

ICE Law and Contract Management Examinations

Examiner's Report 2016

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Moderator's Report

The percentage success rate for Module 1 Paper this year was disappointingly lower than that achieved in previous years whereas the pass rates achieved for Modules 2 and 3 Papers were very much in line with past performance. The number of candidates sitting Modules 1 and 2 Papers was also slightly down on last year but at this juncture this is not viewed by the Moderators as an indication of reduced overall interest in the examinations.

The examiners make useful comments in their reports much of which merits repetition.

For the Module 1 Paper generally, candidates lost marks because (i) they failed to fully explain their answers and develop the relevant legal concept (ii) they simply set out their knowledge of the relevant subject matter rather than applying their knowledge to the relevant question and/or (iii) they reiterated the facts outlined in the question rather than explaining their knowledge and applying it to the question. Moreover, many candidates appear to have wasted time on providing detailed answers for parts of questions with a few marks and not providing comprehensive answers for those parts with the higher marks.

For the Module 2 Paper it was encouraging to note that candidates were in the main adopting NEC language and terminology. However, some candidates wrote out the entire question before answering it. This attracts no marks and takes valuable time. A few candidates paraphrased the questions, which resulted in a slightly different question being answered or a loss of emphasis and ultimately marks. Typically, a good approach is to reference, comment and conclude. Reference the relevant clauses by number, comment on their relevance, meaning or process and then draw your conclusion to answer the question. Simply copying the clause from the contract will not demonstrate an understanding and will attract fewer marks.

For the Module 3 Paper, because of the small number of candidates, it is difficult to generalise. However again it was clear that the candidates that grasped the key issue being examined and focused on addressing them, and did so succinctly, fared considerably better than those who were less focused and often more verbose. This year, happily, there was much less evidence of candidates pointlessly repeating elements of the question or unnecessarily regurgitating sections of the contract, which has been a feature of previous years. It would seem that candidates that gave themselves time to consider the question and the points raised in it, then planned their answer did much better. Time management did seem to be an issue. It seemed that some candidates were struggling to finish the last question in the time available.

The examiners give a considerable amount of time to set and mark papers for a small honorarium and deserve our grateful thanks. The candidates clearly make a considerable effort to assimilate all the material and present commendable scripts whether they pass or not. For those who did not manage to achieve a pass this time we sincerely hope that you will not be deterred from sitting the exam on a future occasion. In this regard, it is also encouraging to note the increased number of approved Organisations offering the ICE Law and Contract Management Courses.

Finally, all the candidates, whether or not they were successful this year are to be congratulated for the hard work put into learning all the law and contract they have displayed. We hope that they will be able to put it into use in their daily work and will be encouraged to improve their knowledge and take it to a higher standard in years to come. It is our belief that knowledge and understanding of civil engineering law and contract procedures are prerequisites to competent project administration and management. Consequently, it is hoped that all candidates will concur with these sentiments and do their part to encourage their colleagues to likewise commit to advancing their own understanding and knowledge of civil engineering construction law and contract.

Examiner's Report

Pass marks

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

Total Number of Candidates taking each Module and % Passing each Module								
	Module 1		Module 2 ICE		Module 2 NEC		Module 3	
	Nr	%	Nr	%	Nr	%	Nr	%
2016	74	51	-	-	91	74	3	33
2015	85	70	-	-	105	76	3	33
2014	68	62	-	-	72	79	4	0
2013	42	73	-	-	51	73	3	0
2012	36	83	-	-	42	82	6	33
2011	43	81	2	50	41	53	2	50
2010	34	83	1	100	36	67	7	29
2009	46	83	2	100	44	80	2	0
2008	45	84	2	100	43	83	2	0
2007	28	74	1	0	25	52	5	20
2006	47	74	21	100	25	76	3	33
2005	57	60	14	86	37	73	5	0
2004	51	98	40	70	9	78	3	33
2003	51	80	32	65	7	85	9	67
2002	42	93	30	63	7	71	10	10
2001	40	83	24	55	N/A	N/A	12	42

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

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

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

Module 1

Section 1

General comments

In general, this section was answered well with the majority of candidates achieving a pass mark or above in this section. Candidates lost marks because: (i) they failed to fully explain their answers and develop the relevant legal concept; (ii) simply set out their knowledge of the relevant subject matter rather than applying their knowledge to the relevant question and/or (iii) reiterated the facts outlined in the question rather than explaining their knowledge and applying it to the question. Candidates that achieved top marks provided well-structured answers which clearly explained the relevant areas of law and the application of the law to the facts.

Question 1

This was a popular question and was attempted by over two-thirds of candidates. Over three-quarters of candidates who attempted this question achieved a pass mark or above.

- a) In general this question was answered well. Candidates recognised that this question concerned offer and acceptance and demonstrated a good understanding of this area of law. However, many candidates lost marks as they failed to recognise that, DRU's statement that it will accept the lowest offer means that the invitation to submit tenders amounts to an offer (not an invitation to treat which was the conclusion of many of the candidates).
- b) Many candidates either failed to answer this part of the question or failed to recognise that this question concerned forms of contract (i.e. simple contracts vs deeds) and the legal formalities for creating a valid deed. Many candidates failed to make a distinction between a simple contract and a deed, and failed to demonstrate a good understanding of the legal formalities for creating a valid deed. Some candidates mistook this question as concerning contract construction and discussed the Parole Evidence Rule.
- c) Many candidates either failed to answer this part of the question or failed to recognise that this question concerned limitation periods.
- d) Candidates answered this question and many candidates obtained full marks. Candidates demonstrated a good understanding of LADs and applied their knowledge of the law on this matter to the facts well.

Question 2

This was the least popular question and was attempted by just over half of candidates. Over three-quarters of candidates who attempted this question obtained a pass mark or above.

- a) In general this question was answered correctly. Candidates lost marks for failing to explain their answers fully.
- b)i) This part of the question was answered fairly well. However, candidates lost marks as they did not read the question properly. This question concerned adequate consideration. However, some candidates mistakenly discussed breach of contract. Candidates lost marks as they failed to explain their answers by making reference to relevant case law and established legal principles.
- b)ii) This part of the question was answered fairly well. However, candidates lost marks as they did not read the question properly. This question concerned past consideration. However,

some candidates mistakenly discussed promissory estoppel. Candidates lost marks as they failed to explain their answers. Candidates failed to make reference to relevant case law and established legal principles or failed to apply their knowledge to the facts correctly.

c) As a whole, this question was poorly answered. Most candidates failed to recognise that this question concerned promissory estoppel. Some candidates mistook this part of the question as concerning breach of contract by the Insurer and discussed remedies available to Claudia for breach of contract. Other candidates mistakenly discussed defences available to Claudia in relation to the professional negligence claim being made against her rather than focusing on the equitable remedy available to Claudia in relation to the Insurer's claim to recover the costs they incurred defending the underlying claim against Claudia.

Question 3

This question was equally popular as Question 1 and was attempted by over two-thirds of candidates. Over two-thirds of candidates who attempted this question passed.

a) This question was answered fairly well. However candidates lost marks by providing short answers with insufficient explanation. Some candidates also lost marks as they failed to demonstrate that they are aware that there are different types of misrepresentation and failed to reach a conclusive view on the most applicable type of misrepresentation given the facts. Candidates demonstrated a better understanding of the available remedies for breach of contract than for misrepresentation.

b) This question was answered fairly well. However candidates lost marks by providing short answers in which they failed to provide sufficient explanation and develop the relevant legal concepts. Candidates failed to make reference to relevant case law and established legal principles or failed to apply their knowledge to the facts correctly. Some candidates mistook this question as one concerning contract formation.

Section 2

General comments

All three questions in this Section were popular and attempted equally by over 60% of the candidates with there only being a very slight marginal preference to one question over another. Overall, candidates demonstrated a reasonable understanding of the legal principles of tortious duty however the standard of responses were not as high as previous years. The majority of candidates achieved a pass in this section. Where candidates lost marks, this was because they had not read the question(s) properly and therefore answered the wrong question. Candidates generally also lost marks by not applying the legal principles to the facts with reference to case law, statute etc. (as appropriate). Moreover, a lot of candidates appear to have wasted time on providing detailed answers for questions with a few marks and not providing comprehensive answers for those questions with the higher marks.

Question 4

49 of the 74 candidates answered this question. Of those that attempted this question, less than half the candidates achieved 12 marks or higher.

a) This question was answered reasonably well. Stronger candidates identified that the OLA 1957 applies as Mike is a 'visitor'. However a number of candidates lost marks by not

considering in detail whether Jane failed to breach the standard of a reasonable occupier (noting that the OLA 1957 imposes a “common duty of care”). Stronger candidates considered, for example, whether Jane took reasonable steps to satisfy herself that Steve was a competent independent contractor.

b) A number of candidates failed to identify that Hugh was a ‘trespasser’ and not a ‘visitor’ and therefore the OLA 1984 applies. Candidates lost marks by not considering whether Jane breached her duty, and whether this caused the loss.

c) This question was answered well. The majority of candidates identified that as Hugh was a trespasser, he would not be able to recover damages for his iPhone as this would fall outside the OLA 1984.

d) This question was answered fairly well. Candidates lost marks by failing to distinguish between a warning notice and an exclusion notice; noting that under the later could operate as a potential defence to a claim. Weaker candidates also lost marks by not identifying that personal injury under the Unfair Contract Terms Act 1977 could not be excluded.

Question 5

50 of the 74 candidates answered this question. Of those that attempted this question, just over half of the candidates achieved 12 marks or higher.

a) This question was not answered very well. A number of candidates did not recognise that Beth can bring a claim against Hilary for negligent misstatement. A number of candidates focussed on the *Caparo v Dickman* principles. Candidates that identified that Beth could be liable for a claim in negligent misstatement, then failed to apply the *Hedley Byrne v Heller* principles to the facts. Moreover, candidates lost marks as they failed to apply the *Bolam* test for breach and the ‘but for’ test for causation considerations.

b) This question was answered very well. The majority of candidates identified that usually, no duty of care will be owed in respect of advice given in a social situation. Stronger candidates went on to discuss the facts and that Claire has more experience and knowledge about Big Design and that Beth could be seen to be relying advice.

c) Whilst the majority of candidates identified that Beth could bring a claim against Accrual & Co vicariously, candidates lost marks on this question by not applying the legal principles to the facts. Those candidates that established the three elements (i.e.: (i) Hilary was an employee; (ii) Hilary committed a tort; and (iii) the tort was committed in the course of employment) and applied this to the facts, achieved good marks.

d) Candidates lost marks on this question by not demonstrating that “*without responsibility*” was sufficient to exclude liability under the *Hedley Byrne v Heller* case. Moreover, candidates also failed to demonstrate that the test of reasonableness would need to apply in order to establish whether the disclaimer could be used to avoid liability.

Question 6

51 of the 74 candidates answered this question. Of those that attempted this question, less than half of the candidates achieved 12 marks or higher.

a) This question was designed to get the candidates to identify that there is strict liability in a claim under *Rylands v Fletcher* and as a result there is no requirement to show negligence on

the part of the owner. Candidates lost marks by setting out the test under *Rylands v Fletcher* instead.

b) This question was answered reasonably well. Candidates lost marks as they did not go onto applying the legal principles to the facts. Stronger candidates demonstrated a distinction between private and public nuisance. They went onto applying the test under *Rylands v Fletcher* to the facts. Candidates who simply set out the test, without applying this to the facts lost marks. Candidates, who considered a duty of care in negligence in detail and failed to recognise that the *Rylands v Fletcher* principles apply, lost marks.

c) This question was answered well. The majority of candidates identified that the act of the third party and 'act of god' could apply as defences. Stronger candidates also identified that contributory negligence on the part of Fast Delivery could apply as a defence.

d) Candidates lost marks in this question but not identifying that the measure of damages was to put Stuart in the same position as he would have been if the fire has not occurred. Candidates also lost marks by identifying that Stuart has a duty to mitigate his losses and is therefore unlikely to be able to recover the additional costs in repairing Unit B arising from his delay.

Module 2

Section 1

General comments

This year saw a good increase in the pass rate for section 1, up from 75% last year to 95%.

Candidates are reminded to use NEC language in their answers including identified and defined terms. We don't expect candidates to write in italics, but capitalisation for defined terms is important.

There were frequent ambiguities relating to 'the date of Completion', 'planned Completion' and the 'Completion Date'. For example, references to 'Completion date'. No marks were lost where on balance it was reasonably clear which date was being referred to.

The defined term 'Defect' was frequently written without capitalisation and 'approve' was cited numerous times in place of 'accept'.

The best answers mirror the language, verbs, identified and defined terms provided in the relevant clauses. These observations sound pedantic but are important. For example, clause 14.1 specifically limits the scope of 'acceptance'.

Some candidates wrote out the entire question before answering it. This attracts no marks and takes valuable time. A few candidates paraphrased the questions which resulted in a slightly different question being answered or a loss of emphasis and ultimately marks.

We request that candidates start each question on a new page and write legibly. Some scripts became almost undecipherable towards the end. In many cases this occurred where candidates were clearly running out of time, yet had unnecessarily written out the relevant clauses word for word.

Typically, a good approach is to reference, comment and conclude. Reference the relevant clauses by number, comment on their relevance, meaning or process and then draw your conclusion to answer the question. Simply copying the clause from the contract will not demonstrate an understanding and will attract fewer marks.

Question 1

This question was answered by 79 of the 91 candidates and was the most popular question. It attracted an average score of 17 out of 25. 67 candidates achieved a pass mark in this question, equivalent to 85%. Picking up on the general comments above, there were plenty of examples of the use of 'approve' instead of 'accept'.

- a) This part of the question was answered well with the majority of candidates identifying the Works Information as the document containing the relevant information.
- b) Around half of the candidates did not appreciate that unless the Works Information requires the particulars of a design to be submitted, no submission is necessary. Many answers focused on the final paragraph of clause 21.2 without understanding the first.
A couple of candidates incorrectly thought designs were deemed accepted if not replied to.
- c) Several candidates confused a design acceptance as a further way to specify the work and so thought the scenario should be treated as an inconsistency under clause 17.
- d) Those candidates who confused the scenario with an inconsistency, consequently did not recognise the matter as a Defect. The majority of the remainder of candidates answered this part well, although some either missed the opportunity to notify an early warning, or incorrectly insisted that a Defect notification needed replying to.
Several confused a Defect notification with the Defects Certificate, incorrectly stating that once a Defect had been corrected a certificate was issued.
- e) Candidates who arrived at the right answer tended to be those who had answered the previous parts correctly.

