Institution of Civil Engineers

# ICE Law and Contract Management Examinations

## Examiner's Report 2013

**ICE Law and Contract Management Examinations**

**Contents**

**Moderator's Report**

The results this year were slightly below the recent averages achieved, but the success percentage for Modules 1 & 2 was still encouraging as was the increased number of candidates sitting the Modules. However, disappointingly this year Module 3 attracted only three candidates all of whom unfortunately failed to achieve the required pass mark. It is recognised that this is not an easy exam. It requires candidates to have considerable professional experience and a good knowledge of two forms of contract some of which necessarily cannot be gained by study alone.

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

The marking structure usually allows a number of marks for identifying the principles and the remainder for correctly applying them. Future candidates would do well to tailor their answers to the marks on offer and also ensure, to an extent, that the length of each answer is proportionate to the available marks. It is also useful to list the key points needing to be addressed in each question before attempting the detailed written answer. The only reason for repeating parts of the question or quoting contractual clauses is to reach a conclusion. It is the conclusion that gets the mark.

Of the marks available it is usually easier to obtain the first mark than the last. It is disappointing to see a candidate provide a good answer to three questions and not answer a fourth at all; easy marks have been wasted. It must be worth spending time providing at least a short answer to the last question than none at all. Devising a plan at the outset, by dividing up the available time approximately equally for all the questions requiring to be answered, can also assist in maximising the number of marks to be secured.

It is worth again reminding candidates to read and answer the question very carefully. Some interesting dissertations on the wrong topic are sometimes provided; often because the principle has been misconstrued or a fact in the question missed.

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 earnestly hope that you will not be deterred from sitting the exam on a future occasion.

Finally, all the candidates, whether or not they were successful this year must 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. Accordingly, 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 contracts.

**Examiner's Report**

**Pass marks**

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

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

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

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

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

## Module 1

### Section 1

#### General comments

The majority of candidates passed this section, although the pass rate was lower than last year.

The main areas where candidates fell down were by failing to properly apply case law and failing fully to consider the issues. Amongst those candidates who did refer to case law a number wasted a significant amount of time setting out the facts of the case in detail, rather than simply applying it to the question.

Most candidates demonstrated a very good understanding of the legal issues and the very best answers contained sensible consideration of the application of those issues to the facts.

#### Question 1

This was the most popular question and 75% of candidates obtained a pass.

a) A number of candidates failed to identify that this question required them to consider whether Chris had a claim for breach of contract and considered whether there were grounds for misrepresentation. Whilst those who correctly applied the law in relation to misrepresentation were given marks they would otherwise have obtained under question b) some candidates missed out on marks by failing to consider whether the statements were contractual terms. Those who did consider the correct issues tended to answer this question well.

b) This question was generally answered well. Fuller answers considered the various types of misrepresentation and the relevant tests and remedies associated with them.

c) Most candidates correctly identified that this question concerned claims for loss of amenity. Better candidates considered the application of the relevant case law to the facts.

#### Question 2

Less than 70% of the candidates who answered this question obtained a pass. Surprisingly few candidates identified that this question focussed on the test in Hadley v Baxendale.

a) Most candidates reached sensible conclusions in relation to the four claims. Some candidates incorrectly concluded that Perfect Pins could not be liable for items 2 and 3 because there was no contract between Perfect Pins and Football Logos. Better answers fully applied the relevant case law to each of the claims before reaching a conclusion.

b) Most candidates correctly identified that this question concerned mitigation, but a number of candidates failed to correctly cite the relevant case law.

c) This question concerned consideration and the best candidates applied the case law in relation to past consideration and considered whether Brilliant Badges would have obtained a “practical benefit”.

#### Question 3

This was the least popular question in this section and approximately 75% of candidates who attempted it obtained a pass.

a) Candidates who scored well considered whether the obligation to deliver the freezers within 6 months was a term or a condition of the contract and the relevance of time being of the essence.

b) The main area where candidates struggled on this question was in failing to identify that Fresco could be in repudiatory breach itself. Better candidates also considered either in this question or in part a) whether Fresco had prevented Superfreeze from performing its obligations.

c) This question was generally answered well, although a number of candidates failed to properly consider and apply the relevant case law on liquidated damages.

d) Most candidates acknowledged that the contract may well contain express terms in relation to sub-contracting. Better answers considered whether this was a contract for personal performance.

e) Very few candidates properly considered the case law in relation to entire contracts (Cutter v Powell) or whether or not Superfreeze could claim in quantum meruit.

