiple chicken coops and has decided to sell one of his favourite chickens named "Mrs. Lombardi". Von enters into negotiations with Myles who is an avid farmer but has never raised chickens before. When Myles visits Von to view the chickens, Von tells Myles that there is no need for Myles to worry about any of the chickens and that all of his chickens are in great health and produce great eggs. Von tells Myles that he has been raising chickens for almost two decades and that he would never sell any chickens that are not healthy. Von tells Myles he has nothing to worry about and any vet would say the same. Von even confirms with Myles that Mrs. Lombardi in particular has won multiple local egg competitions. On hearing this, Myles agrees to buy the entire coop, including Mrs. Lombardi, for £5,000. Von hands Myles the terms and conditions which state:

"The seller does not accept any responsibility for any misdescription or inaccurate statement made in respect of the chickens or any coop sold".

In her first year under Myles' ownership, Mrs Lombardi doesn't lay any eggs. Neither do any of the other chickens in the coop. Myles calls a vet to look at the chickens and the vet confirms that all of the chickens have a hereditary disease prevent them from laying eggs. Myles subsequently makes enquiries as to the chickens' backgrounds and discovers that Von has never won any local chicken or egg competitions and that Von is renowned in the area as a failed chicken farmer. Myles visits Von at the chicken farm and demands a full refund of his £5,000. Von refuses on the basis of the terms and conditions.

- (a) Does Myles have a claim for breach of contract against Von? (12 marks)
- (b) Does Myles have a claim for misrepresentation against Von? (6 marks)
- (c) Briefly discuss what remedies would be available to Myles for
- 1) Breach of contract (4 marks)
 - 2) Misrepresentation (3 marks)

Total (25 marks)

Module 2

Question 2

Tom has recently announced his retirement at the end of January 2023. He plans to throw a party with his friends and colleagues on 31 March 2023.

On 1 February 2023, he agreed with a local cruise company (“Tampa Co”) to hire a cruise ship and throw a pirate-themed party. The contract required an initial payment of £50,000, which Tom paid in cash, and a further payment of £100,000 by 1 March 2023. On 21 February 2023, Tampa Co spent £10,000 on costumes for employees in preparation for the event.

On 15 March 2023, the cruise ship that was due to be hired was damaged and partially sunk. Tampa Co contacted their insurance company and made arrangements for the ship to be fixed. Unfortunately, the ship would not be ready for its next cruise until 1 May 2023. Tampa Co would not have any ships to rent in the interim. Tom was immediately notified of the incident but, despite his anger and complaints, was told that no refunds could be made as the contract made no provision for partial damage.

In order to plan another party, Tom looked to hire an old friend’s company (New England Ltd), which specialises in various celebrations. Mr. Kraft, Tom’s friend, told him that New England Ltd would be able to rent him a new location for his party for a fee of £20,000. It was available on 31 March 2023, however there was a new customer who was looking at renting the location on the same day. Mr. Kraft told Tom that he would like to rent the location to him, but he would have to be quick to beat out the new customer. Tom, realising that he had no other options, immediately agreed to hire the location.

The retirement party goes ahead and is a success, however Tom hears from one of Mr. Kraft’s colleagues that nobody else was interested in hiring the location and Mr. Kraft was only interested in Tom’s offer.

- | | | |
|----|--|-------------------|
| a) | Explain whether the contract between Tom and Tampa Co has been frustrated? | (5 marks) |
| b) | Explain whether: | |
| | (i) Tom can recover any or all of the £50,000 paid to Tampa Co; | (5 marks) |
| | (ii) Tom is liable to pay the further payment of £100,000. | (3 marks) |
| c) | Explain whether Mr. Kraft’s statement that a new customer wanted to rent the location on the same date was a misrepresentation? | (4 marks) |
| d) | Assuming Mr. Kraft’s statement is a misrepresentation, explain: | (4 marks) |
| | (i) What type of misrepresentation it is and why? | (4 marks) |
| | (ii) What remedies are available to Tom? | |
| | Total | (25 marks) |

Module 1

Question 3

Formula OnePointFive Limited (“**FOPF**”) operates youth go-karting training sessions in Woking. They plan to open a new training track in Milton Keynes and renovate the existing track in Woking. FOPF wants the track to be built and both tracks open by the start of the racing season in March, as this is the busiest time of year for go-karting tracks.

For the construction of the new Milton Keynes track, they contract with Charles & Carlos Construction Ltd (“**C&C**”) under a Design & Build contract to design and construct the go-kart track for a total of £5,000,000. The contract provides that the works are to be completed by 15 February and, should they not, then C&C is liable to pay FOPF liquidated damages of £250,000 per week.

As part of the renovation of the Woking track, the director of the Woking circuit, a director of FOPF, approaches Flavio, an eccentric track painter. Through a series of emails, they negotiate and agree the price for Flavio’s services for £5,000 to complete the re-painting of the track under the condition that the painting is completed by 15 February. A contract is typed up and signed by both Flavio and the director of the circuit, and neither of them notice an error in the terms which states that the fee will be £15,000. Both Flavio and the director sign the contract.

As 15 February approaches, it is clear that both of the tracks are behind schedule. The construction of the Milton Keynes track finished 8 weeks late due to delays by C&C and their subcontractors. FOPF bring a claim for breach of contract against C&C for £2,000,000 in liquidated damages. C&C claims that this is excessive and disproportionate.

As for the Woking renovation, FOPF offered Flavio an extra £1,000 if he could complete the track painting by 15 February, given that they had a Grand Prix scheduled, which they do not want to have to cancel as it will bring in an extra £50,000 on top of their usual profits. Flavio agrees to this extra payment and completes the works on time.

When preparing his invoice for the painting, Flavio spots that the contract he signed with FOPF wrongly refers to £15,000 instead of the £5,000 agreed in their emails. He therefore sends an invoice of £15,000 to FOPF, relying on the signed contract and saying that FOPF cannot rely on the pre-contractual emails. FOPF state that they only had to pay £5,000, pointing to the pre-contractual emails referring to the £5,000. The director of the Woking track has also refused to pay Flavio the extra £1,000 for completing the works in time.

a) In regard to the Milton Keynes track, advise FOPF whether C&C is liable to pay liquidated damages of £2,000,000 as a result of their breach of contract for late performance. (5 marks)

b) In regard to the Woking track, advise FOPF whether they are likely to be liable to pay Flavio: (7 marks)

i) £5,000 or £15,000 pursuant to the signed contract; and

- ii) The extra £1,000 agreed for finishing the repainting on time (7 marks)
- c) Would FOPF still have an enforceable contract with Flavio if, instead of agreeing to pay the monetary sums referred to in exchange for Flavio's works, they agree with him to provide free, unlimited access to the go-kart track for himself and his friends for the next 2 years? (6 marks)
- Total (25 marks)

Module 1

Question 4

Fields & Partners, a large architectural firm, rents several offices in the greater Leeds area. The partners have decided to bring all of the firm's leases to an end and instead buy a single premises in a more central area of Leeds.

The partners have identified a potential premises. It is an old warehouse on a large lot converted into multiple floors of modern and flexible working spaces and it has some parking circling the building. Given the increase in hybrid/hot-desking working practices, the partners know that they will not need the entire premises. They have discussed sub-letting any excess space to commercial tenants for additional rental income. This will require money being spent on increasing parking and adding a separate entrance to whatever property they purchase. These talks have only been private internal discussions within the partnership, and at present, there are no planned tenants nor any marketing plan in place to secure tenants.

The premises are on the market for £15 million and the sales brochure mentions that it has planning for extension works, including to the parking areas and for additional entrances. The partners employ Cameron, a solicitor, to act on their behalf in relation to the sale. Cameron prepares his report on the title which provides limited details of the property searches and enquiries that have been carried out. Cameron mentions that he is not concerned as he has advised on a number of other properties being sold by the same developer and does not expect any issues. On that basis, Fields & Partners make a full price offer and complete the sale.

When they begin fitting out the office, it becomes apparent that there are a number of contamination issues, including outstanding warning notices from the local council, and refused planning permissions to increase the parking lot or add a separate entrance for a sub-tenant. Fields & Partners incur £3 million in costs for the repair and clean-up work, as well as for the appeals necessary to get the planning permissions. Further, as a result of the works, they are unable to move into the office as planned and have to extend each of their previous leases for a further 6 months. This costs the company a further £500,000 plus legal fees.

Susan, one of the architects at Fields & Partners, attends a business lunch hosted by the Royal Institute of British Architects. She sits at a table with Carrie, a former friend from university who happens to be the guest of another event attendee. During the lunch, Carrie tells Susan about works she is planning to undertake on her new country home. She wants to create a terraced landscaping design but the house sits slightly elevated from a stream running through the property and she doesn't think a terraced garden leading down to the stream is a good, or safe, idea. Carrie has some photos of the site and sketch drawings of the potential garden on her phone that she shows to Susan. Susan states that in her opinion, as an architect who has worked on many gardens, a terraced approach to the garden would work. She also says that the designs look perfect and exactly what she would have designed. Carrie comments on how reassured she is by Susan's comments, to which Susan responds "well you are in a room full of architects! We need to look out for each other!"

The following day, Carrie, still feeling reassured by her chat with Susan, instructs her builders to landscape the property with the terraced effect. Based on Susan's comments, Carrie tells the contractor the original landscaping designs will work. It transpires that a lot of soil and aggregate near the foundations of the house need to be removed in order to create the start to the terraced

effect. Further, as the underlying soils and aggregate are perpetually damp from the nearby stream, removing the additional soil makes the ground around the house foundations unstable, and the house begins to shift. Cracks start to appear in the foundations and wall, and eventually a wall starts to collapse. The damage suffered to the house is approximately £250,000.

- | | | |
|-----------|---|-------------------|
| a) | Advise on Cameron’s liability to Fields & Partners. | (7 marks) |
| b) | Advise Fields & Partners on whether they could be liable to Carrie for her losses. | (18 marks) |
| | Total | (25 marks) |

Module 1

Question 5

Sebastian is an independent contractor. He is currently engaged by a consumer goods logistics company, Chiltern Logistics, to help update their warehouse facilities. Sebastian has been tasked with changing the floor plan in the main warehouse to allow for new storage racks to accommodate more product.

Austin, the warehouse manager, has been supervising Sebastian’s work. This is standard practice where people are new on site. Despite knowing that Sebastian can be a bit lazy in cleaning up, Austin has generally been happy with most of his work and so he has not been watching him for the past few days. Sebastian spends the day re-arranging the warehouse to test some new racks, but is in a rush to leave at the end of the day as he has a dinner planned with his friends. Despite being told not to do so on several occasions by Austin, Sebastian clocks off early and leaves all of the moving crates littered across the loading bays, office space and the breakroom. Sebastian forgets to put up any signs or notices saying that he’s been working in the warehouse and to warn people about the moving crates.

David, another employee, comes to the warehouse loading dock the next morning. He is looking down at his phone so does not see all the moving crates spread out across the floor. He is also not wearing the right PPE work boots for the warehouse floor. He trips over one of the moving crates and lands badly on his right foot. He thinks it is probably broken so decides to make his way to hospital. Just outside the hospital, David walks past a group of children playing football. One of the children kicks the ball and it rolls towards David. Not thinking, as he is concentrating on texting his boss, he kicks the football out of the way using his right foot. He shouts out in pain and a number of staff come running – he is put into a wheelchair and taken to see the doctor. The doctor confirms that his foot is broken. Due to the nature of his job, David has to take 2 month’s unpaid leave from work while his foot heals.

The next day, nearly everyone at Chiltern Logistics is at a colleague’s birthday party BBQ in a nearby leisure park. Austin is in the parking lot and as soon as he sees Sebastian walk up, he starts yelling at Sebastian for not cleaning up the other day and that now he has an employee off injured. Sebastian laughs it off and says “it’s not my fault the idiot wasn’t watching where he was going. Serves him right!”. Austin picks up a pair of tongs from the BBQ and throws them at Sebastian. Sebastian ducks just in time and the tongs sails over his head and hits a HGV driver who had just parked his lorry nearby and was climbing out, breaking his nose and chipping a tooth.

- a) **Advise David what he will be required to establish in any claim for his loss of earnings, and any defences he may face. (20 marks)**
- b) **Advise Chiltern Logistics on whether they are able liable to the HGV driver for his injuries. (5 marks)**

Total (25 marks)

Module 1

Question 6

Stony Park Stables has fallen into a state of disrepair recently due to poor weather and absences among the staff. The fence around one of the fields, which adjoins a busy main road, was damaged in a storm over a month ago. Many visitors to the stables and passers-by have noticed the broken fence and commented how dangerous this is given its proximity to the road. The complaints have become so numerous, that even the British Horse Society (of which the stables are a long standing member) becomes aware of the situation and writes to the stable owners, stating that the repairs should be carried out to protect the horses and the public. The stable owner has ignored all warnings and says he'll get to it eventually but "the animals are so stupid, they won't even know its broken".