Question 2

This was the third most popular question attempted by 31 of the 91 candidates, averaging a mark of 15, the lowest of all four questions in this section. 18 candidates achieved a pass mark of 13 or higher, a 58% success rate.

- a) Most candidates answered this question well although few scored high marks. For maximum marks, it was necessary to recognise that the assumed quantities may be inaccurate due to a range of physical realities on Site.
- b) Most candidates correctly identified that the *Employer* himself couldn't change the Works Information; the instruction needed to come from the *Project Manager*.
Candidates are reminded that the authority to change the Works Information is under clause 14.3, not clause 60.1(1). Clause 60.1(1) identifies that, under certain conditions, an instruction to change the Works Information is a compensation event.
- c) Most candidates concluded a compensation event had arisen. Not all answers addressed who should notify it, which was clearly a requirement of the question. The best answers noted that the eight-week time bar under clause 61.3 would not apply.
- d) This question really split the results and drew out those who had a full understanding of how compensation events worked in relation to main Option B. Many candidates fell into the trap of thinking that the rates in the Bill of Quantities had to be used.
Whilst many candidates seemed aware of clause 63.1, they went on to confuse this with early parts of clause 63.13. The confusion seemed to centre around the misinterpretation of the first bullet in clause 63.13, namely and incorrectly that, where there was an item in the Bill of Quantities, its rate should be used.

The best answers correctly identified that in accordance with core clause 63.1, the impact to Defined Cost and the resulting Fee needed to be considered unless, in accordance with the last sentence of clause 63.13, the *Project Manager* and the *Contractor* agree to use the rates from the Bill of Quantities.

Similar to clause 63.12 in main Option A, the early parts of clause 63.13 address how to reflect the assessment within the pricing document, not arrive at the assessment itself. For the Activity Schedule this may involve new, removed or changed Prices. For the Bill of Quantities, it is as clause 63.13 describes, a little more complex.

Question 3

This was the second most popular question, attempted by 53 of the 91 candidates, averaging a mark of 17 out of 25. 85% of candidates achieved a mark of 13 or higher making it, along with question 1, jointly the most successfully answered question.

- a) Some confusion was evident with a number of candidates incorrectly referring to the Defects Certificate. The majority however knew the process and arrived at the correct number of weeks, stating sensible assumptions.
- b) Most candidates answered the first element of this part well. Several didn't attempt the second element relating to main Options A and B. Of those that did, some irrelevantly discussed the absence of Disallowed Cost in main options A and B, rather than simply stating that there is no provision for being paid to correct Defects under these main options.
- c) The vast majority of candidates knew the *Supervisor* was required to issue the Defect Certificate and when to do so. However only a couple of answers correctly identified to whom the certificate should be issued, with clause 13.6 requirements not commonly known.
- d) Candidates either scored highly or poorly on both parts d) and e) given their relevance to one another. Some candidates questioned whether the work was part of the *works* but then offered no conclusion either way.

Around half correctly answered by stating it would depend on whether it had been constructed in accordance with the Works Information, with top marks given where answers explored the potential for the failure to be due to a design issue.

- e) Most candidates who answered part d) well achieved full marks in part e), apart from a few who neglected to mention the *Supervisor's* authority to search.

Question 4

This was the least popular question answered by just 19 of the 91 candidates. It attracted an average mark of 17 and 15 candidates achieved a pass mark, a success rate of 79%.

- a) This part was answered well by all.
- b) Most candidates underlined the importance of fully completing Contract Data. However top marks were reserved for those answers that stated the Fee was used by default in the assessment of all compensation events, regardless of main Option choice.

Only a couple of scripts incorrectly suggested completion of these elements was not necessary given the definition of Price for Work Done to Date.

- c) This part was answered better than variations of the same question in previous years. The candidates on the whole appreciated that the Risk Register cannot be used to allocate risk to either Party. Additionally, most knew the distinction between adding matters into Contract

Data parts one and two for inclusion on the Risk Register, and additional *Employer's* risks in Contract Data part one.

- d) Most candidates knew at least one of the circumstances under which the Shorter Schedule of Cost Components might be used under main Option C. Awareness was good and this part was well answered.
- e) All candidates answered this part successfully.
- f) Marks were given where answers cited the reasons in clause 24.1, but high marks required an explanation that any reason could be given, but may have consequences - clauses 13.8 and 60.1(9).

Section 2

General comments

The average mark for this section was around 13 marks, slightly lower than it was last year. Again, this is very encouraging and there were just a handful of candidates scoring quite low marks. Most candidates again have tried to actually answer the questions in front of them, which of course is good. I offered quite a few comments in last year's report in the hope that future candidates can improve upon them. I've added just a few more this year, most of those comments in previous years still stand:

- You don't have to denote italics in any way, it's too difficult for you and your time is better spent reading the question more thoroughly and making sure you give complete answers.
- Sometimes just one short sentence is offered up for a sub-question worth 5 marks – you're not going to score well – look at past papers' questions and suggested answers to see the sort of depth you need to go to for a good score. Similarly, if you offer no answer at all to a sub-question, you will get no marks.
- The word 'approval' still appears quite regularly in scripts concerning, for example, Contractor's design. Read the contract- 'acceptance' is generally required in most instances – look at the index for 'acceptance' and 'approval' to see how and when these terms apply.
- Occasionally, candidates put e.g. Q6 in their answer paper but they were actually answering Q5. No marks were lost for this but be careful.
- It's no use putting 'ran out of time' in your answers – no marks can be given for this. If struggling for time, at least fall back to writing a plan for the remainder of an answer explaining quickly what you were going on to answer – some marks can be given for this.
- Maybe a tip for future candidates is to look at the contents to make sure you are hitting all of the parts of the question – have I addresses payment, title, compensation events etc.?

The number of candidates decreased this year slightly to 91, but is still very encouraging.

Question 5

This was the least popular question with only 15 candidates attempting this question. An average mark of about 12 was achieved.

The more detailed points for answer show what might have been covered but many struggled with this question. A few other comments are:

- In 5(b), what we were looking for was an acknowledgement the Contractor has done nothing wrong as yet but it was worth talking to him to see if the bond was in hand. The Employer also needed to understand the position better.
- In 5(c), some said that a compensation event had occurred, without any further explanation. Some said that the Project Manager should just amend the Contract Data and apply that from then on. In both cases, this is simply wrong.

Question 6

75 candidates attempted this question, with the average mark being 14.5. This was the most popular question and the best marks were scored here. A few other comments are:

- Q6(b) the question was looking to get candidates to think about solving the problem if possible via the early warning/risk reduction meeting process; and then comment upon whether this might end up being a compensation event and explain.
- In Q6(c), the Employer cannot notify an early warning under the contract, this right sits with both the Project Manager and Contractor.

Question 7

36 candidates attempted this question, achieving an average of about 12 marks. A few other comments are:

- In Q7(c), many candidates did not think about possible delegation of Project Manager's duties or mention the practical discussions between the Employer's person and the Project Manager that should happen as an absolute minimum.
- In Q7(d), most candidates definitely struggled with each of the items as to whether they were Disallowed Cost or not. Some candidates merely provided their gut feeling rather than referring to the contract, which gave the answers. Again, use the index to help get you to the part of the contract that will help you with these sorts of answers.

Question 8

56 candidates attempted this question, achieving an average of 13 marks.

56 candidates attempted this question, achieving an average of about 12 marks. A few other comments are:

- In Q8(a) there was no mention of these being Key People so the question needed to be answered from both perspectives.
- In Q8(b) as Project Manager you at least needed to simply talk things over with the Contractor.
- In Q8(c), you needed to think about and address both payment and compensation events.

Module 3

Section 1

General comments

Only three candidates took the Level 3 Paper again this year which again makes drawing any statistically sensible conclusions impossible. However again it was clear that the candidates that grasped the key issue being examined and focused on addressing them, and did so succinctly, fared considerably better than those who were less focused and often more verbose. This year, happily, there was much less evidence of candidates pointlessly repeating elements of the question or unnecessarily regurgitating sections of the contract, which has been a feature of previous years. It would seem that candidates that gave themselves time to consider the question and the points raised in it, then planned their answer did much better. Time management did seem to be an issue. It seemed that some candidates were struggling to finish the last question in the time available.

Question 1

The marks for this compulsory question varied greatly. The question concerned unforeseen physical conditions and how they impact on the contractual relationships between main contractor and employer, and contractor and subcontractor.

Part a) concerned the role of the risk reduction process in the change management process, particularly from the Project Manager's point of view. This part was generally well answered, perhaps benefiting from being the first thing that candidates attempted. The better candidates noted the positive things that the PM could do, including instructing more site investigation and exploring design changes if they were possible. All identified that a compensation event would likely need to be notified and that this could be done by the Project Manger. However, none really addressed the test in 60.1(12) and the level of evidence that is necessary to establish what "*would have such a small chance of occurring*" that it would not be included by a reasonable Contractor. Some touched on the role of the Risk Register, but without suggesting what or how it would be developed, and that involving the sub-contractor should be considered. Better candidates explored record keeping issues and setting up a system for that. None mentioned the role of the accepted programme in defining what work the Contractor was anticipated to carry out. Nor did any suggest the Project Manager should warn the Employer that the costs of this would not be shared with the contractor under the Option D contract, but rather increase the target.

Part b) was less well answered by the majority of the candidates. The best candidate spotted the importance of forecasting and record keeping in satisfying the need for certainty. There was mention of the pressure on the Contractor to predict something that is unknown. The tension in recording defined cost whether subcontracted or not under clause 11.2(22) was addressed by one candidate.

Part c) explored the way the contractor must prove his entitlement in setting out his quotation. It was not well answered, which perhaps reflects a general lack of attention to efficiently valuing compensation events by some in administering the NEC. None of the candidates explored the difficulty or advantages of using rates under Clause 63.13. Some picked up the need for record

keeping and the importance of the accepted programme for forecasting the defined cost before the event arose.

Question 2

Only one candidate answered Question 2.

Question 3

Only one candidate answered Question 3.

Question 4

Only one candidate answered Question 4.

Module 3

Section 2

General comments

All three candidates were consistent in their terminology and did not mention terms or words used in NEC contracts.

Question 5 (Compulsory)

This question was about a Contractor's liabilities under the ICC Measurement contract however that contract has come about. In the case of a novation the substitute contractor has the same benefits and liabilities as if they were the original contractor. Two candidates answered this question well by following this principle but one candidate was inconsistent in application.

Question 6

This question was about the consequences of the Employer or the Engineer making a large number of changes late in the contract and the Engineer and Contractor not managing that change properly under the contract, resulting in additional cost for the Employer. It was answered by one candidate.

Question 4

This question was about an Employer arranging for another contractor to complete defective work (Clause 49) and the importance of ensuring a competitive price for doing that work if it is to be recovered from the original defaulting contractor. It was answered by two candidates.

Institution of Civil Engineers

Examination for the ICE Certificate in Law and Contract Management (CLCM) 2016

Module 1: Law (English and Scots Law)

Monday 6th June 2016

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

There are three questions in Section 1 and three questions in Section 2. Answer **any two** questions from **each section**; a total of **four** questions. Please answer questions from Section 1 in an answer book provided (Yellow book) and answer Section 2 questions in a **separate** answer book provided (Yellow book). All questions carry equal marks.

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

References to Cases and Acts should be quoted where possible.

Please indicate on the outside of the answer booklets whether your answers will be in respect of Scots Law.

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

Section 1

Question 1

On 1 March 2015, DEVELOPERS'R'US ("DRU") placed an advert in a national newspaper inviting contractors to submit bids in respect of the construction of a new leisure centre in Derby.

The advert specified that "*the lowest bid will be the successful bid*". The advert also stated that "*all bids must be submitted by 2pm on 1 April 2015*" and that "*any bids received after this deadline will not be considered*".

Lakin Contractors Ltd ("LCL") submitted a bid for £8m, Ledger Builders ("LB") submitted a bid for £7m and Superstructures Limited ("SL") submitted a bid for £6m.

LCL and LB hand delivered their bids to DRU's post room on 31 March 2015. Both these bids were collected by DRU on 1 April 2015 as part of their daily 9am collection. SL's bid was hand delivered to DRU's post room at 11am on 1 April 2015. Unfortunately, DRU failed to make their daily 1pm collection and SL's bid was recorded as late and not considered.

DRU entered into a contract for the works with LB. DRU intended for the contract to be made by deed. Although the contract was made in writing and it was clear from the face of the contract that the document was intended to take effect as a deed, the contract was not properly executed as a deed.

DRU wanted the leisure centre to be open in time for the New Year. As such, LB was contractually required to complete the works by 20 December 2015. The contract provided that in the event that LB did not meet this deadline, LB was required to pay liquidated damages in the amount of £1m per week until the works were completed.

LB completed the works late on 10 January 2016 and DRU claimed £3m in liquidated damages from LB.

- a) **Does DRU have a binding contract with any of the parties and if so on what basis?** [11 marks]
- b) **Will the contract entered into between DRU and LB be considered a deed?** [2 marks]
- c) **What effect will your answer to question 1(b) (above) have on the contractual rights of DRU and LB?** [3 marks]
- d) **Is the contractor liable to pay liquidated damages to DRU?** [9 marks]

Section 1

Question 2

Claudia is a professional architect. Claudia's neighbour, Nikki, asks Claudia if she would be willing to design an extension to her house in return for two tickets to see Take That at Wembley Stadium. As Take That are Claudia's favourite band, Claudia agreed.

Claudia discovered that her laptop is broken. Lewis owns a laptop repairs company. Claudia agrees with Lewis to have the laptop repaired and returned to her by 1 March for a fee of £100. This should allow Claudia enough time to complete the design for Nikki by 1 April (the deadline agreed with Nikki).

On 26 February, Claudia calls Lewis to check that the laptop will be ready to collect on 1 March. Lewis informs Claudia that he may not be able to complete the repairs as he is very busy. Claudia promises Lewis an extra £50 to repair the laptop on time. Lewis agrees.

When Claudia collects her laptop Lewis explains that he has also installed some anti-virus software on her laptop. Claudia promises to pay Lewis a further £50 for installing the software.

Upon receipt of Lewis' invoice of £200, Claudia only agrees to pay Lewis the original £100 for the repair works.

Claudia completes the design for Nikki by 1 April and Nikki subsequently engages Buildit Ltd to construct the house extension as per Claudia's design. The construction of the house extension is a disaster and Nikki brings a professional negligence claim against Claudia for £35,000.