## Section 2

### General comments

Candidates submitted a wide range of scripts; however with a handful of notable exceptions, the standard of the answers was disappointing. Only 57% of candidates achieved an overall mark over 40%; 37% over 50%; and only 2 candidates scored over 70%. However, these statistics do not do the candidates' efforts justice, because far too many were let down by poor examination technique. As an examiner it was exceedingly frustrating to read scripts where the candidate demonstrated an understanding of legal principle, but made no attempt to set out their understanding in a manner to attract good marks. Answers such as "there is a case about this", shared the candidate's frustration at inadequate preparation and technique with the examiner, but won no marks.

Those candidates returning the best scripts demonstrated that with good preparation and clear thought it was entirely possible to score very highly. At the other end of the scale, candidates were unable to distinguish tort from contract, and repeatedly conflated contract and tort principles.

A lesson to future candidates is that when answering tort questions look for answers in the law of tort and you are less likely to waste time. No marks are awarded for demonstrating knowledge of an area of law if it bears no relation to the question or the module being examined.

Candidates that scored well explained the application and relevance of the authorities to the facts. However, some very good answers demonstrated an understanding of the case law but did not provide any case names at all. Accordingly, marks were lost. Candidates must be taught that whilst it is not essential to be able to rote-learn case names, some cases, such as *Donaghue v Stevenson, Hedley Byrne v Heller* and *Rylands v Fletcher*, are very much part of the basic vocabulary of this area of law.

Causation and loss seemed to be the weakest area's across all questions.

### Question 4

This was the second most popular question, however, it was also the question that caused candidates the greatest problems and performance was lowest, with more than half those who attempted it scoring less than 40%.

a) Very superficial analysis of the extent of any duty of care owed by Darren the digger operator. Few candidates discussed whether and why the duty extended to the neighbour Ted. Easy marks were lost.

b) Most candidates spotted that XCav8 was vicariously liable for Darren's negligence, but, very few set out their reasoning. Confusion with Employer's Liability & Health and Safety legislation.

c) Many candidates wasted too much time with a very complicated approach to the valuation of the van, confusing the measure of damages in contract and tort in trying to answer it.

A good proportion of candidates at least identified the issues relating to economic loss, and foreseeability. Good application of *Spartan Steel* to the facts.

d) Very few candidates spotted the possible negligent misstatement of Plant2U.

### Question 5

This was the most popular question, and most candidates did well, with 63% scoring more than 40%.

a) Most candidates made a reasonable effort in explaining the need to show a duty of care, breach, causation and loss and were able to identify the key cases.

Candidates found difficulty with nervous shock, most concluding simply that because Violet suffered from a clinical condition, it must be damage for which she was entitled to be compensated. There was little consideration of the questions of foreseeability and remoteness. Candidates who jump to conclusions rather than going back to basics and applying the rules have less chance of scoring points, than if they had analysed each part of the losses in a methodical manner, which would have attracted marks.

Candidates were generally good on contributory negligence and were familiar with the case law.

b) Very few candidates had any grasp on the problem of hearsay. Many did not read the question properly, which asked what use Violet could make of Beryl's statement and so missed that the evidence would be hearsay. Nevertheless candidates did analyse Beryl's comments and in many cases picked up points notwithstanding having missed the relevance of the rules of evidence.

c) A large number of candidates wrongly concluded that Dave as driver would have no free standing right of action, but would only be able to make a counterclaim. The fact that this error was repeated by a number of candidates indicates that their learning in this area was flawed.

Good discussion of contributory negligence.

A number of candidates, rather than considering the obvious case in negligence, tried to shoe-horn the facts into public nuisance or the Occupiers Liability Act.

d) Considering that there were 5 marks available for the last part of this question, very few candidates provided full answers. Some answers were only a couple of lines along the lines "Beryl has a personal injury claim", which attracted no points. It was clear from answers given earlier in the question that, even with time constraints, the candidates could have provided answers that would have scored at least 2 marks.

Approximately half of the candidates failed to consider whether Beryl was a volunteer in riding in the car with a man she believed to drive too quickly, although they had mentioned *volenti non fit injuria* elsewhere on their script.

**Question 6**

This was the least popular question. There was a wide disparity in the answers, the highest scoring 23/25 and the lowest 0/25. 7 candidates out of the 22 scored less than 40%, generally showing complete confusion over the tort of nuisance, taking elements of public nuisance, private nuisance and *Rylands v Fletcher* and rolling them into one.

a) Most commonly candidates confused this with a *Rylands v Fletcher* case and applied the wrong tests. Good answers explained clearly why this was a case of private nuisance.