One day, one of the horses escapes from the field through the broken fence and gets out onto the road. Audrey who is driving along the busy main road swerves to avoid the horse. The road is not very wide, and as a result she has no choice but to drive into a brick wall. Audrey suffers a broken leg and is taken to the hospital. Audrey's work requires her to be standing all day and she is therefore unable to work for a period of 8 weeks.

Emily, a neighbour up the road from Stony Park Stables, but a reasonable distance away, sees the accident occur whilst standing on her driveway. Emily becomes fearful that Audrey's car might not be stopped by the brick wall and could continue travelling in her direction and hit her. Emily starts having a panic attack and runs back in her house screaming. It turns out that Emily has an underlying personality disorder, and she develops a strong phobia of going out into the roads for fear of getting into an accident. As a result of this new condition, she misses multiple days of work, and ultimately loses her job.

Mrs Willis is the owner of the property next door to Stony Park Stables and lives there full time. She has been running yoga classes from her garden, which adjoins one of the stables' fields, for many years. Recently, the stable owner has decided to create a manure heap in one of Stony Park Stables' many fields and chooses the field that ends against the fence that adjoins Mrs Willis' garden. The manure heap is built up along the fence to put it as far away as possible from the owner's stable offices. Mrs Willis has had a number of complaints from her students about the foul smell and has noticed a steep decline in the number of attendees to her classes. This is causing her a great deal of stress and money worries given that the yoga is her only source of income since she retired and her husband died a few years ago. She has asked the stable owner to move the manure heap to one of the other fields (Stony Park Stables has more than 20 fields to choose from) but he just laughs and says she is "acting like a crazy old woman". There is a severe rainfall overnight which causes manure to leak into Mrs Willis' garden. As a result, she has to cancel all of her classes for the next few weeks.

- a) **Advise Audrey on whether she has a claim in tort against Stony Park Stables.** (6 marks)
- b) **Advise Stony Park Stables if they have any liability for Emily's losses.** (7 marks)

- c) **Advise Mrs Willis whether she has any claim against Stony park Stables and if she succeeds in establishing liability against Stony Park Stables, what potential remedies may be available to her.** (12 marks)

Total (25 marks)

Law & Contracts Examination Module 1 Points for Answer

Question 1

(a) Does Myles have a claim for breach of contract against Von? [12 marks]	
To have a claim for breach of contract, a term of the contract must have been breached. Such terms may be either express or implied.	1 mark
Express terms can be written or oral. In this case, there seems to be a mixture between oral (i.e. Von's reassurances about the chickens' health) and written (i.e. Von's terms and conditions).	2 marks
When deciding whether an oral statement may constitute a term, the court usually considers the degree of importance attached to the term by the innocent party. If it is clear that the innocent party would not have entered into the contract but for the statement made, it is likely to constitute a term of the contract (<i>Bannerman v White</i>). brief discussion of the Parol Evidence Rule.	3 marks
Marks also awarded for discussion of the Unfair Contract Terms Act (if considered a business to business transaction) or the Consumer Rights Act (if considered a business to consumer transaction) and whether Von's exclusion of liability would be considered reasonable.	1 mark
The two statements made by Von – i.e. (i) the representation as to the chickens' health and (ii) the representation as to its egg-laying abilities - are arguably express terms of the contract.	1 mark
Candidates should draw parallels to <i>Schawel v Reade</i> . Von reassured Myles that he could rely on her word and understood the purpose for which the chickens would be used (i.e. for egg farming).	1 mark
Myles's degree of knowledge (i.e. the fact that he had never purchased or owned chickens before) would also be considered (<i>Dick Bentley Productions Limited v Harold Smith Motors Limited 1965</i>).	1 mark
Candidates should come to a reasoned conclusion as to whether the oral statements made by Von ought to be considered express terms.	1 mark
Candidates should also briefly discuss the fact that the sale falls under s.13 of the Sale of Goods Act 1979 or Consumer Rights Act 2015 if applicable, which implies into all contracts for sale of goods a term that the goods shall comply with their description. Mrs. Lombardi and the rest of the chickens'	1 mark

good health and ability to lay eggs are likely to be considered as part of the description and arguably constitute breaches of an implied term.	
(b) Does Myles have a claim for misrepresentation against Von? [6 marks]	
A misrepresentation is a false statement of fact (or possibly law), (1 mark), made by one party to the contract to another party to the contract, before the contract is formed, (1 mark), with a view to inducing the other party to enter the contract, and that representation induces the other party to enter into the contract. (1 mark).	3 marks
<i>Smith v Land and House Property Corp</i> 1884	3 marks
There must be a reasonable reliance on the statement. In this case, Myles has relied on Von's statements re the health of the chickens in proceeding with the purchase.	
(c) Briefly discuss what remedies would be available to Myles for:	
i. Breach of contract [4 marks]	
The calculation of damages would depend on whether the statements made by Von re the health and egg-laying abilities of the chickens, are warranties or innominate terms of the contract. Candidates should briefly discuss the difference between: <ul style="list-style-type: none"> • a condition as a major term which goes to the heart of the contract which, if breached, entitles the innocent party to terminate the contract and claim damages; • a warranty which is a minor term of the contract which is not central to the existence of the contract which, if breached, gives rise to damages and not termination; and • innominate terms which look at the effect of the breach and whether the innocent party to the breach is deprived of substantially the whole benefit of the contract (<i>Hong Kong Fir Shipping v Kawasaki Kisen Kaisha</i> 1962). 	2 marks
The contract has already been performed – i.e. Myles now owns the chickens and Von has been paid and so Myles's remedy for any breach of contract appears to lie in damages. Alternatively, credit (1 mark) also given for discussion as to how damages might be calculated according to the limbs of <i>Hadley v Baxendale</i> .	1 mark
The general principle when calculating damages for breach of contract is that damages should be assessed to put the claimant in the position it would have been in if the contract had been properly performed.	1 mark
ii. Misrepresentation [3 marks]	

<p>The remedies will depend on the type of misrepresentation. For fraudulent and negligent misrepresentation, Myles may claim rescission and damages. For innocent misrepresentation, the court has a discretion to award damages in lieu of rescission; the court cannot award both (section 2(2) of the Misrepresentation Act 1967).</p>	<p>2 marks</p>
<p>Rescission is where the contract is set aside, and the parties are put back into the position in which they were before the contract was made.</p>	<p>1 mark</p>
<p>Total</p>	<p>25 marks</p>

Question 2

(a) Explain whether the contract between Tampa Co and Tom has been frustrated. [5 marks]	
Frustration occurs when, without the fault of either party, an event occurs which renders the performance of the contract radically different from that contemplated by the parties or makes the contract incapable of being performed – <i>Taylor v Caldwell</i> (1863), <i>Condor v The Barron Knights Ltd</i> (1966).	2 marks
The ship sinking was not the fault of either party, and the contract cannot now be performed.	2 marks
Candidates should conclude that the contract has been frustrated.	1 mark
(b) Explain whether:	
(i) Tom can recover any or all of the £50,000 payment made to Tampa Co. [5 marks]	
Under section 1(2) of the Law Reform (Frustrated Contracts) Act 1943, payments made before frustration are recoverable (or sums payable cease to be payable), subject to the discretion of the court, to allow the payee to retain sums paid or payable in order to defray expenses incurred for the purposes of performance of the contract.	2 marks
On the facts, Tom has paid £50,000 before frustration, but Tampa Co has incurred expenses of £10,000 in buying costumes to prepare for the party. As a result, Tom can recover between £40,000 and £50,000 depending on how the discretion of the court is exercised.	3 marks
(ii) Tom is liable to pay the further payment of £100,000. [3 marks]	
The effect of frustration of the contract is to discharge parties from future performance of it.	1 mark
As the second instalment under the contract fell due before the frustrating event but had not been paid, Tom is discharged from liability to pay it.	2marks
c) Explain whether Mr. Kraft's statement that a new customer was coming to look at the location was a misrepresentation? [4 marks]	
A misrepresentation is an untrue statement of fact which induces the person to whom it is addressed to enter into the contract.	2 marks
Mr. Kraft's statement that a new customer was coming to view the venue is clearly untrue: no other customers were looking at the location; it is a statement of fact: it is a matter which can be shown to be true or false, rather than a statement of opinion, or puff.	2 marks

It induced Tom to enter into the contract - he entered the contract because of his concern that the venue would be secured by the new customer if he did not enter the contract.	
d) Assuming Mr. Kraft's statement to be a misrepresentation, explain:	
(i) What type of misrepresentation it is and why [4 marks]	
A misrepresentation may be fraudulent, where it is made knowing it to be false, or made without belief in its truth, or made with reckless carelessness as to its truth - <i>Derry v Peek</i> (1889).	1 mark
A misrepresentation may be 'negligent', where it falls within section 2(1) of the Misrepresentation Act 1967, where the misrepresenter cannot establish that they had reasonable grounds to believe the statement to be true, and that they did believe it to be true up to the time of the contract.	1 mark
Finally, a misrepresentation may be wholly innocent, where the misrepresenter can establish reasonable grounds to believe the statement was true and belief in its truth up to the time of the contract.	1 mark
Mr. Kraft knows the statement to be false, or is reckless as to its truth, as he makes the statement saying that he has checked the book when he has not. His misrepresentation is therefore fraudulent within the test of <i>Derry v Peek</i> (1889).	1 mark
(ii) What remedies would be available to Tom? [4 marks]	
<p>The remedies for misrepresentation are rescission and/or damages.</p> <p>For innocent misrepresentation, the court has a discretion to award damages in lieu of rescission; the court cannot award both (see section 2(2) of the Misrepresentation Act 1967).</p> <p>As this is fraudulent misrepresentation, Tom may claim rescission and damages.</p>	4 marks
Total	25 marks

Question 3

a) In regard to the Milton Keynes track, advise FOPF whether C&C is liable to pay liquidated damages of £2,000,000 as a result of their breach of contract for late performance. [5 marks]	
Liquidated damages could be a penalty clause if there are no legitimate interests for such a provision to be in place. (<i>ParkingEye v Beavis</i> (2015))	1 mark
The test is objective. (<i>Alfred McAlpine Capital Projects v Tile Box Ltd</i> (2005) and / or <i>Parking Eye v Beavis</i> [2015] UKSC apply)	2 marks
Candidates should provide a reasonable view on whether the £2,000,000 sum of liquidated damages could be reasonably justified by the legitimate interests named.	2 marks
b) In regard to the Woking track, advise FOPF whether they are likely to be liable to pay Flavio:	
i) £5,000 or £15,000 pursuant to the signed contract; [7 marks]	
Candidates should demonstrate a good understanding of the requirement of 'consideration' in the formation of a contract.	1 mark
Candidates should identify that whilst there is an express written term to pay £15,000, there is the potential equitable remedy available of rectification to reflect their contractual intention.	1 mark
Given that both parties missed the error in the contract, there appears to have been a common mistake where both parties mistakenly believe that the document gives effect to their common intention of agreeing £5,000.	1 mark
The requirements for a rectification are that the parties had a common continuing intention in respect of a particular matter in the contract, there was an outward expression of accord, the intention continued at the time of the execution of the instrument sought to be rectified and by mistake the instrument did not reflect that common intention. Candidates should comment on whether these appear to be satisfied – they likely are.	3 marks
The parol evidence rule does not apply to rectification, so FOPF should be able to rely upon the pre-contractual emails (<i>Joscelyne v Nissen</i> (1970))	1 mark
(ii) The extra £1,000 agreed for finishing the repainting on time [7 marks]	
Flavio is under an existing contractual duty to complete the works by 15 February	1 mark
Performance of an existing contractual duty owed to the other party shall not be sufficient consideration (<i>Stilk v Myrick</i> (1809)) (1 mark) and Flavio has provided no extra consideration to complete the works on time (1 mark)	2 marks
However, if performance of an existing contractual duty confers a practical benefit on the other party and the contract is entered into freely without	2 marks

duress or fraud, then this can constitute valid consideration and the promise to make a bonus payment therefore enforceable (<i>Williams v Roffey Bros & Nicholls (Contractors) Limited</i> (1991))	
Candidates should apply this to the facts to reach a conclusion. Given that the Woking track will be able to host the Grand Prix, arranged after the initial contract with Flavio, and obtain the increased profits, and there was no evidence of duress or fraud, then FOPF appear liable to pay the extra £1,000.	2 marks
c) Would FOPF still have an enforceable contract with Flavio if, instead of agreeing to pay the monetary sums referred to in exchange for Flavio's works, they agree with him to provide free, unlimited access to the go-kart track for himself and his friends for the next 2 years? [6 marks]	
A binding contract must include consideration.	1 mark
Consideration is a benefit to the promisor and a detriment to the promisee (<i>Currie v Misa</i> (1875)).	1 mark
Consideration need not be adequate, but must be sufficient (i.e. have some value), and the courts will generally not be concerned with whether it constitutes a good bargain (<i>Currie v Misa</i> (1875)).	2 marks
Applying this to the scenario, FOPF and Flavio appear free to enter into the contract and agree to provide free lessons in consideration of the works. The contract will therefore still be enforceable.	2 marks
Total	25 marks