Claudia does not notify her professional indemnity insurers at this time as she hopes to resolve the matter amicably. After months of discussions, Claudia realises that the issue is unlikely to be resolved amicably and notifies her professional indemnity insurers of the claim. Claudia's insurers believe Claudia has been negligent in her design and agree to pay Nikki £35,000 in damages. Claudia was extremely relieved that her insurance company covered the cost of defending the claim and the £35,000 damages as she would not have been able to afford to pay for these personally. She had managed to put aside some £10,000 in the event that she was found liable.

Some 4 months later, Claudia is contacted by her insurer who informs her that as she failed to notify the claim in accordance with the terms and conditions of her insurance policy the claim is not covered by her policy. Claudia's insurance company commence proceedings against Claudia to recover the amount paid out to Nikki. In the intervening period, Claudia invested her £10,000 savings into her architecture business as she did not think she would need her savings to satisfy a claim.

- a) **Advise whether Nikki gave good consideration for the promise to give Claudia two tickets to see Take That at Wembley Stadium in return for the house extension design.** [5 marks]
- b) **Advise whether Claudia gave good consideration for the promise to pay Lewis:**
- i) **an extra £50 to ensure the repairs were completed by 1 March;** [9 marks]
 - ii) **a further £50 for installing the anti-virus software.** [4 marks]
- c) **Advise Claudia whether she has a defence to her insurance company's claim.** [7 marks]

Section 1

Question 3

Keri is the owner of Picture Perfect, a small photographic company. Stacey approached Keri to take photos of her wedding day.

It was agreed that 2 professional photographers would attend the wedding to take photos of both the bridal party and groomsmen getting ready for the wedding, the ceremony and the reception. As Picture Perfect already had a number of bookings on that day, Keri informed Stacey that she may need to ask someone from outside her company to assist her in taking photos on the day. Stacey was concerned that this may affect the quality of the photographs. Keri reassured her that she would ask a “*professional photographer*” to assist her and that the photos would be of a “*professional quality*”. On this basis, Stacey entered into a contract with Keri.

Keri was unable to resource a professional photographer to assist her on Stacey’s wedding day and so asked her friend, Rachel, to help. Rachel was undertaking a photography course at college, but had no professional qualifications.

On the day of the wedding, Rachel overslept causing both Rachel and Stacey to be late. This meant that no pictures could be taken of the wedding preparations. Additionally, when Stacey received the photographs from Keri, the quality of half of the photographs was very poor.

Rachel asked Keri to pay her for helping at the wedding. Keri refused stating that as Rachel is her friend she should not expect to get paid.

- a) **Advise Stacey if she has a claim against Keri in:**
- i) **misrepresentation; and**
 - ii) **breach of contract,**
- and briefly explain the remedies available to Stacey (if any) in each case. [15 marks]**
- b) **Advise Rachel whether she is entitled to be paid for helping at the wedding, in light of her relationship with Keri. [10 marks]**

Section 2

Question 4

“*Dream*” is a prestigious boutique hotel owned and run by Jane. It has an exclusive kids’ playing area which reads at the entrance “Strictly guests only”; Jane has recently expressed concern that members of the public are using the kids’ playing area.

The foyer of the kids’ playing area features a large water fountain which has recently been leaking. Jane therefore engages Steve, a local plumber to repair the water fountain. Steve arrives at the hotel and places a large notice before he starts work which reads:

“Notice to all guests: Warning Repair Work Underway”

As Steve starts examining the fountain he identifies that the leak is as a result of a water pipe which is connected to the fountain under the adjacent floor. To access this, Steve removes a number of marble slabs from the surface of the floor exposing a large hole and further leaks making the floor slippery; no hoardings or railings are placed around the hole.

Hugh, 14, and his friend Mike, 13, have been playing in the hotel pool. Mike is a guest at the hotel, and has invited his friend Hugh (a non-guest) to join him in the kids’ playing area. As Hugh and Mike walk through the foyer, they notice that the lift is about to close and rush towards it. As they are running towards the lift, Mike and Hugh slip and fall into the large hole and suffer injuries.

As a result of the fall, Hugh breaks his leg and his new iPhone. Hugh has had to spend £200 to repair his iPhone. Mike has seriously injured his back.

Jane apologises for any inconvenience caused and for the injuries but refers them to a notice displayed at the hotel reception. The notice reads:

“The hotel management accepts no liability for any injury or loss sustained by a guest howsoever caused”.

Hugh and Mike approach you for some advice.

- a) **Is Jane responsible for Mike’s injuries? If so why and on what basis?** [11 marks]
- b) **Would your answer to question a) differ if Hugh bought a claim against Jane? Explain.** [9 marks]
- c) **Can Jane be responsible for the costs of repairing Hugh’s iPhone?** [2 marks]
- d) **Jane claims she has no liability to Mike or Hugh as a result of the notice at the hotel reception. Advice Mike and Hugh whether Jane can rely on this.** [3 marks]

Section 2

Question 5

Hilary is an auditor at an accounting firm Accrual & Co. Hilary has recently prepared a financial report for Big Design & Co Ltd (“Big Design”) a design consultancy, to issue to its shareholders. The financial report shows Big Design has done very well in the previous year and has made substantial profits in excess of £20 million. Beth, a shareholder of Big Design on seeing the financial report buys a further 10,000 shares in Big Design. It is later revealed that Big Design’s financial status has been overstated by Hilary. Big Design’s share value fell drastically after it was shown that the company was really making a loss.

Beth is disappointed to find that she has lost her money and speaks to her friend, Claire, over a few drinks at the pub about anything she can do to get her money back and wants Claire’s advice on this. Claire is also an auditor at Accrual & Co and Claire tells Beth that she has been looking into Hilary’s error. Claire does not consider the future prospects of Big Design to be as bad as Big Design has made out. In fact, Claire informs Beth that Big Design’s shares are looking to soar as a result of a new international project on which Big Design has been appointed.

As a result, Beth decides to invest in a further 5,000 shares into Big Design. However, the share prices continue to drop and Beth loses substantially all of her investment.

Beth approaches you for some advice.

- a) **On what basis does Beth have a claim against Hilary?** [11 marks]
- b) **On what basis does Beth have a claim against Claire?** [4 marks]
- c) **Identify which other party/parties against whom Beth can bring a claim against for Hilary’s negligence?** [7 marks]
- d) **What would be the effect if the financial report has a disclaimer which reads “*the information is supplied without responsibility*”?** [3 marks]

Section 2

Question 6

Poly Blocks Ltd (“Poly Blocks”) is a manufacturer of polystyrene blocks and occupies a factory premises at Unit A of a site in Northern England.

The process of manufacturing polystyrene blocks comprises the use of pentane, an inflammable hydrocarbon. When the polystyrene blocks are first stored at Unit A, they contain a residual amount of pentane that is sufficient to ignite.

Adjacent to Unit A is Unit B. Stuart is a director of Fast Delivery Ltd (“Fast Delivery”), a company specialising in the delivery of online shopping purchases who has recently purchased the factory premises at Unit B. Fast Delivery stores various items in its unit including food and clothing for delivery.

Stuart raised concerns about the risks inherent from Poly Blocks’ business when they looked into purchasing Unit B but decided to purchase Unit B in any event due to its cheap price.

Close to the area where the polystyrene blocks were stored were several machines including hot wire cutters. The local fire authority had recently expressed concern as to how the materials were stored at Unit A as this could give rise to a fire spreading easily.

One evening, a group of young boys broke into Unit A and started tampering with the hot wire cutters which resulted in a fire starting at Unit A.

The fire ran out of control and started spreading throughout Unit A and to the outside of the factory premises. A violent storm of unprecedented ferocity which had not previously occurred resulted in the fire spreading even further and more rapidly onto Unit B causing considerable damage to Unit B and its contents.

The damage resulted in delays to Fast Delivery’s deliveries as it was required to purchase new stock.

Stuart does not repair Unit B for six months and when he eventually does, he claims he has spent £5,000 for repairing the damage to Unit B. Poly Blocks has only spent £1,000 on the similar repairs to Unit A which were undertaken soon after the incident.

Stuart comes to you and seeks advice on a possible claim against Poly Block Ltd.

- a) **Stuart mentions that he has spoken to his Citizen Advice Bureau who has advised him that a case called *Rylands v Fletcher [1868]* may be particularly helpful. If so, why?** [2 marks]
- b) **Advise Stuart of any claims he has against Poly Blocks Ltd.** [11 marks]
- c) **Can Poly Blocks Ltd avoid liability in these circumstances?** [8 marks]
- d) **What losses could Stuart claim from Poly Blocks Ltd?** [4 marks]

Module 1: Points for Answer

Section 1

Question 1

- a) Candidates should demonstrate a good understanding of invitations to treat, offers and acceptance. [11 marks]
- An advert to submit bids for tender typically constitutes an invitation to treat **(1 mark)**. The bidder makes an offer **(1 mark)** and the seller is then free to accept that offer **(1 mark)**.
- However, DRU's specification that it will accept the lowest offer means that the invitation to submit tenders amounts to an offer **(1 mark)** - *Harvela Investments Limited v Royal Trust of Canada Ltd (1986)* **(1 mark)**. Therefore, DRU are bound to accept the lowest bid constituting acceptance **(1 mark)**.
- By submitting the lowest bid, SL has accepted DRU's offer and a contract has been formed **(1 mark)**. The fact that DRU failed to consider the bid is irrelevant **(1 mark)**. Pursuant to the case of *Blackpool and Fylde Aero Club Ltd. v Blackpool Borough Council (1990)* **(1 mark)** there is an implied contractual obligation on DRU to consider tenders which conform with the conditions of tender **(1 mark)**. SL bid in accordance with the conditions of tender and DRU must consider it **(1 mark)**.
- b) A document that does not meet the common law and statutory formalities required to constitute a deed will not take effect as a deed **(1 mark)**. [2 marks]
- If all the elements for a simple contract are present (e.g. offer, acceptance, consideration, certainty and intention). The contract is likely to take effect as a simple contract **(1 mark)**
- c) The limitation period in which a party to a contract can bring a claim in contract arising out of a deed is 12 years from the date of breach **(1 mark)**. The limitation period in which a party to a contract can bring a claim in contract arising out of a contract is 6 years **(1 mark)**. Therefore the time in which each party can bring a claim against each other will be reduced from 6 years and not 12 years - a claim cannot be brought after the limitation period has expired. **(1 mark)** [3 marks]
- d) Liquidated damages are pre-agreed damages for the injured party to collect as compensation upon a specific breach (e.g., late performance) **(1 mark)** [9 marks]
- The general position under English law is that a liquidated damages clause will only be enforceable if it is a "genuine pre-estimate of loss" **(1 mark)**
- The test for a genuine pre-estimate of loss is whether there is a substantial discrepancy between the level of damages stipulated in the contract that was likely to be suffered - *Alfred McAlpine Capital Projects v Tile Box Ltd (2005)*. Candidates should consider if the sum of LDs is a genuine estimate of the level of damages that was likely to be suffered by late completion (objective test). **(2 marks)**
- Candidates should reach a reasonable conclusion as to whether DRU will be

able to enforce the liquidated damages clause. Courts are pre-disposed to uphold LAD clauses, however given the £7m contract value (based on SL's bid) and an educated guess at the damages likely to be suffered by DRU over a three week period the level of damages seems excessively high and it is likely that the court would interpret the LADs as a penalty. **(5 marks)**

Question 2

- a) Consideration is a benefit to the promisor and a detriment to the promisee - *Currie v Misa (1875)*. **(2 marks)** **[5 marks]**
- Consideration need not be adequate, but must be sufficient (i.e. have some value). A contract is a bargain freely entered into and the courts will not be concerned with whether it constitutes a good bargain e.g. A rent of £1 per annum (a "peppercorn" rent) would be sufficient consideration for the grant of a lease on premises worth thousands, providing that the contract was freely entered into. **(2 marks)**
- Applying the facts, Claudia is free to enter into the contract and agree to accept the Take That tickets in consideration for providing design services to Nikki. **(1 mark)**
- b) Performance by a promisee of existing contractual duties owed to the promisor will not be sufficient consideration - *Stilk v Myrick (1809)*. **(2 marks)** **[9 marks]**
- i) Lewis is under an existing contractual duty to complete the repair works by 1 March and Lewis provides no extra consideration to Claudia to complete the repair works on time. **(1 mark)** Therefore, applying the findings in *Stilk v Myrick (1809) to the facts*, unless Lewis can show that he has exceeded his contractual duties (*Hartley v Ponsonby (1857)*), there would not be sufficient consideration. **(2 marks)**
- However, *Williams v Roffey and Nicholls (Contractors) Ltd (1990)* qualified the findings in *Stilk v Myrick (1809)*: if performance of an existing contractual duty confers a practical benefit on the other party and the contract is entered into freely then this can constitute valid consideration. **(2 marks)** Claudia has obtained a practical benefit – her laptop can be used to create the design for Nikki's house extension and Lewis was not under any improper pressure or duress when he agreed to repair the laptop on time. **(1 mark)**
- Applying these principles to the facts, Claudia has provided sufficient consideration and is liable to pay Lewis the extra £50 for repairing the laptop on time. **(1 mark)**
- b) Past consideration cannot be sufficient consideration - *Roscorla v Thomas (1842)* **(2 marks)** **[4 marks]**
- (ii) Lewis installed the anti-virus software prior to Claudia promising to pay Lewis a further £50 for the installation and, therefore, Lewis did not provide any additional consideration for the further £50. **(1 mark)**
- Applying these principals to the facts, Claudia has not provided sufficient consideration and is not liable to pay Lewis the further £50 for installing the anti-virus software. **(1 mark)**
- c) Claudia may be able to rely on the equitable doctrine of promissory estoppel as her defence. **(1 mark)** The doctrine is a means of making a promise binding, in certain circumstances, in the absence of consideration - **[7 marks]**

Hughes v Metropolitan Railway Co. (1877) **(2 marks)**

The exact scope of the equitable doctrine of promissory estoppel is a matter of debate but it is clear that certain requirements must be satisfied before the doctrine can be relied on: 1) there must be a clear and unambiguous representation by the promisor; 2) the promisee has acted in reliance on the promisor's representation; 3) it must be inequitable for the promisor to go back on its promise; and 4) the equitable doctrine of promissory estoppel can only be relied upon as a defence. **(2 marks)**

Claudia has acted in reliance on her insurer's actions to defend and pay out the claim on her behalf and it is arguable that it would be inequitable for the insurer to go back on its promise. **(2 marks)**

Question 3

a)

Stacey may be able to bring a claim against Keri for misrepresentation. **(1 mark)**. Misrepresentation is a false statement of fact or law made by one party to the other, which, whilst not being a term of the contract, induces the other to enter into a contract. **(1 mark)**. *Smith v Land and House Property Corp (1884)* - There must be reasonable reliance on the statement. **(2 marks)**

[15 marks]

Candidates should demonstrate that they are aware that there are different types of misrepresentation and identify the most applicable type of misrepresentation given the facts. Negligent misrepresentation under the s. 2 of the Misrepresentation Act 1967 is most applicable here. In accordance with the Act, the burden of proof is on the maker of the statement to disprove negligence. **(5 marks)**

Available remedies should be discussed. Rescission (i.e. setting aside the contract) is a possible remedy for negligent misrepresentation. Where a contract is rescinded it is terminated ab initio; the aim is to put the parties back in the position they would have been in had the contract not been entered into. Alternatively, Stacey could seek damages under s.2 of the Misrepresentation Act 1967 **(3 marks)**.

