

**ICE Law and Contract Management  
Examinations**

**Examiner's Report 2017**

## **ICE Law and Contract Management Examinations**

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## **Moderator's Report**

The percentage success rate for the Module 1 Paper this year was higher than that achieved last year and the percentage pass rate for Module 2 Paper equalled the highest ever achieved; both these statistics are most encouraging. The number of candidates sitting the Module 3 Paper was very much in line with past performance and the percentage success rate was also up on last year. The number of candidates sitting Modules 1 and 2 Papers was very slightly down on last year but again 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 develop the relevant point of law; (ii) they failed to apply their knowledge of the relevant legal concept to the facts of the question and/or (iii) they failed to consider the amount of marks available for each question and provide detail commensurate with the marks available. The best answers were well structured by identifying the legal principle, explaining the law, applying it to the facts in the question, before reaching a reasoned and sensible conclusion. Candidates continue to lose marks by not applying the legal principles to the facts with reference to case law, statute etc.

For the Module 2 Paper it was encouraging to note that candidates were in the main adopting NEC language and terminology. Use the index of the ECC – this can helpfully prompt the candidate to consider different parts of the contract to answer questions. It cannot emphasise enough about the usefulness of the index to the candidate. If a candidate genuinely runs out of time at least the candidate should put a brief plan in of what he/she intended to say. No answer equals no marks, whereas a plan might just get the candidate a few extra 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 the one who was less focused and often more verbose. Many of the questions require the candidates to draft their answers as if they were advising clients or third parties. When phrasing their answers candidates should be adopting a businesslike and professional manner. The use of slang, idioms and the sort of casual language used in settings that are more social should be avoided.

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.

### 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<br>ICE |     | Module 2<br>NEC |    | Module 3 |    |
|   | Nr       | %  | Nr              | %   | Nr              | %  | Nr       | %  |
| 2017  | 70       | 72 | -               | -   | 79              | 83 | 3        | 66 |
| 2016  | 74       | 51 | -               | -   | 91              | 74 | 3        | 33 |
| 2015  | 85       | 70 | -               | -   | 105             | 76 | 3        | 33 |
| 2014  | 68       | 62 | -               | -   | 72              | 79 | 4        | 0  |
| 2013  | 42       | 73 | -               | -   | 51              | 73 | 3        | 0  |
| 2012  | 36       | 83 | -               | -   | 42              | 82 | 6        | 33 |
| 2011  | 43       | 81 | 2               | 50  | 41              | 53 | 2        | 50 |
| 2010  | 34       | 83 | 1               | 100 | 36              | 67 | 7        | 29 |
| 2009  | 46       | 83 | 2               | 100 | 44              | 80 | 2        | 0  |
| 2008  | 45       | 84 | 2               | 100 | 43              | 83 | 2        | 0  |
| 2007  | 28       | 74 | 1               | 0   | 25              | 52 | 5        | 20 |
| 2006  | 47       | 74 | 21              | 100 | 25              | 76 | 3        | 33 |
| 2005  | 57       | 60 | 14              | 86  | 37              | 73 | 5        | 0  |

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

Copies of the current curriculum, the two case lists and a revised reading list are all available on the ICE website [www.ice.org.uk/law](http://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 [econtractsanddisputes@ice.org.uk](mailto:econtractsanddisputes@ice.org.uk)

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

## Examiner's Report

### Module 1

#### Section 1

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##### General comments

In general, the section was answered fairly well with the majority (51%) of candidates achieving a pass mark or above in this section. Candidates lost marks because: (i) they failed to fully develop the relevant point of law; (ii) they failed to apply their knowledge of the relevant legal concept to the facts of the question and/or (iii) they failed to consider the amount of marks available for each question and provide detail commensurate with the marks available.

For some candidates there was some confusion between breach of contract and breach of duty of care in the tort of negligence.

The best answers were well structured by identifying the legal principle, explaining the law, applying it to the facts in the question, before reaching a reasoned and sensible conclusion.

##### Question 1

This was the most popular question and was attempted by over 85% of the candidates. 50% of the candidates who attempted this question obtained a pass overall.

- a) Question a(i): This question was answered very well on the whole with most candidates identifying the invitation to treat, the offer, 2 counter offers, acceptance and the application of the postal rule. However, some candidates lost marks by simply concluding that there was a contract and the date it was formed and failed to explain each stage of the negotiation by reference to contract law.
- b) Question a(ii): Candidates performed less well on this question. Many candidates concluded that there was a breach of contract without comment on when and how the contract was breached. Few candidates identified anticipatory breach and very few candidates mentioned MML's choice as to whether they accept the repudiation and choose to no longer be bound by the contract.
- c) Question a(iii): This question was answered well with most candidates explaining the general principle for calculating damages for breach of contract, the duty to mitigate and the fact that damages might be reduced since MML only obtained 1 quote.
- d) Question b: In general this question was answered correctly. However, simple marks were lost by failing to explain their answers fully by reference to the legal principles.
- e) Question c: This part of the question was answered fairly well with most candidates recognising that the contract did not meet the common law statutory formalities in order to take effect as a deed. However, candidates lost marks by failing to explain that the contract would instead take effect as a simple contract.
- f) Question d: Simple marks were lost by candidates here by failing to recognise the difference in the limitation periods for simple contracts and deeds, with many candidates focusing on the practical difficulties of not having a written contract instead. Where candidates correctly identified the correct limitation period, most

candidates failed to apply this to the time available to Heatopia to claim for breach of contract.

## Question 2

This question was also popular and was answered by two-thirds of candidates. 55% of candidates who answered this question obtained a pass overall.

- a) Question a: This question was answered fairly well with most candidates recognising that Tom and Will acted in a commercial capacity. However, marks were lost by candidates for failing to explaining the law – i.e. the general presumption that there is no intention to create legal relations and in what circumstances this can be rebutted.
- b) Question b: This question was answered reasonable well. Candidates lost marks by providing short answers with insufficient explanation (e.g. many candidates reached a reasonable conclusion as to which heads of loss would be recoverable but failed to explain why by reference to the principles established in *Hadley v Baxendale*). Very few candidates discussed whether Tom would be entitled to recover the cost of retiling the swimming pool and loss of amenity.
- c) Question c: This question was answered fairly well. Many strong candidates drew parallels to the facts in the question and those in *Williams v Roffey Bros & Nicholls (Contractors) Ltd*. Simple marks were lost by candidates for failing to set out the legal principles (i.e. the requirement of consideration to create a valid binding contract, providing an accurate description of consideration and identifying the relevant consideration in the problem question).

## Question 3

This was the least popular question and was answered by under half of candidates. 38% of candidates who answered this question obtained a pass overall.

- a) Question a: This question was answered poorly. Many candidates lost marks for failing to properly define misrepresentation and apply the definition to the facts to come to a reasonable conclusion as to whether or not Matthew has a claim against NFF for misrepresentation. Many candidates made no reference to the Misrepresentation Act 1967 at all. Very few candidates discussed whether the statements might amount to contractual terms and, if so, what type of term.
- b) Question b: This question was answered reasonably well with regard to misrepresentation, with most candidates recognising that misrepresentation would allow Matthew to rescind the contract, or alternatively seek damages. Very few candidates described the effect of rescission. The question in relation to breach of contract was on the whole answered quite poorly. Very few candidates discussed the remedies available for breach of contract by reference to the classification of contract terms as conditions, warranties and intermediate or innominate terms.
- c) Question c: This question was answered fairly well. Most candidates explained the doctrine of privity of contract and applied this to the facts. Stronger candidates made reference to the Third Party Rights Act 1999. Very strong candidates drew parallels between the facts of the scenario and the case *Shanklin Pier Limited v Detel Products Limited (1951)* and the formation of a collateral contract. Some candidates mistook this question as one concerning agency.

## Section 2

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### General comments

This year saw popularity for Question 4 (answered by circa 94% of candidates). Overall, all three questions were answered fairly well and candidates demonstrated knowledge of the legal principles of the elements for a claim in negligence and the OLAs. Stronger candidates had well-structured answers and applied the facts to the legal principles in a “well-thought-out” manner. Weaker candidates confused different legal principles and spent too long setting out the facts of cases of regurgitating statute, without applying the facts of the scenarios. Candidates continue to lose marks by not applying the legal principles to the facts with reference to case law, statute etc. Candidates also lost marks by going into detail where questions are worth less marks, and not going into as much detail for questions which warrant greater marks. Moreover, candidates appear to have wasted time dealing with responses to subsequent questions (i.e. responses to Q b) c) and/or d), in their response to question a).

### Question 4

As commented above, this was the most popular of the three questions which was answered by 66 of the 70 candidates. Given its popularity, this question was not answered as well; just over half the candidates achieved 12 marks or higher.

- a) This question was answered reasonably well. Candidates generally identified negligence as the cause of action and applied the test of (i) duty; (ii) breach; (iii) causation and (iv) loss. Candidates lost easy marks by not identifying that the ‘neighbour’ principle applied or spending too long on the law on one of the elements (e.g. duty). Stronger candidates applied the tests to the facts as opposed to simply stating that a duty applied, or a breach occurred.
- b) This question was answered well. Candidates generally identified *volenti non fit injuria* as the appropriate defence. Weaker candidates answered that no defence was available to Harry. Whilst candidates demonstrated that David knew the nature and extent of the harm, some candidates lost marks by not also demonstrating that the defence would apply as David voluntarily agreed to the risk. Candidates lost marks by referring to contributory negligence in this question, not identifying that the question dealt with the voluntarily assumption of risk by Harry (as expressly stated in the question).
- c) This question was answered reasonably well. Candidates generally identified contributory negligence as a potential defence for Harry and that this may reduce the extent of damages payable. Candidates also identified that Harry may be able to avoid liability for the extended six months. However candidates lost marks by not demonstrating that this was as a result of the defence of *novus actus interveniens*. Whilst some candidates identified this as a defence, they lost marks by not applying the defences to the facts and demonstrating that this would apply where Dr Smith fell below the standard of a reasonable doctor.
- d) This question was not answered as well as it could have been. Candidates lost marks by not applying the tests to the facts. Whilst candidates generally identified that Dr Smith owed a duty of care, marks were lost for not identifying that this is an

established duty of care. Moreover, candidates failed to (i) mention that Dr Smith fell below the standard of a reasonable doctor; and/or (ii) consider foreseeability/remoteness (noting that as a result of eggshell skull rule – David’s pre-existing condition will not affect his ability to recover damages). Stronger candidates noted that the defence of contributory negligence would not be available to Dr Smith.

### Question 5

This was the second most popular of the questions and was answered by 48 of the 70 candidates. This question was answered well with circa 65% of candidates achieving 12 marks or higher.

- a) This question was answered well. Stronger candidates identified that the OLA 1984 would apply to Warren and OLA 1957 would apply to Anna and Jennifer. Well answered questions applied the statute to the facts and identified whether and how a duty of care would apply under the respective OLA. Candidates lost marks by not demonstrating that Justine would be considered an “occupier” and DogLovers a “premises” for the purposes of the OLA 1957 and 1984. Stronger candidates noted that Warren entered the premises outside of normal delivery hours and was therefore an unlawful visitor/trespasser. Candidates who identified that the OLA 1984 applied to Warren lost marks by not setting out that the duty of care would arise if the conditions in section 1(3) of the OLA 1984 were met. In this connection, candidates also lost marks by setting out the conditions under section 1(3) of the OLA 1984, but not applying the conditions to the facts and forming a reasonable conclusion. Similarly, candidates lost marks by not demonstrating that under the OLA 1957 (which applied to a claim by Anna or Jennifer) a common duty of care was owed. Marks were also lost for not demonstrating whether there had been a breach and/or application of the “but for” test. As regards a claim by Anna, candidates generally identified that Anna’s age would be an important factor and considered the implications for Anna/Justine of the warning sign and forming a persuasive conclusion. In relation to a claim by Jennifer, weaker candidates lost marks by concluding that as an employee, Jennifer was not owed a duty of care under the OLA 1957.
- b) This question was answered well. Generally candidates identified that as the OLA 1984 applies, Warren as a trespasser would have no claim for the handheld delivery device (damage to property is outside the scope of OLA 1984).
- c) Similarly, this question was answered well as candidates identified that OLA 1957 would apply and Warren will be able to claim the costs. In some instances, candidates failed to expressly state the appropriate OLA and lost marks as a result. Further, in some instances candidates seemed to answer questions b) and c) correctly, but suggest something different under question a) (i.e. that the OLA did not apply).

### Question 6

This was the least popular of the questions. 26 of the 70 candidates answered this question. The question was not answered as well as the other questions and less than half of those candidates that answered the questions achieved less than 12 marks.

- a) This question was not answered well. Candidates lost marks by not applying the threefold test under *Caparo v Dickman*. Candidates also lost marks by demonstrating that duty of care was owed, but not establishing how the duty was breached and/or whether the breach caused loss. Stronger candidates had well-structured answers that set out the elements for a claim and applied the elements to the facts. Only a limited number of candidates commented on the potential defences for Phillip of *volenti non fit injuria*/contributory negligence (the notices and cones highlighted that no vehicles should be parked due to the works).
- b) This question was answered fairly well. Candidates identified that Freddie may bring a claim against DemoCon for vicarious liability. Stronger candidates established there were three elements and applied these to the facts. Marks were lost for not establishing that a tort was committed and/or making reference to what the particular tort was. Candidates generally formed a reasonable conclusion as to whether Freddie committed the tort in the course of employment by discussing whether Freddie was on a “frolic of his own”.
- c) This question was answered well although candidates lost marks by not demonstrating their understanding of the difference in damages under tort and contract. Candidates also lost marks by listing the potential heads of loss rather than considering the measure of damages.
- d) This question was not answered well. Whilst candidates demonstrated what the nature of each item of Freddie’s loss could be (for example, damage to the Office Block/Projector; motorbike; and/or contents of the motorbike etc.) candidates lost marks by not demonstrating that for each item, the kind of loss was reasonably foreseeable and not remote. As such, it was not clear to the examiner that the candidates had knowledge of the ‘similar in type’ rule or the ‘egg-shell skull’ rule. Stronger candidates listed each item of potential loss and then debated whether it would be a reasonably foreseeable and not too remote, forming a reasonable conclusion.

## Module 2

### Section 1

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#### General comments

This year the pass rate decreased for section one, down from 95% to 80%.

It was particularly challenging to mark some of the scripts this year. A few of the issues below have been communicated in previous reports and are common to other sections of the examination.

- Most candidates sensibly started each question on a new page. Several candidates did not and continued a subsequent question on the same page which makes marking and totalling difficult.
- Candidates are free to answer the questions in whatever order they wish. However, please keep the parts of a question together. A couple of candidates split the questions and answered seemingly random parts of different questions over consecutive pages in the answer booklet.
- Follow the instructions on the front of the answer booklet. Several candidates answered all questions from both sections of module two in the same answer booklet.
- Please leave the right-hand margin clear for marking.
- Many of the scripts were illegible in places, sometimes over many pages. It is far better to write half the amount carefully than volumes that cannot be deciphered.
- Use the index at the back of the contract to look up relevant actions, defined and identified terms. This can help guide and structure your answer.
- Use the right verbs, defined and identified terms in your answers.
- Don't repeat the question, this wastes time and attracts no marks. Ensure you apply reason and conclusion to your answers. Simply citing clauses will not attract high marks.

#### Question 1

This was the third most popular question attempted by 40 of the 79 candidates, averaging a mark of 13, the lowest of all four questions in this section. Only 19 candidates achieved a pass mark of 13 or higher, a 48% success rate.

- a) This part was poorly answered. Many candidates described Works Information as per the first two bullets of clause 11.2(19), but didn't mention Contract Data. Several candidates referred to Bills of Quantity and how the Works Information was driven by the main Option chosen.
- b) Many who answered this well scored 3 marks, with the 4<sup>th</sup> mark reserved for those who explained that a clause 12.3 agreement to change the *conditions of contract* could be far more arduous. Unfortunately, some candidates missed the point of the question and attempted to give commentary on the pros and cons of the actual z-clauses themselves, which attracted no marks.
- c) In general, this was a well answered part. Some answers neglected to mention the special assessment provision at clause 63.8. A few candidates got confused with clause 60.3 and wrongly referred to the Site Information. Where candidates did not

- already score full marks, an extra mark was given for the exception in clause 60.1(1) - precedence of *Employer's Works Information* over that provided by the *Contractor*.
- d) A real mix of answers and explanations were given to this part. In the main it was clear candidates were undecided and often quoted significant sections of the contract, without drawing any real conclusions. Some answers made arguments both ways without falling on the correct answer. Some answers incorrectly suggested the *Project Manager* could instruct the *Contractor* to accelerate.
  - e) Top marks were awarded where it was acknowledged that such an entry could be made in Works Information at any time through clause 14.3, however this would trigger an otherwise avoidable compensation event.

## Question 2

This was the second most popular question, attempted by 47 of the 79 candidates, averaging a mark of 19 out of 25. 100% of candidates achieved a mark of 13 or higher making it the most successfully answered question.

- a) This part was designed to draw out whether candidates understood clause 10.1. NEC have observed the industry tends to focus on the mutual trust and cooperation part of this clause and ignores the obligation to do as the contract states. NEC4 addresses this by separating the clause into 10.1 and a new 10.2. The marking of this part affirmed this as a large number of answers incorrectly stated that the *Project Manager* could and should exercise discretion – which is not the case.
- b) Answered well in the main. Very few answers mentioned clause 14.4.
- c) Most candidates stated necessary assumptions and went on to give appropriate answers. Equivalent marks were awarded for answers that assumed Jane was notified as a delegate.
- d) This is perhaps a classic case of only reading part of a clause and stopping once you have found what you want? Many candidates knew about the 8-week sanction at clause 61.3, but believed it applied to all events. The best answers acknowledged the scenario had arisen from the giving of an instruction by the *Project Manager* and as such was caught by the exception to the 8-week timeout when considering clause 61.3 and 61.1 together.
- e) This part was answered well. Please be careful with the use of verbs – notify, not raise, submit, file or issue.

## Question 3

This question was answered by 53 of the 79 candidates and was the most popular question. It attracted an average score of 15 out of 25. 36 candidates achieved a pass mark in this question, equivalent to 68%.

- a) Most candidates gave good practical examples in line with the mark scheme that underpinned how these differences could come about. Where there was a lack of knowledge this was evident in long answers that did not address the actual question. Lots of easy marks lost here.
- b) There were those who understood that Completion or planned Completion is subject to the reality of progress and delay and those that didn't. As designed, the question drew out the understanding of the difference between the contractual dates that can only move in accordance with the *conditions of contract*, and the planned/realities. Several candidates talked about 'the Date of Completion' as

though it were a third defined term, with various confused references to the programme and progress.