Section 2
Question 4

a) Advise on Cameron's liability to Fields & Partners. [7 Marks]	
Candidates should identify that Fields & Partners have a claim in professional negligence against Cameron.	1 mark
In order to succeed in a claim for negligence, Fields & Partners must demonstrate (i) duty; (ii) breach; (iii) causation; and (iv) loss.	1 mark
<u>Duty</u> Cameron owed Fields & Partners a duty of care pursuant to the <i>Donoghue v Stevenson (1932)</i> / <i>Caparo Industries plc v Dickman (1990)</i> line of authorities.	1 mark
<u>Breach</u> The question is whether Cameron fell below the standard of a solicitor acting within a body of reasonable professional opinion, as per the test in <i>Bolam v Friern Hospital Management Committee (1957)</i> (1 mark). Cameron ought reasonably to have been able to carry out the property searches and enquiries, and advise that there are pollution/contamination issues and cancelled planning permissions (and the process and costs of appealing the refusals) (1 mark).	2 marks
<u>Causation / loss</u> Applying the 'but for' test (<i>Barnett v Chelsea & Kensington Hospital Management Committee (1969)</i>), but for Cameron's negligence, Fields & Partners would not have made a full price offer of £15 million for the property and would not have needed to extend their previous leases whilst undertaking repair work (1 mark). These economic losses were of a foreseeable type and not too remote (1 mark).	2 marks
b) Advise Fields & Partners on whether they are liable to Carrie for her losses. [18 Marks]	
Candidates should identify that Carrie has a potential claim for the tort of negligent misstatement.	1 mark

<p><u>Duty</u> Applying <i>Hedley Byrne v Heller & Partners</i> (1964), candidates should explain that a duty is owed only if a special relationship exists between Susan and Carrie, requiring an assumption of responsibility by Sarah and reasonable reliance by Carrie (2 marks). Candidates should consider the relevant factors:</p> <ul style="list-style-type: none"> - Susan was aware of the purpose for which her advice was required – Carrie said she was wondering whether to undertake the landscape works at the country home (1 mark) - Susan communicated the advice to Carrie directly (1 mark) - However, Susan would not necessarily have known that Carrie was likely to act on that advice without independent inquiry, given her comments at the dinner (1 mark) - Carrie has acted on Sarah's advice to her detriment, as she suffered substantial loss (1 mark) - Carrie arguably reasonably relied on Susan's advice – it was arguably a social setting and Susan and Carrie are friends, but Sarah is an architect and it was at a business lunch at an architects' event (2 marks) 	8 marks
<p><u>Breach</u> The question is whether Sarah fell below the standard of an architect acting within a body of reasonable professional opinion, as per the test in <i>Bolam v Friern Hospital Management Committee</i> (1957) (2 marks). An architect ought to know whether a stream might make the surrounding ground damp, as well as digging out soil near a house foundation might cause instability to the foundations, so breach of duty is likely (1 mark).</p>	3 marks
<p><u>Causation/Loss</u> Applying the 'but for' test (<i>Barnett v Chelsea & Kensington Hospital Management Committee</i> (1969)), but for Sarah's negligence Carrie would not have suffered damage to her country house and she therefore has a claim for £250,000 in damages (1 mark). These economic losses were of a foreseeable type and not too remote (1 mark).</p>	2 marks
<p>Candidates should identify that there is then the question of whether Fields & Partners are vicariously liable for Sarah's negligent misstatement.</p>	1 mark
<p>For there to be vicarious liability, Carrie would need to prove three elements: (i) Sarah was an employee, (ii) Sarah committed a tort; and (iii) The tort was committed during the course of Sarah's employment. (<i>Limpus v London General Omnibus Co</i> (1862)) (1 mark). Sarah is an employee and committed a tort, as above (1 mark). Consideration should be given as to whether the tort was committed during the course of employment – it was in a relatively social setting, but was linked to the employment as Sarah gave the advice and drawing at the business lunch (1 mark).</p>	3 marks
<p>Total</p>	25 marks

Question 5

<p>a) Advise David what he will be required to establish in any claim for his loss of earnings. [20 Marks]</p>	
<p>Candidates should identify that David has a potential claim for negligence (1 mark), as Sebastian was negligent in leaving the moving crates out, despite being told many times not to do so, and not giving notice of the works (1 mark).</p>	2 marks
<p>Candidates should identify that Chiltern Logistics could be vicariously liable for not properly supervising Sebastian as an independent contractor (<i>Kealey v Heard (1983)</i>) (1 mark). As this was on Chiltern Logistics property and the independent contractor wasn't being supervised, Chiltern Logistics is likely liable (1 mark).</p>	2 marks
<p><u>Duty of care</u> As his employer, Chiltern Logistics owes David, as an employee, a duty of care to take reasonable care for his safety at work (1 mark). This constitutes providing the following: (i) Competent staff; (ii) Adequate plant and equipment; and (iii) Safe system of working (3 marks).</p>	4 marks
<p><u>Breach of duty</u> Candidates should provide a reasoned response as to whether Chiltern Logistics may have breached this duty. This may include consideration of not supervising the Sebastian's work, not cleaning up the area themselves or not giving notice to their own employees of the work (2 marks).</p>	2 marks
<p><u>Causation / Loss</u> Applying the 'but for' test (<i>Barnett v Chelsea & Kensington Hospital Management Committee (1969)</i>), Sebastian failing to clean up after being told and any breach of duty by Chiltern Logistics has caused Sebastian's injuries (2 marks). The injured foot was of a foreseeable type and not too remote (1 mark).</p> <p>Candidates should identify that Chiltern Logistics can claim that David was at least partly to blame for his losses by raising the argument of contributory negligence (Law Reform (Contributory Negligence) Act 1945) (1 mark). David failed to pay attention to what he was doing when he entered the warehouse space, and was not wearing the required PPE work boots, which could amount to contributory negligence (2 marks). However, contributory negligence would only reduce Chiltern Logistics' liability and not extinguish it altogether (1 mark).</p> <p>Candidates should also note that David's actions (i.e. texting while walking into the hospital and kicking the ball with his foot which is probably broken) could represent a <i>novus actus interveniens</i> that breaks the chain of causation of Sebastian's negligence for at least some of the losses, if it were found that his injury had been worsened as a result of kicking the ball with his broken foot (3 marks).</p>	10 marks

b) Advise Chiltern Logistics whether they could be liable for Austin's injuring the HGV driver. [5 Marks]	
Candidates should identify that Chiltern Logistics may also be vicariously liable for Austin's actions.	1 mark
<p>For there to be vicarious liability, the HGV driver would need to prove three elements: (i) Austin was an employee, (ii) Austin committed a tort; and (iii) The tort was committed during the course of Austin's employment. (<i>Limpus v London General Omnibus Co</i> (1862)) (1 mark).</p> <p>Candidates should then apply this to the facts and give reasoned opinions (3 marks):</p> <ul style="list-style-type: none"> (i) Austin was an employee; (ii) Austin undoubtedly committed a tort, causing the HGV driver's losses; (iii) However, query whether the tort was committed during the course of Austin's employment. In particular, it was not on the premises of Chiltern Logistics but at a social function, and it could be said to be so outside the course of his employment to be a frolic of his own (<i>Hilton v Thomas Burton (Rhodes) Ltd</i> (1961)). 	4 marks
Total	25 marks

Question 6

a) Advise Audrey on whether she has a claim in tort against Stony Park Stables. (6 marks)	
Candidates should identify that Audrey has a potential claim for the tort of negligence.	1 mark
In order to succeed in a claim for negligence, Audrey must demonstrate (i) duty; (ii) breach; (iii) causation; and (iv) loss.	1 mark
<u>Duty</u> The owner owed Audrey a duty of care pursuant to the <i>Donoghue v Stevenson (1932)</i> / <i>Caparo Industries plc v Dickman (1990)</i> line of authorities.	1 mark
<u>Breach</u> The owner breached this duty by failing to fix the fence adequately and as directed, despite knowing, and having been warned on multiple occasions, that the current fence was unsuitable and likely to cause an accident.	1 mark
<u>Causation / loss</u> The owner caused Audrey's injuries and subsequent losses (1 mark) and those losses were of a foreseeable type and not too remote (1 mark).	2 marks
b) Advise Stony Park Stables if they have any liability for Emily's losses. (7 marks)	
Candidates should identify that Emily has a potential claim in negligence against Stony Park Stables. The elements of duty and breach are as set out above and there is no need for candidates to repeat these.	1 mark
<u>Causation / Loss</u> Applying the 'but for' test (<i>Barnett v Chelsea & Kensington Hospital Management Committee (1969)</i>), the owner will be liable for Emily's injuries because but for the owner's breach of duty, it is likely Emily would not have suffered her injuries (1 mark). Pursuant to the "eggshell skull rule", a defendant must take the victim as they find them (<i>Smith v Leech Brain (1962)</i>) (1 mark). The owner must therefore take Emily as she is with her condition and cannot therefore avoid liability for her losses (1 mark). Candidates should note that this is a psychiatric injury rather than a physical injury (1 mark). Candidates should discuss the facts which will include discussion of her being some distance away, and it was only thought that Audrey might hit her, and the "underlying personality disorder". Candidates should come to a reasoned conclusion as to whether the losses are reasonably foreseeable and not too remote (2 marks).	6 marks
c) Advise Mrs Willis whether she has any claim against Stony Park Stables and if she succeeds in establishing liability against Stony Park Stables, what potential remedies may be available to her.(12 marks)	
Mrs Willis may have a claim against Stony Park Stables in the tort of private nuisance.	1 mark

<p>Candidates should identify that a direct proprietary interest in the land affected is required (<i>Hunter v Canary Wharf Ltd (1997)</i>) (1 mark). Mrs Willis is the owner of the land, so she has sufficient interest to bring a claim (1 mark).</p>	2 marks
<p>Candidates should identify that the smell from Stony Park Stables is a potential nuisance through unreasonable interference (1 marks). Candidates should consider whether the interference is unreasonable. Candidates may mention the agricultural nature of the area however, they should focus on the ease with which the slurry pit could be moved, given the size of the farm (2 marks).</p>	3 marks
<p>Candidates should consider if the owner had developed a right to commit a private nuisance by prescription as an easement (<i>Fay v Prentice (1845) 1 CB 828</i>) (1 mark). Given the owner or recently started using this field for the manure heap, this is unlikely (1 mark).</p>	2 marks
<p>Candidates should identify that Mrs Willis could seek:</p> <ul style="list-style-type: none"> - An injunction to stop Stony Park Stables causing the nuisance and to move the manure heap to another place on the farm (2 marks); and/or - Damages to compensate Mr Willis for loss of amenity / loss of profits as a result of the pollution (2 marks) 	4 marks
<p>Total</p>	25 marks

Institution of Civil Engineers

Examination for the ICE Certificate in Law and Contract Management (CLCM) 2023

Module 2: NEC 4 (English and Scots Law)

Tuesday 20th June 2023

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

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

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

Please answer Section 1 and Section 2 Word (unless agreed otherwise) using separate headings for each section.

All questions carry equal marks.

References to cases and legislation should be quoted where possible.

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

Reference to documents during the examinations

Copies and published amendments of NEC4 Engineering and Construction Contract (ECC), NEC4 Engineering and Construction Subcontract (ECS), Statutes, CDM Regulations and CESMM4 may be taken into the Examination. The use of the internet during this exam is prohibited.

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

Section 1

Question 1

A client is planning to construct a new water treatment works. The feasibility study and outline design are complete and have been based on the use of an innovative and relatively new technology. The client is intending to award the contract under the NEC4 ECC and is considering how best to allocate design responsibility under the contract and to deal with the risk of using an innovative design solution. The design solution if successful will have a market value as it will generate savings and environmental improvements over the current technology.