Stacey could also bring a claim for breach of contract against Keri. Picture Perfect has breached a condition of the contract by not supplying the photos that were agreed and is therefore entitled to repudiate the contract and claim damages. **(3 marks)**

b)

In order for a contract to be valid there must be intention to create legal relations **(2 marks)**

[10 marks]

As Stacey and Rachel are friends there is a rebuttal presumption that there is no intention to create legal relations, however in commercial relationships, there is a strong presumption that the parties intended to be legally bound and this presumption can generally only be rebutted by express words: *Rose and Frank Co v Crompton Bros. Ltd (1925)* **(5 marks)**

As Stacey is acting in her commercial capacity as the owner of Picture Perfect and in respect of a clear commercial arrangement, a court is likely to find that the parties intended to be legal bound and Rachel will be entitled to be paid for helping at the wedding **(3 marks)**

Question 4

This question concerns occupiers' liability; liability to visitors and trespassers and the effects of warnings/exclusion notices. Candidates are required to demonstrate their knowledge of the Occupiers Liability Act 1957 ("OLA 1957") and Occupiers Liability Act 1984 ("OLA 1984").

a)

Mike v Jane: OLA 1957

[11 marks]

- Candidates should identify that Jane is an "occupier" as someone who has sufficient degree of control over the premises – *Wheat v E Lacon & Co Ltd [1966]*.
- Jane has statutory duties to visitors and in certain circumstances to trespassers under the OLA 1957 and OLA 1984, as applicable.
- Mike is a "visitor" under the OLA 1957 as he has express permission to be on Jane's land. Premises mean land and not just buildings.
- Accordingly the 1957 Act applies **(2 marks)**.
- Duty - Section 2(1) imposes a "common duty of care" to visitors **(1 mark)**.
- Breach – Candidates to consider whether Jane failed to reach the standard of a reasonable occupier. Candidates should demonstrate that this assessment is based on the circumstances of the case. Applying the facts:
 - Candidates should consider the warning in the foyer and whether this was sufficient. Candidates should identify that Jane can discharge her duty if there was adequate warning of the danger. Candidates should assess the warning and provide commentary on whether the wording is sufficient. On the facts, arguably the warning is too wide and does to alert visitors to the potential problems with the slippery floor/large hole and would therefore not be sufficient **(2 marks)**.
 - Candidates should identify that the type of visitor is an important factor. As Mike is a child visitor, he would require a higher degree of care from Jane than the other visitors (s.2 (3) (a) of OLA 1957) **(1 mark)**.
 - Candidates should consider whether there are any allurements factors and advise that on the facts, it does not appear there are any **(1 mark)**.
 - Candidates should consider the scope of section 2(4) (b) of the OLA 1957 as Steve is an independent contractor. Candidates should consider whether Jane took reasonable steps to satisfy herself that Steve was competent and whether he had done the work properly. For example, Steve had not screened off the area and Jane should have questioned this **(3 marks)**.
- Causation/Loss – Applying the 'but for' test (*Barnett v Chelsea & Kensington Hospital Management Committee [1969]*) Jane will be liable for the injury which Mike has suffered. The loss is a foreseeable

type and is not too remote **(1 mark)**.

b) Hugh v Jane: OLA 1984

[9 marks]

- Candidates should identify that the OLA 1984 applies to persons who do not have express or implied permission to be on the premises i.e. trespassers. Hugh is a trespasser as he does not have permission to be on the premises **(1 mark)**.
- Duty - The duty owed by Jane to Mike as a trespasser does not arise automatically and is subject to the following conditions set out in section 1(3) of OLA 1984. Applying this to the facts Jane owes Hugh a duty:
 - Jane is aware of the danger or has reasonable grounds to believe that it exists. The floor was slippery from the leaks and Jane should have reasonable grounds to believe that repair to the fountain works could result in danger **(2 marks)**.
 - Jane had reasonable grounds to believe that Hugh may come in the vicinity of the danger (whether or not he has lawful authority to do so). This is clear on the facts as the notice and her concerns suggest that Jane is aware that trespassers will be in the vicinity, for example, Jane expressed concern that the public were using the kids' playing area. As it is a kids playing area, this is an allurements to children – *White v St Albans CC [1980]* **(2 marks)**.
 - The risk is one against which Jane, in all the circumstances of the case may reasonably be expected to provide some protection. The cost and practicality of precautions is reasonable – it is not technical in nature and Jane could have offered railings and hoardings around the large hole **(2 marks)**.
- Breach - Jane is required to take such care as is reasonable to see that Hugh does not suffer injury - section 1(4) of OLA 1984. On the facts, Hugh can argue that Jane has not taken reasonable steps **(1 mark)**.
- Causation/Loss – Applying the 'but for' test again; Jane will be liable for the injury which Hugh has suffered. The loss is a foreseeable type and is not too remote **(1 mark)**.

- c) • Hugh v Jane for costs of iPhone Candidates to identify that the OLA 1984 will not recover damages for Hugh's iPhone as Hugh is a trespasser and damage to property is outside the scope of the OLA 1984 **(2 marks)**.

[2 marks]

d) Warning notice v exclusions notice

[3 marks]

- Candidates should identify that this is an exclusion notice (not a warning notice) which would operate as a potential defence to a claim once the visitor has established breach of the common duty of care **(1 mark)**.
- However as Jane is a business occupier - the notice is void as regards Mike and Hugh's personal injury – section 2(1) of the OLA 1957 and section 2(2) of the Unfair Contract Terms Act 1977 **(2 marks)**.

Question 5

This question concerns negligent misstatement; the *Hedley Byrne v Heller [1964]* principles; special relationships; vicarious liability; disclaimers for exclusion of liability.

a)

Beth v Hilary: Negligent Misstatement

[11 marks]

- Candidates should identify that Beth can bring a claim against Hilary for the tort of negligent misstatement **(1 mark)**.
- Duty – Applying *Hedley Byrne v Heller [1964]* a duty is owed if there is a ‘special relationship’ between Beth and Hilary. This requires an assumption of responsibility and reasonable reliance by Beth **(1 mark)**.
 - Assumption of responsibility: Hilary was aware of the purpose for which she was producing the report and that it would be communicated to Beth **(2 marks)**. Hilary knew or ought to know that Hilary would rely on the financial report as she is the auditor of the company and as a shareholder, Beth would have relied on this advice without independent inquiry **(2 marks)**. Beth has acted on the advice to her detriment **(1 mark)**.
 - Beth has reasonably relied on the advice of Hilary **(1 mark)**.
- Breach – Discussion of whether Hilary fell below the standard of a reasonable auditor. Hilary will be assessed against the skilled defendant: *Bolam v Friern Hospital Management Committee [1957]* **(1 mark)**.
- Causation/Loss – Applying the ‘but for’ test, the loss which Beth has suffered is as a result of reliance on the negligent advice and is a foreseeable type and not too remote **(1 mark)**.
- Loss – Hilary would be liable for pure economic loss but only to the extent of the 10,000 shares **(1 mark)**.

b)

Beth v Claire: Social v Professional Relationship

[3 marks]

- General rule is that, usually, no duty of care will be owed in respect of advice given in a social situation because there is no assumption of responsibility – *Chaudhry v Prabhakar [1989]* **(1 mark)**.
- Candidates to discuss the facts: Claire has more experience and knowledge about Big Design’s financial status than Beth and Beth made it clear that she will be relying on the advice, so it is not simply advice given in a social setting and therefore Beth could argue that Claire assumed responsibility **(2 marks)**.

c)

Beth v Accrual & Co – Vicarious liability for tort of Hilary **[7 marks]**

[7 marks]

- Candidates should identify that Beth can bring a claim against Accrual & Co who may be vicariously liable for the negligence of Hilary **(1 mark)**.
- Beth would need to establish the following three elements: (i) Hilary

was an employee; Hilary committed a tort; the tort was committed in the course of employment **(1 mark)**.

- Applying this test to the facts:
 - Hilary is clearly an employee and not an independent contractor **(1 mark)**.
 - Hilary has committed a tort of negligent misstatement: Hilary owes Beth a duty of care as the *Hedley Byrne v Heller [1964]* principles apply. By falling below the standard for a reasonable financial auditor, Hilary has breached this duty causing Beth to lose her money. The economic loss is a foreseeable type and not remote **(2 marks)**.
 - Hilary committed the tort during the course of her employment **(1 mark)**.
- Accrual & Co is liable to the extent of the 10,000 shares **(1 mark)**.

d)

Disclaimers to avoid liability

[3 marks]

- Terms, “*without responsibility*” was sufficient to exclude liability under *Hedley Byrne v Heller [1964]* however, candidates should demonstrate knowledge of the “reasonable” test as required under the Unfair Contract Terms Act 1977 and that this will depend on all the facts of the case **(2 marks)**.
- On the facts, as an auditors role is to prepare financial reports to be relied upon by the Big Design (company) and Beth (shareholder), Candidates to discuss whether disclaimer is likely to be held reasonable **(1 mark)**.

Question 6

This question concerns nuisance; negligence; *Rylands v Fletcher [1868]* claims, acts of third parties; acts of gods; and remoteness of damage.

a)

Rylands v Fletcher

[2 marks]

- Strict liability in a claim under *Rylands v Fletcher [1868]* – Stuart does not need to demonstrate that fire could not have been prevented by the exercise of reasonable care (i.e. negligence on the part of the owner) **(2 marks)**.

b)

Fast Delivery Ltd v Poly Blocks Ltd - Claim

[11 marks]

- Candidates should demonstrate a distinction between private and public nuisance. On the facts, Fast Delivery can bring a claim against Poly Blocks for private nuisance and arguably a claim in public nuisance - the effect of the fire affects the individual interests of the company and the public at large (the items have been delayed leading to a delay in the delivery of online purchase) **(3 marks)**.
- Candidates should consider a duty of care in negligence and note that Poly Blocks breached this duty by not putting adequate safety measures in place **(1 mark)**.
- Candidates should identify the facts fit closely with the *Rylands v*

Fletcher [1868] test. Applying the test to the facts:

- Standing to bring claim: only parties with ownership or exclusive possession of the land concerned can take a claim under *Rylands v Fletcher [1868]* which was confirmed *Transco v Stockport MBC [2004]*. Fast Delivery owns/has exclusive possession of the land so Stuart can bring a claim on behalf of Fast Delivery Ltd **(2 marks)**;
 - Poly Blocks bought something onto its land - inflammable materials and hot wire cutters that posed a recognised fire risk. These were likely to cause and/or catch fire and were clearly dangerous. The way the materials were stored meant it was easier to spread if they caught fire **(1 mark)**;
 - Poly Blocks made a "non-natural use" of his land – damage caused by use of land for a specific manufacturing purpose **(1 mark)**;
 - it was foreseeable that it is likely to do mischief if it escaped, this was noted by the local fire authority **(1 mark)**; and
 - thing did escape and cause damage to Unit B and its contents **(1 mark)**.
- Stuart can argue under *Rylands v Fletcher [1868]* Poly Blocks is therefore liable for the losses which Stuart/Fast Delivery has suffered **(1 mark)**.

c) Fast Delivery Ltd v Poly Blocks Ltd - Defences

[8 marks]

- Act of third party – The act of the third party would need to be unforeseeable for the defence to be established. On the facts, it does not appear that this was anticipated and defence likely to apply **(2 marks)**.
- Act of god – Poly Blocks' liability will be reduced by reference to the extraordinary act of nature. The violent storm was exclusively the consequence of natural causes of a nature that could not be anticipated or reasonably expected by Poly Blocks **(3 marks)**.
- Contributory negligence - No liability where a party consents to a dangerous thing being brought to a place where it might cause harm if it escapes unless he can show negligence. Fast Delivery consented to the presence of purchasing Unit B with knowledge that it was adjacent to a unit using highly flammable hydro carbon when it purchased the site **(3 marks)**.

d) Fast Delivery Ltd v Poly Blocks Ltd -Remedies

[4 marks]

- Measure of damages put Stuart in the same position as he would have been if the fire had not occurred **(2 marks)**.
- Candidates to apply the tests of remoteness, causation and mitigation to the level of damages awarded to assess whether Stuart is entitled to the costs of repair and contents **(2 marks)**.

Institution of Civil Engineers

Examination for the ICE Certificate in Law and Contract Management (CLCM) 2016

Module 2: NEC (English and Scots Law)

Monday 13th June 2016

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

There are four questions in Section 1 and four questions in Section 2. Answer **any two** questions from **each Section**; a total of **four** questions.

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

You may consult un-marked copies of the NEC3 Engineering and Construction Contract (ECC), NEC3 Engineering and Construction Subcontract (ECS), Statutes, CDM Regulations and CESMM4.

All questions must be answered using NEC3 Contracts.

Please indicate on the outside of the answer booklet whether your answers will be in respect of Scots Law.

Section 1

Question 1

A local authority is preparing to invite tenders under an ECC main Option A contract for a new swing bridge over a canal. The successful bidder will be required to design the hydraulic jacking and slewing systems.

- a) **Explain how those parts of the *works* which the *Contractor* is to design are identified.** [2 marks]
- b) **Can the *Contractor* proceed with construction work that he has designed without it being submitted to the *Project Manager* and accepted?** [6 marks]

During construction the *Contractor* submits a package of design that includes a drawing showing hydraulic pipes fixed externally to the steel box sections. The *Project Manager* accepts the design.

Later in the project the *Supervisor* notices part of the hydraulic pipework has been fitted externally. He checks a specification document forming part of the Works Information prepared by the *Employer*. This clearly states hydraulic pipes must run within the steel box sections.

- c) **Does the contract require the pipework to be external or internal to the steel box sections?** [8 marks]
- d) **What communication(s) should be sent immediately and by whom?** [4 marks]
- e) **Does the pipework have to be removed and re-fixed?** [5 marks]

Section 1

Question 2

Construction of an embankment is under the ECC main Option B. The Works Information specifies the removal of soft materials until a CBR of 5% or more is achieved. The Site Information shows harder material is typically present at depths of 500 to 700mm. The tendered total of the Prices in Contract Data part two is £600,000.