Some answers cited compensation events as examples for why planned Completion may be delayed. Whilst not wrong, these examples did little to confirm an understanding of the differences between the defined terms. The best answers cited delays and progress as affecting planned Completion and acceleration, compensation events and Defect acceptance as affecting the Completion Date.

- c) This part was well answered on the whole with the process being well described. Full marks were given for answers that distinguished 'cost' rather than 'loss' and that amounts were included in the next assessment. There was however lots of detail on early warnings given by some, which attracted no marks. The scenario was that 'a *condition had been* missed' by the *key date*, many answered a different question to that posed, based on 'a *condition might be* missed'.
- d) The majority of candidates identified X5 correctly.
- e) Many answers missed full marks by not mentioning the circumstances that might give rise to compensation event – 60.1(15). The rest of the question was answered well on the whole.

#### **Question 4**

This was the least popular question answered by just 18 of the 79 candidates. It attracted an average mark of 18 and 15 candidates achieved a pass mark, a success rate of 83%.

- a) Good structure provided to the majority of answers in this part, with sensible levels of detail on the whole, unlocking most of the marks. Some answers confused the resources required in relation to Option D, thinking that payment was based on rates and lump sums rather than Defined Cost. More marks could have been given had answers drawn similarities between Option C, D and E in terms of payment, and that for Options C and D, the maintenance of the Prices was similar as for A and B.
- b) This part was answered well. Some had a confused understanding of how Option C operates (here and in part a) also), suggesting that the total of the Prices (target) was the maximum to be paid and that Defined Costs was applied for against this amount.
- c) Most understood the question and answered correctly.
- d) A fair bit of confusion around the Bill of Quantities was evident in some answers. Many answers did not succinctly explain the concept of remeasure. The additional compensation events under Option B were also mentioned and attracted a mark if full marks had not already been given.

## Section 2

### General comments

The average mark for this section was around 13.7 marks, slightly higher 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 reports from previous years 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:

- Don't challenge the questions. If something could be answered 2 ways then answer it 2 ways. If you need to make sensible assumptions to help you answer the question, state them and then answer the question.
- The spelling is as bad as ever. I appreciate not many people write anymore as we all use electronic devices but this does not excuse poor spelling. How will this come across to clients in reports? Lots of spelling mistakes are present such as 'identifies', 'implamented', 'incurrer', 'ommission', 'program' and 'delt'.
- Research clause 12.3 that little bit more and offer it as a possible route to consider sometimes when the contract doesn't quite do what you would like it to do.
- There is a lot of paper in the booklet to answer the questions. Count the questions and parts to it, count the pages and you will see you can comfortably start each part of a question on a new page. We then won't have successive questions starting the immediate sentence after the last one with links to other pages where the candidate then realised they wanted to add something in. Take your time and space things out.
- Use the index of the ECC – this can really helpfully prompt you to consider different parts of the contract to answer questions. I cannot emphasise enough the usefulness of the index to you.
- If you genuinely run out of time at least put a brief plan in of what you intended to say. No answer = no marks, a plan might just get you a few extra marks.
- A number of times it seems the candidates got a little stuck and said things like "this is left to the discretion of the *Project Manager*" or "under clause 10.1 the *Project Manager* can waive this". Where is that said in the contract?
- Read the rules clearly and carefully of how to fill in booklets. One candidate offered 4 answers, 3 from 1 section and 1 from the other so can only have 3 of those questions marked.

The number of candidates decreased this year to 69 whose papers were marked, which was disappointing from last year's level.

### Question 5

This was the least popular question with only 18 candidates attempting this question. An average mark of about 11.3 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), the completion date is not something fixed by the *Project Manager* or dependent upon the submission of the first programme. A number of candidates offered one of these as an answer – again, surely a quick look up on the index would have got you to the right part of the contract?
- In 5(c), except for time issues, a compensation event is assess exactly the same way whether it has a positive or negative effect upon Defined Cost.
- In 5(d), most easily referred to acceleration as the main means of achieving an earlier Completion Date but what about clause 44 accepting Defects or via clause 12.3?

### Question 6

52 candidates attempted this question, with the average mark being 14.1. This was the most popular question and some good marks were scored here. A few other comments are:

- Q6(a) few mentioned the relevance of clause 40.3 and for some reason a number of candidates talked rightly about programme implications but suggested that acceleration was happening here.
- In Q6(d) there were fairly easy marks available here for an essay style answer but for some reason a number of candidates spoke instead about the compensation event process.
- In Q6(e), contrary to what a number of candidate's believed, it is not in the *Project Manager's* powers to change the defect correction period. Where does it say this in the contract?

### Question 7

29 candidates attempted this question, achieving an average of about 14.6 marks. A few other comments are:

- In Q7(a), rarely was Option X15 referred to and again that word 'approve' crept into many an answer.
- In Q7(c), note there is no such thing as to 'issue' or 'instruct' a compensation event.
- In Q7(d) for some reason many candidates were fixated on the forecasting aspect of the scenario and some suggested a compensation event arises each time a higher forecast is predicted!

### Question 8

38 candidates attempted this question, achieving an average of 14 marks. A few other comments are:

- In Q8(a) as with other questions, generally you will need to answer the question starting with the core clauses then working through the main Option then considering any secondary Options that apply. The question says it's "Option A" so people frequently only consider the Option A part of the answer.
- In Q8(b) most candidates forgot to discuss the *Contractor's* share provisions and this question was about how much would be paid, not what the compensation event was worth.

## Module 3

### Section 1

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#### General comments

Once again, only three candidates took the level 3 paper and the general level of the candidates was high. Again, the candidates seem to have recognised the need for focus and addressing the particular issues to which the questions referred. The better candidates noted contractual clauses and drew the important and relevant aspects from them rather than merely repeat the elements of the contract. Some candidates did not fully grasp the salient features of the contract or limited themselves unnecessarily by not considering the problem as widely as they may. However, general conclusions are difficult with such a small pool of candidates.

#### Question 1

This was the compulsory question. The scenario was an issue with unforeseen physical conditions in a situation where the contractor carried a significant amount of design responsibility, along with being engaged at pre-construction stage. The question is in two parts. Two of the candidates answered the question extremely well and one less so.

- a) The candidates were required to provide advice to the Employer in relation to the compensation events system and how it should be operated against a backdrop of poor management and aggravation. The better candidates explored the implications of the early contractor involvement and also the potential implications of the “*tit for tat*” exchanges without notification. They also examined in detail the elements of the Site Information actually provided and looked carefully and critically at the test in clause 60.1(12). They also had a careful and balanced approach to the difficulty with identifying what a reasonably experienced contractor would include in his tender. The better candidates drawing appropriate conclusions rather leaping to a view. The element of the question concerning breach of contract by not contributing to the risk reduction meeting was ignored by the weaker candidate but addressed in some detail by the others. One of the answers contained an analysis of case law concerning the application of the test in clause 60.1(12) which were excellent.
- b) Again, two of the candidates answered this part of the question very well and one less so. This element again concerns compensation events including what is an Employer’s risk under the contract and requires advice to the Project Manager before he attends a risk reduction meeting. The better candidates identified the issue with clause 60.1.14 and looked at its analysis with clause 80.1 and Employer’s or Contractor’s risks. One of the candidates also analysed the implications of Option C and how it impacts on the recovery, whether something is a compensation event or otherwise in these circumstances. Identifying the uncertainty around that interpretation and practical analysis of the site information also helped the stronger candidates. Weaker answers tended to dismiss the Employer’s risk element and dogmatically without any explanation. Most candidates touched on the implications of design acceptance also. One candidate provided an intemperate answer suggesting that the contractor may

have committed fraud without any evidence. Candidates should be very circumspect in making serious allegations without any basis in the question provided to them.

### **Question 2**

Only one candidate answered question 2.

### **Question 3**

Two candidates answered the third question. This concerned a mixture of actions where a subcontractor has caused damage to the Employer, and how compensation events should be dealt with following an adjudicator's decision. The question was answered well by both candidates. The question provided fertile ground for a large number of points to gain marks if the question was tackled sensibly and both candidates scored very highly.

- a) Part A required candidates to describe the actions by the Contractor, project manager and employer based on the unfortunate events perpetrated by the subcontractor. The better answers touched on the obligation to notify the relevant health and safety agencies and the subcontractor's insurers, and provided a succinct summary of the actions to be taken by each of the parties. Both candidates identified that all the parties needed to inform their insurers as a priority throughout the contractual chain and for the Employer to identify his loss in order to make an appropriate claim. One candidate realised that withholding money by the Employer was an option and explored it. The implications of a joint names insurance policy were also discussed.
- b) Both candidates dealt correctly with the proper implications of the adjudicator's decision and the status of the Contractor's programme which identified planned completion as an earlier date. In both cases they identified that planned completion had no effect on the completion date. One candidate identified the subcontractor's insolvency as a possible clause 60.1(19) compensation event, whereas the other candidate ruled it out. Neither candidate was correct in their approach since neither discussed without a dogmatic answer. Consequently marks were needlessly lost. Both candidates provided appropriate case law and discussed the implications of the high level of delay damages included in the contract and whether or not a court would enforce them which is also a useful approach to gain marks.

### **Question 4**

Not answered by any candidate.

## Module 3

### Section 2

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#### Question 5 (Compulsory)

Three candidates answered this question. Only one of those achieved a score in excess of the 65% pass mark. Answers to questions such as these require reasoning to justify the statements made and this was not evident at all times. The two candidates with the lower marks did not substantiate their responses and their reasoning, where provided, was too simplistic.

- a) This is a classic example of a “battle of the forms”. Drillbit did not respond to the revised contract sent by McBodgers but effectively accepted the contract by its conduct in progressing the works. The earlier discussions are irrelevant, the parol evidence rule applies here although none of the candidates mentioned this point.
- b) Liquidated damages do apply to this scenario because Drillbit finished its works late. The 2015 Supreme Court cases of *Makdessi* and *Parking Eye* should have been mentioned here, although only one candidate did this and correctly quoted the binding precedent from those two cases. Only one candidate questioned the logic of stepping down the main contract LAD’s quantum to the subcontract. The one day’s delay into week 8 did generate a liability for a further week’s damages.
- c) Use of the “without prejudice” label does not, of itself, impact upon the ability of a document’s author to withhold that document from future proceedings. The contents of the document, and whether they can be seen to be seeking to settle a dispute, are what matters here. Only one candidate made this distinction.
- d) All candidates recognised the duty of care owed by the project’s participants to Mr Crilly but only one candidate mentioned relevant case law (e.g. *Donoghue v Stevenson*, *Caparo v Dickman*). Only one candidate addressed the final part of the question about the need for Mr Crilly to demonstrate his losses and the causal link.
- e) One candidate failed to answer this part of the question at all. The remaining two correctly identified the contractors’ public liability policies as the likely route for compensation. One candidate mentioned the subject of excesses and the possibility of a professional indemnity claim against a designer if that was relevant.

#### Question 6

Two candidates answered this question. Only one of those achieved a score in excess of the 65% pass mark. It is likely that a level of experience / exposure to dispute resolution matters was an advantage in respect of this question as it was clear that one candidate had such experience and the other did not. The candidate with the lower marks did not address all of the parts of the question and thereby did not take the opportunity to obtain some relatively easy marks.

- a) This ‘three-part’ question contained simple directions as to what was required of the candidates to obtain a ‘pass’ level of marks.
- b) One candidate gave a full and reasoned answer indicating an understanding of the need for impartiality in time and money matters and the case law supporting such

requirement. The other candidate's answer was simplistic and lacking in any discussion/depth.

- c) The Engineer's 'role' in the dispute avoidance and resolution is very limited in terms of the contractual provisions but can be significant in practical terms, allied to his impartial management of the time and money provisions of the contract. One candidate mentioned that the Engineer may be involved in attempting to resolve the dispute at an early stage and both candidates noted that the Engineer may be required to provide a witness statement and give evidence in arbitration.
- d) One candidate failed to answer the final part of the question at all. The other candidate gave a brief but satisfactory answer.

### **Question 7**

One candidate answered this widely addressed question.

Whilst the index to the Conditions would have led candidates to several of the notice provisions quickly, a deeper knowledge and greater experience of the Condition/contracts was required in order to gain the higher marks in this question.

The candidate who answered this question covered nearly all of the principal provisions and discussed their purpose adequately to obtain a high mark.

### **Question 8**

None of the candidates answered this question. The points that required addressing were:

- a) The Contract contains inconsistent obligations. Is it reasonable skill and care or fit for purpose? Contract interpretation points: (i) Contra proferentem, (ii) Amendment to standard form taking precedence over standard terms. Does the term in the specification have relevance? Statute – Sale of Goods Act. Reference to Eon v MT Hojgaard, such obligations are not necessarily mutually incompatible.
- b) Whilst the piling was removed at the value engineering stage, agreement not to use piling at the pre-contract stage did not relieve the Contractor of his obligations to provide design of the appropriate standard. Whether the required standard was reasonable skill and care or fit for purpose, the lack of piling or other ground support has meant that the design doesn't reach either standard. Knowledge of poor conditions and of piled foundations in adjacent buildings should have alerted the designers to the risk. Cheepbuild therefore owes an obligation to BPA to rectify the defective works.
- c) The Contractor's obligations to rectify defects don't stop (in this case) 12 months after completion. Reference to the Limitation Act 1980 (in England & Wales). Be careful for any candidate answering under Scots law, the situation is similar but not identical. 6 years for simple contract, 12 years for deed. Necessary to demonstrate breach by the Contractor to obtain damages. So yes, BPA can require Cheepbuild to return. Reference to designers' PI insurers?
- d) The issue of set-off and whether it would be operative here. Discussion as to when set off is possible. A random demand for £5m wouldn't apply in any case, the sum due would need to be demonstrated. Is a claim on another contract sufficiently close to being successful? Probably not. These two stations are being built under two transactions, not one. Would it be manifestly unjust to allow such set-off?

**Institution of Civil Engineers**

**Examination for the ICE Certificate in Law and Contract Management (CLCM)  
2017**

**Module 1: Law (English and Scots Law)**

Monday 5<sup>th</sup> June 2017

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

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### Question 1

Maggie's Marquees Limited ("**MML**") were appointed to supply tents and marquees for Rock Fest, a small music festival in Somerset. On Monday 8 May, MML sent an email to Space Warmers ("**Space**") asking for a written quotation for the price of 20 propane heaters. The same day, Space sent a holding email back to MML saying that they would provide the quotation by letter as requested and that it would be in the post that day.

Space's letter arrived on Tuesday 9 May. In their letter, Space offered to supply 20 propane heaters for £5,000. The letter stipulated that responses should be sent by post. MML replied by email to Space immediately that morning saying "*The most we are willing to pay is £3,000*". Space responded by email to MML an hour later saying "*The price is non-negotiable. If you would like to have the 20 propane heaters for £5,000, we will need written confirmation by post by Friday 12 May because we have been contacted by a competitor who would like to use our heaters for a wedding over the same weekend*". On Thursday 11 May, MML wrote a letter to Space accepting the quote of £5,000 for 20 propane heaters and put it in the post that morning (the letter was correctly addressed to Space).

Due to a delay in the post, Space did not receive MML's letter until Monday 15 May. Having not heard from MML, Space emailed MML on the morning of Friday 12 May explaining that they had agreed that morning (i.e. Friday 12 May) to supply the propane heaters to Todd's Tents instead. MML read the email on Monday 15 May and subsequently had to find an alternative supplier of heaters, Heatopia Limited ("**Heatopia**") for £8,000. MML did not seek any other quotation.

Following the success of Rock Fest, Heatopia phoned MML proposing a 5 year framework agreement for the supply of 20 propane heaters for £10,000 a year and said: "*We do not require any formal paperwork to be signed but can we agree that our appointment takes effect as a deed? Our Managing Director prefers to contract this way.*" MML agreed.

MML subsequently suffered serious financial difficulty and, in breach of contract, stopped paying Heatopia for the supply of the heaters.

- a) **In relation to contract law, discuss the stages of negotiation between MML and Space to explain:**
- I. **Whether a contract between MML and Space exists and, if so, when the contract between MML and Space came into existence.** [8 marks]
  - II. **Whether Space are in breach of contract and, if so, when and how the contract was breached.** [4 marks]

- III. Briefly explain how damages would be calculated if Space are found to be in breach of contract. [4 marks]**
- b) Explain whether your answer to question a (II) (above) would differ had Space emailed MML on Wednesday 10 May explaining that the propane heaters were no longer available as they had agreed to supply them to Todd's Tents instead. Nonetheless, MML posted its letter of acceptance to Space on Thursday 11 May as it believed it had until Friday 12 May to accept the offer. [4 marks]**
- c) Will the contract entered into between MML and Heatopia be considered a deed, and explain your answer. [2 marks]**
- d) What effect will your answer to question c (above) have on Heatopia's rights to claim for breach of contract? [3 marks]**

## Section 1

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### Question 2

Tom is the owner of a boutique hotel in the Cotswolds. Tom asked his best friend, William, a tiler, for a quote to retile the indoor swimming pool at his hotel. William quoted £15,000 to tile the swimming pool by 25 November. Tom accepted the quote on 1 October.

At the time of their agreement, Tom had specified to William that the tiles must be aquamarine. William was unable to order aquamarine tiles from his usual supplier and so, without consulting Tom, he used dark green tiles on the swimming pool instead.

Tom had appointed Digital Creations (“**Digital**”), a brand agency based in London to photograph the swimming pool on 26 November, in time to use the photographs on 28 November when Tom was due to give a presentation to Voyage Luxe, a luxury hotel booking website, with a view to being selected by Voyage Luxe to be listed on their website. A term of Tom’s contract with Digital Creations required Tom to pay a penalty fee of £2,000 should he postpone or cancel the photography session with less than 1 months’ notice.

On 12 November, William called Tom to explain that he had been really busy and he would be unable to complete the job by 25 November. Tom offered William an extra £500 to complete the works on time, explaining that Digital were due to photograph the new swimming pool on 26 November. William agreed he would complete the works by 25 November for the additional £500.

When Tom arrived at the hotel on 25 November to check out the new swimming pool, he found that the tiling was incomplete and he was disappointed to see that William had used dark green tiles rather than the agreed aquamarine ones.

Tom had to cancel the photography session with Digital and incurred the £2,000 penalty. He also had to cancel his business meeting with Voyage Luxe. As a result, Voyage Luxe decided not to go ahead with the contract with Tom. As a result, Tom lost out on £100,000 of potential profit on hotel bookings through Voyage Luxe.

The swimming pool was unable to be used for a further month whilst William completed the tiling. As a result, Tom lost £10,000 of normal profit due to cancellations of a number of bookings after informing clients that the pool would be out of use during their stay.

- a) **Advise Tom whether the fact that he and William are best friends has any effect on the validity of the contract.** [5 marks]
- b) **Assuming Tom and William do have a binding contract, advise Tom on what basis he can claim for damages** [12 marks]

and what may be recoverable as damages.