Most discussed whether the use of the neighbouring land by the Cricket Club would be a public benefit.

There were 12 marks for the first part of the answer. Most candidates missed easy marks by failing to analyse the facts by reference to the law, but instead tended to make sweeping statements without showing the thinking behind them.

Generally good discussion of remedies available, particularly most candidates showed an understanding of the circumstances when an injunction might be available.

b) Many candidates simply listed all possible defences, rather than suggesting which of those defences best suited the facts. The answer cried out for a discussion of the defence of prescription; the facts were in the question for candidates to take a view on whether or not this would be a realistic defence in this case.

c) This was a clearly signposted question about negligent misstatement and *Hedley Byrne v Heller*. However, very few candidates answered this part of the question well. There was a widespread error that this was about misrep and so candidates answered by applying the tests for contractual representations. This is an easy error to make, but with proper preparation it should have been

obvious to candidates that the answer was to be found in the tort of negligent misstatement and not in misrepresentation. It was of particular concern that some candidates appeared never to have heard of negligent misstatement at all.

## Module 2

### Section 1

#### General comments

There was a drop in the pass rate for section 1 from last year, down from 83% to 75%.

The correct use and citing of identified and defined terms was great to see with candidates on the whole adopting the appropriate verbs and general language of NEC. Much improved from last year.

There is definitely an '*if in doubt notify an early warning and instruct a risk reduction meeting*' mind-set. Although more prevalent in question 3, this was a common theme to some extent throughout the exam scripts.

Candidates would be safe to assume that even a question with a risk based scenario will only allocate marks once for the full detailing of clause 16 procedure.

Far too many candidates cited the early warning and risk reduction mechanisms in longhand as their sole answer for multiple parts of the question. Often the latter parts of the question had nothing to do with early warning and were aimed at entirely different procedures.

On the whole, where questions were poorly answered, there was usually an extended narrative around how the parties might solve the issues presented in a risk reduction meeting. This likely accounted for the drop in marks compared with last year.

One final general observation - a few candidates provided excellent answers achieving all the marks available in the first few lines, then went on to provide a further page or two that gave real confidence they knew the subject. It was then a real shame to see that a few had left parts blank - presumably due to lack of time.

#### Question 1

This question was answered by 18 of the 51 candidates who achieved the highest average score of 18. 16 of the 18 candidates achieved a pass mark in this question.

a) Most candidates correctly answered this part of the question although a few confused Completion with take over.

b) The points to answer were looking for X5 and the vast majority answered citing this. If one of the points to answer were missed, a mark was given for mention of X6 Bonus for early Completion, which would also have been an appropriate secondary option given the nature of the works meant early Completion generated a source of revenue.

c) This part was on the whole answered well, although a few candidates either didn't address the 'to whom?' part of the question or where they did, they neglected to state that certificates need to be communicated to the *Employer* as well as the *Contractor*.

d) Most candidates correctly stated the *Contractor* was entitled to compensation and on the whole correctly identified a number of assumptions that were relevant to the assessment. Several explained perfectly how the assessment would be based on a comparison of events with and without the compensation event's effects. A few candidates did not mention time at all and marks were lost as a result.

e) Not all candidates addressed the relevance of the Completion Date having been passed. Many lost marks here either due to not mentioning that a compensation event would in this scenario not arise, or the fact that takeover would still be necessary.

   Clause 80.1 was also mentioned more than once, with candidates advising their *Employer* regarding risk.

   Most correctly advised that delay damages would reduce proportionately. A couple suggested that the *Employer* may consider not taking over if the delay damages were higher than the potential revenue from tenants – shrewd but perhaps not in the spirit of the contract.

**Question 2**

This was the least popular question attempted by just 7 candidates. The average mark was 16. 6 of the 7 candidates achieved a pass.

a) The majority of candidates answered this part correctly.

b) 2 candidates correctly pointed out the precast units could have been manufactured by the *Contractor*. Marks were given where this argument was made. The majority of the remaining candidates assumed that the works were subcontract although many didn't look up the definition of Subcontractor and/or spot the reference to the sections being designed specifically for the *works*.

Parts c) & d)

Were designed to draw out the different definitions of Price for Work Done to Date and their impact on cash flow. Most candidates correctly picked up on the definitions, but a couple nonetheless went on to say the *Contractor* would still get paid the sum in the Activity Schedule regardless. Some detailed knowledge of the schedule of cost components was demonstrated.