- | | | |
|--------------|---|-------------------|
| a) | How is design allocated under the ECC? | [3 marks] |
| b) | If design is allocated to the <i>Contractor</i> how can the <i>Client</i> require this to be reviewed for compliance with the Scope before construction starts and what risk is there in such a review creating a design liability for the <i>Client</i> or those managing the contract on its behalf? | [5 marks] |
| c) | What secondary Options could be considered to deal with the risk of an innovative design solution if design is allocated to the <i>Contractor</i>? | [4 marks] |
| d) | Who owns the rights over the <i>Contractor's</i> design under the contract? | [3 marks] |
| e) | How is insurable liability for design allocated between the Parties under the contract? | [6 marks] |
| f) | If the expectation is that design will be carried out by a Subcontractor would this change the allocation of risk for the design between the Parties; and how could the <i>Client</i> protect itself for errors in the design provided by a Subcontractor? | [4 marks] |
| Total | | [25 marks] |

Module 2

Question 2

A *Contractor* has been appointed to construct an extension to an airport terminal building under NEC4 ECC main Option C. The *Client* wants to ensure that certain suppliers and Subcontractors are used so that the systems in the extension integrate with those in the existing airport.

- a) **What can the *Client* do to achieve its requirements; for instance can it nominate or name Subcontractors or suppliers; what is the procedure for appointing Subcontractors what can the *Project Manager* do if it is not followed?** [7 marks]

A Subcontractor appointed to install the foundations for the terminal extension is failing to deliver the works in the accordance with the Scope. The *Contractor* is of the view that as the Subcontractor was accepted by the *Project Manager* they are not responsible for its failure to perform

- b) **Is the *Contractor* correct?** [2 marks]
- c) **What should the *Project Manager* do once they become aware of the problems with the Subcontractor?** [5 marks]
- d) **If it is decided to remove and replace the Subcontractor who will be liable for any additional cost and delay that is incurred as a result?** [11 marks]

Total [25 marks]

Module 2

Question 3

A member of the *Client's* organisation has informed the *Project Manager* that the *Contractor* is using the wrong type of steel for the reinforcement in the construction of new abutments for a road bridge and that, as it does not comply with the Scope, it is a Defect. The *Project Manager* calls the *Contractor* on the phone to make them aware of the Defect. The *Contractor* tells the *Project Manager* that the *Client's* member of staff is wrong and that they have used the right type of steel reinforcement and that anyway that part of the *works* is complete and so it cannot now be investigated, therefore no further action is required. The contract is an NEC4 ECC main Option D.

- a) **Was the *Contractor* correctly informed of the issue with the reinforcement steel in accordance with the contract and if not, how should this have been dealt with?** [6 marks]
- b) **Does the *Contractor* have an obligation to correct a Defect if they are not notified of it correctly?** [2 marks]
- c) **How could the problem with the steel reinforcement be investigated to identify whether or not it was a Defect? What would happen if a Defect was not found?** [5 marks]

Following a review the steel used in the reinforcement it is shown to have not complied with the specification however, it does comply with the requirements shown on a drawing, both documents form part of the *Client's* Scope.

- d) **What should the *Project Manager* do when they become aware of the issue?** [7 marks]
- e) **Would the process be any different if the drawing was contained in Scope provided by the *Contractor* for its design?** [3 marks]
- f) **In either situation who would the error in the Scope be viewed in favour of?** [2 marks]

Total [25 marks]

Module 2

Question 4

As part of the construction of a new rail depot 50 piled foundations have to be installed by the *Contractor*. The *Contractor* has installed 5 piles to date and the *Supervisor* has just received the results of the test cubes that were sent to a laboratory for testing. The results show that the concrete has failed to achieve the required strength stated in the Scope. The *Supervisor* has notified the failure as a Defect. The *Contractor* subsequently notified an early warning as correction of the Defect may delay Completion. At the following early warning meeting the *Contractor* proposed that the Defect should be accepted as the concrete only just failed to achieve the required strength and so is unlikely to have any long term impact on the *works* and the correction of the Defect will cause delay. The *Contractor* also states that the *Project Manager* must accept the proposal in accordance with clause 10.2 of the contract and the requirement to act in a spirit of mutual trust and cooperation. The contract is an NEC4 ECC main Option A with secondary Option X16. The *retention free amount* is £50,000 and the *retention percentage* is 10%.

- a) **Does the *Project Manager* have to accept the Defect, what are their options? [5 marks]**

The *Contractor* has submitted an application for payment before the assessment date as follows.

Ref	Activity	Value	Percentage Complete	Total
1	Clear site	£100,000	100%	£100,000
2	Install piles on grid line A (5 number)	£150,000	100%	£150,000
3	Install piles on grid line B (5 number)	£150,000	80%	£120,000
N/A	Compensation event number 1 – to be agreed	£50,000	On account	£50,000
N/A	Materials on Site	£10,000	N/A	£10,000
Price for Work Done to Date				£430,000

- b) **What should the *Project Manager* assess as the Price for Work Done to Date and why, bearing in mind that the piles in activity 2 are those which have not achieved the required strength and have been notified as a Defect? [10 marks]**

- | | | |
|----|---|-------------------|
| c) | What would be the amount due under the contract and how would this be assessed? | [5 marks] |
| d) | If the contract was under main Option C how would the Price for Work Done to Date be assessed and would the notified Defect in respect of the piles effect this? | [5 marks] |
| | Total Marks | [25 marks] |

Section 2

Question 5

You are preparing tender documents for an ECC *Client*-designed contract. The main Option has not yet been chosen. The *Client* has recently read reports in the press about negative cash flow and inflation causing problems with contractors and asks you to offer some suggestions in a report to address cash flow and inflation issues.

- a) **What options exist in the ECC to consider here and what are the risks of each?** [12 marks]

The contract is awarded sometime later and includes Y(UK)2. The first assessment date passes, and everything goes to plan apart from the actual payment. The *Client's* accounts department holds back payment for some reason (not due to any fault of the *Contractor*) and one week after it has still not been paid.

- b) **What would you advise the *Contractor* to do here?** [5 marks]

At the next assessment date, the *Contractor's* quantity surveyor is poorly with Covid and is not able to submit an application for payment. Finally, it is submitted 2 days after the assessment date..

- c) **What happens next?** [3 marks]

Secondary Option X20 Key Performance Indicators was incorporated into the contract. One of the targets was the amount of cycle rides to and from work the *Contractor's* operatives would make. This would line up with a *Client's* corporate objective on carbon reduction. All the way through the contract, the *Contractor* was forecasting that they would meet the target, but it emerges that there was an error in the data analysis and in fact the *Contractor* falls 10% short of the target. This infuriates the *Client* who demands money is deducted from the *Contractor's* account for this.

- d) **What should the *Project Manager* do?** [5 marks]

Total [25 marks]

Section 2

Question 6

A 104-week contract is awarded under an NEC4 ECC Option C contract for a large highways project. The contract includes Secondary Option X5 sectional Completion with just one *section*; Secondary Option X7 delay damages; a statement in the Contract Data that the *Client* is not willing to take over the *works* before Completion; Secondary Option X16 retention.

The *Contractor* progresses well with the *works* and *section* one in particular, so much so that the *Client* advises the *Project Manager* it would like to take over that part of the *works*, even though the landscaping has not been done. This would be good for public relations.

- a) **What does the *Project Manager* do next and what are the implications? [9 marks]**

It turns out that the implemented compensation event for the take-over is inadequate. The quotation should have included more delay to the Completion Date for *section* one. The *Contractor* is then late finishing *section* one by some 3 weeks. The *Project Manager* is sympathetic and acknowledges the error.

- b) **What happens next? [7 marks]**

The *Contractor* gets back on track and achieves what they think is Completion 4 weeks before the Completion Date. In looking through the Scope, there are no details for what state the *works* need to be in to achieve Completion.

- c) **How does the *Project Manager* decide if Completion has occurred? [5 marks]**

- d) **What then happens if Completion has occurred? [4 marks]**

Total [25 points]

Section 2

Question 7

A *Contractor* has recently been awarded an NEC4 ECC contract using Option D. The *Client* tells the *Project Manager* that they may require a change to the Scope as they are considering changing their corporate image. This could affect paint colours and signage.

- a) **What should the *Project Manager* do upon receiving this news?** [7 marks]

A week later the *Client* informs the *Project Manager* that the internal Board wishes to know the time and cost implications before committing to the change.

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

Before the *Contractor* has chance to act, the *Client* changes their mind about the need for a quotation and says go ahead and inform them verbally straight away at the progress meeting that day.

- c) **What should the *Project Manager* do now?** [7 marks]

Some 4 weeks later, no quotation has been submitted by the *Contractor* and they have not put the changes Scope into effect. The *Client* is getting anxious.

- d) **What happens here** [6 marks]

Total [25 marks]

Section 2

Question 8

A *Contractor* is working on an NEC4 ECC contract using Option C. About half-way through the contract, all is good and the forecasts of Defined Cost is suggesting a substantial saving compared to the target. The *Contractor* asks the *Project Manager* if an on-account payment for the *Contractor's* share would be possible, it will help their end of year accounts.

- a) **What does the contract say about this and what should the *Project Manager* do now?** [4 marks]

Two months later, in the next forecast submitted by the *Contractor*, it transpires that the previous forecasting by the *Contractor* contains a serious flaw and in fact they should have been forecasting that the Price for Work Done to Date will be greater than the total of the Prices.

- b) **Are there any sanctions here against the *Contractor* and what do they need to submit with the forecast?** [4 marks]

Now the *Client* becomes concerned that they will overpay and may struggle to get some of the likely over-payment back from the *Contractor*. The *Client* asks the *Project Manager* to apply the *Contractor's* share provisions in the next assessment.

- c) **How should the *Project Manager* react here?** [4 marks]

A Defect is notified by the *Supervisor* to the *Contractor*. The *Contractor* acknowledges it is a Defect but is hopeful that, as it is only aesthetic in nature, it can be left in place.

- d) **How does the contract deal with this scenario and what happens if there is no agreement?** [8 marks]

An agreement is reached on this Defect and the Scope is changed. 6 months after the Defects Certificate is issued, the *Client* becomes dissatisfied about the poor aesthetics and asks the *Project Manager* to get the *Contractor* back to fix things

- e) **How does the contract deal with this?** [5 marks]

Total [25 marks]

Law & Contracts Examination Module 2 Points for Answer

Section 1

Question 1

a) How is design allocated under the ECC? [3 marks]	
Relevant points include <ul style="list-style-type: none"> • Default position <i>Client</i> design. • Design allocated to the <i>Contractor</i> via the Scope. • Clause 21.1 	3 marks
b) If design is allocated to the <i>Contractor</i> how can the <i>Client</i> require this to be reviewed for compliance with the Scope before construction starts and what risk is there in such a review creating a design liability for the <i>Client</i> or those managing the contract on its behalf? [5 marks]	
Relevant points include <ul style="list-style-type: none"> • The <i>Client</i> can identify in the Scope those parts of the design to be carried out by the <i>Contractor</i> that will need to be submitted to the <i>Project Manager</i> for acceptance. • Clause 21.2 • <i>Contractor</i> cannot start that part of the <i>works</i> until the <i>Project Manager</i> has accepted the design. • Acceptance by the <i>Project Manager</i> of a <i>Contractor's</i> submission including design does not transfer any liability to the <i>Project Manager</i>. • Clause 14.1. 	5 marks
c) What secondary Options could be considered to deal with the risk of an innovative design solution if design is allocated to the <i>Contractor</i>? [4 marks]	
Relevant points include <ul style="list-style-type: none"> • Secondary Option X15 <i>Contractor's</i> design • Limits the <i>Contractor's</i> liability for its design to reasonable skill and care. • Secondary Option X18 limitation of liability • Can be used to limit the <i>Contractor's</i> liability to the <i>Client</i> for certain types of loss or overall loss, most relevant in this case X18.4 and X18.5 	4 marks
d) Who owns the rights over the <i>Contractor's</i> design under the contract? [3 marks]	
Relevant points include <ul style="list-style-type: none"> • As a default the <i>Contractor</i> owns the rights over the design it prepares for the <i>work</i> but provides the <i>Client</i> with a right to use that design for any purpose connected with the <i>works</i>. • Clause 22.1. • Secondary Option X9 can be used to transfer the rights to. the <i>Contractor's</i> design prepared for the <i>works</i> to the <i>Client</i>. 	3 marks

e) How is insurable liability for design allocated between the Parties under the contract [6 marks]	
Relevant points include <ul style="list-style-type: none"> • Clause 80.1 lists the <i>Client's</i> liabilities. • Third bullet of clause 80.1 states the <i>Client</i> is liable for faults in its design and design contained in an instruction from the <i>Project Manager</i> changing the Scope. • Clause 81.1 identifies the <i>Contractor's</i> liabilities and these are basically anything that is not a <i>Client's</i> liability. • The <i>Contractor</i> is liable for any design it produces as this is not identified as a <i>Client's</i> liability. • <i>Contractor</i> provides the insurances stated in clause 83.3 and these insurances have to cover all of the <i>Contractor's</i> liabilities. • If secondary Option X15 has been included in the contract, the <i>Contractor's</i> liability for its design is limited to reasonable skill and care and the <i>Contractor</i> has to provide PII. 	6 marks
f) If the expectation is that design will be carried out by a Subcontractor would this change the allocation of risk for the design between the Parties and how could the <i>Client</i> protect itself for errors in the design provided by a Subcontractor? [4 marks]	
Relevant points include <ul style="list-style-type: none"> • No it will not change the risk allocation between the Parties. • Clause 26.1 makes it clear that the <i>Contractor</i> is responsible for Providing the Works as if it has not been subcontracted. • Secondary Option X8 undertakings to <i>Client</i> or Others • This allows for the <i>Client</i> to require that any Subcontractor appointed to undertake design has to provide them with an undertaking in the form stated in the Scope. 	4 marks
Total	25 marks