- c) Assume that William used the correct colour tiles and did manage to complete the work by 25 November and the photography session with Digital went ahead, would Tom be contractually obliged to pay William the additional £500 he promised.

[8 marks]

## Section 1

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### Question 3

Matthew instructed Becca, an interior designer, to undertake the role of project manager for the redesign and redecoration of his kitchen.

Becca put together a specification for the kitchen, including the new flooring by Oakworld Limited (“**Oakworld**”) at a cost of £6,000. Under the terms of Matthew’s contract with Becca, Matthew had a right to vary the specification of products to be used in the redecoration of his kitchen.

Two weeks before the commencement of the works, No Flaws Floors (“**NFF**”), a local flooring manufacturer, approached Matthew with the aim of securing the contract for the supply of flooring for his new kitchen. Amrish, a sales advisor for NFF, attended a meeting with Matthew and Becca and told them about NFF’s new product “Distressed Oak” which was 100% scratch and dent resistant due to its protective varnish seal. Amrish advised that the product should remain scratch and dent free for 15-20 years and this explained why it was more expensive than other products on the market. With this in mind, Matthew varied the specification and instructed Becca to use the Distressed Oak flooring by NFF as opposed to the Oakworld flooring. Matthew entered into a contract with NFF for the supply of the flooring for £12,000.

In fact, a note on the product file advised NFF sales advisors not to describe the Distressed Oak flooring as 100% dent and scratch resistant or that the product life was 15-20 years due to the large volume of complaints received by NFF from customers who had experienced severe dents and scratches on their new floors immediately after installation. Amrish had forgotten to check the product file before attending the meeting.

Two weeks after completion of the works, Matthew noticed that severe scratches and dents had begun to form on the NFF ‘Distressed Oak’ floorboards in his kitchen.

- a) **Advise Matthew as to whether he has a possible claim against NFF for:**
- I) **Misrepresentation** [9 marks]
  - II) **Breach of contract** [3 marks]
- b) **Explain the remedies available to Matthew (if any) in each case** [8 marks]
- c) **Explain whether Matthew would have a possible claim against NFF for breach of contract, if Matthew had instructed Becca to enter into the contract with NFF for the supply of the Distressed Oak flooring.** [5 marks]

## Section 2

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### Question 4

David is a graduate engineer. David has recently started a new graduate job at Pro Engineering Services Ltd and celebrates his achievement with Harry one afternoon in the pub.

Harry has recently passed his driving test after failing on eight previous attempts and drinks pints of beer and lager to celebrate his achievement. He has just bought a new Audi R8 which he has been eagerly awaiting to start driving. Harry drinks six pints and is over the drink drive limit. David is currently unwell and is taking antibiotics. He therefore does not consume alcohol.

When the discussion between Harry and David turns to the speed of his new car, Harry suggests taking his Audi R8 (which is parked outside the pub) for a drive along the adjacent private road. David cannot wait and they decide to take a drive straight away.

Harry starts the car but neither Harry nor David wear their seat belts. To demonstrate the car's acceleration, Harry drives at an obviously excessive speed. Harry loses control of the car and crashes into a lamp post. David suffers whiplash and severe injuries to his arms and legs.

David is taken to his local hospital to be treated for his injuries and is advised that he is unable to work for three months. Dr Smith, a junior doctor on the hospital ward misreads his consultant's handwriting and as a result, prescribes David a drug which should not be taken whilst on antibiotics. This causes David's illness to worsen. David is required to stay at home for a further six months to recover. He is not paid whilst recovering.

David approaches you and expresses his intention to make a claim against Harry.

- a) **Advise David of any claim he would have against Harry and what he will be required to establish.** [6 marks]
- b) **Harry argues that David voluntarily rode in the car and as such, Harry has no liability to David. To what extent (if at all) can Harry rely on this argument?** [3 marks]
- c) **Does Harry have any defences to avoid liability?** [5 marks]
- d) **What, if anything, can David recover from Dr Smith?** [11 marks]

## Section 2

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### Question 5

DogLovers, a small, independent dog rescue centre has been managed by Justine for over 10 years. A new branch of DogLovers was opened in the village of Hipswich earlier this year.

Justine has imposed restrictions on delivery times and puts a sign outside the front of the new centre which states: ***“Deliveries will only be accepted between 9:00am and 3:00pm Monday to Friday”***.

Warren frequently delivers dog food products to the centre and arrives at the new branch at 8:00am on Monday. Ignoring the sign, Warren starts to make a delivery to the centre’s basement. The basement ladder is broken and as Warren climbs down the ladder, he falls onto the floor, smashes his hand held delivery device, and breaks his ankle.

Meanwhile, Anna, 13, who loves dogs, decides to go to the centre on hearing about the centre’s new branch in Hipswich. Surrounding the grounds where the dogs are kept freely are signs which read: ***“Do not feed the dogs as they bite.”***

Anna notices signs surrounding the grounds but is unable to read the content as she has left her glasses at home. She therefore assumes that these are signs which provide information about the dogs. Whilst walking around the centre’s grounds, Anna notices a labrador retriever which she admires and decides to run towards it. In doing so, Anna decides to feed the dog. The dog is afraid of Anna and bites her finger.

A worker at the centre takes Anna to the cafeteria. Anna requests a warm drink from the waitress, Jennifer. Jennifer goes to prepare a warm coffee for Anna using a new urn in the cafeteria. The urn was installed by Chris, a local handy man.

Chris is not experienced in electrical installation but has done carpentry jobs at the centre previously. Chris has not wired the urn correctly and as a result there is a power surge. The urn explodes and the very hot coffee lands on Jennifer who suffers serious burns.

Warren, Anna and Jennifer come to you for some advice.

- a) **Advise whether or not Warren, Anna and Jennifer can bring any actions under the Occupier Liability Acts.** [20 marks]
- b) **Warren wants the replacement costs of his hand held delivery device to be reimbursed. Are these recoverable under the Occupier Liability Acts?** [2 marks]
- c) **Would your answer differ if Warren broke his hand held delivery device whilst making the delivery at 10am?** [3 marks]

## Section 2

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### Question 6

DemoCon is a demolition contractor who has recently been engaged by PSW to demolish a block of offices (“Office Block A”).

The demolition work was to be undertaken by Phillip, an employee of DemoCon who was particularly good at operating the demolition spec excavator ZAZ100, which DemoCon owned and operated on its other projects.

When Phillip arrives on the site for Office Block A, he is informed by his employer that ZAZ100 was not working and another demolition spec excavator, YUF200 has been hired in at short notice for him to operate for the demolition works at Office Block A. Phillip calls his supervisor, Julia, who informs him she is not aware that ZAZ100 is not working and that Phillip should not operate YUF200 until he has obtained proper supervision and instructions. Julia advises Phillip to return to the DemoCon office so they can discuss the matter.

Phillip is intrigued by YUF200 as this is the newest model of demolition excavators; it is a much bigger and a more advanced excavator than ZAZ100. Phillip decides to play around with YUF200 and is overheard saying to his fellow contractors “what’s the worst that can happen?” He begins by pressing the various controls and pulling and pushing on the various levers. All of a sudden, the excavator spirals out of control and proceeds to charge into a block of offices (“Office Block B”) adjacent to Office Block A.

As a result, a number of offices in Office Block B have their windows and walls damaged. Freddie, owns an IT office in Office Block B. Freddie’s offices are significantly damaged and a new projector television worth £2,000 that he had mounted on the wall is destroyed. As a result, Freddie is unable to honour an IT contract that week and loses the £20,000 contract sum.

The debris from the demolished Office Block B falls onto the ground. In doing so, debris fell onto Freddie’s motorbike which he had parked on the driveway of his IT office, where the building management company had temporarily suspended parking by erecting large notices and setting down cones. The motorbike is so badly damaged that it has to be scrapped.

Freddie purchased the motorbike the previous year for £10,000. In the motorbike’s compartment was a £1,000 watch which Freddie had purchased to give to his girlfriend.

Freddie approaches you for some advice.

- a) **Advise Freddie of any potential claim he may have against Phillip?** [12 marks]
- b) **Would Freddie succeed in a claim against DemoCon?** [5 marks]
- c) **What would be the measure of Freddie's damages?** [2 marks]
- d) **Advise Freddie on the extent of losses he can recover.** [6 marks]

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

| a)   |   | Marks            |
|------|---|------------------|
|      | Candidates should demonstrate a good understanding of the law on offer, acceptance, counter-offers, invitations to treat and the postal rule.   |                  |
| I.   |   |                  |
| •    | The initial email sent by MML to Space on Monday 8 May merely constitutes a request for information (i.e. an invitation to treat) and not an offer  | [1 mark]         |
| •    | Space's holding email sent on Monday 8 May constitutes a reply to the request for information and is also not an offer  | [1 mark]         |
| •    | When Space's letter arrives with MML on Tuesday 9 May, the offer is made  | [1 mark]         |
| •    | MML's email offering £3,000 constitutes a counter-offer and typically counter offers destroy the original offer (Hyde v Wrench(1840))   | [1 mark]         |
| •    | Space's response by email on the morning of Tuesday 9 May rejects MML's counter offer and makes a new offer of £5,000 and confirms method of acceptance to be post  | [1 mark]         |
| •    | MML's letter of acceptance by post is valid acceptance because MML followed the method of acceptance stipulated by Space  | [1 mark]         |
| •    | MML did not unreasonably delay in communicating the acceptance and followed the method of communication stipulated by Space and posted it to the correct address. Therefore the postal rule applies.  | [1 mark]         |
| •    | The contract between MML and Space is made at the moment of posting (i.e. Thursday 11 May). The arrival date of the letter of acceptance is not relevant (Adam v Lindsell (1818)).  | [1 mark]         |
|      | <b>Total</b>  | <b>[8 marks]</b> |
| II.  |   |                  |
|      | The contract was formed at the moment MML posted its letter of acceptance – i.e. the morning of Thursday 11 May.  | [1 mark]         |
|      | Space's email on Friday 12 May constitutes anticipatory breach of the contract (1 mark) because Space has made it clear before the time for performance of the contract its intention that it will not perform its contractual obligation to supply the 20 propane heaters (Frost v Knight) | [2 marks]        |
|      | MML 'accepts' Space's anticipatory breach on reading the email and finding an alternative supplier of heaters, thereby terminating the contract.  | [1 mark]         |
|      | <b>Total</b>  | <b>[4 marks]</b> |
| III. | Candidates should be able to explain the general principles of  |                  |

|  |   |                  |
|--|---|------------------|
|  | damages for breach of contract.   |                  |
|  | The general rule for damages for breach of contract is that it is meant to put the injured party in the same position as if the contract had been performed (i.e. expectation damages)  | [1 mark]         |
|  | In this scenario, had Space performed the contract, MML would have been able to purchase the heaters for £5,000. Instead, due to the short notice, MML had to purchase the heaters for £3,000 more.                             | [1 mark]         |
|  | Candidates should also mention that MML cannot recover any part of the loss that should have been avoided and therefore MML have a duty to mitigate (British Westinghouse co v Underground Electric Rys, Co, of London (1912)). | [1 mark]         |
|  | MML did not seek an alternative quote and this may amount to a failure to mitigate and so MML's loss may be limited to the difference between the contract price and the current market price at the date of breach             | [1 mark]         |
|  | Credit also given to discussion on the limbs of Hadley v Baxendale.   |                  |
|  | <b>Total</b>  | <b>[4 marks]</b> |

| <b>b)</b> |  | <b>Marks</b>     |
|-----------|--|------------------|
|           | Candidates should be able to distinguish between the alternative facts and apply the rule in Dickinson v Dodds.  |                  |
|           | The offer to MML was withdrawn by Space in its email to MML on Wednesday 10 May  | [1 mark].        |
|           | No contract existed between the parties because Space withdrew its offer to MML on Wednesday 10 May before MML had posted the letter of acceptance to Space on Thursday 11 May.                              | [1 mark]         |
|           | Promises to keep an offer open until a certain time can only be a promise unless made binding by consideration in exchange for the promise   | [1 mark]         |
|           | Space were not obliged to keep the offer to MML open until Friday 12 May. Space were free to withdraw the offer at any time before the acceptance take places because MML had not provided any consideration | [1 mark]         |
|           | <b>Total</b>   | <b>[4 marks]</b> |

| <b>c)</b> |  | <b>Marks</b> |
|-----------|--|--------------|
|           | Even though the parties have agreed orally that the contract should take effect as a deed, the contract between Heatopia and MML will not take effect as a deed because it does not meet the common law statutory formalities required to constitute a deed. For instance, they have agreed the contract will not be in writing. | [1 mark]     |

|  |   |                  |
|--|---|------------------|
|  | If all the elements of a simple contract are present (i.e. offer, acceptance, consideration, certainty and intention), the contract is likely to take effect as a simple contract | [1 mark]         |
|  | <b>Total</b>  | <b>[2 marks]</b> |

| <b>d)</b> |   | <b>Marks</b>     |
|-----------|---|------------------|
|           | Candidates should show a good understanding of the difference between a simple contract and a deed under the Limitation Act 1989.   |                  |
|           | The limitation period in which a party can bring a claim in contract arising out of a deed is 12 years from the date of breach ( <i>1 mark</i> ) and under a simple contract 6 years from the date of breach ( <i>1 mark</i> ). | [2 marks]        |
|           | Therefore, Heatopia will only have 6 years to bring a claim for breach of contract – a claim cannot be brought after the limitation has expired. A successful claim is unlikely after the limitation has expired                | [1 mark]         |
|           | <b>Total</b>  | <b>[3 marks]</b> |

|  |                                   |                   |
|--|-----------------------------------|-------------------|
|  | <b>Total marks for question 1</b> | <b>[25 marks]</b> |
|--|-----------------------------------|-------------------|

|           | <b>Section 1 - Points for answer<br/>Question 2</b>   | <b>Marks</b>     |
|-----------|---|------------------|
| <b>a)</b> |   |                  |
|           | In order for a contract to be valid there must be an intention to create legal relations.   | [1 mark]         |
|           | Candidates should consider the impact of contracting with friends in respect of the formation of a binding contract. There is a presumption that there is no intention to create legal relations between friends.                 | [1 mark]         |
|           | However, this presumption can be rebutted – e.g. in commercial relationships there is normally a presumption that the parties intended to be legally bound by their agreement: <i>Rose and Frank Co v Compton Bros Ltd (1924)</i> | [2 marks]        |
|           | As Tom is acting his commercial capacity as a hotel owner, it is likely that a court would find the parties intended to be legally bound and the contract will be enforceable.  | [1 mark]         |
|           | <b>Total</b>  | <b>[5 marks]</b> |

| <b>b)</b> |  | <b>Marks</b> |
|-----------|--|--------------|
|           | Candidates should explain that damages are likely to be awarded because William is in breach of an express term that (a) the | [2 marks]    |

|  |   |           |
|--|---|-----------|
|  | swimming pool be built by 25 November and (b) that the tiles would be aquamarine.   |           |
|  | Contractual damages compensate the innocent party for the loss which he has suffered as long as they are reasonably foreseeable and not too remote. The objective is to put the innocent party in the position he would have been had the contract been performed.  | [2 marks] |
|  | Candidates should briefly discuss the position on remoteness of damage as laid down in Hadley v Baxendale and clarified in Diamond v Campbell Jones (1961) and Cottrill Steyning and Littlehampton Building Society (1966). The innocent party can recover damages for its losses which (a) arise naturally from the breach and (b) were in the reasonable contemplation of the parties at the time of the contract as a probably result of the breach.   | [2 marks] |
|  | Delay: The recoverability of the loss of normal profit (£10,000) depends on the facts but are likely to satisfy the first limb of Hadley v Baxendale as William is likely to be taken to have foreseen this loss at the time of entering into the contract as it was not unlikely that the pool would have to be closed as a result of any delay. The recoverability of the loss of potential profit (£100,000) depends on whether William was aware of the potential contract with Voyage Luxe (i.e. the special circumstances under the second limb of Hadley v Baxendale. Although it seems that William was aware of the photography session with Digital, he does not seem to be aware of the meeting with Voyage Luxe. Credit also given to discussion over the recoverability of the £2,000 penalty fee charged by Digital where candidates have applied the limbs of Hadley v Baxendale and have come to a reasoned conclusion. | [3 marks] |

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|  | Tiles: Candidates should discuss whether Tom would be entitled to recover the cost of retiling the swimming pool. Credit should be given to the argument that the colour of the swimming pool tiles should not impact the value of the pool itself. Candidates should apply the principles in Ruxley Electronics and Construction Ltd v Forsyth (i.e. loss of amenity / enjoyment) and come to a reasoned conclusion as to whether Tom would be awarded the cost of replacing the tiles or the cost of loss of amenity / enjoyment. | [3 marks]         |
|  | <b>Total</b>  | <b>[12 marks]</b> |

| <b>c)</b> |   | <b>Marks</b> |
|-----------|---|--------------|
|           | Candidates should demonstrate a good understanding of the requirement of 'consideration' in the formation of a contract   |              |
|           | The terms of the agreement between Tom and William were that William would tile the swimming pool by 25 November at the price of £15,000 (1 mark). For a contract to be formed, there must be consideration (1 mark). Candidates should provide an accurate | [3 marks]    |

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|  | description of consideration (e.g. a benefit to one party and a detriment to the other – Currie v Misa (1875)) (1 mark)  |                  |
|  | William is already under an existing duty to complete the work by 25 November and therefore provides no extra consideration for Tom's promise to pay the additional £500 (1 mark): Stilk v Myrick. (1 mark)  | [2 marks]        |
|  | Strong candidates will draw a parallel to the facts in Williams's v Roffey Bros & Nicholls (Contractors) Ltd (1989). A promise to make a bonus payment is enforceable when the promisor obtains a benefit or avoids a penalty out of the performance of the service (1 mark), and where the promise had not been obtained by fraud or duress (1 mark). In this scenario, in William completing the work on time, Tom avoided being charged the cancellation penalty under his contract with Digital and the agreement does not appear to be entered into under duress or fraud (1 mark). Therefore, assuming William did complete the works on time, Tom may be legally obliged to pay the additional £500 | [3 marks]        |
|  | Consideration of scots Law   |                  |
|  | <b>Total</b>   | <b>[8 marks]</b> |