A couple of candidates answered perfectly; appropriately identifying the relevance of the different definitions of Price for Work Done to Date, both in the context of progress with the *works* and on cash flow.

e) Too few candidates identified the link to Working Areas. Perfect answers referred to the schedule of cost components, The Working Areas, why head office could never be within The Working Area and consequently why Tom Smith's costs are within the Fee.

**Question 3**

This was the most popular question, attempted by 40 candidates, averaging a mark of 16. 75% of candidates who attempted the question achieved a mark of 13 or higher.

a) Most candidates answered this part well. However a few too many believed notification of an early warning was only required where the *Contractor* was sure a compensation event would later arise.

b) Some confusion was evident around compensation events only being valid where an early warning has been given in advance. A couple of candidates cited the 8 week timeout under clause 61.3 in connection with early warnings.

Many candidates unnecessarily wrote out most of clause 16.1 long hand. Although very few spotted the last sentence in this clause that explicitly provided the answer.

c) This part was on the whole answered well with most candidates correctly citing clause 61.5 as well as 63.5. Significantly fewer candidates made reference to the implications of Disallowed Cost under main options C, D, E or F, although a range of other appropriate observations where offered.

d) On the whole this was answered well. Whilst the points to answer were looking to an acknowledgement that the *Employer* was disadvantaged, marks were given where candidates decisively suggested clause 14.4 may be exercised without hesitation!

e) The majority of candidates identified the points to answer almost word for word. The question was designed to test understanding of the difference between the Risk Register and *Employer's* risks. Of those who did not answer this part well, some incorrectly felt the *Contractor* should notify an early warning given he had anticipated the risk in Contract Data Part 2.

**Question 4**

This was the second most popular question in section 1 attempted by 37 of the 51 candidates. An average score of 15 was achieved with 28 candidates achieving a pass mark of 13 or over.

a) Vast majority achieved 3 marks.

b) Again, this part was answered very well, with only a few marks dropped where candidates neglected to mention the retained 25% could only continue in assessments until submission of a first programme showing the information required. A few candidates incorrectly stated the programme had to be accepted before retained amounts could be released.

c) This question was designed to draw out a common misconception and also check understanding with respect to withholding acceptance under clause 13.8.

Many candidates answered by saying the *Project Manager* could reject the programme, but then incorrectly cited a reason under the contract. By far the most prevalent mistake made was candidates rationalising the Completion Date as forming part of the Works Information.

Far too many explained in depth how an early warning could be notified and risk reduction meeting called, failing to address the question.

The best answers acknowledged the programme was realistic; explained the *Project Manager* should accept it; pointed out he didn't have to; however that not doing so would give rise to a compensation event without improving prospects.

d) Many candidates directly quoted chunks of clause 62.6 and despite having nothing to do with programme, uncomfortably argued the link. Several candidates struck answers through, changing their minds more than once.

e) Most candidates achieved at least some of the marks, but few covered all the points to answer. Although some candidates mentioned it might entitle the *Contractor* to a compensation event, many did not give a detail enough answer to attract all the marks.

f) Candidates on the whole answered this part well, with marks lost where the answer neglected to mention that acceleration could not be imposed and that quotations did not follow the assessment criteria for compensation events, i.e. commercial negotiation.

g) Some candidates assumed that under the scenario an Accepted Programme was still not in place and therefore correctly cited clause 64.2 as well as the anticipated clause 64.1 bullet requiring the *Project Manager* to assess compensation events.

## Section 2

### General comments

The average mark for this section rose slightly from 11.6 last year to 11.8 this year. This is still quite disappointing and mainly due to a number of candidates scoring quite low marks.

In previous years, many candidates scored similar marks on both questions chosen, with the average marks from the 4 questions ranging from 11.1 to 12.3.

Most candidates again have tried to actually answer the questions in front of them, which of course is good. In quite a few instances candidates wrote e.g. 5(a) to commence the answer, and then wrote nothing so no marks can be awarded for this of course.