Question 2

a) What can the <i>Client</i> do to achieve its requirements, for instance can it nominate or name Subcontractors or suppliers; what is the procedure for appointing Subcontractors what can the Project Manger do if it is not followed?	
Relevant points include <ul style="list-style-type: none"> • There are no provisions to nominate or name Subcontractors or suppliers under the contract. • Requirements in respect of Subcontractors and suppliers can be included in the Scope. 	7 marks

<ul style="list-style-type: none"> • <i>Contractor</i> has to comply with the Scope, clause 20.1. • <i>Contractor</i> has to submit the name of each and every Subcontractor to the <i>Project Manager</i> for acceptance as well as copies of subcontract documentation. Clause 26.2 & 26.3. • A reason for not accepting a Subcontractor is that their appointment will not allow the <i>Contractor</i> to Provide the Works in accordance with the requirements of the contract including compliance with the Scope. • <i>Contractor</i> cannot appoint a Subcontractor until the <i>Project Manager</i> has accepted them and the subcontract documentation. • Appointing a Subcontractor for substantial work before the <i>Project Manager</i> has accepted them is grounds for termination, clause 91.2. 	
b) Is the <i>Contractor</i> correct? [2 marks]	
Relevant points include <ul style="list-style-type: none"> • No, they are not. Clause 26.1 makes it clear that the <i>Contractor</i> is responsible for Providing the Works as if it had not been subcontracted. • Acceptance by the <i>Project Manager</i> of a <i>Contractor's</i> submission including the name of Subcontractor does not transfer any liability to the <i>Project Manager</i>, Clause 14.1 	2 marks
c) What should the <i>Project Manager</i> do once they become aware of the problems with the Subcontractor? [5 marks]	
Relevant points include <ul style="list-style-type: none"> • Notify an early warning, clause 15. As the matter may affect Completion, meeting a Key Date or impair the performance of the <i>works</i> in use. • Enter early warning matter into the Early Warning Register. • Discuss the early warning at the next early warning meeting, clause 15.3. • Perhaps instruct the <i>Contractor</i> to attend an immediate early warning meeting, clause 15.2. • At the early warning discuss how the effects of the matter can be mitigated. 	[5 marks]
d) If it is decided to remove and replace the Subcontractor who will be liable for any additional cost and delay that is incurred as a result? [11 marks]	
Relevant points include <ul style="list-style-type: none"> • It will ultimately be for the <i>Contractor</i> to decide to remove the Subcontractor, the <i>Project Manager</i> cannot instruct this. • This will not be a compensation event as it is not one of the events listed in the contract as such, clause 60.1 etc. • Therefore, there will be no change to the Prices, Key Dates or Completion Date. • <i>Contractor</i> therefore responsible for any delays incurred as a result. • As this is main Option C the Price for Work Done to Date is based on Defined Cost plus Fee. Clauses 11.2(31) and 11.2(24) • Defined Cost is less Disallowed Cost. 	11 marks

<ul style="list-style-type: none"> Disallowed Cost is defined in clause 11.2(26). There is no Disallowed Cost applicable to this situation. Therefore the <i>Contractor</i> will be able recover the costs of removing the old Subcontractor and the cost of the new Subcontractor as part of Defined Cost, Schedule of Cost Components, component 4. The increase in Defined Cost will be paid by the <i>Client</i> and may impact the calculation of the <i>Contractor's</i> share. Depending on the gain share / pain share mechanism the cost risk is shared between the Parties. 	
Total	25 marks

Question 3

a) Was the <i>Contractor</i> correctly informed of the issue with the reinforcement steel in accordance with the contract and if not, how should this have been dealt with? [6 marks]	
<p>Relevant points include</p> <ul style="list-style-type: none"> No they were not. The <i>Supervisor</i> and not the <i>Project Manager</i> should notify a Defect. Clause 43.2 Unless the power was delegated to the <i>Project Manager</i>, clause 14.2. Notification of a Defect has to comply with requirements of clause 13.1, 13.2, 13.7. Verbal communication not recognised by the contract, has to be in form that can be read, copied and recorded and if stated in the Scope communicated via the stated communication system. Notifications separate to other communications. 	6 marks
b) Does the <i>Contractor</i> have an obligation to correct a Defect if they are not notified of it correctly? [2 marks]	
<p>Relevant points include</p> <ul style="list-style-type: none"> Yes, they do. Clause 44.1 requires the <i>Contractor</i> to correct a Defect whether or not the <i>Supervisor</i> has notified it. <i>Contractor</i> also has an obligation to notify Defects it is aware of, clause 43.2. 	2 marks
c) How could the problem with the steel reinforcement be investigated to identify whether or not it was a Defect? What would happen if a Defect was not found? [5 marks]	
<p>Relevant points include</p> <ul style="list-style-type: none"> The <i>Supervisor</i> can instruct a search for a Defect. Clause 43.1 This can involve uncovering and dismantling work. If no Defect is found this will be a compensation event. Clause 60.1(10). 	5 marks

<ul style="list-style-type: none"> Unless the search was only required because the <i>Contractor</i> gave insufficient notice of doing work obstructing a required test or inspection. 	
d) What should the <i>Project Manager</i> do when they become aware of the issue? [7 marks]	
<p>Relevant points include</p> <ul style="list-style-type: none"> They could notify an early warning and follow the early warning process to investigate the matter and determine the correct course of action, but this is not mandatory. Notify the <i>Contractor</i> of an inconsistency between documents which are part of the contract. Clause 17.1. <i>Project Manager</i> has to state how the inconsistency should be resolved. <i>Project Manager</i> should give an instruction changing the Scope to remove the ambiguity, clause 14.3. This will be a compensation event, clause 60.1(1). <i>Project Manager</i> has to notify the event as a compensation event and instruct the <i>Contractor</i> to submit quotation. Clause 61.1 & 61.2. 	7 marks
e) Would the process be any different if the drawing was contained in Scope provided by the <i>Contractor</i> for its design? [3 marks]	
<p>Relevant points include</p> <ul style="list-style-type: none"> The process would be the same, clause 17.1, 14.3, however the event would not be a compensation event. Clause 60.1(1) second bullet, second sub-bullet. <i>Client's</i> Scope takes precedence over <i>Contractor's</i> Scope provided for its design. 	3 marks
f) In either situation who would the error in the Scope be viewed in favour of? [2 marks]	
<p>Relevant points include</p> <ul style="list-style-type: none"> A compensation event which is an instruction to change the Scope in order to resolve an inconsistency is read in the favour of the Party that did not provide that part of the Scope. Clause 63.10. Therefore read in favour of the <i>Contractor</i> in the first instance and the <i>Client</i> in the second instance. 	2 marks
Total	25 marks

Question 4

a) Does the <i>Project Manager</i> have to accept the Defect, what are their options? [5 marks]	
<p>Relevant points include</p> <ul style="list-style-type: none"> No they do not have to 	5 marks

<ul style="list-style-type: none"> • Acceptance of a Defect can only occur with the mutual consent of the <i>Project Manager</i> and <i>Contractor</i> • Clause 45.1, 45.2. • <i>Project Manager</i> should discuss the issue with the <i>Client</i> and possibly the <i>Supervisor</i> to understand the impact on the <i>works</i> as a result of the reduced quality concrete. • If the <i>Client</i> is prepared to accept the Defect the <i>Project Manager</i> follows the process in clause 45.1 and 45.2 to seek a mutually agreeable quote. • Clause 10.2 has no direct bearing on the decision and is secondary to clause 10.1. 	
<p>b) What should the <i>Project Manager</i> assess as the Price for Work Done to Date and why, bearing in mind that the piles in activity 2 are those which have not achieved the required strength and have been notified as a Defect? [10 marks]</p>	
<p>Relevant points include</p> <ul style="list-style-type: none"> • Price for Work Done to Date Clause 11.2(29) • Only completed activities. • Only activity 1 should form part of the Price for Work Done to Date. • Price for Work Done to Date is £100,000 • Activity 3 is not 100% complete. • Activity 2 is 100% complete but it is not one without a notified Defect the correction of which will delay following work. • There are no “on account” payments under the ECC. • Compensations events, under main Option A, once implemented are added into the Activity Schedule, clause 63.14. • They only form part of the Price for Work Done to Date when the activity they are assigned to is complete. • There is no payment for “materials on Site” as a specific item under the ECC. • In main Option A an activity could be included in the Activity Schedule for material on Site but this would not appear to be the case in this example as no activity reference is provided. 	<p>10 marks</p>
<p>c) What would be the amount due under the contract and how would this be assessed? [5 marks]</p>	
<p>Relevant points include</p> <ul style="list-style-type: none"> • The amount due is assessed in accordance with clause 50.3 or 50.4. • It is the Price for Work Done to Date plus other amounts to be paid to the <i>Contractor</i> less any amounts to be paid by the <i>Contractor</i>. • The Price for Work Done to Date is £100,000. • An amount to be retained from the <i>Contractor</i> is retention under secondary Option X16. • The amount of retention will be $(£100,000 \text{ less } £50,000 = £50,000) \times 10\% = £5,000$ • Amount due is therefore $£100,000 \text{ less } £5,000 = £95,000$. 	<p>5 marks</p>

d) If the contract was under main Option C how would the Price for Work Done to Date be assessed and would the notified Defect in respect of the piles effect this? [5 marks]	
Relevant points include <ul style="list-style-type: none"> • Price for Work Done to Date is based on Defined Cost plus Fee • Clauses 11.2(31) and 11.2(24) • Defined Cost is less Disallowed Cost, Disallowed Cost is defined in clause 11.2(26). • Disallowed Cost includes the cost of correcting Defects after Completion. This not applicable. • Disallowed Cost includes the cost of correcting Defects caused by the <i>Contractor</i> not complying with a constraint on how it is to Provide the Works stated in the Scope. • This would not appear to be applicable in this case and the cost of Defined Cost of installing the piles should form part of the Price for Work Done to Date. 	5 marks
Total	25 marks

Question 5

	What options exist in the ECC to consider here and what are the risks of each?	
a)	For cashflow, the first thing to consider would be to shorten the payment periods from the assessment date. Candidates to explain the incorporation of Y(UK)2 or not and discuss the default payment periods unless stated otherwise in the Contract Data (51.1/Y(UK)2). The 3 weeks could be changed to 2 weeks, for example where Y(UK)2 is not used. The main risk would be not making the payment by the date stated and the effects of that.	[2 marks]
	Another consideration would be the use of a project bank account. This can be achieved by incorporation of secondary Option Y(UK)1 for projects in the UK. Candidates to explain basically how PBAs are set up and how they are managed. Little risk to the <i>Client</i> other than late payment into the PBA. <i>Contractors</i> tend not to like PBAs as they are not holding others' cash for periods of time.	[3 marks]
	The final thing to consider for cashflow would be the incorporation of secondary Option X14: Advanced payment to the <i>Contractor</i> . The idea of this is to start the <i>Contractor</i> off with some positive cashflow, avoiding the <i>Contractor</i> having to finance the contract and pass these on through increased Prices. The amount of advanced payment is to be determined by the <i>Client</i> at tender	[3 marks]

	stage and stated in the Contract Data. Candidates to explain how X14 works. The key risk would be <i>Contractor</i> non-performance or insolvency after the advanced payment is made. X14.2 provides for an advanced payment bond to be provided, if stated in the Contract Data.	
	For inflation, discuss that contractors are more likely to positively respond to tenders using main Options C to F, rather than Options A or B. Discuss Option X1 price adjustment for inflation and consider adding in additional compensation events for certain aspects of inflation. The main risk would be that inflation is far worse than anticipated.	[4 marks]
	Total	[12 marks]

b)	What would you advise the <i>Contractor</i> to do here?	
	Notify an early warning under 15.1. It is entirely possible that the longer this goes on, the more chance that Completion could be delayed.	[1 mark]
	Instruct the <i>Project Manager</i> to attend an early warning meeting and instruct the <i>Client</i> to attend if the <i>Project Manager</i> agrees (15.2)	[1 mark]
	Seek solutions at the early warning meeting (15.3).	[1 mark]
	Continue working but consider suspension rights under Y(UK)2.	[1 mark]
	Make sure that interest is added next assessment (51.2).	[1 mark]
	Total	[5 marks]

c)	What happens next?	
	First, the <i>Contractor</i> is obliged to submit an application for payment before each assessment date (50.2).	[1 mark]
	If the <i>Contractor</i> does, then assessment is detailed in clause 50.3.	[1 mark]
	If the <i>Contractor</i> does not, then assessment is detailed in clause 50.4.	[1 mark]
	Total	[3 marks]

d)	What should the <i>Project Manager</i> do?	
	In assessing the amount due, and assuming the <i>Contractor</i> has submitted an application for payment before the assessment date, then assessment is detailed in clause 50.3.	[1 mark]
	In addition to the Price for Work Done to Date, the amount due can include 'other amounts to be paid to the <i>Contractor</i> ' less	[2 marks]