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|  | <b>Total marks for question 2</b> | <b>[25 marks]</b> |
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|            | <b>Section 1 - Points for answer</b>  | <b>Marks</b> |
|------------|---|--------------|
|            | <b>Question 3</b>   |              |
| <b>a)</b>  |   |              |
| <b>I)</b>  | Misrepresentation   |              |
|            | Matthew may be able to bring a claim against NFF for misrepresentation. (1 mark). Misrepresentation is a false statement of fact 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 a reasonable reliance on the statement (1 mark). In this case, Matthew chose to use the more expensive product because he believed it would be scratch and dent resistant and would last longer (1 mark). | [4 marks]    |
|            | Candidates should demonstrate an awareness of the different types of misrepresentation and identify the most applicable type of misrepresentation given the facts. There should be reference to the Misrepresentation Act 1967 (3 marks) As Amrish had simply forgotten to check the file before the meeting, negligent misrepresentation is the most applicable. (1 mark)The burden of proof is on the maker of the statement to disprove negligence (1 mark).   | [5 marks]    |
| <b>II)</b> | Breach of contract  |              |
|            | Candidates should demonstrate an understanding of a warranty as a contractual term, which is secondary to the main purpose of the contract (1 mark). In this case, the main purpose of the contract was the supply of flooring, Amrish gave a warranty as to the resilience of the product (it being dent and scratch resistant) (1 mark). A breach   | [3 marks]    |

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|  | of warranty gives rise to a breach of contract (1 mark). Credit also given to discussion over whether the flooring is “fit for purpose” by reference to the Sale of Goods Act 1979. |                   |
|  | <b>Total</b>  | <b>[12 marks]</b> |

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| <b>b)</b> |   | <b>Marks</b> |
|           | Misrepresentation:  |              |
|           | A claim for negligent misrepresentation may allow Matthew to rescind the contract (1 mark). The effect of rescission is to put the parties in the position they would have been in prior to the contract being made (1 mark). Alternatively, Matthew could seek damages under s.2 of the Misrepresentation Act 1967 (1 mark). | [3 marks]    |

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|  | Breach of contract  |                  |
|  | Candidates should distinguish between breach of condition and breach of warranty (1 mark). By definition a warranty is a contractual term that is secondary to the main purpose of the contract. As a result, a breach of warranty would not normally entitle Matthew to terminate the contract unless Matthew can show that the breach of warranty goes to the heart of the contract (Hong Kong Fir Shipping v Kawasaki Kisen Kaisha (1962) (2 marks).<br>The general principle when calculating damages for breach of contract is that damages should be assessed so as to put the claimant in the position it would have been in if the contract was properly performed. In this case, damages would seek to put Matthew in the position he would be in if the warranty was true (i.e. the difference between the true value of the floor and its value with the quality as warranted (2 marks). Credit also given for discussion of damages available for breach of an implied term under Sale of Goods Act 1979. | [5 marks]        |
|  | <b>Total</b>  | <b>[8 marks]</b> |

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|-----------|---|--------------|
| <b>c)</b> |   | <b>Marks</b> |
|           | Candidates should mention the doctrine of privity of contract and its effect – i.e. a contract cannot, as a general rule, confer rights or impose obligations arising under it on any person except the parties to it. In this case, there is clearly privity of contract between Becca and NFF evidenced by the contract.  | [2 marks]    |
|           | Stronger candidates should demonstrate an awareness of the formation of a <u>collateral</u> contract (a side agreement that pertains to the original agreement) and the Third Party Rights Act 1999. Parallel should be drawn between the facts of this scenario and the case Shanklin Pier Limited v Detel Products Ltd (1951). In this scenario, in consideration of the warranty given by Amrish regarding the scratch and dent resistance and life of the flooring, Matthew instructed Becca to purchase the floorboards to use them in the | [3 marks]    |

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|  | re-decoration of his kitchen. Matthew has suffered damage by reason of the breach of warranty and this may entitle him to damages for breach of collateral contract. |                  |
|  | <b>Total</b>   | <b>[5 marks]</b> |

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|  | <b>Total marks for question 3</b> | <b>[25 marks]</b> |
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|           | <b>Module 1 Section 2 - Points for answer</b>   |                  |
|           | <b>Question 4</b>   |                  |
|           | This question concerns negligence, <i>volenti non fit injuria</i> ; contributory negligence; <i>novus actus interveniens</i> and the eggshell skull rule.   |                  |
| <b>a)</b> | <u>David v Harry: Negligence</u>  |                  |
|           | Candidates should identify negligence as the cause of action.   | [1 mark]         |
|           | In order to succeed in a claim for negligence, David must demonstrate: (i) duty; (ii) breach (iii) causation; and (iv) loss.<br>Applying this to the facts:<br>Duty - Candidates to discuss the 'neighbour principle' and establish by reference to <i>Donoghue v Stevenson</i> [1932] and <i>Caparo v Dickman</i> [1990] that Harry owed a duty of care to David as a passenger of his car. This is an established duty of care. | [2 marks]        |
|           | Breach - Harry breached the duty by driving recklessly and at excessive speed whilst intoxicated  | [2 marks]        |
|           | Causation and Loss - As a result of Harry's breach, David has suffered injury which is of a foreseeable type and not remote.  | [1 mark]         |
|           | <b>Total</b>  | <b>[6 marks]</b> |

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| <b>b)</b> | <u><i>Volenti non fit injuria</i> – Voluntary assumption of risk</u>  |                  |
|           | Candidates should identify Harry's defence as the defence of <i>volenti non fit injuria</i> .   | [1 mark]         |
|           | In order for this defence to succeed, Harry would need to argue that David:<br>(i) knew the nature and extent of the risk of harm – David knew that Harry was intoxicated and intending to drive at high speed; and<br>(ii) voluntarily agreed to it – David voluntarily got into Harry's car with the knowledge that Harry was intoxicated ( <i>Morris v Murray</i> [1991]). | [2 marks]        |
|           | <b>Total</b>  | <b>[3 marks]</b> |

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| <b>c)</b> | <u>Defences: <i>Novus actus interveniens</i> and contributory negligence</u>   |           |
|           | Candidates should identify the following defences:   |           |
|           | <i>Novus actus interveniens</i> – Dr Smith's carelessness in misreading the consultant's handwriting is an intervening act of a third party. Harry would need to demonstrate that a reasonable junior doctor would not have made the same mistake. | [2 marks] |
|           | Harry may be able to avoid liability for David's loss of wages for the extended six months as being an unforeseeable independent act of  | [1 mark]  |

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|  | Dr Smith (1 mark).   |                  |
|  | Contributory negligence – Harry could argue that in failing to wear his seat belt, David was contributory negligent. | [1 mark]         |
|  | Harry can only avoid the extent of any damages payable under contributory negligence and not liability altogether.   | [1 mark]         |
|  | <b>Total</b>   | <b>[5 marks]</b> |

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| <b>d)</b> | <u>David v Dr Smith: Professional Negligence</u>  |                   |
|           | Candidates should identify that David can bring a professional negligence claim against Dr Smith.   | [1 mark]          |
|           | Candidates should adopt the same test as in question a). Applying the tests to the facts, in order to succeed in a claim for professional negligence, David would need to demonstrate:<br>Duty – Dr Smith owed David a duty as his patient. This is an established duty of care.                        | [2 marks]         |
|           | Breach – Dr Smith will be assessed against the skilled defendant: <i>Bolam v Friern Hospital Management Committee</i> [1957]. Dr Smith fell below the standard of a reasonable doctor. No allowance will be made for the inexperience of a junior doctor.   | [2 marks]         |
|           | Causation/Loss – Dr Smith’s liability is for the extended six months which David is unable to work. Applying the ‘but for’ test ( <i>Barnett v Chelsea &amp; Kensington Hospital Management Committee</i> [1969]) the original three months recovery would still have happened.                         | [2 marks]         |
|           | Foreseeability/Remoteness of damage – Eggshell skull rule extends rule of remoteness stated in <i>The Wagon Mound No. 2</i> [1967] – David’s pre-existing condition will not affect David’s ability to recover damages. <i>Smith v Leech Brain</i> [1962] – you must take your victim as you find them. | [2 marks]         |
|           | Defence of contributory negligence would not be available to Dr Smith. David’s failure to wear his seatbelt did not have a causal effect on the further injury caused.  | [2 marks]         |
|           | <b>Total</b>  | <b>[11 marks]</b> |

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|  | <b>Total marks for question 4</b> | <b>[25 marks]</b> |
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|           | <b>Section 2 - Points for answer</b><br><b>Question 5</b>   |          |
|           | This question concerns occupier’s liability and liability to visitors and trespassers. Candidates are required to demonstrate the knowledge of the Occupiers Liability Act 1957 (“OLA 1957”) and Occupiers Liability Act 1984 (“OLA 1984”). |          |
| <b>a)</b> | <u>General</u>  |          |
|           | Candidates should demonstrate their knowledge of occupier’s liability – i.e. damage arising from the state of the premises. Liability for lawful visitors arises from OLA 1957 and the OLA 1984 for unlawful visitors.                      | [1 mark] |

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|  | DogLovers would fall within the definition of ‘premises’ under section 51 of OLA 1957 as this includes land and buildings.   | [1 mark]  |
|  | Even if Justine is not the owner of the ‘premises’ as she runs the centre for over 10 years she exercises sufficient control over the premises and Justine is likely to be considered as the “occupier” and therefore the defendant in all three claims.                       | [1 mark]  |
|  | <u>Warren v Justine: OLA 1984</u>  |           |
|  | Warren is an unlawful visitor.   | [1 mark]  |
|  | Candidates should discuss that for normal deliveries within the specified time, Warren would be a lawful visitor and would have permission to enter. However, as Warren entered the premises outside of these hours, he is an unlawful visitor and therefore OLA 1984 applies. | [2 marks] |
|  | Duty – As set out in section 1(3) of OLA 1984, the duty owed by Justine to Warren as a unlawful visitor does not arise automatically and is subject to the following conditions:   |           |
|  | For Justine to be liable, Justine should be aware of the danger or have reasonable grounds to believe that it exists;  | [1 mark]  |
|  | Justine should have reasonable grounds to believe that there are unlawful visitors in the vicinity; and  | [1 mark]  |
|  | Candidates should demonstrate that the danger should be one against which Justine should reasonably afford protection.   | [1 mark]  |
|  | Breach – Pursuant to section 1(4) of OLA 1984, Justine is required to take such action as is reasonable to see that Warren does not suffer injury.   | [1 mark]  |
|  | Causation/Loss – Discuss the application of the “but for” test and whether Justine is liable for the injury Warren has suffered. Is the loss foreseeable and not too remote? Form a reasonable conclusion.   | [1 mark]  |
|  | <u>Anna v Justine: OLA 1957</u>  |           |
|  | Anna is a lawful visitor for the purposes of OLA 1957 as she has permission to be at the centre, accordingly OLA 1957 applies.   | [1 mark]  |
|  | Duty – A common duty of care is imposed by section 2(1) of OLA 1957.   | [1 mark]  |

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|  | Breach – Discuss whether Justine fell below the common duty of care and failed to reach the standard of a reasonable occupier. Candidates should identify that the type of visitor is an important factor Justine’s liability will depend on whether she provided sufficient warning to enable visitors to be reasonably safe from risk – section 2(4)OLA 1957. Candidates should demonstrate that Justine may be able to discharge duty if adequate warning of the danger was given | [1 mark] |
|  | On the facts, the centre provided warning re the risk of being bitten if the dogs were fed   | [1 mark] |
|  | Accordingly Justine may be able to avoid liability on the basis that   | [1 mark] |

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|  | she provided adequate warning of the risk to enable Anna to be reasonable safe. Candidates to discuss and form a reasonable conclusion.  |                   |
|  | <u>Jennifer v Justine: OLA 1957</u>  |                   |
|  | As an employee of Justine, Jennifer has express permission to be at the 'premises' and is therefore a lawful visitor. Accordingly, OLA 1957 applies.<br>Duty – As above a common law duty of care is imposed by section 2(1) of OLA 1957   | [1 mark]          |
|  | Breach – Candidates should demonstrate that the issue here is whether Justine can be responsible for the injury caused by work carried out by Chris, the local handyman who is an independent contractor. Justine would need to show that she took reasonable steps to satisfy herself that Chris was competent and has done the work properly | [2 marks]         |
|  | Causation/Loss – As above, applying the “but for” test, Candidates should reach a reasonable conclusion on whether Justine will be held liable   | [1 mark]          |
|  | <b>Total</b>   | <b>[20 marks]</b> |

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| <b>b)</b> | <u>Warren v Justine – Claim for costs of handheld delivery device</u>  |                  |
|           | Under OLA 1984, only personal injury/death can be claimed for and therefore Warren would have no claim for the handheld delivery device. Damage to property is outside the scope of OLA 1984 | [2 marks]        |
|           | <b>Total</b>   | <b>[2 marks]</b> |

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| <b>c)</b> | <u>Warren v Justine – Claim for costs of handheld delivery device</u>  |                  |
|           | Candidates to demonstrate that if Warren made the delivery at 10:00am, he would not be an unlawful visitor but a lawful visitor and as such OLA 1957 will apply. | [1 mark]         |
|           | As such, Warren will be able to claim the costs of his hand held delivery device.  | [2 marks]        |
|           | <b>Total</b>   | <b>[3 marks]</b> |

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|  | <b>Total marks for question 5</b> | <b>[25 marks]</b> |
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|           | <b>Section 2 - Points for answer</b><br><b>Question 6</b>   |          |
| <b>a)</b> | <u>Freddie v Phillip</u>  |          |
|           | Candidates should identify what is required to succeed in a claim in negligence. This would require Freddie to demonstrate that Phillip (i) owed a duty of care; (ii) breached that duty; and (iii) that duty was causative of the damage/loss. | [1 mark] |
|           | Duty – Did Phillip owe Freddie a duty of care? Candidates should determine the existence of a duty of care applying the test of <i>Caparo</i>   |          |

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|  | <i>v Dickman</i> [1990]:   |                   |
|  | Was there reasonable foresight of harm to Freddie? – Candidates should identify that it was foreseeable that people with offices within the vicinity of the demolition works should be affected by Phillip’s care and attention (or lack of it). They would expect Phillip to ensure the demolition works are undertaken to a proper standard.   | [2 marks]         |
|  | Was there sufficient proximity of relationship between Freddie and Phillip? - Candidates should demonstrate that there was sufficient proximity between Phillip and Freddie (as owner of the motorbike/offices).   | [2 marks]         |
|  | Is it fair, just and reasonable to impose a duty of care? Candidates should demonstrate that in these circumstances, it would be reasonable for a duty to be extended to those with property (in this case the offices/ motorbike) within the vicinity of the demolition works.  | [2 marks]         |
|  | Breach – Candidates should consider whether Phillip fell below the standard of a reasonable person in Phillip’s position? Candidates will need to assess whether this would appear to be a breach of a ‘reasonable man’ – <i>Blyth v Birmingham Waterworks</i> (1865). Phillip proceeding with a new demolition excavator without instructions is arguably not something which a reasonable demolition contractor would have done in the circumstances. Greater the risk, greater the care required, <i>Bolton v Stone</i> [1951]. | [2 marks]         |
|  | Causation – As a matter of fact, did Phillip’s conduct cause Freddie’s damage? Yes. “But for” Phillip’s negligence the damage/loss would not have occurred and there is no “ <i>novus actus interveniens</i> ”.  | [1 mark]          |
|  | Defences – <i>Volenti non fit injuria</i> / Contributory negligence – Candidates to demonstrate there were notices and cones which highlighted that no vehicles are parked and discuss what defences are available to Freddie.   | [2 marks]         |
|  | <b>Total</b>   | <b>[12 marks]</b> |

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| <b>b)</b> | <u>Freddie v DemoCon – Vicarious Liability</u>   |           |
|           | Candidates should identify that Freddie may bring a claim against DemoCon for vicarious liability for the negligence of Freddie  | [1 mark]  |
|           | Freddie would need to establish three elements: (i) Phillip was an employee; (ii) Phillip committed a tort; and (iii) the tort was committed in the course of employment.<br>Applying this test to the facts:    |           |
|           | Phillip is an employee of DemoCon  | [1 mark]  |
|           | Phillip has committed a tort of negligence: As noted above, Phillip has operated a machine for which he has had no supervision and training.   | [1 mark]  |
|           | Phillip committed the tort during the course of his employment. Candidates to discuss whether Freddie was on “frolic of which his own” – <i>Joel v Morison</i> (1834); <i>Hilton v Thomas Burton (Rhodes)Ltd</i> | [2 marks] |

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|  | [1961]. Candidates may argue he deviated away from his normal business and didn't listen to instructions and therefore did not commit the tort during the course of employment and accordingly, DemoCon are not vicariously liable. Candidates for form a reasonable conclusion. |                  |
|  | <b>Total</b>   | <b>[5 marks]</b> |

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| <b>c)</b> | <u>Freddie v Phillip – Measure Damages</u>  |                  |
|           | Candidates are required demonstrate their understanding of the difference in damages under Tort and Contract. | <b>[2 marks]</b> |
|           | <b>Total</b>  | <b>[2 marks]</b> |

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| <b>d)</b> | <u>Freddie's - Claim for damages</u>  |                 |
|           | Candidates are required to analyse the nature of each item or group of items of Freddie's loss and the causation of those items.  |                 |
|           | Candidates will need to demonstrate for each item that the kind of damage was reasonably foreseeable and not too remote (i.e. damage had to be a direct consequence of the negligent act) – <i>Re Polemis and Furness, Withy &amp; Co (1921)</i> ; <i>the Wagon Mound (No1)(1961)</i> . There are two provisos to this rule: <ul style="list-style-type: none"> <li>• the 'similar in type' rule: provided the type of damage was reasonably foreseeable, the defendant is liable, even if the precise way in which it occurred was not foreseeable.</li> <li>• The 'egg-shell skull' rule: Provided the type of harm was reasonably foreseeable, the defendant is liable for the full extent of the harm, even if the precise extent of the damage was not foreseeable.</li> </ul> | <b>[1 mark]</b> |

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|  | The damage to Office Block B – physical damage.  | <b>[1 mark]</b>  |
|  | The damage to the motorbike – physical damage and complete loss of the motorbike as this had to be scrapped. Freddie will be entitled to the market value of the van | <b>[1 mark]</b>  |
|  | The damage to the watch/contents of the motorbike – Freddie would be entitled to value of the watch.   | <b>[1 mark]</b>  |
|  | Loss of profits on lost contracts – loss foreseeable but remote. Pure economic loss unrecoverable ( <i>Hedley Byrne v Heller [1963]</i> )                            | <b>[2 marks]</b> |
|  | <b>Total</b>   | <b>[6 marks]</b> |

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|  | <b>Total marks for Question 6</b> | <b>[25 marks]</b> |
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**Institution of Civil Engineers**

**Examination for the ICE Certificate in Law and  
Contract Management (CLCM) 2017**

**Module 2: NEC (English and Scots Law)**

Monday 12<sup>th</sup> June 2017

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 (Greenbook).

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.

**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**

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**Question 1**

- a) **Which of the documents making up an NEC3 ECC identify Works Information?** [3 marks]

An *Employer's* in-house lawyer is considering the following *additional conditions of contract*.