- a) **Assuming no compensation events arise, what would you expect the Price for Work Done to Date to be at Completion and how is this derived?** [7 marks]

During the project the *Employer* decides an additional balancing pond is required.

- b) **Explain how the *Employer* includes the balancing pond in the works?** [3 marks]
- c) **Comment on whether the *Contractor* would be entitled to additional money and time. If so who is responsible for initiating this process?** [7 marks]
- d) **The *Project Manager* considers the Bill of Quantities rates for excavation are far too expensive. Is the *Project Manager* obliged to pay the *Contractor* for the additional work based on these rates?** [8 marks]

Section 1

Question 3

Construction of a new dock facility, designed by the *Employer*, is underway using the ECC with main Option C. Contract Data part one states:

- The *defect correction period* is ...**four**... weeks except that
- the *defect correction period* for ...**security alarms**... is ...**one**... week.

The Accepted Programme shows planned Completion at the end of week 45. It is the start of week 20 and the *Supervisor* notifies the *Contractor* of a Defect. The *Contractor* has painted a small exterior wall in the wrong colour.

- a) **How many weeks does the *Contractor* have to correct the Defect?** **[7 marks]**
- b) **What consideration might motivate the *Contractor* to correct the Defect sooner? Why would the same not be true under main Options A or B?** **[7 marks]**

The *Contractor* achieves Completion as planned at the end of week 45. Contract Data part one also states

- The *defects date* is ...52... weeks after Completion of the whole of the *works*.

- c) **Who issues the Defects Certificate? To whom do they issue the certificate and by when?** **[3 marks]**

12 weeks after Completion the *Supervisor* notices that a concrete loading apron adjacent to the quay has cracked and partially subsided.

- d) **Comment on whether or not the issue is a Defect?** **[4 marks]**
- e) **What might the *Supervisor* do to establish the cause of the problem?** **[4 marks]**

Section 1

Question 4

- a) What convention links the conditions of contract with the identified terms in Contract Data? [2 marks]

Under the ECC the definition of Price for Work Done to Date for main Options C, D, E and F is based on Defined Cost plus Fee.

- b) For an ECC under main Option A or B, comment on whether it is necessary to include entries in Contract Data part two for the *direct fee percentage* and *subcontracted fee percentage*. [5 marks]
- c) In Contract Data part one of an ECC, explain the effects of adding entries under each of the following bullets: [10 marks]
- The following matters will be included in the Risk Register
 - These are the additional *Employer's* risks
- d) The definition of Defined Cost for an ECC main Option C refers to the Schedule of Cost Components. Explain why it is still necessary to populate the entries for the Shorter Schedule of Cost Components in Contract Data part two. [3 marks]
- e) Part way through an ECC one of the *Contractor's* key people identified in Contract Data part two decides to retire early. Explain if the *Contractor* is able to appoint a replacement. [2 marks]
- f) What reason(s) for not accepting the person can the *Project Manager* give? [3 marks]

Section 2

Question 5

On a £10m contract under the NEC3 Engineering and Construction Contract (ECC) using Option D, the *Project Manager* assesses the amount due at the latest assessment date. Option X16 retention is included in Contract Data part one at an amount of 4%, and there is no *retention free amount* included. Option X13 and Y(UK)2 are also included.

- a) **Explain the purpose of retention and whether it always has to be included in an ECC contract?** [4 marks]

The *Contractor* was to provide a performance bond for £1m. Three weeks after the Contract Date, the bond has not yet been provided. The *Employer* is not happy and says to the *Project Manager* that he will not pay any future monies to the *Contractor* until the bond is provided.

- b) **As *Project Manager*, what would you do here?** [7 marks]

The *Contractor* receives payment for the first assessment on time. When looking back over the *Project Manager's* certificate of payment he realises that there is a mistake in the calculations and 5% retention has been held instead of 4%. He immediately rings the *Project Manager* who says that the 4% in the Contract Data was inserted in error; it should have been 5% as the *Employer* requested, which the *Project Manager* has since validated via some past records.

- c) **What would you advise here?** [7 marks]

In the next assessment an amount for this additional retention is included but payment has not been made by the final date for payment.

- d) **What would you advise here?** [7 marks]

Section 2

Question 6

A contract is awarded using ECC Option C with secondary Options X2, X18, X20 and Y(UK)2. The Works Information contains a 'hold point' where the *Contractor* needs to stop a part of the *works* to allow the *Supervisor* to inspect. At 5pm one evening, the *Contractor* notifies the *Supervisor* that part of the *works* are able to be inspected the following morning. On the morning of the inspection the *Supervisor* realises he is unable to attend but does not contact the *Contractor*.

- a) **Can the inspection proceed in the absence of the *Supervisor* and what should the *Contractor* do here?** [5 marks]

The following week the *Supervisor* notifies the *Contractor* of an inspection, scheduled to take place 2 weeks from that notification, but he will be on holiday that week. The *Supervisor's* late inspection would likely delay the *works* by up to a week.

- b) **What action should the *Contractor* take?** [6 marks]

The Works Information states the *Employer* via a third party, is to provide use of some equipment for testing at a nearby location. The third party informs the *Employer* that this may now not be possible.

- c) **As *Employer*, what would you do here?** [4 marks]

After overhearing a Subcontractor in some discussions on Site, the *Supervisor* is concerned that some steelwork may not have been treated in accordance with the Works Information. All related tests and inspections were appropriately notified.

- d) **Explain what powers the *Supervisor* could use here to determine if there is a Defect or not and if the *Contractor* has to obey this.** [5 marks]

- e) **What happens next when a Defect is found, or, alternatively, not found?** [5 marks]

Section 2

Question 7

You are the *Project Manager* on the construction of a new asset for a client using ECC Option C including secondary Option X7. On reviewing the Works Information, the *Project Manager* notes some conflicting requirements.

a) How will you deal with this matter? [7 marks]

The *Contractor* wants to send a communication to the *Project Manager* but thinks there may be a problem with the address stated in the Contract Data and is not sure of the form the communication should take.

b) What action will you take here as *Contractor*? [4 marks]

One of the *Employer's* operational team members is regularly visiting the Site as he is keen to see how things are going. The *Contractor* has commented to the *Project Manager* that this person last time remarked that he would like a few changes to the Works Information as he's not happy with some of it.

c) What would you advise the *Project Manager* to do here? [5 marks]

The *Project Manager* is auditing the accounts and records of the *Contractor*. This is done on a fairly regular basis each month, the *Project Manager* spending just a few hours each time. He has spotted what he thinks might be some Disallowed Cost for the following items:

- Correcting a Defect prior to Completion
- Payment of a bonus to a Subcontractor for completing his subcontract works early
- Payment of the entire redundancy costs of a foreman who has been with the *Contractor* for 10 years but only worked on this project for 6 months.

d) What advice would you give to the *Project Manager* for determining whether these 3 items would be Disallowed Cost? [9 marks]

Section 2

Question 8

An ECC Option B contract has just started. The *Project Manager* has received a communication from the *Contractor* saying that unfortunately the foreman and Site Agent have both tendered their resignations and replacements will be sought as soon as possible.

a) Can the *Contractor* do this? [6 marks]

Assume you are the *Project Manager*. Some documents appear on your desk which you are surprised to note as being the first programme submitted for acceptance. Only about half of the requirements of clause 31.2 are noted on the programme but there is a note saying "Sorry this is incomplete but as you are aware I'm leaving the organisation soon and just wanted to get this in to meet our requirements"

b) What would you do here? [6 marks]

c) If there is no Accepted Programme in place say a month later and a number of compensation events have occurred, what does the *Project Manager* do here? [5 marks]

A few compensation events have arisen under clause 60.1(1) that has resulted from the *Project Manager* instructing changes to the Works Information. These have not been implemented. The *Contractor* wants to know if he can submit some 'on account' sums in respect of those changes in the *capital works* which he has carried out but for which the compensation events have not yet been implemented.

d) What would you advise the *Contractor* to do here? [4 marks]

The new Site Agent for the *Contractor* is coming under increasing pressure from head office as the cash flow position is poor. There are a number of compensation events not yet implemented and the *Project Manager* has been orally instructing changes to the Works Information saying "you can trust me in accordance with clause 10.1".

e) Assume you are the Site Agent. You are new to the job but these two issues are giving you some concern. What would you do here? [4 marks]

Module 2: Points for Answer
Section 1

Question 1

- a) The Works Information should include a section in which the *Contractor's* design is covered. It should specifically state what parts of the works the *Contractor* is to design. [2 marks]
- b) It depends. The Works Information may state how designs are submitted. [2 marks]
If the Works Information is silent then no submission is necessary. [2 marks]
However, if the Works Information requires a design to be submitted then the *Contractor* cannot proceed with the relevant work until the *Project Manager* has accepted it. [2 marks]
- c) Internal because that is what the Works Information states. [2 marks]
The external fixing of the pipework is a Defect. [2 marks]
Only an instruction given under clause 14.3 changes the Work Information. [2 marks]
The acceptance of the *Contractor's* design does not change the Works Information. Clause 14.1 is relevant [2 marks]
- d) The *Supervisor* should notify the Defect to the *Contractor* as soon as he finds it. [2 marks]
The *Project Manager* or the *Contractor* should give early warning by notifying the other of this matter. The *Supervisor* may have spoken to the *Project Manager* first. [2 marks]
- e) Yes, unless the *Project Manager* and the *Contractor* are prepared to agree to a change to the Works Information in order that the Defect need not be corrected. [3 marks]
This may result in a reduced Price or an earlier Completion Date or both. [2 marks]

Question 2

- a) Under main Option B the Price for Work Done to Date is the total of the quantity of work which the Contractor has completed for each item in the Bill of Quantities multiplied by the rate. [2 marks]
This specific work could have been covered by a lump sum but the question does not infer this. [1 marks]
Price for Work Done to Date is therefore subject to re-measure. [2 marks]
The Price for Work Done to Date at completion will almost certainly vary from the total of the Prices at tender. By how much depends on how accurate the assumed quantities were. [2 marks]

- b) He will have to make his requirement know to the *Project Manager*. [2 marks]
 The *Project Manager* is the only role under the contract with the authority to instruct changes to the Works Information.
 The *Project Manager's* authority to change the Works Information is provided by clause 14.3. [1 marks]
- c) The *Contractor* is entitled to a compensation event under 60.1(1). [2 marks]
 Because the event arises from the *Project Manager* giving an instruction, the *Project Manager* should notify the compensation event to the *Contractor* (61.1). [2 marks]
 The *Contractor* notifies the *Project Manager* of the compensation event under clause 61.3 if the *Project Manager* does not do so. [1 marks]
- The eight week time bar does not apply in this case.
- d) No. The rates in the Bill of Quantities may be used, but only where the *Project Manager* and the *Contractor* agree (clause 63.13). [3 marks]
 The default method of assessment is set down in core clause 63.1. [2 marks]
 The changes to the Prices will include risk allowance for cost and time (clause 63.6). Defined Cost under main Option B is the cost of the components in the Shorter Schedule of Cost Components whether work is subcontracted or not. [1mark]

Question 3

- a) The *Contractor* has 29 weeks to correct the Defect. [1 mark]
 Assuming Completion occurs as planned. [1 mark]
 25 weeks until Completion, upon which the *defect correction period* will begin for Defects notified before Completion (clause 43.2). [2 marks]
 The Defect does not appear connected to security alarms and therefore the *defect correction period* is four weeks. [1 mark]
 Assumes the *Employer* allows the *Contractor* access to and use of the *works* if needed. The *defect correction period* will begin at the later of Completion or when the *Employer* provides such access. (clause 43.4). [2 marks]
- b) Under main Option C the correction of a Defect after Completion is a Disallowed Cost (clause 11.2(25)). [2 marks]
 Correcting Defects before Completion will form part of the Price for Work Done to Date. [2 marks]
 However the total of the Prices – the ‘target’ will not change. [1 mark]
 Under main Option A or B the *Contractor* is paid based on price. [1 mark]

- There is no provision for being paid to correct Defects.
- c) The *Supervisor* issues the Defect Certificate at the later of the *defects date* and the end of the last *defect correction period* (clause 43.3). [2 marks]
The *Supervisor* issues his certificates to the *Project Manager* and the *Contractor* (clause 13.6) [1 mark]
- d) The issue may be a Defect, but this would only be the case if the work is not in accordance with the Works Information. [2 marks]
The issue might be that the design of the apron was not sufficient to take the loads experienced in use. If the cracks and subsidence have appeared for this reason they are not a Defect. [2 marks]
- e) Until the *defects date* the *Supervisor* may instruct the *Contractor* to search for a Defect (clause 42.1). [2 marks]
He would likely take cores to establish the depth of construction of the apron. He may also send samples to be tested. If these were all in accordance with Works Information then a Defect would not be notified. [2 marks]

Question 4

- a) Throughout the conditions of contract identified terms are in italics. (Clause 11.1). [2 marks]
- b) It is necessary to populate fully Contract Data part two with these percentages. [2 marks]
The Price for Work Done to Date is not based on Defined Cost plus Fee, however... [1 marks]
The default method of assessing compensation events is clause 63.1. This includes Fee. [2 marks]
- c) Adding entries into the Risk Register does not change the allocation of risk. [2 marks]
The Risk Register is a management tool and there is an identical opportunity for the *Contractor* to add entries in Contract Data part two. [2 marks]
Additional *Employer's* risks do allocate the risk matters to the *Employer*. [2 marks]
These are brought in by clause 80.1.
If an *Employer's* risk occurs it is also a compensation event 60.1(14).
- d) If the *Project Manager* and the *Contractor* agree they can use the Shorter Schedule of Cost Components to assess compensation events. The *Project Manager* may choose to use the Shorter Schedule of Cost Components when performing his own assessment of compensation events (clause 63.15). [3 marks]

- e) Yes but they must first be accepted by the *Project Manager* (clause 24.1). [1 mark]
 The *Contractor* submits their name, relevant qualifications and experience to the *Project Manager* for acceptance. [1 mark]
- f) The *Project Manager* may withhold acceptance for the reason that the relevant qualifications and experience is not as good as those of the person that he is replacing (clause 24.1). [1 mark]
 Any reason (clause 13.8). This may give rise to a compensation event 60.1(9). [2 marks]