### Question 5

25 of 51 candidates attempted this question, with an average mark of 12 achieved.

a) Most candidates picked up that the early warning process was the means by which both contractual and practical outcomes would be achieved. A strong emphasis was placed on the safety side of matters, which was good to see.

b) The question was reasonably well answered, candidates needing really to understand that the Risk Register does not allocate risks, it is merely a tool to help manage them.

c) Quite a few candidates got tangled up with sympathy and clause 10.1, mutual trust and co-operation. If the Project Manager has wrongly rejected compensation events, that needs dealing with. If the Contractor is late, unfortunately delay damages should be deducted at source by the Project Manager, without recourse to the Employer (unlike other forms of contract). Some

excellent answers were given to see if part of the works could be taken over by the Employer and thus potentially reducing the delay damages.

d) This question was surprisingly answered quite badly, some considering that Completion brought an end to most financial matters such as this instance. Others also didn't read the question correctly, it was compensation events that were missed off the Bill of Quantities and not simply missed off items from the outset.

**Question 6**

40 candidates attempted this question, this being the most popular question, with the average mark being 11.4.

a) The question was designed to tease out candidates' knowledge of what to do with a quotation for a compensation event which was more than expected. If candidates gave this some practical thought, i.e. what would you do in real life, then plugged this into the contract, it was quite easily answered.

b) It was good to see most candidates grasping how to get to the position of a compensation event being deemed accepted.

c) Quite a few candidates thought the Project Manager could ask for anything he or she wants, all in a spirit of mutual trust and co-operation. The Project Manager could ask for this but required an instruction to change the Works Information first, which would be a compensation event.

d) The answer was split here, half saying the Contractor was right and the other half saying the Project Manager was right. Once a compensation event was implemented then this cannot later be changed if recorded information showed a forecast was wrong. Would the Project Manager have been so keen if the outcome was the other way round?

e) This issue is now getting serious and the Contractor should try and persuade the Project Manager of his or her error, being minded to take the matter to adjudication if all else fails. Lots of candidates confused the rights of payment and certification, it is the Project Manager that has erred here in failing to certify what he or she should have done; the Employer does not issue a pay less notice as the Employer is simply paying what the Project Manager has certified.

**Question 7**

Only 10 candidates attempted this question, achieving an average of 11.1 marks.

a) Most candidates picked up that the Supervisor has very limited powers unless delegated by the Project Manager, so could really only inform here.

b) This question seemed to trouble a lot of candidates, there are two contracts to think about here, the main contract and also the subcontract. The Subcontractor was also only probably going into administration, it hadn't happened yet. Therefore, we were looking for some practical steps to be taken as well as having a solid back up plan, closely following the contract whatever the outcome

c) This followed on from the previous question; care needs to be taken in replacing old with new, particularly where the old had not quite failed yet.

d) A practical response was generally given here, the design must comply with the Works Information and the parties should talk the problems through soonest.

e) Many candidates did not see proceeding at risk a problem, even though the contract simply does not support this concept. There should have been quite a bit of dialogue here, but it is not for the Project Manager to allow a departure from the contract like this.

**Question 8**

26 candidates attempted this question achieving an average of 12.3 marks of the 25 available.

a) This question was designed to tease out the benefits of Option C, where the Contractor tries to innovate, to bring something to the table to create a greater share for both parties. This should be

welcomed and encouraged, taking care not to compromise progress on the contract in the meantime.

b) Whilst candidates grasped that a Project Manager needed to instruct a change to the Works Information, quite a few didn't correctly answer that the Prices did not change as a result of this proposal by the Contractor, accepted by the Project Manager.

c) This question was not about early warning/risk reduction meeting exclusively, though of course this could have been used; instead it was looking for clause 61.2 proposed instructions to be suggested.

d) Some candidates wrongly thought the Project Manager was acting incorrectly and also that the Contractor could indeed refuse to carry out the additional works until the quotation was accepted. This is not the case unless the proposed instruction route is taken; other instructions should be implemented immediately.

## Module 3

### Section 1

**General comments**

Only three candidates took the level 3 paper this year, so it was not easy to identify themes.

**Question 1– compulsory**

Question 1 concerned the practical application of the compensation event mechanism in the face a situation changed by the Contractor rather than by events controlled by the Employer or Project Manager. The problem was compounded by failures in the Contractor's adherence to the contract. It was not answered well by any the candidates. Although it is a very small sample, the answers revealed a disappointing level of understanding of how the contract can (and should) be used in a proactive way to deal with a rapidly changing situation.