- Z2 The *Contractor* does not make noise above 65 decibels (measured 30m from anywhere along the *boundaries of the site*) between the hours of 6pm Saturdays and 10am Sundays.
- Z3 The *Contractor* does not use highway B4066 for accessing the Site by vehicles exceeding 3.5 tonnes

- b) **Comment on whether Z2 and Z3 are appropriate *additional conditions of contract* and if there are any disadvantages to their inclusion in this way.** [4 marks]

- c) **Briefly explain how an inconsistency in the Works Information is resolved and how this may affect the Prices and dates.** [5 marks]

A first programme is identified in Contract Data part two that shows the *Contractor* will install a haul road by Week 16. At the end of Week 4, the *Contractor* submits a revised programme showing the haul road will now be in place by Week 20.

- d) **The *Project Manager* writes to the *Contractor* insisting the haul road be in place by Week 16, arguing the first programme showed this. Does the *Contractor* have to obey?** [8 marks]

- e) **The *Project Manager* has promised another contractor that they can use the haul road on the site to access an area adjacent to the Site. What statement(s) would you expect to see in the Works Information in relation to this?** [5 marks]

**Section 1**

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**Question 2**

- a) **Can the *Project Manager*, acting in a spirit of mutual trust and cooperation, exercise discretion in the event that the *conditions of contract* do not reflect the intentions of the Parties? Explain your answer.** [5 marks]

The *Project Manager* under an ECC has returned from a 3-week holiday that commenced on the *starting date*. He is surprised to learn the *Contractor* has been notifying the *Supervisor* of its tests and inspections.

- b) **The *Project Manager* writes to the *Contractor* requesting that future tests and inspections are notified to himself and not the *Supervisor*. What should the *Contractor* do?** [5 marks]

Prior to leaving for holiday, the *Project Manager* left a number of changes to the setting out with his assistant project manager, Jane to progress. Jane is a senior employee of the *Employer* who has been seconded to the project team.

Jane instructs changes to the Works Information revising the setting out information.

- c) **Should the *Contractor* act on Jane's instructions?** [5 marks]

On his return, the *Project Manager* is unhappy with Jane's instructions. He promptly revises Jane's instructions to the Works Information, but does not notify a compensation event.

- d) **Notwithstanding your answer to (c) above and assuming the *Contractor* acts on Janes' instruction, can he then notify a compensation event and, if so, is there a time limit for him to do so? Comment on whether the Prices and Completion Date should change.** [4 marks]

The *Project Manager* writes to the *Contractor*, arguing that the *Contractor* failed to give early warning of his concerns regarding delegations and as such, the *Contractor* is not entitled to notify a compensation event.

- e) **Comment on the *Project Manager's* interpretation of the contract.** [6 marks]

**Section 1**

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**Question 3**

- a) Explain why each of the **Contract Date**, *starting date* and *first access date* do not necessarily coincide. [4 marks]
- b) Explain the difference between the date of **Completion** and the **Completion Date**. Give examples of things that may affect these dates. [9 marks]
- c) What is the **Project Manager** required to do in the event a **condition** stated for a **key date** is not met by the **key date**? [6 marks]

An *Employer* is looking to construct a number of commercial units for lease. They are preparing an invitation to tender for an NEC3 ECC. Due to Site constraints, it is not possible to work on all the units at the same time.

- d) Which **secondary Option** will be attractive to the **Employer**? Explain your answer. [3 marks]
- e) In the event the **Employer** does not choose the **Option** given in your answer to part d), explain if they are still able to use parts of the **works** prior to **Completion**. [3 marks]

**Section 1**

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**Question 4**

- a) **Explain how the resourcing of a project team is dependent on the choice of main Option for payment. Structure your answer with reference to each main Option A to F.** [11 marks]

It is three days since the tenth assessment date on an ECC with main Option C. The *Contractor* usually provides an application for payment the day prior to each assessment date, but on this occasion, did not. The *Project Manager* writes to the *Contractor* to advise that he will not be able to certify payment on time if an application is not received by the end of today.

- b) **How long does the *Project Manager* have to certify payment in this situation?** [5 marks]

Under an ECC on main Option D with Y(UK)2, the *Employer's* accounting team have challenged the *Project Manager* about a payment to the *Contractor*. The lead accountant has emailed the *Project Manager* pointing out that the certificate includes for goods and services not yet received.

- c) **Comment on whether the *Employer's* team are correct to make this challenge.** [4 marks]
- d) **Briefly explain why an earthworks project under an ECC Option B contract may present the *Contractor* with lower financial risk than the same project were it to be administered under Option A.** [5 marks]

## Section 2

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### Question 5

You are preparing tender documents for an ECC Option A *Contractor*-designed contract. The *Employer* has recently been on an NEC3 contract training course and is keen to implement a few of the ideas that were picked up. The *Employer* likes the idea of using Option X6 (bonus for early Completion) but is not sure whether you need to use Option X7 (delay damages) at the same time.

- a) **When might you recommend using Option X6 or X7, both, or neither, in a tender document?** [10 marks]
- b) **How is the *completion date* fixed in a contract?** [4 marks]

The *Project Manager* instructs a change to the Works Information, resulting in planned Completion being earlier than shown on the Accepted Programme. The *Contractor* is not sure how to deal with the time and cost implications in his quotation for the compensation event arising.

- c) **What would you advise the *Contractor* to do here?** [5 marks]
- d) **What options does the contract provide for bringing forward the Completion Date?** [6 marks]

**Section 2**

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**Question 6**

You are the *Supervisor* on an ECC contract. You note that the *Contractor* seems to have started certain activities before these are planned for on the Accepted Programme.

- a) **Can the *Contractor* do this and how might you deal with this?** [5 marks]

There are some parts of the *works* that in hindsight should have been included in the Works Information as hold points to allow the *Supervisor* to carry out some tests and inspections.

- b) **How can this be addressed using the ECC?** [5 marks]

You have checked the requirements in the Works Information and spotted that an external design approval process has not taken place.

- c) **What does the contract require in terms of getting such approval and dealing with the omission?** [4 marks]

- d) **Describe the early warning process, what the *Supervisor's* input might be and how the process might help the Parties here.** [8 marks]

After Completion, the *Supervisor* notifies the *Contractor* of a Defect under clause 42.2. The *Contractor* advises that they might struggle to correct the Defect within the *defect correction period*.

- e) **What can be done here?** [3 marks]

## Section 2

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### Question 7

You are the *Project Manager* on an ECC Option C scheme which was mainly designed by the *Employer*. There are though some small items of the *works* to be designed by the *Contractor*.

- a) **Describe how the contract deals with *Contractor* designed parts of the *works*?** [6 marks]

In a progress meeting, the *Contractor* suggests to the *Project Manager* that it has an idea to offer an alternative design for a part of the *works* designed by the *Employer*. An Accepted Programme is in place.

- b) **How would you deal with this suggestion and what are the alternatives?** [7 marks]

After a few weeks of extensive negotiations and design, the *Project Manager* and *Contractor* are both happy with the alternative, with the design to be carried out by the original designer on behalf of the *Employer*.

- c) **How is this all to be put into effect and will this result in a change to the Prices?** [7 marks]

Whilst undertaking the revised part of the *works*, the *Contractor* considers that the physical conditions are different to those which it had expected. The *Contractor* explains this in the clause 20.4 forecast of Defined Cost. Not only will the expected gain not materialise, it appears the Parties will now be in financial pain through the clause 53 provisions.

- d) **Can the *Contractor* still seek a change to the Prices here, even though the alternative was its proposal?** [5 marks]



| <b>Module 2 - Section 1 – Points for answer</b> |  |                  |
|---|--|------------------|
| <b>Question 1</b>                               |  |                  |
| <b>a)</b>                                       |  | <b>Marks</b>     |
|   | Contract Data identifies what volumes the Works Information is in.<br>The <i>Employer's</i> Works Information is identified in Contract Data part one. | [1 mark]         |
|   | The <i>Contractor's</i> Works Information for his design is identified in Contract Data part two.  | [1 mark]         |
|   | <b>Total</b>   | <b>[3 marks]</b> |

|           |   |                                   |
|-----------|---|-----------------------------------|
| <b>b)</b> |   | <b>Marks</b>                      |
|           | Z2 and Z3 are examples of constraints on how the <i>Contractor</i> is to Provide the Works.<br>Constraints should be included in the Works Information - see clause 11.2(19).<br>Constraints stated in Works Information, may be changed by the <i>Project Manager</i> under clause 14.3. A deed of variation would be required if it was a z clause based on negotiation and subject to agreement. | [1 mark]<br>[2 marks]<br>[1 mark] |
|           | <b>Total</b>  | <b>[4 marks]</b>                  |

|           |  |  |
|-----------|--|--|
| <b>c)</b> |  | <b>Marks</b>   |
|           | Inconsistencies are dealt with under clause 17.1.<br>The <i>Contractor</i> and <i>Project Manager</i> each notifies the other as soon as they are found.<br>The <i>Project Manager</i> gives an instruction to resolve the ambiguity, in this case changing the Works Information.<br>This may give rise to a compensation event, except if the change is to Works Information that the <i>Contractor</i> provided to align with the <i>Employer's</i> - see clause 60.1(1).<br>Clause 63.8 is relevant here, as it favours the Party that did not create the inconsistency. That is, one that exists within or between documents provided by the other Part | [1 mark]<br>[1 mark]<br>[1 mark]<br>[1 mark]<br>[1 mark] |
|           | <b>Total</b>   | <b>[5 marks]</b>   |

| d) |   | Marks  |
|----|---|--|
|    | <p>The <i>Project Manager</i> appears to think the first programme forms part of the Works Information.</p> <p>This is incorrect. The programme is not Works Information and does not specify or describe the <i>works</i>.</p> <p>It is up to the <i>Contractor</i> to decide how they Provide the Works, so far as the programme complies with the Works Information.</p> <p>The question uses the word obey. The <i>Project Manager</i> may try to instruct the desired outcome under clause 14.3. In accordance with clause 27.3, the <i>Contractor</i> obeys an instruction that is in accordance with the contract.</p> <p>This would give rise to a compensation event under clause 60.1(1).</p> | <p>[1 mark]</p> <p>[2 marks]</p> <p>[1 mark]</p> <p>[2 marks]</p> <p>[2 marks]</p> |
|    | <b>Total</b>  | <b>[8 marks]</b>   |

| e) |   | Marks   |
|----|---|---|
|    | <p>In this scenario the other contractor is an Other.</p> <p>The haul road is part of the Working Areas.</p> <p>Clause 25.1 requires the <i>Contractor</i> to cooperate with Others and share the Working Areas with them as stated in the Works Information.</p> <p>Therefore statements regarding the use of the haul road by Others, should have been in the Works Information.</p> <p>The <i>Project Manager</i> can change the Works Information to include these details, but this will give rise to a compensation event under clause 60.1(1).</p> | <p>[1 mark]</p> <p>[1 mark]</p> <p>[1 mark]</p> <p>[1 mark]</p> <p>[1 mark]</p> |
|    | <b>Total</b>  | <b>[5 marks]</b>  |

|  |                                   |                   |
|--|-----------------------------------|-------------------|
|  | <b>Total marks for Question 1</b> | <b>[25 marks]</b> |
|--|-----------------------------------|-------------------|

|    | <b>Section 1 – Points for answer<br/>Question 2</b>  |   |
|----|--|---|
| a) |  | <b>Marks</b>                                      |
|    | <p>No. Clause 10.1 requires the <i>Project Manager</i> to act as stated in the contract.</p> <p>If the Parties wish to change the contract, they can do so by written agreement under Clause 12.3.</p> | <p>[1 mark]</p> <p>[2 marks]</p> <p>[2 marks]</p> |

|  |              |                  |
|--|--------------|------------------|
|  | <b>Total</b> | <b>[5 marks]</b> |
|--|--------------|------------------|

| <b>b)</b> |   | <b>Marks</b>   |
|-----------|---|--|
|           | <p>Clause 40.3 requires the <i>Contractor</i> and the <i>Supervisor</i> to each notify the other of its tests and inspections.</p> <p>The <i>Contractor</i> should continue to notify the <i>Supervisor</i> named in the Contract Data unless the <i>Employer</i> replaces them in accordance with clause 14.4.</p> <p>The <i>Contractor</i> may copy the <i>Project Manager</i> into the notifications, but is not obligated to.</p> | <p>[2 marks]</p> <p>[1 mark]</p> <p>[1 mark]</p> <p>[1 mark]</p> |
|           | <b>Total</b>  | <b>[5 marks]</b>   |

| <b>c)</b> |  | <b>Marks</b>                                      |
|-----------|--|---|
|           | <p>The answer depends on whether the <i>Project Manager</i> notified the <i>Contractor</i> that Jane is his delegate in accordance with clause 14.2.</p> <p>If no such notice of delegation was given, Jane's instructions are not in accordance with the contract and the <i>Contractor</i> should not act on them.</p> <p>The fact Jane works for the <i>Employer</i> is irrelevant. Jane cannot give this notification herself, it must come from the <i>Project Manager</i> or their delegate.</p> | <p>[2 marks]</p> <p>[1 mark]</p> <p>[2 marks]</p> |
|           | <b>Total</b>   | <b>[5marks]</b>                                   |

| <b>d)</b> |  | <b>Marks</b>                      |
|-----------|--|-----------------------------------|
|           | <p>Yes, under clause 61.3 the <i>Contractor</i> notifies a compensation event if it believes it is one and the <i>Project Manager</i> has notified.</p> <p>The eight week timeout sanction in clause 61.3 would not apply here since it is an event that the <i>Project Manager</i> (giving an instruction) should have notified to the <i>Contractor</i>.</p> <p>It would seem likely the <i>Contractor</i> is entitled to money and time based on the original work, future work and the impact that has on programme.</p> | <p>[2 marks]</p> <p>[2 marks]</p> |
|           | <b>Total</b>   | <b>[4 marks]</b>                  |

| <b>e)</b> |  | <b>Marks</b> |
|-----------|--|--------------|
|           |  |              |

|  |   |   |
|--|---|---|
|  | <p>The <i>Project Manager</i> is referring to 61.5 and 63.5. However he is not accurately interpreting these clauses.</p> <p>Failing to give an early warning does not prevent the notification of a compensation event. It imposes assumptions on how it must be assessed.</p> <p>The <i>Contractor</i> has done nothing wrong in this instance. Leaving this aside, if clause 63.5 were to apply, the event would be assessed as though early warning had been given. In this case it is difficult to see how it would have turned out differently.</p> | <p>[2 marks]</p> <p>[2 marks]</p> <p>[1 mark]</p> <p>[1 mark]</p> |
|  | <b>Total</b>  | <b>[6 marks]</b>  |

|  |                                   |                   |
|--|-----------------------------------|-------------------|
|  | <b>Total marks for Question 2</b> | <b>[25 marks]</b> |
|--|-----------------------------------|-------------------|

| <b>Section 1 – Points for answer</b> |  |                  |
|--------------------------------------|--|------------------|
| <b>Question 3</b>                    |  |                  |
|                                      |  | <b>Marks</b>     |
| <b>a)</b>                            |  |                  |
|                                      | The Contract Date may be sometime in advance of the <i>starting date</i> owing to the need to make firm advanced commitments to Subcontractors and suppliers.                | [2 marks]        |
|                                      | The <i>starting date</i> may be in advance of the first <i>access date</i> , for example, due to manufacture, fabrication or design in advance of work taking place on Site. | [2 marks]        |
|                                      | <b>Total</b>   | <b>[4 marks]</b> |

|           |   |                       |
|-----------|---|-----------------------|
| <b>b)</b> |   | <b>Marks</b>          |
|           | Completion (clause 11.2(2)) is when the <i>Contractor</i> has done the work required and corrected Defects that would prevent use or ongoing work.      | [2 marks]             |
|           | The Completion Date (clause 11.2(3)) is the ‘deadline’ by which the <i>Contractor</i> must achieve Completion.  | [2 marks]             |
|           | Completion may change due to the <i>Contractor’s</i> plans and the progress/delay of the <i>works</i> .   | [2 marks]             |
|           | The Completion Date only changes in accordance with the <i>conditions of contract</i> , namely compensation events, acceleration and Defect acceptance. | [1 mark]<br>[2 marks] |

|  |              |                  |
|--|--------------|------------------|
|  | <b>Total</b> | <b>[9 marks]</b> |
|--|--------------|------------------|

| c) |  | Marks            |
|----|--|------------------|
|    | In accordance with clause 25.3, the <i>Project Manager</i> is required to assess the additional cost which the <i>Employer</i> has paid or will incur. | [2 marks]        |
|    | The rights to recover costs are limited to those in the clause and do not extend to other costs or losses.   | [1 mark]         |
|    | The assessment is made within four weeks of the date when the Condition for the Key Date is met.   | [2 marks]        |
|    | The amount is included as another amount in the next assessment of the amount due.   | [1 mark]         |
|    | <b>Total</b>   | <b>[6 marks]</b> |

| d) |  | Marks                            |
|----|--|----------------------------------|
|    | X5 Sectional Completion.<br>This Option provides for the <i>Employer</i> to take over and use those units finished in advance of Completion of the whole of the <i>works</i> .<br>This means the <i>Employer</i> would be able to achieve revenue from some of the units earlier than otherwise. | [1 mark]<br>[1 mark]<br>[1 mark] |
|    | <b>Total</b>   | <b>[3 marks]</b>                 |

| e) |  | Marks                            |
|----|--|----------------------------------|
|    | The <i>Employer</i> may take over parts of the <i>works</i> prior to Completion.<br>If it does, the <i>Project Manager</i> certifies takeover of those parts within one week.<br>Doing so prior to Completion and the Completion Date would give rise to a compensation event – clause 60.1(15). | [1 mark]<br>[1 mark]<br>[1 mark] |
|    | <b>Total</b>   | <b>[3 marks]</b>                 |

|  |                                   |                   |
|--|-----------------------------------|-------------------|
|  | <b>Total marks for Question 3</b> | <b>[25 marks]</b> |
|--|-----------------------------------|-------------------|

| <b>Section 1 – Points for answer</b> |   |          |
|--------------------------------------|---|----------|
| <b>Question 4</b>                    |   |          |
| a)                                   |   | Marks    |
|                                      | Option A – clause 11.2(27) The Price for Work Done to Date is the total of the Prices for completed activities. There is no measurement | [1 mark] |