Question 5

- a) Retention is a traditional construction industry security for complete performance of the *Contractor's* obligations and to cover any Defects that arise before the *defects date* and remain uncorrected by the *Contractor*. [2 marks]
 It is not essential to be included in any contract; the risk to the *Employer* is that the *Contractor* defaults on his obligation to correct Defects and the *Employer* has to pursue such monies via other means. [1 mark]
 It is an optional provision in an ECC contract, included as secondary Option X16. [1 mark]
- b) The performance bond obligations are stated in Option X13, the actual form of bond is stated in the Works Information. [1 mark]
 Clause X13.1 states that if the bond was not given by the Contract Date, it is given to the *Employer* within four weeks of the Contract Date. [1 mark]
 As it stands, the *Contractor* is not in breach just yet, he has another week to go to comply with the provisions of the contract. [1 mark]
 It would be prudent of the *Project Manager* to inform the *Employer* of this but also check with the *Contractor* to make sure that things are in place and that the bond will be provided at some point within the next week. [1 mark]
 The *Project Manager* could do this via the early warning process, even instructing the *Employer* to attend a risk reduction meeting if the *Contractor* agrees (clause 16). [2 marks]
 Should the bond not be provided by the date the contract provides then the ultimate remedy available to the *Employer* would be termination, not something to be taken likely of course. The reason would be R12 stated in clause 91.2 as the *Contractor* would not have 'provided a bond or guarantee which this contract requires'. There would be some steps before termination might occur and hopefully the *Contractor* will fulfil his obligations in good time anyway.
- c) There is no ambiguity or inconsistency here, the Contract Data provision is clearly stated as 4%. [1 mark]
 Whatever the reason for the mistake in the Contract Data entry, the *Project Manager* certainly does not have the power to amend a contract in this way; he is not a Party to the contract. [1 mark]

The two Parties to the contract could make such an amendment if they both agreed, confirmed in writing and signed such (clause 12.3). This is not likely to happen here, the *Contractor* has done nothing wrong and the contract reflects an entire agreement between the Parties (clause 12.4). [1 mark]

So the 'mistake' will stand and the *Project Manager* should administer the contract accordingly, with retention being 4%. If the *Employer* wishes to discover and address why the mistake occurred, that's up to him and is nothing to do with the *Contractor*. [1 mark]

As for the effect on the payment just made, clause 50.5 states that the *Project Manager* corrects any wrongly assessed amount due in a later payment certificate. There is nothing the *Project Manager* can therefore immediately do. [1 mark]

Clause 51.3 states that if an amount due is corrected by the *Project Manager* in relation to a mistake then interest on the correcting amount is paid. Interest is assessed from the date when the incorrect amount was certified until the date when the correcting amount is certified and included in the assessment which includes the correcting amount.

This amount is paid to the *Contractor* in the next assessment by virtue of clause 50.2 'other amounts to be paid to the *Contractor*'.

d) The *Employer* needs to pay the amount certified soonest, there appears to be no pay less notice issued by the *Employer* on the facts here. The *Project Manager* should contact the *Employer* as soon as practicable to determine the reasons for lack of payment. [1 mark]

As *Contractor*, it may be prudent to find out for himself what the problem is so there would be no harm in notifying an early warning, calling a risk reduction meeting and instructing the *Employer* to attend (clause 16). Is the reason because the *Employer* forgot, or the accounts department rejected it, he never received the *Project Manager's* certificate of payment, or something else? [1 mark]

Hopefully the *Contractor* can contribute to the solution here, but the reasons for non-payment might be important to find out sooner rather than later. [1 mark]

Dealing with the late payment itself, the contract provides in clause 51.2 for interest to be paid on the late payment. Interest is assessed from the date by which the late payment should have been made until the date when the late payment is made, and is included in the first assessment after the late payment is made. [2 mark]

At a point, the *Contractor* may exercise his right under the Housing Grants, Construction and Regeneration Act 1996 to suspend performance. If he does so, this will be a compensation event (see clause Y2.4)

If the problem worsens, the *Contractor* is entitled to terminate if the *Employer* has not paid an amount certified by the *Project Manager* within thirteen weeks of the date of the certificate (R16), clause 91.4.

Question 6

a) It appears that the Works Information is written for an inspection that must only be carried out by the *Supervisor*. We do not have [1 mark]

the exact wording here, if it said 'if required by the *Supervisor*' (in relation to the inspection then maybe the *Contractor* would be right to give notice and proceed with the *works* if the *Supervisor* did not inspect or come back on this in a reasonable time. [1 mark]

The *Contractor* is required to notify the *Supervisor* of his test or inspection in time for a test or inspection to be arranged and done before doing work which would obstruct the test or inspection. This is stated in clause 40.3. It appears he has done so here but the hold point in the Works Information suggests the subsequent works should not go ahead. [3 marks]

It appears likely here that a compensation event might well arise under clause 60.1(11) 'a test or inspection done by the *Supervisor* causes unnecessary delay' but the inspection hasn't been done yet so the *Contractor* would be best advised to notify an early warning to the *Project Manager* (clause 16.1) and instruct the *Project Manager* to attend a risk reduction meeting under clause 16.2 so that the parties can set about trying to avoid or reduce the registered risk (which the *Project Manager* will have added to the Risk Register as required in clause 16.1). The *Contractor* is likely of course to want the *Supervisor* to carry out the inspection soonest or for the *Project Manager* to delete this hold point through a *Project Manager's* instruction to change the Works Information.

b) Again, the *Contractor* should notify an early warning to the *Project Manager* immediately (under clause 16.1) and instruct the *Project Manager* to attend a risk reduction meeting under clause 16.2. This would ideally happen prior to the *Supervisor* going on leave. [3 marks]

The potential delay could increase the Prices and delay progress so what options are available – how likely would the delay be, is the *Supervisor* possibly able to attend Site just for one day even during his holiday, can the *Supervisor* delegate his actions to another competent person able to inspect, is the inspection really necessary and so on? All of these sorts of things could be worked through during the risk reduction meeting to hopefully bring advantage to all those who are affected (clause 16.3). [3 marks]

If the timings could not be resolved and delay arose, the *Contractor* should notify a compensation event under clause 61.3 citing clause 60.1(11). The *Project Manager* would reply under clause 61.4 within a week. It is difficult to see how the *Project Manager* could do anything other than accept this would be a compensation event and instruct the submission of a quotation dealing with the time/cost implications of this.

The *Contractor* would be likely to lose their entitlement to changed Prices/Completion Date if he does not notify the event as a compensation event within eight weeks of becoming aware of the event.

c) The *Employer* is not responsible to notify early warnings, even within his own contract, and therefore should speak with the *Project Manager* who should notify this straight away to the *Contractor* under clause 16.1. [2 marks]

This time it may be sensible to have more than just the *Contractor* and *Project Manager* at the risk reduction meeting and clause 16.2 allows for each to instruct other people to attend if the other agrees. Of course in this instance it is at least the *Employer* and [2 marks]

the third party who could attend, assuming they are willing and able. This will allow for a more complete discussion to take place to better solve the problem.

- d) This may expose a problem with the *Contractor's* quality management system and in any case this may lead to Completion being delayed so the *Supervisor* should inform the *Project Manager* immediately. The *Project Manager* should then notify an early warning to the *Contractor* under clause 16.1. [2 marks]
- The most appropriate power the *Supervisor* has here is that until the *defects date* the *Supervisor* may instruct the *Contractor* to search for a Defect (clause 42.2). For this, the *Supervisor* would need to give his reasons for the search with his instruction (clause 42.2). The *Contractor* has to obey this instruction to search (see clause 27.3). [3 marks]
- e) If no Defect is found the *Contractor* could notify a compensation event under clause 61.3 referring to clause 60.1(10). In this case there appears not to be an instance of insufficient notice of doing work obstructing a required test or inspection and the *Contractor* has done nothing wrong. Perhaps the *Supervisor* mis-heard the conversation. [2 marks]
- As this would be a compensation event, the main principles are that the effect the compensation event has upon the Prices is determined as stated in clause 63.1 and any delay to planned Completion would be added to the Completion Date, as stated in clause 63.3. [2 marks]
- Should a Defect be found here then either the *Supervisor* notified the Defect to the *Contractor* or the *Contractor* notifies this to the *Supervisor*. It depends who was aware of this first. This is stated in clause 42.2. The *Contractor* would then be obliged to correct the Defect before the end of the *defect correction period*. Should the Defect not be corrected by this date, then the *Project Manager* would deal with this as an uncorrected Defect under clause 45 if there is no agreement to accept the Defect under clause 44.

Question 7

- a) There appears to be an ambiguity or inconsistency within the Works Information. [1 mark]
- As soon as either the *Project Manager* or the *Contractor* becomes aware of the ambiguity or inconsistency then the *Project Manager* gives an instruction resolving the ambiguity or inconsistency. [1 mark]
- There is no problem in the *Project Manager* first discussing this with the *Contractor* to make sure of the instruction to be given – that it will likely not cost too much or cause significant delay etc. This is quite practical [1 mark]
- Once sure of the instruction then the *Project Manager* will instruct a change to the Works Information under clause 14.3. This should be obeyed by the *Contractor*, as stated in clause 27.3. [2 marks]
- The *Contractor* of course appears not to be at fault here and the additional time and or money should be assessed using the compensation event process. The *Project Manager* should first notify the compensation event under clause 61.1, the actual event

being an event stated in clause 60.1(1).

Clause 63.8 tells us that in this case the compensation event would be assessed as if the Prices, the Completion Dates and the Key Dates were for the interpretation most favourable to the Party which did not provide the Works Information. It appears the *Employer* provided the Works Information so benefit of the doubt would go to the *Contractor*.

- b) All communications must be in a form which can be read, copied and recorded. This is stated in clause 13.1. The clause goes on to state that writing is in the *language of this contract* – this provision will be stated in the Contract Data. [1 mark]
- The form which communications must take is really anything that can be read, copied and recorded. The Works Information might though be more prescriptive on this e.g. including sample pro-forma which must be followed. Or there might have been a communication protocol meeting early on where the form was agreed. [1 mark]
- In terms of the address that each party uses, this will initially be stated in the Contract Data. Addresses will be given for the *Employer, Contractor, Supervisor and Project Manager*. Clause 13.2 tells us that a communication has effect when it is received at the last address notified by the recipient for receiving communications. If none is notified then those addresses in the Contract Data are used. [1 mark]
- The address does not have to be a postal address; it could be an electronic address. If the *Contractor* thinks that the address for the *Project Manager* is wrong then simply ask the *Project Manager* and get him or her to notify a change, should this be the case.
- c) The right to change the Works Information belongs only to the *Project Manager*. This is as stated in clause 14.3. [1 mark]
- The *Project Manager* may though delegate any of his or her actions. This is provided for in clause 14.2. In principle therefore the representative of the *Employer* could be delegated such actions as being able to instruct a change to the Works Information. All that would need to happen is that the *Project Manager* first notifies the *Contractor* in a form which can be read, copied and recorded. [2 marks]
- From a practical point of view it may be that the *Employer* only wants the *Project Manager* to be able to instruct such changes, to try to keep some sort of sensible control on things. It might be prudent to have a 3 way conversation, *Project Manager, Employer* and the *Employer's* operational team member to discuss requirements for the Works Information (which should have happened anyway in the compilation of this document) and then to consider a mini-business case for further changes – will it be cost effective, might it delay the project and so on. [2 marks]
- d) If the Defect was caused and corrected by a Subcontractor then you would have to look and see what the Subcontractor's contract said about such matters. If the Defect was caused and corrected by the *Contractor* then this would only be a Disallowed Cost if it was corrected after Completion or it was caused by the *Contractor* not complying with a constraint on how he is to Provide the Works stated in the Works Information (see clause 11.2(25)). [3 marks]
- Again, to determine if bonus payment to the Subcontractor was a [3 marks]

Disallowed Cost then you would have to look and see what the Subcontractor's contract said about such matters. If the bonus was given as a discretionary thank you payment by the *Contractor*, such a provision not being included in the Subcontractor's contract, then this would be a Disallowed Cost.

Item 12a of the Schedule of Cost Components covers payments to people for severance related to work on this contract. The preamble to this Schedule also stating that an amount is included only if it is incurred in order to Provide the Works. It follows that severance pay in respect of the last 6 months of employment will be part of the Defined Cost. The remainder of the severance pay in respect of previous employment is not a Defined Cost and not payable; so it is not necessary to consider whether it is a Disallowed Cost, it is simply not payable.

Question 8

- a) What we do not know here is if both members of the *Contractor's* staff were named in the Contract Data part two as key people, or not. [2 marks]
If they were not named as key people then there should be no problems here in the *Contractor* recruiting he believes to be the right people for the job. There could possibly be constraints stated in the Works Information in this regard, so that would need to be checked first. Otherwise, the *Contractor* gets on with this recruitment as he normally would. [2 marks]
If one or both were named as key people then clause 24.1 deals with this matter and the *Contractor* needs to employ a replacement person(s) who has been accepted by the *Project Manager*. The *Contractor* would need to submit the name, relevant qualifications and experience of a proposed replacement(s) to the *Project Manager* for acceptance. A reason for not accepting is that his or her relevant qualifications and experience are not as good as those of the person(s) who is to be replaced. [2 marks]
- b) The *Contractor* has not discharged his obligations here. He is obliged to submit his first and all subsequent revised programmes that meet the requirements of the contract. This submission does not do that in respect of the first programme which needs to comply with all of the clause 31.2 requirements, not just some of those he has time to show at the moment. [2 marks]
It is difficult to know here whether the first assessment is due, whether he's submitted the first programme early or not but there may be time to talk to the *Contractor* and explain what is required. The *Project Manager* can assist as best he is able to in a collaborative way. It is in everyone's interest to get an Accepted Programme in place in a timely fashion and keep it up to date thereafter. [2 marks]
If no programme is identified in the Contract Data, one quarter of the Price for Work Done to Date is retained in assessments of the amount due until the *Contractor* has submitted a first programme showing the information which this contract requires. This is stated in clause 50.3 and is not a discretionary matter.
- c) The *Project Manager* may still be retaining one quarter of the Price for Work Done to Date as required in clause 50.3. Note the programme does not need to be accepted, just that it shows the information which [2 marks]
[2 marks]

the contract requires.

In relation to assessing compensation events then if one of the four bullets in clause 64.1 applies to the *Project Manager* who should assess such compensation events and in accordance with clause 64.2 the *Project Manager* assesses a compensation event using his own assessment of the programme for remaining work if one of the two bullets in this clause applies. The first bullet definitely seems to apply here.

[1 mark]

Of course the way around this really needs to be to work with the programme to get this submitted showing the information the contract requires and to get it accepted.