	'amounts to be paid or retained from the <i>Contractor</i> ' (50.3). So, we look to the contract in relation to X20 and the <i>incentive schedule</i> .	
	As there are no negative adjustments allowed to be made via the <i>incentive schedule</i> , the <i>Project Manager</i> cannot deduct such amounts when calculating the amount due.	[2 marks]
	Total	[5 marks]
	Total marks	[25 marks]

Question 6

	What does the <i>Project Manager</i> do next and what are the implications?	
a)	Clause 35.2 allows the <i>Client</i> to use any part of the <i>works</i> before Completion has been certified. This extends to sections of the <i>works</i> because clause 35 does not use 'whole of the <i>works</i> ' in the drafting as stated in Option X5.	[2 marks]
	Clause 35.2 does not apply so the <i>Project Manager</i> should certify the date upon which the <i>Client</i> takes over that part of the <i>works</i> within one week of the date (35.3).	[2 marks]
	There are a number of implications of this. Firstly, this now becomes a <i>Client's</i> liability, clause 80.1.	[1 mark]
	Next, a compensation event occurs under clause 60.1(15) and this falls to the <i>Project Manager</i> to notify under clause 61.1. Note this would not fall foul of the time bar should the <i>Contractor</i> instead notify under clause 61.3. The quotation would need to reflect the time and cost implications of carrying out the outstanding landscaping works now that the rest of that <i>section</i> is taken over.	[2 marks]
	There is no release of retention under Option X16 as it refers to the whole of the <i>works</i> in that clause.	[1 mark]
	Finally, the delay damages for Option X7 would need to be reduced as per clause X7.3.	[1 mark]
	Total	[9 marks]

b)	What happens next?	
	Discuss the effect of an implemented compensation event, clause 66.1 and 66.3.	[2 marks]
	Conclude that the only way to change this would be via the Parties coming to an agreement under clause 12.3.	[2 marks]

	If there is no such agreement, then the <i>Project Manager</i> needs to deduct the delay damages for <i>section</i> one, though this will likely be a lower figure than that at tender stage due to the early take over, discussed above. The <i>Project Manager</i> follows Option X7 in calculating the damages and this should be deducted in the next payment certificate via clause 50.3 or 50.4 as appropriate.	[3 marks]
	Total	[7 marks]

c)	How does the <i>Project Manager</i> decide if Completion has occurred and what then happens?	
	Clause 30.2 states that the <i>Project Manager</i> decides the date of Completion and certifies it within one week of that date.	[2 marks]
	We then need to decide what Completion means here. It is a defined term, clause 11.2(2). As the Scope does not state what work the <i>Contractor</i> is to do by the Completion Date, then the second paragraph of clause 11.2(2) applies and judgement will be required as to whether Completion has occurred. If it has, certify Completion as clause 30.2. If not, then no certificate is given yet.	[3 marks]
	Total	[5 marks]

d)	What then happens if Completion has occurred?	
	The Completion certificate needs issuing as clause 30.2. The final matter here is the statement in the Contract Data regarding take over. In accordance with clause 35.1 the <i>Client</i> need not take over the <i>works</i> before the Completion Date. If the <i>Client</i> has subsequently changed its mind, then take over can be certified under clause 35.3. If the <i>Client</i> decides not to take over at this point, then no take over certificate is issued and the <i>works</i> not taken over will still fall to be a <i>Contractor's</i> liability under clause 81.1.	[4 marks]
	Total	[4 marks]
	Total marks	[25 marks]

Question 7

a)	What should the <i>Project Manager</i> do upon receiving this news?	
	Discuss further with the <i>Client</i> to try to gauge the exact possible requirements so this can be discussed with the <i>Contractor</i> and be a part of future reporting.	[1 mark]
	Notify an early warning to the <i>Contractor</i> under 15.1.	[1 mark]
	Add the early warning to the Early Warning Register (15.1) and probably call an early warning meeting (15.2).	[2 marks]
	Discuss implications of this with the <i>Contractor</i> at the meeting (15.3), understand deadlines for ordering signs and paint to minimise abortive costs. Probably invite the <i>Client</i> to the meeting (15.2) or at least update them as soon after the meeting as you can.	[3 marks]
	Total	[7 marks]

b)	What should the <i>Project Manager</i> do next?	
	The <i>Project Manager</i> should instruct the <i>Contractor</i> to submit a quotation for this proposed instruction (65.1).	[2 marks]
	The <i>Project Manager</i> states in the instruction the date by which the proposed instruction may be given (65.2). This allows the <i>Contractor</i> to prepare the quotation with a bit more confidence than if it were open ended.	[2 marks]
	Note the <i>Contractor</i> does not put a proposed instruction into effect (65.1).	[1 mark]
	Total	[5 marks]

c)	What should the <i>Project Manager</i> do now?	
	The <i>Project Manager</i> cannot give verbal instructions to change the Scope, these must be in a form that can be read, copied and recorded (13.1).	[2 marks]
	Clause 14.3 permits the <i>Project Manager</i> to give an instruction to the <i>Contractor</i> that changes the Scope. This must be followed, but it is ok to verbally discuss this at the progress meeting as a head up.	[2 marks]
	When the instruction is given then the <i>Project Manager</i> should notify this clause 60.1(1) compensation event under clause 61.1.	[1 mark]
	In the same notification the <i>Project Manager</i> should instruct the <i>Contractor</i> to submit a quotation (61.2).	[1 mark]
	It would be prudent to cancel the proposed instruction too.	[1 mark]
	Total	[7 marks]

d)	What happens here?	
	The <i>Contractor</i> must obey an instruction given by the <i>Project Manager</i> that is in accordance with the contract.	[1 mark]
	A compensation event is assessed based on the assumptions that the <i>Contractor</i> reacts competently and promptly to the event and that any Defined Cost and time due to the event are reasonably incurred (63.9).	[1 mark]
	The <i>Contractor</i> cannot wait until the compensation event is implemented.	[1 mark]
	As the <i>Contractor</i> has not submitted the quotation and details of its assessment within the time allowed, the <i>Project Manager</i> assesses the compensation event (64.1)	[1 mark]
	The <i>Project Manager</i> needs to follow the provisions of clause 64.3 here.	[1 mark]
	If the <i>Project Manager</i> does not act accordingly, then a further compensation event under clause 60.1(18) would occur.	[1 mark]
	Total	[6 marks]
	Total marks	[25 marks]

Question 8

a)	What does the contract say about this and what should the <i>Project Manager</i> do now?	
	Clause 54.3 and 54.4 are clear that the share assessment/payment happens at two points in the contract, at Completion of the whole of the <i>works</i> and in the final assessment.	[2 marks]
	There is no chance to pay anything on account here, unless the Parties agree such a provision under clause 12.3.	[1 mark]
	The <i>Project Manager</i> needs to act as stated in the contract (10.1) and advise the <i>Contractor</i> accordingly.	[1 mark]
	Total	[4 marks]

b)	Are there any sanctions here against the <i>Contractor</i> and what do they need to submit with the forecast?	
	There are no sanctions against the <i>Contractor</i> for erroneous forecasting, clause 20.4 forecasts do not even have to be accepted by the <i>Project Manager</i> . This is intended to be reliable management information, but can only be so accurate.	[2 mark]
	The <i>Contractor</i> must explain the changes made since the previous forecast and submitted with each forecast. This happens whether the changes are of a positive or negative nature.	[2 marks]
	Total	[4 marks]

c)	How should the <i>Project Manager</i> react here?	
	The <i>Project Manager</i> needs to act as stated in the contract (10.1) and in a spirit of mutual trust and co-operation (10.2).	[2 marks]
	The answer is the same as a) above, clause 54.3/54.4 state when the share is calculated.	[2 marks]
	Total	[4 marks]

d)	How does the contract deal with this scenario and what happens if there is no agreement?	
	Once a Defect is notified, then the contract states by when the Defect must be corrected. If the Defect prevents the <i>Client</i> from using the <i>works</i> or Others from doing their work, which appears unlikely in this case, then it would have to be corrected before Completion can occur (11.2(2)). Otherwise, clause 44.2 tells us it would have to be corrected before the first <i>defect correction period</i> which begins at Completion for Defects notified before Completion.	[4 marks]
	If a Defect remains uncorrected then clause 46 applies.	[1 mark]

	Of course, what the question is hinting at is a discussion of clause 45 where the <i>Contractor</i> or the <i>Project Manager</i> may propose to the other that the Scope is changes so that a Defect does not have to be corrected. If no agreement is reach, then the Parties revert to the clauses above.	[3 marks]
	Total	[8 marks]

e)	How does the contract deal with this?	
	We are past the Defects Certificate and final assessment presumably being made, so the <i>Project Manager's</i> role is basically defunct.	[1 mark]
	We are now in general law territory as to what the <i>Client</i> may or may not do here and should seek legal advice.	[1 mark]
	That said, the <i>Project Manager</i> should explain how the contract dealt with accepting the Defect and as a result, presumably the Prices being reduced, there is no longer a Defect. The <i>Project Manager</i> on behalf of the <i>Client</i> has done a commercial deal to leave the Defect in place. If the deal is 'wrong' then there is no provision to change this.	[2 marks]
	The last sentence of clause 44.3 should be referred to and discussed.	[1 mark]
	Total	[5 marks]
	Total marks	[25 marks]

Institution of Civil Engineers

Examination for the ICE Certificate in Law and Contract Management (CLCM) 2023

Module 3: (English and Scots Law)

ICE Certificate in Law

Wednesday 21st June 2023

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

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

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

Please answer Section 1 and Section 2 Word (unless agreed otherwise) using separate headings for each section.

All questions carry equal marks.

References to cases and legislation should be quoted where possible.

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

Reference to documents during the examinations

Statutes, and published amendments of NEC4 Engineering and Construction Contract (ECC), NEC4 Engineering and Construction Subcontract (ECS), NEC4 Engineering and Construction Short Subcontract (ECSS) and other standard forms of building contracts may be taken into the Examination. The use of the internet during this exam is prohibited.

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

Section 1

Question 1 - Compulsory

Harrison Contracting (**Harrison**) has been appointed to provide fabricated mesh flooring to the ramps between adjacent storeys in a new multi-storey car park. The architect's objective is to provide ramps that drain effectively in wet weather. Harrison is a subcontractor to the main contractor Toshack Contracts (**Toshack**). The subcontract was proposed by Toshack and is based on its in-house standard form of subcontract.

The sub-contract contains these provisions;

Clause 10.7

“all materials and works provide by the Sub-Contractor shall be safe and suitable for the purpose or purposes for which they are intended or required and the Sub-Contractor shall indemnify the Contractor against all claims, demands, proceedings, damages, costs, charges and expenses arising out of or as a consequence of such details, materials, or goods not being fit, safe or suitable for purpose.”

Clause 19.2

“The mesh flooring to be provided by the Sub-Contractor shall be the StrongFit 420 units manufactured by Cooper Metalwork Limited or similar approved.”

Shortly after the car park opened, vehicles travelling up and down ramps between adjacent storeys were slipping on the metal flooring leading to some collisions and claims against the car park's owner for damage to vehicles by their owners using the car park.

Toshack agrees to install higher-friction surfacing on top of the metalwork to prevent further problems and now seeks to recover the £100k costs of the additional work from Harrison who refused to obey an instruction to do the work itself when it discovered that Toshack had no intention to pay for the work.