|  |   |  |
|--|---|--|
|  | <p>or records of cost to inspect for the original work.</p> <p>The demand on resource is less, relative to the other main Options.</p> <p>Option B – clause 11.2(28) The Price for Work Done to Date is the total of the quantities of work done multiplied by the rate.</p> <p>This requires the measurement of quantities and so the resource demand is typically higher than that of main Option A.</p> <p>For Options C and D, more resource is required than that in A and B respectively. The same resources as for A and B are required for maintaining the ‘target’ rather than for payment. Further resource is likely, given the Price for Work Done to Date (clause 11.2(29)) is the total Defined Cost forecast before the next assessment. This will draw on different skills as the <i>Contractor’s</i> accounts and records of cost will be considered.</p> <p>For Options E and F, the Price for Work Done to Date is defined in the same way as for Options C and D, so they require the same resource in this respect.</p> <p>However there is no target to maintain and no pricing document, so relative to Options C and D, Option E should require less resource over all.</p> <p>Like in Options C and D, the <i>Contractor</i> is required to provide forecasts of Defined Cost to Completion.</p> | <p>[1 mark]</p> <p>[1 mark]</p> <p>[1 mark]</p> <p>[2 marks]</p> <p>[2 marks]</p> <p>[1 mark]</p> <p>[2 marks]</p> |
|  | <b>Total</b>  | <b>[11marks]</b>   |

| <b>b)</b> |  | <b>Marks</b>   |
|-----------|--|--|
|           | <p>The <i>Project Manager</i> must certify a payment within one week of each assessment date (clause 51.1).</p> <p>The <i>Project Manager</i> should assess the amount due (clause 50.1).</p> <p>In assessing the amount due the <i>Project Manager</i> considers applications from the <i>Contractor</i> (clause 50.4).</p> <p>The <i>Contractor</i> is not obliged to submit an application for payment. Application is not a precondition of payment.</p> | <p>[2 marks]</p> <p>[1 mark]</p> <p>[1 mark]</p> <p>[1 mark]</p> |
|           | <b>Total</b>   | <b>[5 marks]</b>   |

| c) |   | Marks   |
|----|---|---|
|    | <p>Challenge is healthy, but on this occasion the issue is explainable.<br/>Under main Option D the Price for Work Done to Date (clause 11.2(29)) is the total Defined Cost the <i>Project Manager</i> forecasts will have been paid by the <i>Contractor</i> before the next assessment date plus the Fee. Therefore some works are forecast and not actual.<br/>The intention is to keep cash flow healthy/neutral for the <i>Contractor</i>.</p> | <p>[1 mark]<br/>[1 mark]<br/>[1 mark]<br/><br/>[1 mark]</p> |
|    | <b>Total</b>  | <b>[4 marks]</b>  |

| d) |   | Marks  |
|----|---|--|
|    | <p>Under main Option A the Prices are lump sums for completed activities on the Activity Schedule.<br/>The Prices can change but only through compensation events, Defect acceptance and acceleration.<br/>Under Option B, the <i>Contractor</i> tenders a rate against assumed quantities. The final total of the Prices vary with volume, as well as the reasons under Option A.<br/>The Prices therefore track the actual quantities, which for an earthworks project, may be different to the assumed quantities, presenting lower financial risk to the <i>Contractor</i>.</p> | <p>[1 mark]<br/><br/>[1 mark]<br/><br/>[1 mark]<br/><br/>[2 marks]</p> |
|    | <b>Total</b>  | <b>[5 mark]</b>  |

|  |              |                 |
|--|--------------|-----------------|
|  | <b>Total</b> | <b>25 marks</b> |
|--|--------------|-----------------|

| <b>Module 2 - Section 2 – Points for answer</b> |  |                   |
|---|--|-------------------|
| <b>Question 5</b>                               |  |                   |
| <b>a)</b>                                       |  | <b>Marks</b>      |
|   | X6 is a secondary Option covering a bonus to the <i>Contractor</i> payable when it achieves Completion before the Completion Date. This is the sort of incentive that might be used where time is of the essence to the <i>Employer</i> , perhaps used where the financial returns when an asset is available for sale or use are significantly higher than the daily on-cost of the construction project. | [3 marks]         |
|   | X7 is effectively the opposite to X6 and is a secondary Option covering delay damages payable by the <i>Contractor</i> if it achieves Completion after the Completion Date. This is the sort of provision that might be used by the <i>Employer</i> in the event that the <i>Employer</i> will incur significant additional costs should the <i>Contractor</i> over run Completion of the <i>works</i> .   | [3 marks]         |
|   | As X7 damages are a liquidated damage, they must be a number of things including a genuine pre-estimate of the cost likely to be suffered by the <i>Employer</i> in the event of a delay. If challenged and the amount was found to be more than the conceivable loss, then these might be found to be a penalty, set aside, and replaced with genuine loss.   | [2 marks]         |
|   | There is no reason why X6 and X7 could not both be included in the tender document; or one or the other; or neither. If neither, then in the event the <i>Contractor</i> achieved Completion after the Completion Date then damages might be recoverable from the <i>Contractor</i> by the <i>Employer</i> .   | [2 marks]         |
|   | <b>Total</b>   | <b>[10 marks]</b> |

| <b>b)</b> |  | <b>Marks</b>     |
|-----------|--|------------------|
|           | The <i>completion date</i> for the whole of the <i>works</i> can either be set by the <i>Employer</i> or <i>Contractor</i> at tender stage. If the <i>Employer</i> wishes to set the <i>completion date</i> then this should be included in the Contract Data part one. If the <i>Employer</i> wishes to invite the tenderer(s) to offer a <i>completion date</i> , and perhaps use this as part of tender appraisal, then the appropriate part of Contract Data part two should be included for the tenderer(s) to complete | [4 marks]        |
|           | <b>Total</b>   | <b>[4 marks]</b> |

| <b>c)</b> |  | <b>Marks</b> |
|-----------|--|--------------|
|           | The quotation for the compensation event is dealt with exactly the same, whether the works instructed are additional or a reduction in scope. The only exception to this being the changes to the Completion Date. | [1 mark]     |
|           | Clause 63.1 sets out the basic rules for assessing the cost side of things within the quotation – the effect of the compensation event   | [2 marks]    |

|  |  |                  |
|--|--|------------------|
|  | upon Defined Cost should be shown in the quotation – so if there is less cost of people, Subcontractor, Plant and Materials, accommodation in the Working Areas and so on, then these are all shown (as a saving) within the quotation.  |                  |
|  | Clause 63.3 sets out the basic rules for assessing the time side of things within the quotation – here though you only assess delays to the Completion Date so this cannot be brought forward even though on the face of it the <i>Contractor's</i> time spent in the Working Areas looks like it will reduce. However, planned Completion will be affected by this and will be brought forward, generating what is commonly known within the industry as terminal float. The alterations to the Accepted Programme would be included in the quotation, which would include the changes to planned Completion. | [2 marks]        |
|  | <b>Total</b>   | <b>[5 marks]</b> |

| <b>d)</b> |   | <b>Marks</b>     |
|-----------|---|------------------|
|           | Under clause 12.3 the Parties can bring about a change to the contract i.e. to bring forward the Completion Date. This is something the <i>Project Manager</i> might orchestrate but cannot effect as the <i>Project Manager</i> will not be a party to the contract. This change would have to be agreed, confirmed in writing and signed by the Parties.                    | [2 marks]        |
|           | Clause 44 provides a process for accepting Defects where the <i>Contractor</i> and the <i>Project Manager</i> may each propose to the other that the Works Information be changed so that a Defect does not have to be corrected. It is for the <i>Contractor</i> to submit a quotation for this and this could lead to reduced Prices or an earlier Completion Date or both. | [2 marks]        |
|           | The other process in the contract that could lead to an earlier Completion Date is acceleration. This is dealt with in clause 36 and the quotation that the <i>Contractor</i> submits for acceleration comprises proposed changes to the Prices and a revised programme showing the earlier Completion Date (and any changed e.g. Dates).                                     | [2 marks]        |
|           | <b>Total</b>  | <b>[6 marks]</b> |

|  |                                   |                   |
|--|-----------------------------------|-------------------|
|  | <b>Total marks for question 5</b> | <b>[25 marks]</b> |
|--|-----------------------------------|-------------------|

|           | <b>Section 2 – Points for answer<br/>Question 6</b>   | <b>Marks</b> |
|-----------|---|--------------|
| <b>a)</b> |   |              |
|           | The <i>Contractor's</i> obligation is to Provide the Works in accordance with the Works Information (clause 20.1). If there is a constraint in the Works Information then such constraints must be complied with and shown on the Accepted Programme. There is no | [2 marks]    |

|  |   |                  |
|--|---|------------------|
|  | indication of any such constraint in this question so the <i>Contractor</i> is free to Provide the Works as it sees fit.  |                  |
|  | It would be practically impossible for any contractor to follow the Accepted Programme exactly as it is written, so the programme can never and will never be exact in showing the <i>Contractor's</i> intentions and what is actually happening on the project.  | [1 mark]         |
|  | That said, it is surely in everyone's best interests to keep the programme as up-to-date and as realistic as possible so if the programme seems out of date then clause 32.2 allows the <i>Contractor</i> or the <i>Project Manager</i> to instigate the requirements for a revised programme to be submitted. The <i>Supervisor</i> should talk to the <i>Project Manager</i> about whether or not a revised programme should be instructed. | [2 marks]        |
|  | <b>Total</b>  | <b>[5 marks]</b> |

| b) |   | Marks            |
|----|---|------------------|
|    | It is possible that these parts of the <i>works</i> also give the <i>Contractor</i> some concern so maybe first check the Accepted Programme to see if anything has been provided for in this from the <i>Contractor's</i> perspective. Under clause 40.3 the <i>Supervisor</i> may watch any test done by the <i>Contractor</i> . Also under clause 40.3 the <i>Contractor</i> and the <i>Supervisor</i> each notifies the other of the results of any tests or inspections. So this may be covered. | [3 marks]        |
|    | If this is not so covered, then it would be prudent for the <i>Supervisor</i> to discuss this matter with the <i>Project Manager</i> with a view to changing the Works Information accordingly to allow for such a hold point. This would be achieved via a <i>Project Manager's</i> instruction under clause 14.3 to change the Works Information and would result in a compensation event arising under clause 60.1(1).   | [2 marks]        |
|    | <b>Total</b>  | <b>[5 marks]</b> |

|    |  |                  |
|----|--|------------------|
| c) | Where there are <i>Contractor</i> designed works these are usually to be accepted by the <i>Project Manager</i> , if so required through the Works Information, and the implications of such acceptances are covered by clause 14.1. In this instance, the design is to be approved by an external organisation. These are called Others in the contract and defined in clause 11.2(10). | [2 marks]        |
|    | Clause 27.1 states that the <i>Contractor</i> obtains approval of its design from Others where necessary. It does not though state this has to be carried out before any construction, though it may be such a requirement in the requirements laid down by Others somewhere. Measures should be put in place to gain such approval as quickly as possible.                              | [2 marks]        |
|    | <b>Total</b>   | <b>[4 marks]</b> |

| d) |   | Marks            |
|----|---|------------------|
|    | The early warning process is detailed in clause 16. Clause 16.1 covers the matters that give rise to early warnings that must be notified by <i>Project Manager</i> and <i>Contractor</i> as opposed to those only notified by the <i>Contractor</i> if the <i>Contractor</i> so chooses. It is for the <i>Project Manager</i> to enter each early warning in the Risk Register.  | [1 mark]         |
|    | Either the <i>Project Manager</i> or the <i>Contractor</i> may instruct the other to attend a risk reduction meeting, under clause 16.2.  | [1 mark]         |
|    | Clause 16.3 gives 4 reasons for when an early warning must be notified, but does not say these are the only basis for notifying early warnings.   | [1 mark]         |
|    | In clause 16.4 the <i>Project Manager</i> revises the Risk Register to record the decisions made at each risk reduction meeting.  | [1 mark]         |
|    | Clause 16.1 names only the <i>Contractor</i> and the <i>Project Manager</i> as being able to notify early warnings under the contract. The <i>Supervisor</i> would have to speak with the <i>Project Manager</i> and get the <i>Project Manager</i> to notify any such early warnings.  | [1 mark]         |
|    | At the risk reduction meeting, the most important part of the early warning process is making and considering proposals for how the effect of the registered risks can be avoided or reduced and seeking solutions that will bring advantage to all those who will be affected.   | [1 mark]         |
|    | In this case, the sort of discussions would most likely concentrate on the technical aspects of this problem. Are there any time restrictions as to when such design must be approved? How long do the attendees think it might take? What relationship does the <i>Contractor</i> currently have with the particular organisation that will approve such design. Might it be worth having a follow up risk reduction meeting and inviting the external organisation along to get them to try and help solve the problem? As a result of answering these sorts of questions, then those attending the risk reduction meeting would decide what can be done to solve any problems that will bring advantage to all those who will be affected. | [2 marks]        |
|    | <b>Total</b>  | <b>[8 marks]</b> |

| e) |   | Marks     |
|----|---|-----------|
|    | It would be possible for the Parties to change the contract for this particular event under clause 12.3. That is probably a bit of overkill here though.  | [1 mark]  |
|    | Instead, in this scenario clause 43.4 should help here. It is for the <i>Project Manager</i> to arrange for the <i>Employer</i> to allow the <i>Contractor</i> access to and use part of the <i>works</i> which the <i>Employer</i> has taken over. The necessary access could be delayed until it gives the <i>Contractor</i> sufficient time to correct the | [2 marks] |

|  |  |                  |
|--|--|------------------|
|  | Defect within the <i>defect correction period</i> , which begins when the necessary access and use have been provided. |                  |
|  | <b>Total</b>   | <b>[3 marks]</b> |

|  |                                   |                   |
|--|-----------------------------------|-------------------|
|  | <b>Total marks for question 6</b> | <b>[25 marks]</b> |
|--|-----------------------------------|-------------------|

| <b>Section 2 – Points for answer</b> |   |                  |
|--------------------------------------|---|------------------|
| <b>Question 7</b>                    |   |                  |
| <b>a)</b>                            |   | <b>Marks</b>     |
|                                      | The Works Information is the place where any design of any parts of the <i>works</i> the <i>Contractor</i> is obliged to carry out is to be stated. This is the requirement of clause 21.1.   | [1 mark]         |
|                                      | Clause 21.2 deals with the submittal and acceptance process. Note, it only relates to the <i>Contractor</i> submitting the particulars of its design as the Works Information requires. Whilst the Works Information may provide for some <i>Contractor</i> design, it may well be the case that there is no submittal/acceptance process required i.e. the <i>Contractor</i> just designs and then builds that part of the <i>works</i> .  | [2 marks]        |
|                                      | If, however, the Works Information does require such <i>Contractor's</i> design parts to be submitted for acceptance, then this should be followed, noting that the last sentence of clause 21.2 puts a hold on the <i>Contractor</i> proceeding with the relevant work until the <i>Project Manager</i> accepts this design. Two grounds are stated for the <i>Project Manager</i> to use where the <i>Project Manager</i> does not accept the design submitted, and the relevance of acceptance according to clause 14.1 should be noted. | [2 marks]        |
|                                      | Clause 21.3 allows the design to be submitted in parts as stated and finally, if X15 is included then the <i>Contractor</i> will be deemed to use reasonable skill and care to ensure its design complies with the Works Information.   | [1 mark]         |
|                                      | <b>Total</b>  | <b>[6 marks]</b> |

| <b>b)</b> |  | <b>Marks</b> |
|-----------|--|--------------|
|           | The best starting point as <i>Project Manager</i> is probably to notify an early warning. Although the matter may not strictly fit within one of the clause 16.1 bullets, these provide a minimum set of obligations for notifying early warnings and the early warning process is likely to help the parties in their later deliberations.  | [2 marks]    |
|           | At this point the early warning matter is entered in the Risk Register and either the <i>Project Manager</i> or <i>Contractor</i> can instruct the other to attend a risk reduction meeting. It might well be a good idea to instruct the original designer to attend along with anybody else who should be at the meeting. This needs to be | [2 marks]    |

|  |   |  |
|--|---|--|
|  | agreed by the party not giving such instruction to attend the risk reduction meeting. |  |
|--|---|--|

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|--|--|------------------|
|  | At the risk reduction meeting, those who attend co-operate in seeking solutions that will bring advantage to all those who will be affected. Those attending can look at the <i>Contractor's</i> alternative proposals, consider the whole life implications of the alternative, consider the cost of the re-design, discuss timescales for re-design, ensuring any delay is minimal, considering any effects on the Accepted Programme, what the effect will be on the total Defined Cost ensuring there would be likely minimal abortive costs such as <i>works</i> already carried out or materials ordered, along with any other matter worthy of consideration. | [2 marks]        |
|  | The parties should consider who actually should carry out the re-design and who therefore should take liability for this. It is possible that this could become <i>Contractor-designed works</i> .   | [1 mark]         |
|  | <b>Total</b>   | <b>[7 marks]</b> |

| c) |   | Marks            |
|----|---|------------------|
|    | The <i>Project Manager</i> will need to instruct a change to the Works Information in accordance with clause 14.3.  | [1 mark]         |
|    | The change to the Works Information will be a compensation event under clause 60.1(1) because it is not a change to the Works Information provided by the <i>Contractor</i> for its design, which is what the 2 <sup>nd</sup> bullet of this clause states. The effect this has on the Prices, however, is dealt with in clause 63.11. This clause states that if the effect of the compensation event is to reduce the total Defined Cost and the event is a change to the Works Information, other than a change to the Works Information provided by the <i>Employer</i> which the <i>Contractor</i> proposed and the <i>Project Manager</i> has accepted, the Prices are reduced. | [3 marks]        |
|    | As the <i>Contractor</i> proposed the change to the Works Information provided by the <i>Employer</i> , then the Prices (target) are not reduced. The theory behind the Prices not reducing is that the expectation is the total Defined Cost will be reduced, which with the Fee added should hopefully be less than the target and the Parties should then benefit financially via the clause 53 <i>Contractor's</i> share calculations.  | [3 marks]        |
|    | <b>Total</b>  | <b>[7 marks]</b> |

| d) |   | Marks    |
|----|---|----------|
|    | The proposals were properly considered by all those parties who attended the risk reduction meeting and no doubt a number of other people who followed up on the decision to change the | [1 mark] |

|  |  |                  |
|--|--|------------------|
|  | Works Information. A good number of people will have looked over the change no doubt.  |                  |
|  | The compensation event did not itself lead to a change in the Prices, but the <i>Contractor</i> had revised obligations in terms of Providing the Works.   | [1 mark]         |
|  | The allocation of risk within the ECC remains with the Parties even where the Works Information is changed. Even though the proposal came from the <i>Contractor</i> , it is still able to notify a compensation event in this instance and seek a change to the Prices if applicable. The clause 60.1(12) compensation event is therefore still able to be relied upon by the <i>Contractor</i> but the <i>Contractor</i> will still need to demonstrate that all of the 3 bullets of this clause apply to the physical conditions encountered. | [2 marks]        |
|  | The <i>Contractor</i> needs to notify this matter as a compensation event to the <i>Project Manager</i> in accordance with clause 61.3 in a timely manner to avoid it being potentially time barred in the same clause.  | [1 mark]         |
|  | <b>Total</b>   | <b>[5 marks]</b> |