- d) The payment process is detailed in section 5 of the contract. Of particular relevance is clause 50.2 in that the amount due includes, amongst other things, the Price for Work Done to Date.

[1 mark]

For Option B, the Price for Work Done to Date is defined in clause 11.2(28) and refers to proportions of lump sums and quantities of work completed – these relate though to the Bill of Quantities and therefore do not include any compensation events which have not yet been implemented.

[1 mark]

[1 mark]

[1 mark]

Clause 63.13 gives some rules of the form of changed Prices for compensation events and how the Bill of Quantities is changed, clause 65 tells us about how and when compensation events are implemented.

So at the moment, there is just no way that on account payments can be made for this work as the compensation events have not been implemented, they have not found their way onto the Bill of Quantities which is used to determine in part the amount due. Of course practically speaking the *Project Manager* and *Contractor* should work closely to implement as many compensation events as they can as quickly as they can.

- e) In accordance with d above, at the moment, there is just no way that on account payments can be made for those compensation events which have not been implemented. They have not found their way onto the Bill of Quantities which is used to determine in part the amount due under clause 50.3. The best advice here would be for the *Project Manager* and *Contractor* to work closely to implement as many compensation events as they can as quickly as they can. Those that are completed before each assessment date can then be paid.

[2 marks]

[2 marks]

With the verbal instructions dilemma, the *Contractor* is obliged to obey an instruction which is in accordance with the ECC and given to him by the *Project Manager* (clause 27.3). The *Project Manager* may instruct a change to the Works Information (clause 14.3) but all communications (which include instructions – see clause 13.1) must be in a form that can be read, copied and recorded (again, see clause 13.1). So really the Site Agent needs to talk to the *Project Manager* to get him to realise his verbal instructions are not in accordance with the contract but this can easily be rectified by putting them in a form that can be read, copied and recorded, which allows the rest of the contract provisions to work.

Institution of Civil Engineers

Examination for the ICE Advanced Certificate in Law and Contract Management (ACLCM) 2016

Module 3: (English and Scots Law)

Monday 13th June 2016

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

There are four questions in Section 1 based on NEC3 Contracts and four questions in Section 2 based on ICC Conditions of Contract.

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

All questions carry equal marks.

You may consult un-marked copies of the ICC Conditions of Contract Measurement version August 2011, ICC Conditions of Contract for Design and Construct version August 2011 and ICC Conditions of Contract Target Cost Version August 2011. The CECA/FCEC form of Sub-Contract, NEC3 Engineering and Construction Contract (ECC), NEC3 Engineering and Construction Subcontract (ECS), NEC3 Engineering and Construction Short Subcontract (ECSS), Statutes, CDM Regulations, CESMM4.

References to Cases and Acts should be quoted where possible.

Please indicate on the outside of the answer booklets whether your answers will be in respect of Scots Law.

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

Section 1

Question 1 – Compulsory

The form of contract for a road scheme is an NEC Option D. The Contractor has engaged a Sub-Contractor under the NEC3 Short Sub-Contract. The Contractor just issued a notification to the Project Manager of an Early Warning that a large amount of rock has been discovered unexpectedly (in the Contractor's eyes!) on site. The Project Manager is preparing to go to a Risk Reduction Meeting and is considering how to proceed. His interpretation of the Site Information is that the Contractor should have expected about 100m³ of rock but largely at a different chainage. From the early warning it seems that the Contractor only estimates that the amount of rock might be 15m³. The Project Manager is interested in making sure that the Employer pays the right amount for the additional rock excavation.

- a) **How does the Project Manager proceed in relation to the Risk Reduction Meeting?** [12 marks]
- b) **How would your answer differ if the Employer's priority was cost certainty and the main option was Option A?** [5 marks]

Eventually, over 300m³ of rock is found on site. The Contractor claims a compensation event has occurred. In trying to establish the value of the Compensation Event, the Contractor has used the Sub-Contract rates for excavation works. The Sub-Contract price list includes an item for rock. The Sub-Contractor has told the Contractor "*we will just measure whatever comes out and you can pay the contractual rate*".

- c) **What problems may the Contractor face in quoting for the Compensation Event and how may this be resolved?** [8 marks]

Section 1

Question 2

Construction of Ballygobackward's iconic new Town Hall is now in full swing. Excavation is well underway. However, following local elections the new leader of the Council has insisted on a dramatic redesign of the roof structure to include a representation of the "*Ballygobackward's Bull*". There was a preliminary design done for this at pre-contract stage and the Council's designers have produced a detailed draft of the changed Works Information. The Contract is an NEC Option A and the roof design is to be carried out by the Contractor.

The Project Manager has issued the changed Works Information under Clause 61.2 and is presented with a quotation for the compensation event. It is very much more than he expected. The Contractor has claimed 25% above the total of the work elements of his quotation for risk. The Project Manager does not think this is appropriate. The quote includes some elements of site supervision costs, the design of the new roof, and a percentage adjustment to the activity schedule item for the roof "*for the added complexity*".

- a) **How does the Project Manager proceed and what information do you suggest he uses?** [15 marks]

The works progressed and are now approaching the end of the job. However, the Contractor has suffered a number of delays for things that are not compensation events. The Project Manager has instructed him to revise his programme. The outstanding works require the Contractor to carry out the replacement of a 300mm diameter pipe below a live road. He has programmed this to take one day and the Project Manager thinks that this is ludicrous. In earlier versions of the programme the Contractor had indicated it would take over a week. The Project Manager therefore rejects the programme. The Contractor is at a loss because he must show it taking one day or the programme will show that the Project will not be completed by the completion date.

- b) **How does the Contractor proceed?** [10 marks]

Section 1

Question 3

Ballygobackwards sewage treatment works is a complicated piece of civil engineering. Originally the contract for its construction called for completion in two sections. Due to various design changes the two sections were combined. Consequently, there was a series of problems with the commissioning stage of the project. The biomass filtration system failed to operate as expected and the Project Manager has refused to certify completion of these works. However, the urgent need to bring elements of the treatment works online necessitated the Employer taking over the works, except the biomass filtration system and associated elements, when the Contractor had reached "*practical completion*". This was at the end of the commissioning period when the other elements of the works were sufficiently advanced to allow the Employer to operate the plant. It is now five months since the takeover was certified by the Project Manager.

The Works Information for the biomass system states that it is to be a Contractor design and the outputs are to be tested in the presence of the Supervisor. Recently the tests were repeated, and although six of the seven tests were successful, the seventh test failed, albeit marginally. The form of contract is an NEC Option A Contract and the Employer remains deeply concerned about the long term viability of the system. The Contractor is frustrated. In his view, the output requirement of the seventh test is impossible to achieve and the test should be abandoned

- a) Advise the Project Manager on how he should deal with this [15 marks]**

In the part of the plant which is taken over by the Employer there has been a series of problems with the operational equipment. The Employer wants the defects corrected but the Contractor has said that they were caused by the poor quality of the Employer's running of the works.

- b) Advise the Project Manager on his role and what the contract anticipates the Employer, Contractor and Supervisor will need to do [10 marks]**

Section 1

Question 4

The project is an NEC Option C Contract for a retail development. Mr Hawkeye is the Project Manager, who also designed the works. He roams the site one Sunday afternoon after his Sunday lunch, and identifies that the concrete block work at the rear elevation of the sub-basement is not “*fair faced*” as the Works Information requires. He tells the Supervisor, a junior architect in his firm, to notify the Contractor.

The Supervisor thinks the Project Manager is being rather harsh about this. He inspected the work when it was being built and he felt it was in line with the sample panel he (and Mr Hawkeye) had accepted. He also thinks that the Employer isn't going to be worried. The walls are due to be painted soon.

- a) **What options are open to the Supervisor and what do you recommend he does?** [15 marks]

The works also require the installation of a new boiler. The Supervisor has just received an email from his assistant, who is in Germany inspecting the boiler before it is brought to site. The supply agreement is the NEC Supply contract. The email says that the tests required by the Works Information have not been completed because the supervisor's test machine has broken (apparently the Contractor's man spilled a litre of wheat beer over it while they were travelling to the factory). The Supplier needs the unit removed from his factory and the transport is coming urgently to take the unit to site. The supplier has pointed out that cancellation of the transport and continuing to store the boiler will be expensive.

- b) **What options are available to the Supervisor and what do you advise him to do?** [10 marks]

Section 2

Question 5 – Compulsory

The contractor on an ICC measurement contract to provide a new 1100m long reinforced concrete retaining wall for a Local Authority (LA) has gone into Administrative Receivership, having built 600m of the wall. Finish Contractors Ltd have entered into an agreement with the Local Authority and the Administrator for the contract to be novated to them. This gives Finish the same benefits and obligations as if they were the original contractor.

- a) **What are the advantages to the LA of novating the contract?** [5 marks]

Finish Contractors have been working on the contract for 2 months when they identify a number of omissions in the CESMM4 Bill of Quantities (BQ). For example, concrete blinding to the formation and fair faced finish to the front of the retaining wall are specified but there are no items for payment. Finish have also discovered that the original contractor had been paid for laying 150m of outfall drainage pipework but had in fact only laid 5m of pipework at each of the two exposed ends. Finish propose new rates for the omitted BQ items and give notice that they will be seeking payment for laying the missing outfall drain.

- b) **What actions should the Engineer take regarding the BQ omissions?** [3 marks]

- c) **Explain whether Finish should be paid for blinding and fair finish for the whole of the retaining wall or just the length they are building.** [3 marks]

The Engineer takes the view that Finish must construct the outfall drain at their own cost.

- d) **What is the strict contractual position and why?** [5 marks]

- e) **Explain whether the engineer or any party to the novation might be liable to pay compensation for the original overpayment, and to whom?** [5 marks]

Finish find out that rock was encountered by the original contractor when excavating for the first 100m of the retaining wall. A more powerful excavator than the one on site with a hydraulic breaker was needed to dislodge the rock for excavation. Additional concrete backfill was also needed below the blinding due to rock overbreak. Having consulted the site investigation information Finish decides to claim for unforeseen conditions encountered by the original contractor.

Section 2

Question 6

A Contractor was awarded a £2.1 million contract to construct the parking areas, roads and highway drainage for a new out of town retail park. The Contract was under the ICC Measurement Version. The Employer's consulting engineer was responsible for the design of the Works and one of the partners was named as the Engineer.

The Time for Completion was 30 weeks and the Date for Commencement was 1 September. The Contractor submitted his Clause 14 programme shortly after contract award. The submitted programme did not have any links or show the Contractor's planned resources. There was apparently no float but the programme did allow for a two week break for the Christmas shutdown.

The Contractor commenced work generally in line with his programme. In early September, the Engineer told the Contractor that part of the Site would not be available until after Christmas. He also issued a number of alterations to the Works, which he described as "minor". Over the next two months a total of 9 variations were ordered but the Engineer did not extend the Time for the Completion of the Works. In monthly progress meetings the Engineer stated that the additional costs would be sorted out at the end of the Contract. The Contractor applied for lump sums in interim applications for payment for the direct costs of the alterations and these were mostly accepted by the Engineer and certified for payment.

The variations caused significant disruption to the Contractor's planned operations. To catch up he paid overtime to his subcontractor to work one week of the Christmas break and to his Agent to re-programme to ensure the remaining work (as it was known at the time) would be completed by the end of February. On return to site on 5 January, the Contractor issued his revised Clause 14 programme to the Engineer and increased his resources on site.

The Works were mostly completed by the end of February and access was given to other contractors to start construction of the units on the retail park on time. The Contractor applied for a Certificate of substantial completion for 31 March. Minor items of finishing off (mainly landscaping) took a further four weeks. During this time the Engineer issued 6 new items of work arising from the requirements of the other contractors.

From January onwards the Contractor had included in his interim applications a lump sum of £30,000 for the additional costs of disruption and acceleration; he increased it to £150,000 in the February application. The Engineer did not certify any payment and declined the Contractor's invitations to meet to discuss the issue. In May the Contractor submitted a draft final account in the sum of £2.35 million, including £90,000 for the direct costs of the variations and £210,000 for disruption and acceleration.

Three months later, the Engineer issued his final payment certificate in the sum of £2.15 million. In the accompanying letter he said that the Contractor had failed to carry out the Works with due expedition and had not given proper notice on any acceleration of the Works. The Engineer also issued the Certificate of substantial Completion dated 31 March and told the Contractor that he had advised the Employer that he could deduct Liquidated Damages for 3 weeks in the total sum of £120,000.

As a result, the Contractor was paid £2.03 million by the Employer. He has issued a Notice of Dispute under Clause 66A and threatened to issue a final account in a month

- a) **What actions should the Engineer have taken during the course of the Contract to avoid the current situation?** [7 marks]
- b) **What actions should the Contractor have taken during the course of the Contract to try to avoid the current situation?** [6 marks]
- c) **Advise the Employer on his likely contractual liabilities, including any redress against the Engineer, the options he has and the risks associated with those options** [12 marks]

Section 2

Question 7

A term repair and maintenance contract (ICC Term Version) for a highway authority is in its Defects Correction Period when a number a number of problems come to light such as work not to specification, sunken areas of reinstatement and incomplete work like as missing road markings. The Employer holds £10,000 in retention. The Engineer carries out a full inspection of the Works and produces a report identifying over 150 defects, most of them small in nature but in the public highway (verge, footpath and carriageway). The report is sent to the Contractor with a request to complete the work as soon as possible but the Contractor refuses to do so.

- a) **Describe the actions the Engineer and Employer should take to enable the Employer to appoint another contractor to carry out the work and protect the Employer's rights under his contract with the original Contractor** [13 marks]

The Employer appoints another contractor to rectify the defects, with payment on a cost reimbursable basis. The original Contractor was advised of this and that the estimated costs were £150,000 but in the end they amounted to £390,000. The Employer seeks to recover the £390,000 from the original Contractor, who refuses to pay, arguing that the work would have only cost him £125,000 to do. From observations and records the original Contractor provides examples of inefficient working by the replacement Contractor in carrying out the work but he does offer to pay the original estimate of £150,000, in full and final settlement provided that the £10,000 held by the Employer in retention is included as part of the £150,000.

- b) **Advise the Employer on his options for recovering the repair costs and the risks associated with them** [12 marks]

Section 2

Question 8

A consulting engineer has the following portfolio of new projects for his client, Water Company PLC. Key issues:

- (i) A trial hole and borehole excavation contract for some 45 separate housing sites in London over an 18 month period
- (ii) A contractor wishing to subcontract formwork, reinforcement and concreting work for new primary settlement tanks on a sewage treatment works.
- (iii) A new 1200m long, 2m diameter tunnel under the West Coast main railway line and adjacent canal.
- (iv) A contract for piling and a base slab for a retail unit to be built on reclaimed ground with major damages for delay.
- (v) A network repair and maintenance contract for a small water company in the north of England.
- (vi) A sensory garden for a charity with a maximum budget of £12,000.