Harrison says that it installed the product specified by clause 19.2 and therefore any inadequacy in the work is the fault of Harrison or the Employer's designers.

Toshack says that the materials provided by Harrison breach the requirements of clause 10.7 and therefore Harrison is in breach.

Toshack refuses to repay the £40k retention it holds from Harrison and sends a demand for a further £60k which Harrison refuses to pay. Harrison has sent a demand to Toshack for the return of the £40k retention.

- a) Is Harrison liable for the additional cost of retrofitting the high-friction surfacing? [8 marks]**

Toshack writes to Harrison reiterating its entitlement to the payment of the additional £60k but says that it would accept an agreement for only £30k if Harrison was to respond within 7 days to avoid further cost and effort

- b) The email is labelled “without prejudice”. What does that label mean? [6 marks]**

The Parties eventually reach a Settlement Agreement which is recorded in writing whereby Toshack will pay Harrison a further £20k in full and final settlement on the claims at the car park project. Work on another project between the Parties for a new factory has also not gone well and Toshack says that it won't now pay the £20k due on the car park project as it will set that amount off against the sums it claims from Harrison on the factory project. Neither subcontract mentions set-off.

- c) Is Toshack correct to make the set-off claimed? [6 marks]**

It transpires that the Settlement Agreement for the car park project contains a typographical error. The relevant clause requires Toshack, “to pay the sum of £2,000 (twenty thousand pounds...)”. Toshack, predictably, now says that the amount due is £2k and refers to some earlier pre-agreement correspondence where it offered £2k. Harrison, equally predictably, says that £20k is due.

- d) What is the correct interpretation of the amount due? [5 marks]**

Total Marks [25 marks]

Section 1

Question 2

A consultant, Cooper Engineering (“**Cooper**”), has been appointed by Lowfields City Council (“**Lowfields**”), the Employer, to undertake a series of assessments of highway structures. The contract has been formed using a standard contract produced by Lowfields’ in-house procurement department, entitled “Form 701 - Terms for the supply of goods and services to the Northern Group of Local Authorities [A]” Footnote A lists four local authorities, of which Lowfields is one.

The primary document referred to by the parties as a contract is an email from Lowfields’ “Head of Highways Procurement” to Cooper dated 1 April saying, “*you’ve got the job, please start on the work in the scope of services for the prices stated in your proposal of 4 January, detailed terms to be as per F701 (attached).*” The attachment is just a standard PDF template with no details inserted.

Cooper started work on 1 April.

Cooper’s proposal of 4 January said, amongst other things,

- Anticipated duration – 3 months.
- Total fees due £120k. Interim invoice dates of 30 April, 31 May, 30 June.
- Professional indemnity insurance £10m – certificate attached.
- Liability limited to £50k.

Form 701 says, amongst other things,

Clause 65 All goods provided under this agreement will be fit for the purpose intended and the supplier accepts responsibility for all costs incurred by the Council if they are shown not to be fit for purpose.

Clause 66 Services will be provided with the reasonable skill and care to be expected of a provider of such services.

The surveying work started on 2 April and was completed within 2 weeks. The first report was delivered to the Council on 19 April and was not well received. The Council criticised the standard of the report and demanded changes to Cooper’s quality plan and its methodology to comply with the Scope. The work was halted and then proceeded slower than originally forecast by Cooper.

Cooper invoiced the Council for £10k on each of 30 April, 31 May & 30 June. Each invoice was paid in full. When Cooper invoiced for £10k on 31 July, the Council refused to pay and explained that nothing was now due until completion of the services as the final interim payment date had passed.

A series of contractual communications followed between the parties which are explained below. You should answer each part of this question discretely, and not cumulatively.

- a) **Lowfields says that the services are not fit for purpose and thereby Cooper is in breach of clause 65. It says that it will pay no more until its long list of required corrective actions has been completed by Cooper. If you were representing Cooper, how might you reply to this?** [5 marks]
- b) **Cooper says that monthly invoices and payments must continue on the same cycle as before, in other words starting with an invoice submission on the last day of the month. Is Lowfields correct not to make any further payments until after completion of the services?** [5 marks]
- c) **Lowfields seeks payment of £500k from Cooper for what it says are major breaches of the contract. Cooper denies that any breach has occurred and says that in any event its liability is limited to £50k. Lowfields points to the insurance certificate and states that surely £10m of cover is in place? By reference to case law and statute, explain the relevant considerations when establishing Cooper's liability here.** [10 marks]
- d) **Cooper denies that it is in contract at all with Lowfields, highlighting the incomplete contract form. Is Cooper correct here?** [5 marks]
- Total [25 marks]**

Section 1

Question 3

Ayling Construction (“**Ayling**”) is constructing a new highway junction for Employer, Gelderd City Council (“**Gelderd**”). The contract requires the parties to use the EyeSpy online communications system for all communications and document transfers. Gelderd subscribes to the service and provides 4 licences for Ayling’s use. The project is running very late and the contract contains liquidated damages for delay at the rate of £5k per day that the project finishes late. Ayling says that the rate of liquidated damages is clearly a penalty and therefore is unenforceable. Consequently, it says, it has no liability whatsoever for finishing late. Gelderd refuses to provide a calculation showing how the rate has been calculated but points to its prolonged site supervision and project management costs and the delay caused to the local community.

a) With reference to case law, explain if the rate is enforceable [8 marks]

b) If the rate was to be shown to be unenforceable, is Ayling’s claim about having no liability correct [5 marks]

Ayling submits a claim for an extension of time to Gelderd following delays caused by Gelderd’s traffic signal contractor who was employed under a separate contract by Gelderd. The traffic signals contractor blames its delays on Ayling’s failure to install cable ducts and base slabs for signalling equipment on time. When asked for justification for its claim, Ayling says that it has limited documentation available because it has been a victim of a cyber attack where criminals have stolen significant quantities of the firm’s data.

(c) How would an adjudicator, arbitrator or court assess Ayling’s claim in the absence of supporting documentation? [5 marks]

The matter proceeds to adjudication and Ayling repeats its claim about having lost data through the cyber-attack. It notifies the adjudicator that it can no longer access the EyeSpy service as Gelderd has arranged with the operators of EyeSpy to block Ayling’s access.

(d) Was Gelderd correct to block access? What might an adjudicator do when told of this development? [7 marks]

Total [25 marks]

Section 1

Question 4

A bespoke earthworks contract has been awarded to a Contractor, Wober Contracting (**Wober**) to support the construction of a new airport runway. Clause 24.2 of the contract provides relief for the Contractor in the event of, “*encountering groundwater contamination, rock, running sand, sink holes and other physical encumbrances to the works...*”

The works are disrupted by environmental protesters who have broken in to the site and now occupy trees on the site and dig shallow tunnels which they say are occupied. These tactics are designed to halt the works.

Wober seeks relief for the actions of the protesters under clause 24.2 saying that they are a physical encumbrance to the works.

- (a) **Is Wober correct to rely on clause 24.2?** [5 marks]
- (b) **By reference to legislation, explain if Wober has any liability for the safety of the protesters whilst they are on site.** [5 marks]
- (c) **A geotechnical engineer who works for the Employer visits the site to inspect the tunnels. She falls and breaks her leg when tripping over unmarked cables in Wober’s site car park. What liability, if any, does Wober have to her?** [4 marks]

Later in the project, the protester problems have been dealt with and the work has proceeded well. Wober has manufactured several precast concrete culvert units. Wober’s site manager Max has been caught boasting that the culvert units, “*are a load of rubbish, cheap as anything, but as long as they last for the 12 months defects period after Completion, we’ll be fine because they [the Employer] can’t touch us after the 12 months.*”

- (d) **By reference to statute law, explain if Max is correct about Wober’s liability for the culvert units?** [7 marks]

Several litres of liquid chemical waste have accumulated at the site of one of the culverts where waterproofing solution has been applied to the concrete units. Tyler, a chartered civil engineer employed by Wober, is told by his line manager to dispose of it into the nearby stream because it would be expensive to take to a waste water treatment site which is the manufacturer’s recommendations

- (e) **Should Tyler should comply with this instruction? And what would the consequences be?** [4 marks]

Total [25 marks]

Section 2

Question 5 - Compulsory

You are the *Project Manager*.

The Accepted Programme is shown below. The red bars are on the critical path. All activities are finish- start.

		Bridge 8 West Coast Railway Deck Construction																									
Activity		Week No																									
		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	
1	Erect steel bridge beams	█																									
2	Construct abutment diaphragms		█	█																							
3	Permanent formwork to beams			█	█	█	█																				
4	Concrete bridge deck							█																			
5	Eastern P6 concrete vehicle restraint								█																		
6	Western P6 concrete vehicle restraint									█																	
7	Deck waterproofing										█																
8	Kerbing and surfacing over bridge deck											█															
9	Remove crane platform		█																								
10	Erect abutment rear drainage system			█	█																						
11	import and compact granular backfill				█	█	█	█																			
12	Pavement construction to bridge approach								█	█																	
13	Road Open																										
14	Completion Date																										

Planned completion = end of week 13
 Completion Date = end of week 15

What is the effect on planned completion an the Completion Date, with your reasons, if:-
 [Note the questions in a, b, c and d are not cumulative]

- a) During the removal of the crane platform an uncharted drain is found. The *Project Manager* issues a compensation event to remove the drain and backfill. This takes 3 weeks and delays the commencement of the abutment drainage system. [5 marks]
- b) The *Supervisor* notifies the *Contractor* of a Defect for out of specification grading of the granular backfill. The activity now takes 6 weeks. The *Project Manager* issues a compensation event to amend the deck reinforcement, this adds a week to concreting the bridge deck. [5 marks]
- c) Following the stage 3 safety audit the *Project Manager* issues compensation event to install additional safety fencing on the bridge approaches. This takes place after activity 12 and takes 2 weeks to complete. [5 marks]

- d) The following activities occur in the order shown below: [10 marks]
- I. Week 2 the *Project Manager* issues CE No1 to remove unchartered drain. The activity takes 3 weeks and delays the commencement of the abutment drainage system.
 - II. Week 7 the *Project Manager* issues CE No 2 to amend the deck reinforcement. This delays concreting the deck by one week
 - III. The waterproofing subcontractor is delayed on another contract and does not arrive on site until week 15.

Total [25 marks]

Section 6

Question 6

You are the *Client's* advisor.

The Client is a major developer and is in the process of developing a 100-hectare area of brownfield land for housing and associated amenities. The development includes a 8km dual carriageway link road to the nearby M63 motorway. National Highways have agreed to a new junction on the M63 pursuant to a formal 278 agreement provided the contract is NEC4 and uses a Project Bank Account.

- | | |
|--|------------------|
| a) How is a Project Bank Account administered. | [8 marks] |
| b) What are the responsibilities of Parties. | [3 marks] |
| c) Who decides and on what basis which Named Suppliers to include | [3 marks] |
| d) What is the purpose of the Trust Deed and Joining Deed. | [5 marks] |
| e) What information needs to be provided in the Contract Data | [6 marks] |

Total	[25 Marks]
--------------	-------------------

Section 2

Question 7

You are the Contractor

Contract Data Part One includes the following: -

The *conditions of contract* are the core clauses and the clauses of the following main Option, the Option for resolving and avoiding disputes and secondary Options of the NEC4 Engineering and Construction Contract June 2017 (with amendments October 2020).

Main Option.....A Option for resolving and avoiding disputes.....W2

Secondary Options X2, X4, X7, X9, X10, X11, X16, X18 and Y(UK)2.

Contract Data Part Two includes the following: -

The *fee percentage* is.....6%

Data for the Short Schedule of Cost Components

The *people rates* are

Category of person	Unit	Rate £
Agent	hour	£42.00
Commercial Manager	hour	£31.00
Site Engineer	hour	£20.00
Works Manager	hour	£35.00
Machine Operator	hour	£25.00
Gang Leader	hour	£22.00
Senior Operative	hour	£20.00
Operative	hour	£18.00

The published list of Equipment is the edition current at the Contract Date of the list published byCivil Engineering Contractor Association.

The percentage for adjustment for Equipment in the published list is..... -35%.

You receive the following compensation event from the *Project Manager*.

“In accordance with Clause 60.1(1) the Scope is amended as follows: -

The post and four rail timber highway boundary fence from CH 350 to CH 625 is deleted and replaced by 1.8m chain link fence to Highway Construction Details H11. Pursuant to Clause 61.2 you are instructed to provide a quotation.”