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|--|-----------------------------------|-------------------|
|  | <b>Total marks for question 7</b> | <b>[25 marks]</b> |
|--|-----------------------------------|-------------------|

| <b>Section 2 – Points for answer</b> |   |                  |
|--------------------------------------|---|------------------|
| <b>Question 8</b>                    |   |                  |
| <b>a)</b>                            |   | <b>Marks</b>     |
|                                      | This is an Option A contract and clause 50.2 says the amount due includes the Price for Work Done to Date. This is defined in clause 11.2(27) for Option A as being the total of the Prices for each group of completed activities and each completed activity which is not in a group. So, it will be the Activity Schedule that determines the Price for Work Done to Date. | [2 marks]        |
|                                      | In the compensation event process, the assessments for changed Prices for compensation events are in the form of changes to the Activity Schedule (clause 63.12). So, any compensation event becomes part of the Activity Schedule when it is implemented, which in turn is used to assess payments to the <i>Contractor</i> .  | [2 marks]        |
|                                      | In this case therefore, the <i>Contractor</i> will be paid the amount of the implemented compensation event. Since the <i>Project Manager</i> accepted the <i>Contractor's</i> quote of £15,000 plus the Fee, that is its amount and what the <i>Contractor</i> gets paid.  | [2 marks]        |
|                                      | Under clause 65.2, the assessment of a compensation event is not reviewed later if a forecast upon which it is based (for example, poor weather) is shown by later recorded information to have been wrong.   | [2 marks]        |
|                                      | <b>Total</b>  | <b>[8 marks]</b> |

|           |  |              |
|-----------|--|--------------|
| <b>b)</b> |  | <b>Marks</b> |
|-----------|--|--------------|

|  |   |                  |
|--|---|------------------|
|  | With Option D, compensation events are assessed in exactly the same way as Option A through clause 63.1 and again are not changed once implemented. The definition of Defined Cost is different between the two main Options, but otherwise the process is the same.  | [1 mark]         |
|  | With Option D contracts, the value of implemented compensation events is added to the Prices (the target). Compensation events therefore have no immediate effect on what the <i>Contractor</i> gets paid.  | [1 mark]         |
|  | In Option D, the Price for Work Done to Date in Option D is clause 11.2(29), which is different to Option A, and this says the <i>Contractor</i> is paid the total Defined Cost which the <i>Project Manager</i> forecasts will have been paid to the <i>Contractor</i> before the next assessment date plus the Fee. In this case it looks like it will be £3,000 plus the Fee, although we have no idea of what works and therefore cost the <i>Contractor</i> is inputting to the fencing works. | [2 marks]        |
|  | The <i>Contractor</i> will later pay or get a share of the difference between the original target together with all the implemented compensation events and the total Defined Cost plus Fee via the <i>Contractor's</i> share mechanism in the contract (clauses 53.5 to 53.8).   | [2 marks]        |
|  | <b>Total</b>  | <b>[6 marks]</b> |

| <b>c)</b> |   | <b>Marks</b>     |
|-----------|---|------------------|
|           | In main Option A, clause 63.12 states that assessments for changed Prices for compensation events are in the form of changes to the Activity Schedule. Compensation events are implemented when one of three instances occur in clause 65.1.  | [2 marks]        |
|           | So, the only way the compensation event finds its way onto the Activity Schedule is as a result of the compensation event being implemented. As none of the clause 65.1 instances have occurred, it cannot be included on the Activity Schedule and no monies can be paid for the additional works, even if they are completed which is not the case here anyway. | [2 marks]        |
|           | <b>Total</b>  | <b>[4 marks]</b> |

| <b>d)</b> |  | <b>Marks</b>     |
|-----------|--|------------------|
|           | In main Option A, correcting Defects caused by the <i>Contractor</i> (even though in this case it is by the Subcontractor) is not part of the definition of Defined Costs in clause 11.2(22). This is a <i>Contractor's</i> risk item and is not a separately recoverable cost through the clause 50.2 amount due payment process. | [2 marks]        |
|           | This will also not be a compensation event as there are no appropriate compensation events stated for this eventuality.  | [2 marks]        |
|           | <b>Total</b>   | <b>[4 marks]</b> |

| e)                                |   | Marks             |
|-----------------------------------|---|-------------------|
|                                   | In main Option A clause 11.2(27), the Price for Work Done to Date is the total of the Prices for each group of completed activities and each completed activity which is not in a group. A completed activity is one which is without Defects which would either delay or be covered by immediately following work. | [2 marks]         |
|                                   | If the Defect therefore would delay or be covered by immediately following work then no monies would be due until such Defect was rectified; otherwise, the £15,000 plus the Fee would be payable as provided for in the Activity Schedule.   | [1 mark]          |
|                                   | Total   | [3 marks]         |
| <b>Total marks for question 8</b> |   | <b>[25 marks]</b> |

## **Institution of Civil Engineers**

### **Examination for the ICE Advanced Certificate in Law and Contract Management (ACLCM) 2017**

#### **Module 3: (English and Scots Law)**

Monday 12<sup>th</sup> June 2017

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

There are four questions in Section 1 based on NEC3 Contracts and four questions in Section 2 is based on “sample” contractual provisions from familiar non-NEC contracts such as the ICC, FIDIC and JCT.

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 unmarked copies of JCT Design and Build 2016, ICC Conditions of Contract Measurement version, ICC Conditions of Contract for Design and Construct and ICC Conditions of Contract Target Cost Version August 2011 and NEC3 Engineering and Construction Contract (ECC), NEC3 Engineering and Construction Subcontract (ECS), NEC3 Engineering and Construction Short Subcontract (ECSS), NEC3 PSC.**

**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

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### Question 1 – Compulsory

Big Man Developments is building 2,500 units in a mixed use housing development. The project includes a huge amount of road and drainage infrastructure which Big Man put out to the market based on an NEC3 Option C contract with no amendments. Mr E Scrooge has been appointed *Project Manager* under an NEC PSC Form of contract with main Option A, which he has never read but he has a long working relationship with Big Man.

Nice and Sneaky Ltd were identified early on in the tender process as the preferred bidder and worked closely with Big Man's design team and Mr Scrooge to work up the final tender package. This includes a detailed Risk Register and a considerable amount of contractor design, particularly on the drainage. Nice and Sneaky also advised about the appropriate location for boreholes which eventually ended up in the Site Information of the 34 boreholes taken across the site:

- 5 boreholes identified significant amounts of industrial contamination. These were all along the length of an old rifle range that straddled the site; and
- 14 boreholes identified hard rock at 3m below ground level. The other 15 indicated that there would be firm clay to a depth of 18m. There is no discernible pattern to the level of rock. Clearly the level of rock head is highly variable and this is stated in the Site Information.

Nice and Sneaky are awarded the contract and begin work. Their drainage design is accepted by Scrooge and excavation begins. So do the problems. Nice and Sneaky's site team begin producing notifications of potential compensation events every time that they encounter rock. The risk reduction meetings become very fractious. Scrooge makes it clear that in his view, none of this is unexpected. None of the rock encountered is deeper than 3m below ground. That is merely consistent with the Site Information, so Nice and Sneaky should just get on with the work. Nice and Sneaky are adamant that this is all a great surprise to them and they should be paid. Nice and Sneaky are falling behind programme. The tit for tat continues for 3 months and eventually Nice and Sneaky notify Scrooge that the rock they have encountered is a compensation event and that Mr Scrooge has put Big Man in breach of contract because Scrooge did not come up with anything helpful in the Risk Reduction meetings.

**a) Advise Big Man on the contractual position? [15 marks]**

In the midst of this furore, Nice and Sneaky notify Scrooge of another issue. This time it is accompanied by a notification of a compensation event. This concerns the level of contamination along the line of the main drain run. Nice and Sneaky's design puts the majority of the drain run within the boundaries of the old rifle range and Nice and Sneaky have encountered a considerable amount of contamination. As part of the notification, they have alluded to the Risk Register.

This has the following item:

| Item | Risk                          | Indicator                          | Mitigation Measure | Risk Owner |
|------|-------------------------------|------------------------------------|--------------------|------------|
| 16   | Contaminated Material in Soil | Discovery of contaminated material | Site Investigation | Employer   |

The Risk Reduction meeting is due tomorrow. Scrooge has formed the view that the whole thing is ridiculous. It was Nice and Sneaky that picked the line of the drainage and the Site Information was clear that this area contained contamination

- b) Given that Scrooge will be privy to your answer to part a), advise him on the possible contractual position and on how he should prepare for the Risk Reduction meeting? [10 marks]**

## Section 1

### Question 2

On his way back from the party to celebrate the successful completion of a huge pharmaceutical development project on the outskirts of Ballygobackwards for Drugs-r-us, the *Project Manager* was congratulating himself on the successful delivery when he gets an email on his mobile telephone from the *Employer's* American accounts department. The Finance Director wants to speak to him the next day.

The multimillion dollar investment for Drugs-r-us has been delivered under an NEC3 Option C contract and the concept was to rely on the *Contractor's* expertise because it has a long running relationship with the *Employer* internationally. So the *Employer's* involvement was "light touch", which translated itself into considerable disinterest. The use of the NEC was something new to the *Employer* and so far the management team had been delighted by the results. The accounts people had not troubled the *Project Manager* at all during the 2 year contract. The preliminary assessment of the *Contractor's* share at completion was not contentious although it had not resulted in the anticipated saving. On the other hand, the *Project Manager* is looking forward to a considerable payment under his NEC3 PSC Option C contract because things have gone so smoothly that his costs are well below his target.

However, when the *Project Manager* speaks to the finance director, he learns that the head office finance team have just finished carrying out a detailed audit of the *Contractor's* costs, including payments made to Subcontractors and suppliers. The audit team has discovered a number of substantial anomalies in large payments made to a certain Subcontractor. They have concluded that this Subcontractor has been paid nearly \$10 million more than he was entitled to under the terms of his Subcontract with the *Contractor*. The Finance Director informs the *Project Manager* that he is to deduct the amount in question from the *Contractor* along with interest on the overpayment.

- a) **Explain if the *Project Manager* is bound to accept the instructions of the Finance Director and reduce the amount due to the *Contractor*?** [5 marks]

When the *Project Manager* reviews the information from the Finance Director he comes to the conclusion that the Finance Director is correct. The Subcontractor has been paid more than the terms of his Subcontract allow. He notifies the *Contractor* that he intends to deduct monies and re adjust the *Contractor's* share. It will mean the *Contractor* having to pay back a substantial sum.

The *Contractor* is less than pleased. He does not dispute that overpayments may have been made but makes the following points.

- It is the *Project Manager*, not the *Employer*, who decides what is due under the contract and the auditor has no role to play and therefore cannot usurp the *Project Manager's* previous decision.
- In reliance on the amount shown in the *Project Manager's* previous certificate the *Contractor* has paid the full amount to the Subcontractor, who has subsequently

ceased trading. The *Contractor* therefore cannot now recover any of the monies from the Subcontractor and therefore it would be inequitable for the *Employer* to recover the costs from the *Contractor*.

**Advise the *Project Manager* on the following, giving your reasons**

- b) Whether or not in such circumstances he is entitled to deduct the amounts from what is otherwise due to the *Contractor*. [12 marks]**
- c) Whether or not he would be entitled to deduct interest on the overpayment. [8 marks]**

**Section 1**

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**Question 3**

A project has been procured using an NEC3 Option A contract. The contract includes Option X7 and Y(UK)2 and the delay damages are set at £1,000,000 a day.

During the construction one of the *Contractor's* sub-contractors allowed 50 number 1.2 m diameter steel pipe sections to roll out of the Site, down a steep bank and on top of *Employer's* offices which are beside the Site. Luckily the accident happened at night and no one was hurt. However, the offices are destroyed and the *Employer* calculates repairs will cost £150,000 and they have lost £200,000 of lost sales because the offices will be out of action for 3 weeks.

- a) Describe what actions the *Contractor*, *Project Manager* and *Employer* should take. [15 marks]**

During construction the *Contractor* encounters a series of problems with ground conditions which delayed progress by 2 months. This is notified as a compensation event under Clause 60.1(12) and provides a quotation including the 2 month delay. However, the *Project Manager* notifies the *Contractor* that he disagrees it is a compensation event at all because it does not satisfy the test in Clause 60.1(12). The *Contractor* refers the matter to adjudication. The *Adjudicator* decides that it was a compensation event and decides that the *Contractor* is due 6 weeks extension to the Completion Date. However, the *Contractor* manages to progress the *works* faster than expected and submits a programme some months after the adjudication indicating that he will be finished on the original Completion Date. The *Project Manager* accepts this programme.

However, not long after that the *Contractor* suffers a series of problems including a shock insolvency of a key subcontractor. This delays the *works* again. Eventually he finishes 8 weeks later than the original Completion Date for the contract.

- b) Describe the process for withholding delay damages and identify the sum to which the *Employer* is entitled. [10 marks]**

## Section 1

### Question 4

The project is an NEC3 Option C Contract for a water pumping station. A value engineering exercise led the *Project Manager* and *Contractor* to agree that the *Contractor* would use a Cool-o-pump “mega-cool” pump which is a cutting edge water pump. It comes with an integrated software package that was trialled by the *Employer* as part of the value engineering and worked seamlessly with the *Employer’s* rather dated facility management software. The *Project Manager* and *Supervisor* are contracted under NEC3 PSC Option C contracts.

The project is now at commissioning stage with the pumps installed. Mr Official the *Supervisor*, has however noted some things that in his view are not in accordance with the Works Information. He has noticed particularly that the Works Information says that all installed plant “*must have assembly manuals to allow the Employer’s maintenance team to disassemble and reassemble the plant along with all parts identification and repair and/or maintenance systems*”. The manuals provided are only user manuals and there is no information which would make possible repair and/or proper maintenance. The *Contractor* has said that he has passed on everything that he has. Cool-o-pumps have said that they will provide servicing and maintenance for 5 years for free and thereafter they are happy to enter into a contract to maintain the pumps.

- a) **What should the *Supervisor* do and what options are available to the *Contractor*, *Project Manager* and *Employer*?** [7 marks]

The *Employer* is adamant that he must be able to repair the pumps in house and will not accept external interference in the maintenance of the pumps, which he says are mission critical to his business. He commissions an investigation of the pumps by a rival supplier who spends 3 weeks taking one of the pumps apart and analysing the systems and produces a comprehensive manual for the *Employer*. No sooner is the manual printed than Cool-o-Pumps launches an adjudication against the *Contractor* for infringement of the pumps patent and breach of a clause in Cool-o-Pumps terms of sale, which protect the integrity of the pump. The *Contractor* is at a loss to understand what he should do next.

- b) **What should the *Contractor* do and what remedies might he have available under the NEC3 contract with the *Employer* and what actions should he take under that contract?** [7 marks]

Meanwhile, the *Employer's* entire facilities management system has crashed. The computer system has become completely corrupted and the resultant damage to computer hardware and system downtime will cost millions of pounds to remedy. The virus which has caused the problem has been traced to the Cool-o-pumps software.

- c) **Advise the *Employer* on what options he has to pursue a financial remedy for this from the *Project Manager, Supervisor and Contractor*?** [11 marks]

## Section 2 – Compulsory question

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### Question 5

Main contractor McBodgers carried out work at Ballygobackwards Water Treatment Works to install 600m of water main beneath Ballygobackwards. Drillbit carried out directional drilling as subcontractor to McBodgers. The subcontract tender sum was approximately £500k.

Unforeseen ground conditions were met by Drillbit, and a dispute arose over contractual provisions for recovery of costs and losses due to these.

McBodgers had invited Drillbit to submit a tender on the basis of the IChemE Yellow Book Form. Drillbit submitted a tender but using its own form of contract, not the IChemE contract requested by McBodgers. The two parties met to discuss Drillbit's tender and agreed some of the terms but they could not agree on some other terms, including liquidated damages provisions which Drillbit vehemently refused to accept.

McBodgers then re-sent Drillbit a proposed contract, once again incorporating the IChemE Yellow Book Form. Drillbit explained that it would send the proposed contract to its head office for approval. The proposed contract contained liquidated damages provisions for late completion at the rate of £25k per week or part thereof. This was the same rate as that contained in the main contract.

Drillbit did not confirm approval of the contract. However, it proceeded with the work and claimed additional payment and an extension of time for the delay and disruption to its work. It eventually completed 7 weeks and 1 day later than the duration agreed by the parties.

Drillbit's terms and the IChemE Form contained significantly different provisions for ground conditions claims and delay/disruption claims, hence the argument. McBodgers had made an amendment to the IChemE Form removing the clause referring to unforeseen ground conditions.

McBodgers argued that under the IChemE contract with its amended terms there are no provisions for an extension of time in this scenario and therefore 8 weeks liquidated damages were due. Drillbit disagreed.

**Knowledge of the IChemE Yellow Book contract is not needed to answer this question.**

- a) Which of the two parties' terms, if any, apply to this contract? Explain your answer. [4 marks]
- b) Explain whether liquidated damages are applicable to Drillbit's late completion. How should the quantum of such deductions be established? [7 marks]

Drillbit's works coincided with structural cracking in a nearby expensive house. The house's owner, Mr Crilly, blames the directional drilling for the cracking and is seeking £100,000 to put right the problems. An email from Drillbit to McBodgers on this subject said, "*It's probably our fault but I'm not giving that idiot £100k, it will be £10k at most*". The email was headed "without prejudice" and Drillbit now says that the email can't be presented in any subsequent legal action. Drillbit now denies any liability in the matter.

- c) **What effect, if anything, does the label "without prejudice" have in correspondence such as this email?** [3 marks]
- d) **What obligations do McBodgers and Drillbit have to Mr Crilly? What must Mr Crilly demonstrate in order to secure any payment from either of the contractors here?** [7 marks]
- e) **What, if any, type of insurance cover might be relevant here? Whose policy should pay for any compensation?** [4 marks]

**Section 2**

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**Question 6**

- a) With particular regard to valuation/certification and extension of time matters under the ICC Infrastructure Conditions of Contract, discuss the purpose and importance of the Engineer's impartiality in contracts and explain its basis in law. [10 marks]
- b) Discuss the Engineer's role in dispute resolution under the ICC Infrastructure Conditions of Contract [5 marks]
- c) Discuss and contrast the dispute resolution forums available under the ICC Infrastructure Conditions of Contract, with reference to examples of disputes suitable or unsuitable for each forum. [10 marks]

**Section 2**

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**Question 7**

- a) **Discuss the principal notice provisions contained in the ICC Infrastructure Conditions of Contract, Measurement Version August 2011, the purpose of such provisions and the effects of the Engineer's or the Contractor's non-compliance with such provisions.** [25 marks]

## Section 2

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### Question 8

Main Contractor, Cheepbuild had a £25m contract with Ballygobackwards Police Authority (BPA) to design and build a new police station. The contract was formed using the JCT Design and Build 2016 form of contract. Some excerpts from that contract are shown on a following page. **Further knowledge of the JCT contract is not required to answer this question.**

The station has been completed and in use for about 18 months. It was built on land with a known history of movement, and mine workings are rumored to lie underneath. Cheepbuild's Contractor's Proposals, submitted with its tender, included piled foundations for the station and all of its external works and car parks. At post-tender value engineering sessions Cheepbuild was persuaded by BPA to omit the piling from all but the main building and its tender price was reduced by £350k to reflect the omitted work. The car park is now heavily subsided and there are cracks, ridges and other trip hazards in place. Adjacent premises, on a retail park, are all thought to be piled.