- a) Advise the managing Director of the most appropriate contract from the ICC suite of contracts for each project with a brief explanation to support your recommendation [12 marks]**

In a separate arrangement Water Company PLC wishes to order and pay for new pumps which are on a long lead time before the end of the financial year. To do so they propose to issue a letter to their preferred contractor saying that they intend to award them the contract and ask them to place an order for the pumps with the required duty/specification within 10 days.

- b) Identify the main elements for the letter of intent, and the risks involved? [13 marks]**

**Module 3: Points for Answer
Section 1**

Question 1

- a) This question touches on the compensation event and, particularly, the early warning system for unforeseen physical conditions. The purpose of Part A is to examine the role of the early warning and risk reduction meeting in dealing with a problem such as unforeseen physical conditions. It gives average candidates the opportunity to rehearse the standard form provisions in Clause 16 and 60.1(12) including the role of Clause 60.2 and 60.3. However, the question requires candidates to identify how the Project Manager should prepare for an Risk Reduction Meeting and consequently close examination of the requirements of Clause 16.1 – whether there will be any increase to the contract sum in an Option D Contract and 16.3 – how the Project Manager will prepare to consider solutions from the Contractor and make proposals. More able candidates may identify that there is probably very little room for manoeuvre in terms of identifying different solutions and an early warning meeting is likely to be unproductive. **[12 marks]**
- b) This question deals with the mechanisms in Clause 6 for settling compensation events where the extent of claims is not fully understood. Answers should include consideration of the use of Clause 61.6 to state assumptions for compensation events and the role of Clause 65.2 in not changing forecasts. **[5 marks]**
- c) The question examines the potential lacuna in valuing sub-contract works where the sub-contractor has no incentive to maintain records to comply with the schedule of costs components, and defined costs are not necessary to value the works under the sub-contract. The answer should identify the default mechanism for valuing compensation events as change in defined costs and also at Clause 63.14 which allows the use of rates as long as they are agreed with the Project Manager. The answer may include some views around this. It may also discuss whether changing quantities is a compensation event under the sub-contract. **[8 marks]**

Question 2

- a) This question principally concerns the valuation of compensation events. It is, in particular, related to the mechanism for valuing of proposed compensation events including the level of risk that should be included by a Contractor under Clause 63.6. However, it also touches on the use of defined cost under Clause 63.1 and operation of Clause 63.14. All of these should be mentioned. The answer should point out where rates have been included this has to be agreed and if rates are used then some element of risk must be included in them. Better answers are likely to look at sources of justification for risk including the programme at Clause 61.2 and other potential sources advance by the contractor. The answer should conclude with the difficulty associated with this. **[15 marks]**

- b) This question considers the difficult position of a Contractor in delay having to provide a programme for acceptance to the Project Manager. The Project Manager is entitled to reject the programme under Clause 61.3 for failing to conform to the works information should the Contractor indicate that he will complete late. However, if the Contractor's plans are unrealistic then the Project Manager is also entitled to reject the programme under the first bullet point in Clause 31.3. This question explores that issue. Better answers will discuss remedies to the problem including an agreement to extend the completion date other than by a compensation event to allow the Contractor a realistic time to complete and the contractual difficulties in establishing this. **[10 marks]**

Question 3

- a) This question concerns defect correction and impossibility of performance. It touches on the obligation to comply with the works information in Clause 20.1 and the passing of tests under Clause 40.1. Answers should include a discussion of the requirements to identify that work is not complete until tests pass only if set out in the Works Information and some discussion may be had concerning this. The answer also touches on the correction of defects by the Contractor and the role of the Project Manager in accepting defects. Answers should identify that it is for the Supervisor rather than the Employer or Project Manager to identify defects. **[15 marks]**
- b) This question deals with exclusions to liability under Clause 80.1 fifth bullet point and the likelihood that the Project Manager's instruction to correct something may be a compensation event under Clause 60.1(14). It should be compared with Clause 82.1 which requires the Contractor, until the Defects Certificate has been issued, to promptly replace damaged parts of the works. This should be discussed. Answers may also include the use of the risk reduction system to resolve the difficulties and the duty of the contractor to obey instructions (Clause 27.3). **[10 marks]**

Question 4

- a) The question concerns correction of defects generally and the role of the Supervisor. Part A focuses on: **[15 marks]**
1. Responsibility for identification of defects. Reference should be made to clause 40.3 and 43.1;
 2. The Project Manager's role in controlling a Supervisor and the Supervisor's independence, which is unstated in the contract but

(potentially) implied by the duties; and

3. The implications of previously accepted work, so the answer should refer to Clause 14.1 and 60.1(8).

It also touches on:

1. The possibility that the instruction changes the Works Information (Clause 14.3 and 60.1(1)); and
2. How the uncorrected defect would be fixed and the Project Manager's role in this. This particularly relates to the timing of any correction and whether the defect prevents following work. If the work is complete is clearly relevant (Clause 43.2).

It should discuss and reach some conclusion on the Supervisors independence. Better answers discuss this as part of the Professional Services Contract but also discussing the value of it.

b)

[10 marks]

This part concerns the risk sharing of problems in testing under an NEC Option C contract. The answer should consider the balance between the intention of clause 41.1 and the obligation on the contractor not to bring plant to site that has not been tested with the additional cost involved. The answer could explore 60.1(11) and the implications of delay and whether the facts that the damage to the machine is (allegedly) caused by the contractor might amount to a contractor default.

Consideration of defined cost and disallowed cost is also relevant. Better answers might identify that the exact terms of the supply contract will be important to establish defined cost. As will the Project Manager's authority to instruct the bringing of the plant to site (as opposed to the supervisors) since it a constraint and so change to the Works Information.

Question 5

This is a question about the contractor's liabilities under the ICC measurement contract however that contract has come about. It is also about rules of CESM4.

a)

The advantages to the Local Authority of novating the contract are

[5 marks]

- completion of the contract at original tender rates and prices
- risk of defective work by original contractor transferred to Finish, the substitute contractor
- saving of re-tendering time and reduced delay to completion
- saving of costs of re-tendering
- saving of costs of preparing a final account for the original contractor and arguments over the additional costs incurred in completing the contract, including keeping the site safe

b)

The Engineer should correct the Bill of Quantity omissions in accordance with the principles of Clause 55(2) and value the work in

[3 marks]

accordance with Clause 52 (3) or 52 (4). A good start has been made as Finish has proposed rates for the missing items.

- c) Finish should be paid for blinding and fair finish for the whole of the length of the retaining wall as they have taken on the responsibility for delivering the contract. In doing so they inherited the benefits and liabilities of the work carried out by the original contractor. In this case Finish will benefit from payment for work which the original contractor did and should have claimed payment for. **[3 marks]**

- d) Finish must lay the outfall drain. A hard line would be to say that as payment had been made Finish took that risk. However, questions must be asked as to how the Engineer came to certify payment for work that had not been carried out. The Employer should not pay twice for the drain due to an error by the Engineer. Whilst Finish have taken on liabilities for defective work they could not foresee that payment for work not carried out would be falsely claimed and negligently certified. **[5 marks]**

The answer should consider potential liability of the original contractor and/or employer under the novation agreement, as well as potential liability of the engineer for over certification. This could include discussion of misrepresentation, fraud and negligence, **[5 marks]**

In circumstances like this sometimes a cost sharing compromise is reached between the Employer, the Contractor and the Engineer, taking into account all the factors considered in this question, some of which work out to the contractor's advantage and some of which do not.

- e) Unforeseen conditions in the form of rock gives rise to an admissible claim. It does not matter that Finish did not incur the costs of the unforeseen conditions themselves. The Engineer should follow the process set down in Clause 12, albeit for a claim made long after the event. It may be necessary for the Engineer and Finish to share information to determine a reasonable valuation of the claim. **[4 marks]**

There is also an opportunity for a commercial discussion – Finish will be paid for excavation of rock which they did not do but not be paid for the outfall drain which they have to construct.

Question 6

This is a question about the consequences of making a large number of changes late in the contract and the Engineer and Contractor not managing that change properly under the contract, resulting in additional cost for the Employer

- a) The Engineer's actions should have included: **[6 marks]**

- Recognition of the potential delay and disruption caused by a large number of variations
- Discussion with the Contractor about the change of access to the site and its implications
- Advised the employer of potential delay/additional costs
- In the absence of a claim from the Contractor made his own assessment of additional time that might be due
- Recognition that failure to respond to the Contractor could lead to an acceleration claim
- Been careful about issuing further variations after the due date for substantial completion, especially if not necessary for the satisfactory completion of the works

b) The Contractor's actions could have been:

[5 marks]

- Given formal notice of intention to claim additional costs (Clause 53)
- Sought approval from the Engineer to his revised programme (Clause 14)
- Requested extension of time (Clause 44)
- Notify the Engineer of intention to work at Christmas and bring in additional resources from January
- Been clear that he was accelerating his programme as no extension of time had been granted

c) Advice to the Employer

[8 marks]

- Must recognise that access was given to other Contractors on 28 February as required – no delay to the overall programme for the retail park.
- Employer liable for some additional costs of delay and disruption resulting from variations
- Contractor may have entitlement to extension of time for period between 28 February and 31 March. Not unusual to defer landscaping work for seasonal reasons
- If so, liquidated damages will have to be repaid with interest
- Risk that contractor will produce inflated claim – it will take time and resources to assess properly at additional cost to the Employer
- Contractor could use Clause 66 and give notice of adjudication – again time and cost to respond

Options

- Negotiate with contractor to try and resolve amicably, with possible mediation/conciliation
- Follow adjudication procedure (explain) and let third party decide – no control over outcome
- Over-ride the Engineer's advice and accept contractor's original draft account
- Question the RE's actions and the Engineer's administration of the contract – could a claim be made by the Employer against the Engineer for failing to administer the contract with due skill and care (Engineer should have Professional Indemnity Insurance)

[6 marks]

Question 7

This is a question about an Employer arranging for another contractor to complete defective work (Clause 49) and the importance of ensuring a competitive price for doing that work if it is to be recovered from the original defaulting contractor.

- a) The Engineer should send the list of work required to the Contractor, with a request for the Contractor to complete it as soon as practical, Clause 49(2). The Contractor may dispute some of the items as not being his responsibility (49(3)).

[13 marks]

The Contractor should have given an undertaking under Clause 48(1) to complete outstanding work in the Defects Correction Period. Note times can be specified for this but often are not, allowing the Contractor to leave work until the end (49(1)).

Clause 49(4) allows the Employer to carry out the work using another contractor and recover the costs from the original Contractor if the works should have been carried out at the original Contractor's expense. It is essential that the original Contractor is given every opportunity to complete the work himself, so a clear trail of requests and refusals between the Employer and the Contractor should be in place.

The Employer may have to wait until the end of the Defects Correction Period to arrange for the work to be carried out. The exception to this is if urgent repairs are required. Clause 62 allows the Employer to carry out urgent repairs and deduct the costs of doing so from monies owed to the original Contractor or request payment on demand. This work was in the highway and some of it could have been urgent (e.g. sunken reinstatement)

Clause 49(4) allows the Employer's cost of carrying out the repairs to be recovered from monies due or to become due to the original Contractor. In this case only £10,000 of retention remains and that it is insufficient, so the Employer will have to seek recovery of his costs in other ways. In any event the cost of carrying out the work by others should be reasonable and the Employer should inform the original Contractor when the work is being carried out and the forecast costs, updated as necessary. This would give the original Contractor the opportunity to observe/inspect the repair works and comment appropriately. Details of the final costs should also be provided.

- b) The actual cost is more than twice the estimated cost of the remedial work. This will almost certainly make resolution very difficult. It would be worth asking who advised the Employer to arrange for the work to

[12 marks]

be undertaken on a cost reimbursable basis and what supervision was provided to ensure good value for money? Options and risks are:

- The Employer could try to negotiate a settlement with the original Contractor for a sum greater than the £150,000 offered, recognising that the full £390,000 may have been unreasonably high.
- The Employer could pursue the original Contractor for the full £390,000 through the mechanics of the Contract, using Clause 66. In this case adjudication could be used to bring matters to a head.
- Formal action beyond adjudication is unlikely to be cost effective, as legal and management costs would probably greatly exceed the level of return, if successful. If not the Employer could lose even more money. A risk analysis should be carried out to inform any decision.
- The Employer could seek to recover some of the monies from the substitute contractor, if it could be shown that the repair work was not carried out diligently and with reasonable skill and care.
- There is a lesson here on governance procedures. If work carried out on a cost reimbursable basis is not controlled it can result in unexpected overrun. Current and forecast costs should have been reported regularly to the Employer and in turn to the original Contractor. Just because the original Contractor defaulted in his obligation to rectify the defects it does not mean they can be corrected at any cost to him.

Question 8

This is a question about the different types of contracts in the ICC suite and the essential elements of a letter of intent.

- a) (i) Ground Investigation version; suitable for boreholes, trial pits and reports with the advantage of no retention monies for small value works **[12 marks]**
- (ii) No form of Sub-Contract available; use measurement version with bill of quantities to CESMM4 to enable monthly payment applications work completed
- (iii) Measurement Version; full Clause 12 provision for unforeseen physical conditions given the nature of the structures to be tunnelled underneath
- (iv) Design and Construct version; more control for contractor and incentivise with pain/gain share or use Target Cost version
- (v) Term Version; large number of similar operations
- (vi) Minor Works version; small value project, consider lump sum price to protect charity

b)

Letters of intent are not without risk to the parties and should not be entered into lightly. The contractor does not have to agree to the water company's request. The contents should be discussed and agreed by the two parties. The plan for the letter of intent should contain the following elements:

[13 marks]

- A statement that the water company intends to award the contract to the contractor, subject to any constraints such as signing of a formal contract agreement.
- The reasons for issuing the letter of intent (e.g. pump long lead time)
- Details of the work and/or services required
- The cost of the work, possibly with a cap or limit, payment terms and assurance of payment for completion of the work whether or not a contract is awarded.
- Method of calculating the contractor's costs and any agreed fee (overheads and profit)
- The timescale for completion of the work – in this case delivery of the completed pump sets to site
- Any sureties if required – particularly if stage payments to the manufacturer of the pumps are involved
- Other terms and conditions, for example the terms and conditions of the main contract to be awarded could apply
- Confirmation of acceptance of the letter by the contractor.