You receive the following from your fencing subcontractor

“Provision of 275m of 1.8m chain link fence including posts = £9625.00

Deletion of 275m of driven post and four rail timber fence = (-£3,850)

Works to take 14 working days
 Subcontractor risk allowance.....10%

Note – Post holes and concrete to be provided by the main contractor”
 There are 153 posts to excavate and concrete. Based on the following; -

10 posts installed / day
 Total volume of spoil to be excavated and removed offsite.....23m³
 Total volume of concrete to be supplied, inc wastage.....30m³ @£85/m³

Equipment
 Dumper 3.1 tonnes CECA ref 9.5.....£16.71/hr
 Excavator (exc Operator) 6 tonnes CECA ref 10.4.....£37.88/hr
 Mess Cabin CECA ref16.2.....£71.31/wk

Management time
 Agent & Commercial manager 10% of operatives time
 Site Engineer and Works Manager 25% of operatives time

- | | |
|---|--|
| <p>a) Prepare a quotation for consideration by the <i>Project Manager</i>.
 [Note: The question may not include all the information required to complete the quotation. You should state any assumptions.]</p> <p>b) What actions are available to the <i>Project Manager</i> on receipt of the <i>Contractor’s</i> quotation.</p> | <p>[20 marks]</p> <p>[5 marks]</p> |
| Total | [25 marks] |

Section 2

Question 8

You are the *Project Manager*

Contract Data Part One includes the following: -

The *conditions of contract* are the core clauses and the clauses of the following main Option, the Option for resolving and avoiding disputes and secondary Options of the NEC4 Engineering and Construction Contract June 2017 (with amendments October 2020).

Main Option.....A Option for resolving and avoiding disputes.....W2

Secondary Options X2, X4, X7, X9, X10, X11, X16, X18 and Y(UK)2.

The *Contractor* has submitted its Clause 32 programme for acceptance. In the accompanying narrative the *Contractor* states that to maintain its forecast planned completion it is necessary to increase the drainage resource from two gangs to four. In doing so the *Contractor* requires acceptance of a revised Activity Schedule

- (a) **Describe the process the *Contractor* should follow, if any, to obtain your acceptance of the revised Activity Schedule. [4 marks]**
- (b) **Having considered the *Contractor's* request you consider that the *Contractor* has front loaded the revision to the drainage activities. You are unwilling to accept the revised Activity Schedule. Draft a response to the *Contractor* quoting the appropriate clauses of the contract. [6 marks]**
- (c) **The *Supervisor* has issued the Defects Certificate. Describe the process for finalising the amount due to the *Contractor*. [15 marks]**

Total [25 marks]

Law & Contracts Examination Module 3 Points for Answer

Question 1 Compulsory

- | | | |
|-----|--|-------------------|
| (a) | There is a contradiction in the contract. Contra proferentem applies here. contract was proposed by Toshack so any interpretation difficulty will be in favour of Harrison | [3 marks] |
| | Answers should assess the two clauses. Clause 10.7 requires something that is fit for purpose and the failure to achieve the stated performance has led to Toshack suffering loss. | [3 marks] |
| | Clause 19.2 was satisfied by Harrison as it provided the product specified. The conclusion is Harrison is not liable. | [2 marks] |
| (b) | Explanation that the WP label on its own has little, if any effect | [2 marks] |
| | When placed on documents seeking a settlement of a dispute it would prevent the receiving party from producing it as evidence of any liability in future proceedings. | [4 marks] |
| (c) | Cross contract set off not allowable unless expressly agreed by the parties in subcontract which is wasn't here. | [4 marks] |
| | Equitable or legal set off might be available anyway under one contract. | [2 marks] |
| (d) | Extrinsic evidence – pre-contract correspondence will not be taken into account | [2 marks] |
| | Where words and numbers conflict, the words prevail. A general legal principle, so we are not looking for case law specifics. | [3 marks] |
| | Total | [25 marks] |

Question 2

- (a) The contract is a hybrid contract for the sale of goods and/or services, very common in this environment. The supply here is of services so clause 65 does not apply, but clause 66 does. **[2 marks]**
 There is no obligation for the services to be fit for purpose. **[3 marks]**
- (b) See Balfour Beatty v Grove (EWCA). **[2 marks]**
 Parties had agreed interim payments in accordance with HGCRA but agreement ended at the date stated so nothing further due until completion. **[3 marks]**
- (c) Marks for reference to UCTA 1977 and Ampleforth v Turner and Townsend [2012]. **[2 marks]**
 UCTA's considerations for assessing reasonableness of limitation clauses. **[4 marks]**
 Ampleforth for effect of large PII certificate and low liability limitation. **[4 marks]**
- (d) Parties have clearly agreed to the contract by their conduct. **[1 mark]**
 Cooper has done work, Lowfields instructed a commencement and has paid invoices. **[2 marks]**
 Incomplete status of contract form unlikely to be relevant. **[2 marks]**
- Total **[25 marks]**

Question 3

- (a) Refer to Parking Eye v Beavis and Makdessi v Cavendish Square. **[2 marks]**
 Amount probably enforceable as it seems to be a genuine pre-estimate of the Employer's losses in the event of delay. **[2 marks]**
 Also, is the amount in the legitimate business interest of the Employer? It does not seem to be extravagant, exorbitant or unconscionable? **[4 marks]**
- (b) In this scenario, damages would be at large; they would not be zero **[5 marks]**

- (c) Parties making contractual claims have the burden to prove what they say. **[5 marks]**
 Inevitably this involves providing documents to demonstrate what has happened and when.
 The reason for the inability to provide supporting information is unfortunate but its absence would still be detrimental to the claim. Each party must prove what it says and should keep such data secure and backed up.
- (d) Gelderd was not correct to block access – see *Trant v Mott MacDonald*. **[3 marks]**
 Under the Scheme and most contractual processes, the adjudicator has the power to direct a party to provide additional documents and draw inferences if they do not. Eg Scheme para 13(a) & (15)b. **[4 marks]**
- Total **[25 marks]**

Question 4

- (a) No, it isn't correct. The interpretation of this clause, *ejusdem generis*, is that the other items are in the same class as the earlier ones so would be things such as bad ground. But not protesters. [2 marks for naming EJ]. [3 marks for remainder] **[5 marks]**
- (b) Demonstrate the difference between guests and uninvited people. Occupiers' Liability Act 1984. **[5 marks]**
- (c) Wober has liability as the Occupier here **[2 marks]**
 Occupiers' Liability Act 1957. **[2 marks]**
- (d) Liability for breach continues after completion, either 6 years (simple contract) or 12 years (deed). The boast is incorrect. Limitation Act 1980. Long stop date of 15 years. **[7 marks]**
 Answers from Scots law candidates will differ and will need to explain prescription and the relevant time periods. Prescription (Scotland) Act 2018.
- (e) Tyler should not comply. This type of discharge is likely to be a criminal offence for the individual and the company. Tyler's loyalty to his employer does not extend to committing offences. **[4 marks]**
- Total **[25 marks]**

Law & Contracts Examination Module 3 Points for Answer

Question 5 Compulsory

- (a) The instruction to remove the drain takes three weeks. There is two weeks float on the follow-on activities, thus planned completion is delayed by one week. The Completion Date moves by one week to the end of week 16. **[5 marks]**
- (b) The CE to amend the deck reinforcement is on the critical path and therefore moves the planned completion by one week. The impact of correcting the Defect moves the subsequent activities by two weeks. This has one week float. The Completion Date moves by one week to the end of week 16. **[5 marks]**
- (c) The two-week duration to amend the safety fencing swallows the float to activity 12 but does not impact on planned completion. And consequently, the Completion Date is not adjusted. **[5 marks]**
- (d) Without the impact of the delay to the arrival of the waterproofing subcontractor the combination of CE1 and CE 2 is to move the planned completion by one week hence the Completion date is week 16. The delay to the arrival of the waterproofing subcontractor is a *Contractor* risk so no change to the Completion Date, however planned completion is now the end of week 17. **[10 marks]**
- Total **[25 marks]**

Question 6

- Quote the definition of a Project Bank Account Y1.1(3) **[25 marks]**
- Contract Data Part One provides information on who will be the account holder, this can be the Parties or the *Contractor*. It also states whether the *Contractor* is responsible for any bank charges.
- The *Contractor* completes Contract Data Part 2 as part of its tender and states which bank is proposed. The *Contractor* also provides details who will be the Named Suppliers
- Explain the responsibilities of the Parties,
 - The *Client*,
 - The *Contractor*
- Explain who would be a Supplier.
- Explain when the Project Bank Account is to be operational.

- State that bank charges and interest is excluded from Defined Cost
- If the *Contractor* is the account holder, then it is required to submit to the *Project Manager* the banking arrangements.
- Explain that the *Contractor* prepares a Payment Schedule and what it contains.
- All members of the Project Bank Account sign the Trust Deed which is the form of agreement.

All members of the Project Bank Account sign a Joining Deed

Total

[25 marks]

Question 7

- (a) The quotation should be presented in a format mirroring the Short Schedule of Cost Components – e.g.
- People cost
 - Equipment
 - Plant and Materials
 - Subcontractors
 - Charges – assumption to be made
 - Manufacture and Fabrication
 - Design
 - Insurance

[20 marks]

Sample Quotation for provision of chain link fence

Quotation for the provision of a chain link fence to HCD H11 between Ch 350 and Ch 625		
Change to the Prices		
Description	Defined Cost	Prices
People Cost	£13,150.20	
Equipment	£4,680.95	
Plant & Materials	£2,550.00	
Subcontractors	£7,352.50	
Charges	£2,707.73	
Manufacture & Fabrication	£0.00	
Design	£0.00	
Insurance	£0.00	
Total	£30,441.20	

Agreed Risk allowance (8%)	£2,435.30	
Total	£32,876.50	
Fee Percentage @ 6%		£1,972.59
Increase in the Prices		£34,849.09
Change to the Completion Date		
There is no change to planned completion because of this compensation event		
Contractor's assumptions		
None		

1 People Cost

Excavate post holes – 15.5 working days, including removal of spoil.

Machine Operator	8hrs x 15.5 days x £25.00/ hr.....	£3,100.00
Gang Leader	8hrs x 15.5 days x £22.00/ hr.....	£2,728.00
Senior operative	8hrs x 15.5 days x £20.00/ hr.....	£2,480.00
Operative	8hrs x 15.5 days x £18.00/ hr.....	£2,232.00

Sub Total Operatives.....£10,540.00

Agent	12.4 hrs x £42.00.....	£520.80
Commercial Manager	12.4 hrs x £31.00.....	£384.40
Works Manager	31 hrs x £35.00.....	£1,085.00
Site Engineer	31 hrs x £20.00.....	£620.00

Sub Total Management.....£2,610.20

Total People Cost.....£13,150.20

2 Equipment

3.1 Tonne Dumper	8hrs x 16 days x £16.71.....	£2,138.88
6.0 Tonne Excavator	8hrs x 16 days x £37.88.....	£4,848.64
Mess cabin	3 wks x £71.31.....	£213.93

Sub Total Equipment.....£7,201.45

Percentage adjustment (-35%).....£2,520.50

Total Equipment.....£4,680.95

3 Plant and Materials

30m³ concrete @ £ 85/m³.....£2,550.00

4 Subcontractors

Fencing Subcontractor

Provision of 275m of 1.8m chain link fence.....£9,625.00

Deletion of 275m timber fence.....**£3,850.00**

Sub Total.....£5,775.00

Risk @10%.....£577.50

Total Fencing Subcontractor.....£6,352.50

Design Consultant

Alter construction drawings and Information Model.....£1,000.00

Total Subcontractors.....£7,352.50

5 Charges

Assume 15% of People Cost.....£1,972.53

Assume 10% of Subcontract Cost.....£735.20

Total Charges.....£2,707.73

6 Manufacture & fabrication Nil

7 Design Nil

8 Insurance Nil.

(b) Clause 62.3 sets down the three actions available to the *Project Manager* [5 marks]

Total Marks [25 marks]

Question 8

(a) The answer should include: - [4 marks]

- Definition of Activity Schedule
- Clause 55.3 is the mechanism to revise the Activity Schedule

(b) The *Project Manager* would rely on the second bullet point of Clause 55.4. [6 marks]
 Additionally, Clause 13.4 requires the *Project Manager* to state the reason in sufficient detail to allow the *Contractor* to correct and resubmit.

(c) The answer requires to be a detailed analysis of Clause 53 stating [15 marks]
 Time period after issue of the Defects Certificate
Project Manager provides the *Contractor* of how the amount has been assessed
 If payment is due when after the assessment

If the *Project Manager* fails to make an assessment what action should the *Contractor* take

If the *Contractor* disagrees with the assessment what action is required and when

Significance of “conclusive evidence”

Total

[25 marks]