BPA wants the car park to be rebuilt so that it may be used safely. Relying on Clause 10.2 it says that the car park is not fit for purpose and should be rectified.

Cheepbuild refuses to do anything stating that it has designed the building with reasonable skill and care as per the specification. In addition it refers to the Third Recital saying that the Employer approved its initial design which contained no piling for the car park.

- a) **Describe the legislative and contractual considerations that apply to the standards of design and construction of the car park.** [7 marks]
- b) **Explain what Cheepbuild's obligations are to BPA in respect of the car park design.** [7 marks]

Cheepbuild has refused to return to site to rectify other building defects saying that it has no further obligations following the end of the 12 months defects' provisions.

- c) **Can an Employer such as BPA require a Contractor to return after the defects' provisions have been completed? Explain your answer.** [6 marks]

Cheepbuild has another contract with BPA; it is building another police station in the neighbouring town. BPA is planning to deduct £5m from payments due on that project to pay for remedial works at Ballygobackwards.

- d) **Is BPA able to recover an amount in this way? Explain your answer.** [5 marks]

**Excerpts from JCTDB16 Contract**

**Third Recital**

“the Employer has examined the Contractor’s Proposals and, subject to the Conditions, is satisfied that they appear to meet the Employer’s Requirements.”

**Clause 2.17.1**

“...the Contractor shall in respect of any inadequacy in such design have the same liability to the Employer, whether under statute or otherwise, as would an architect or other appropriate professional designer who holds himself out as competent to take on work for such design...”

**Amendments to the standard provisions of JCTDB16**

**Clause 10.1 - Remove 2.17.1 entirely.**

**New Clause 10.2** “The Parties agree that the police station, once built, shall comply in all respects with the operational requirements of a police force.”

**Specification**

“The design of this project shall be done with reasonable skill and care as per Clause 2.17.1 of the JCTDB16 contract.”

### ICE Advanced Certificate in law and Contract Management

| <b>Module 3 - Section 1 – Points for answer</b> |  |                   |
|---|--|-------------------|
| <b>Question 1</b>                               |  |                   |
| <b>a)</b>                                       |  | <b>Marks</b>      |
|   | <p>This question concerns the compensation event and risk reduction systems for unforeseen physical conditions. Candidates should demonstrate their understanding of Clause 60.1(12) combined with Clauses 60.2 and 60.3, both of which should be mentioned. It also requires candidates to consider the implications of a <i>Project Manager</i> and <i>Contractor</i> that fail to engage constructively in the early warning and risk reduction process. Candidates should identify the requirements of Clause 16.3 and discuss the possibility of this giving rise to a compensation event under Clause 60.1(18). The extent to which this arises by a fault of the <i>Contractor</i> (61.4) should be discussed and the implications of quasi-consensual nature of Clause 16 are likely to be relevant to the analysis. The possibility of a time bar by Clause 61.3 should also be considered.</p> | <b>[15 marks]</b> |
| <b>b)</b>                                       |  |                   |
|   | <p>This question deals with the mechanisms in Clause 16 but is specifically concerned with the implications of the entry in the Risk Register. Candidates should consider Clauses 60.1(14) and 80.1. This will allow candidates to develop their understanding of the argument about what amounts to an “<i>Employer’s Risk</i>” for the purpose of Clause 60.1(14). The answer may conclude that the contractual interpretation is not settled. Dogmatic answers in one direction or the other would need to be well supported.</p>   | <b>[10 marks]</b> |
|   | <b>Total</b>   | <b>[25 marks]</b> |

| <b>Section 1 – Points for answer</b> |  |                   |
|--------------------------------------|--|-------------------|
| <b>Question 2</b>                    |  |                   |
| <b>a)</b>                            |  | <b>Marks</b>      |
|                                      | <p>Candidates should realise that is the <i>Project Manager</i> who decides what is payable to the <i>Contractor</i> using the terms set out in the contract for calculating such payments. He should not allow himself to be “instructed” by others as to what that amount should be.</p> <p>The candidates should be aware that if the <i>Employer</i> or <i>Contractor</i> disagrees with the <i>Project Manager’s</i> assessment of what is due to the <i>Contractor</i> then either of them can and should use the dispute resolution procedures in the contract, which will depend upon which dispute resolution option has been chosen.</p>   | <b>[5 marks]</b>  |
| <b>b)</b>                            |  |                   |
|                                      | <p>Candidates need to be aware, as stated above, that it is up to the <i>Project Manager</i> to make his own decision as to the amounts due under the contract.</p> <p>Candidate should explain the Clauses that dictate what the <i>Contractor</i> is paid in an Option C contract by reference to them.</p> <p>Clause 50.2,</p> <ul style="list-style-type: none"> <li>c) the definition of Price for Work Done to Date in Clause 11.2(29),</li> <li>d) the definition of Defined Cost in Clause 11.2(23), and</li> <li>e) the definition of Disallowed Cost in Clause 11.2(25)</li> </ul> <p>From these Clauses the candidates should reach the conclusion that a payment to a Subcontractor in excess of that required by their subcontract are Disallowed Cost that should be deducted from Defined Cost, and therefore from the amount due to the <i>Contractor</i>.</p> <p>Candidates should go on to explain that the <i>Project Manager</i> had wrongly assessed the Price for Work Done to Date in his previous assessments and that Clause 50.5 requires the <i>Project Manager</i> to correct this in a later payment certificate.</p> <p>Candidates should explain that this correction can be made at any time and that it is irrelevant as to whether or not the <i>Contractor</i> has paid the Subcontractor. The risk that the <i>Contractor</i> overpays a Subcontractor and is then unable to recover that overpayment is therefore a <i>Contractor’s</i> risk in an Option C contract, as it is with an Option A contract, because of the wording of Disallowed Cost. It is not therefore a matter of being “equitable” or “inequitable”. Candidates should explain when this assessment should be made and certified.</p> | <b>[12 marks]</b> |
| <b>c)</b>                            |  |                   |
|                                      | <p>Candidates should explain that clause 51.3 allows for payment of interest on any amount corrected by the <i>Project Manager</i> in a later certificate in relation to a mistake. Clause 51.3 does not limit the payment of interest to one or other of the Parties. By reading the Clause as a whole it is clear</p>  | <b>[8 marks]</b>  |

|  |   |                   |
|--|---|-------------------|
|  | <p>that the payment is to be made by whichever Party benefited from the original mistake.</p> <p>In this case the <i>Contractor</i> benefitted and has had the use of the additional monies he has been paid, albeit that he passed them on to his Subcontractor. Therefore Clause 51.3 requires that interest be added to the amount deducted from the <i>Contractor's</i> assessment. Candidates should also explain how this interest would be calculated.</p> <p>Candidates should point out that, unlike other contracts, it is the <i>Project Manager</i> who calculates such interest and includes it in his assessment of the amount due under the 2<sup>nd</sup> or 3<sup>rd</sup> bullet of Clause 50.2.</p> <p>Candidates should explain that the amount of interest will not be included within the figures for calculating the Contractor's share under Clause 53.</p> |                   |
|  | Total   | <b>[25 marks]</b> |

|           |   |                   |
|-----------|---|-------------------|
|           | <b>Section 1 – Points for answer<br/>Question 3</b>   |                   |
| <b>a)</b> | <p>The answer should Identify that, as far as the <i>Employer</i> is concerned, this is a risk that is the <i>Contractor's</i> under Clause 81.1. It should include the <i>Contractor's</i> responsibility for its Subcontractor and that defaults of the Subcontractor are <i>Contractor</i> risks. It could include that the event is not a compensation event and so there is no change to the prices or time, it is (or should be) covered by the <i>Contractor's</i> third party insurance as set out in the third row of the Insurance Table and that the <i>Contractor</i> indemnifies the <i>Employer</i> for his risks (per Clause 83.1) and therefore has to bear the cost of any excess in the insurance policy (per Clause 85.4). Candidates should mention that the <i>Project Manager</i> should take any action within the Risk Register and his obligation to consider the matter in assessing the PWDD. The <i>Employer</i> should get proper proof for his losses and can withhold payment only by operation of Clause Y(UK)2.3</p> <p>Candidates should also discuss the <i>Employer's</i> loss for profit being beyond the Reasonable contemplation of the parties, quoting relevant case law and discuss the implications of the “joint names” insurance and identify that the indemnity provisions are designed to avoid failing to recover losses.</p> | <b>[15 marks]</b> |
| <b>b)</b> | <p>Answers should identify that the Completion Date decided by the <i>Adjudicator</i> changes the Completion Date despite any accepted programme and identify that the insolvency of a subcontractor is a <i>Contractor</i> risk event and delays caused by it are not compensation events. The candidate could also include the obligation on the <i>Project Manager</i> to reduce the PWDD in his assessment for payment by the delay damages per X7.1 and mention the requirement for the delay damages to be a genuine pre-estimate and not a penalty; and discuss the law with regard to penalties.</p> <p>Candidate might discuss whether the amount of delayed damages seem very high and might be regarded as a penalty; Although without knowing the value of the contract the scale is hard to judge.</p> <p>The answer should also discuss the risk reduction process in respect of <i>Contractor</i> defaults and the possible methods of co-operation. There are not likely to be many. It could cover the law on what damages, if any, may be recovered if the delay damages are found to be a penalty and that the <i>Project Manager</i> has no discretion and should deduct the amount stated in the contract.</p>   | <b>[10 marks]</b> |
|           | Total   | <b>[25 marks]</b> |

| <b>Section 1 – Points for answer</b> |   |                   |
|--------------------------------------|---|-------------------|
| <b>Question 4</b>                    |   |                   |
| <b>a)</b>                            |   |                   |
|                                      | Concerns defect identification and correction. The answer should review The contractual definition of a defect (Clause 11.2(5)) and identify that the precise instructions and commitments in the “value engineering” exercise need to be examined. Whether there is a conflict in the Works Information as a result of the instruction to use Cool-o-pumps amends the original Works Information is relevant as is the incorporation of any limitation in the scope of the service that is implied by the pumps’ use. Particularly whether the requirement for assembly manuals were waived. However, the answer should conclude that this is not something for the <i>Supervisor</i> who should issue a notification of a defect under Clause 42.2. it would then be for the Contractor to seek an instruction resolving an ambiguity under 17.1 (if one might exist) or for the Project Manager and Contractor to resolve the Defect either by correction or acceptance under Clauses 43, 44 or 45. The use of risk reduction and Clause 16 may be relevant. Various options are open to the <i>Employer</i> from acceptance to outright rejection. Clause 10.1 may be relevant. | <b>[7 marks]</b>  |
| <b>b)</b>                            |   |                   |
|                                      | Requires an understanding of the obligations on the <i>Contractor</i> under the NEC3 Form. The difficult position he finds himself in with his supplier is not Caught by the provisions of the main contract except if they are back to back which seems unlikely. Candidates may note that the <i>Contractor</i> is innocent of the breach since it was carried out by the <i>Employer</i> and he is not the <i>Employer’s</i> agent. It could increase the <i>Contractor’s</i> costs and since it is a supplier, it may be caught by the definition of Defined Cost under Option C. This could be explored. The answer will need to be clearly structured and demonstrate an understanding of privity of contract issues.   | <b>[7 marks]</b>  |
| <b>c)</b>                            |   |                   |
|                                      | Examines the remedies for defective work and Clauses 81 and 82. The requirement of the <i>Contractor</i> to provide an indemnity and repair damage to the works is relevant. Although it is not clear if the damage is beyond the <i>works</i> . Therefore the extent of liability is important. Some discussion of insurance is also important.  | <b>[11 marks]</b> |
|                                      | Total   | <b>[25 marks]</b> |

| <b>Module 3 - Section 2 – Points for answer</b> |   |                  |
|---|---|------------------|
| <b>Question 5 – Compulsory</b>                  |   |                  |
| <b>a)</b>                                       |   |                  |
|   | Explanation needed that this is a 'battle of the forms' situation and why the IChemE Yellow Book terms included in the contract documents provided by McBodgers, apply. i.e. that the most recent offer was made by McBodgers using the IChemE Form and that Drillbit, by its conduct, accepted that offer when it started work on site, without further protest. | <b>[4 marks]</b> |

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|-----------|--|-------------------|
|           | The discussions at the meetings are irrelevant due to the parol evidence rule.   |                   |
| <b>b)</b> |  |                   |
|           | Drillbit now has no entitlement to an extension of time for unforeseen ground conditions. Having finished late the damages become due. 8 weeks' LAD's are due because of the amount per week <u>or part thereof</u> . Answers should contain a comment about whether replicating the main contract LAD's rate is the best thing for a main contractor to do. Reference to up-to-date case law ( <i>Makdessi &amp; Parking Eye</i> ) needed re the quantum. | <b>[7 marks]</b>  |
| <b>c)</b> |  |                   |
|           | Explanation re: the Without Prejudice label and that, on its own, it has no effect. Does it have effect here? Is the email a genuine attempt to resolve the dispute?   | <b>[3 marks]</b>  |
| <b>d)</b> |  |                   |
|           | Recognition needed that this is not entirely a contractual issue. Law of tort, duty of care owed by both firms (and the Employer) to Mr Crilly. When is a duty of care due? What has to be shown to be successful in such a claim?   | <b>[7 marks]</b>  |
| <b>e)</b> |  |                   |
|           | Public liability (or third party) insurance would apply here. Likely contractual matrix would have stepped down any requirements to Drillbit to provide insurance. A claim between £10k and £100k is likely to fall within the limit of liability of any policy.   | <b>[4 marks]</b>  |
|           |  |                   |
|           | Total  | <b>[25 marks]</b> |

|  |  |                   |
|--|--|-------------------|
|  | <b>Section 2 – Points for answer<br/>Question 6</b>  |                   |
|  | <b>The candidates should;</b>  |                   |
|  | <ul style="list-style-type: none"> <li>• Be aware of and refer to Clause 2(8) of the ICC Conditions.</li> <li>• Be aware of the duty for the Engineer’s Representative or other delegated person to also act impartially.</li> <li>• Discuss in general terms the reasons for such impartiality.</li> <li>• Offer opinion on the benefits of the Engineer complying with this obligation.</li> <li>• Discuss the difficulties the obligation to be impartial brings in real life.</li> <li>• With regard to valuation/certification and extension of time matters, identify the specific duties placed on the Engineer to act impartially.</li> <li>• Discuss the possible effects and contractual/legal consequences of the Engineer’s failure to act impartially in each respect.</li> <li>• Discuss in greater depth the purpose of Clause 2(8).</li> <li>• Discuss in greater depth the position of the parties and the possible legal consequences when the Engineer does not act impartially in respect of valuation/certification duties and his duties under Clause 44.</li> <li>• Discuss the increase in legal actions against Engineers and the effect this may have on their compliance with the duty to act impartially.</li> </ul> | <b>[25 marks]</b> |

|  |  |                   |
|--|--|-------------------|
|  | <b>Section 2 – Points for answer<br/>Question 7</b>  |                   |
|  | <b>The candidates should;</b>  |                   |
|  | <ul style="list-style-type: none"> <li>• Understand the breadth and nature of the various notices required to be given in the Conditions by both the Engineer and the Contractor.</li> <li>• Discuss the purpose of the identified notice provisions in the Conditions.</li> <li>• Be aware that under Clause 68 (and Clause 1(6)) notices are to be in writing.</li> <li>• Identify and briefly discuss the principal notice provisions contained in the Conditions, relevant to the Engineer and the Contractor.</li> <li>• Be aware of and discuss (some of) the provisions at Clauses 7(3), 12, 44, 46(1), 48, 52, 53, 60(9) (10), 66 and 68.</li> <li>• Discuss the effects of the Engineer’s or the Contractor’s non-compliance with notice provisions.</li> <li>• Discuss in greater depth the nature and purpose of the principal notice provisions in the Conditions.</li> <li>• Consider whether any notice provisions in the Conditions constitute condition precedents to other rights (i.e. to payment or extension of time) (see Clause 7(3), Clause 53(5)).</li> <li>• Discuss in greater depth the effects of the Engineer’s or the Contractor’s non-compliance with notice provisions.</li> </ul> | <b>[25 marks]</b> |
|  | Total  | <b>[25 marks]</b> |

|           |  |                   |
|-----------|--|-------------------|
|           | <b>Section 2 – Points for answer<br/>Question 8</b>  |                   |
| <b>a)</b> |  |                   |
|           | Contract contains inconsistent obligations. Is it RS&C or FFP? Contract interpretation points; (i) Contra proferentem, (ii) Amendment to standard form taking precedence over standard terms. Does the term in the specification have relevance?<br>Statute – Supply of Goods and Services Act 1982. Reference to Eon v MT Hojgaard, such obligations are not necessarily mutually incompatible.   | <b>[7 marks]</b>  |
| <b>b)</b> |  |                   |
|           | Whilst the piling was removed at the value engineering stage, agreement not to use piling at pre-contract stage did not relieve Contractor of his obligations to provide design of the appropriate standard. Whether the required standard was RS&C or FFP, the lack of piling or other ground support has meant that the design doesn't reach either standard. Knowledge of poor conditions and of piled foundations in adjacent buildings should have alerted designers to the risk. Cheepbuild therefore owes an obligation to BPA to rectify the defective works | <b>[7 marks]</b>  |
| <b>c)</b> |  |                   |
|           | Contractor's obligations to rectify defects don't stop (in this case) 12 months after completion. Reference to Limitation Act (in E&W). Be careful for any candidate answering under Scots law, the situation is similar but not identical. 6 years for simple contract, 12 years for deed. Necessary to demonstrate breach by the Contractor to obtain damages. So yes, BPA can require Cheepbuild to return. Reference to designers' PI insurers?  | <b>[6 marks]</b>  |
| <b>d)</b> |  |                   |
|           | Issue of set-off and whether it would be operative here. Discussion as to when set off is possible. Random demand for £5m wouldn't apply in any case, the sum due would need to be demonstrated. Is a claim on another contract sufficiently close to being successful? Probably not. These two stations are being built under two transactions, not one. Would it be manifestly unjust to allow such set-off?   | <b>[5 marks]</b>  |
|           | Total  | <b>[25 marks]</b> |