a) most candidates noted that the contractor's failure to attend the risk reduction meeting or produce a revised programme were breaches of contract but none drew any conclusions about the real detriment to the Employer, which may well be only any additional fees paid to the Project Manager for maintaining his own version of the programme. Candidates tended to be distracted by the hypothetical rather than identify issues actually alluded to in the question. The stronger answers concentrated on practical upshots for both the Project Manager and Employer of a programme which did not reflect the works. The hypothetical included (for example) whether or not there were key dates which had to be changed or access dates which would need to be amended or approvals which would have to be brought forward, none of which were in the question. None of the candidates identified that the Project Manager has no mechanism for *"unaccepting*" the programme and what that might mean. One candidate even suggested that the Contractor's failure to issue an early warning that he intended to exceed expectation could be used to reduce his entitlement under the compensation event mechanism for the completely separate instruction regarding the pavilion, which is clearly incorrect.

b) This was very poorly answered by all three candidates. In each case there was only a general discussion about the nature of the programme and the compensation event mechanism. None of the candidates discussed the awkward requirement to use the accepted programme, now out of date, to determine the compensation event value in accordance with Clause 63.3. Some even suggested that a failure to issue an early warning could be used as a reason to deduct sums in an unspecified way which is clearly not consistent with the contract. None of the candidates discussed the requirement of the Project manager to use his own programme if the Contractor's is lacking.

c) Again this was poorly answered. None of the candidates identified that the Contractor would be entitled to his change in defined cost for the period that he was obliged to remain on site. Answers tended to concentrated on repeating the compensation event mechanism which attracted few marks at this level. Candidates missed the opportunity to demonstrate their understanding of how clause 63.1 and 63.6 operate.

**Question 2**

Two candidates answered this question. One answer was markedly superior to the other.

Part 1 The removal of the obligation to work *"in a spirit of mutual trust and cooperation"* was analysed in the stronger answer against the background of the other contractual provisions, which require effective cooperation such as the early warning mechanism. The answer correctly identified that there would have to much more significant amendments to the contract to remove that contractual protection. The poorer answer substituted the removal of the clause with the absence of any trust or cooperation which was not the case. Consequently the candidate failed to address the practical examples of effective cooperation demanded by the other provisions of the contract. The stronger answer mentioned some relevant case law and the continuing obligation on the Project Manager to discharge certain of his functions independently of his Client's needs.

Part 2 Both candidates tended to voice their distaste about the conduct of the Project Manager. Both digressed into what they felt was reasonable conduct or otherwise. Neither specifically mentioned that the Project Manager is obliged to act as stated in the contract and, therefore, as the programme is non-compliant, he has the option to reject it for that reason. Both candidates abhorred the Project Manager's conduct in deducting the damages pursuant to Clause 50.3 but neither suggested that this was a penalty and therefore unenforceable nor provided any contractual grounds for resisting the deduction of the money that were valid. Neither candidate identified that the Project Manager's rejection of the programme outside of the appropriate time scale was not relevant for the application of Clause 50.3. One candidate did conclude with the clear advice to the contractor to revise his programme promptly to comply. One also noted, correctly, that the Contractor could instruct the Project Manager to attend a risk reduction meeting, but did not discuss what might be achieved by it.

**Question 3**

Only one candidate attempted this question and answered very well

**Question 4**

This question was not answered.

## Section 2

**General Comments**

Although only three candidates sat the examination, all questions were attempted as each candidate chose a different non- compulsory question.
The standard of answers was similar from all candidates, except in one case for Question 5 where the answer scored low. Whilst candidates generally demonstrated an understanding of the clauses of the Infrastructure Conditions of Contract, a practical approach to solving some of the problems set by the questions was not so apparent.
Only one candidate appeared to plan out their answers, which added structure to them.

**Question 5 – compulsory**

Two candidates calculated the total costs of delay correctly and so demonstrated a commercial understanding of the decisions to be made.

Only one candidate recognised that defective foundations and issues with the block-work were separate issues

One candidate consistently used NEC terminology such as Compensation Event, Works Information, Defined Cost etc. These terms do not exist in the Infrastructure Conditions of Contract.

One candidate mixed up liquidated damages for delay with retention.

**Question 6**

Key points of each question were noted but part of the answer included copying clauses of the conditions of contract. This added little value as the application of those clauses was not fully explained.

**Question 7**

An understanding of how to proceed with a claim for additional costs and the vulnerabilities in that claim were understood but extensions of time were not considered and the answer to part (b), deletion of Clause 12 from the contract, lacked breadth.

**Question 8**

An understanding of CDM was demonstrated but the answer to (a) did not focus on the question, which was to write a report on the client's (Employer's) obligations, as it provided information on the Principal Contractor's and the CDM co-ordinator's obligations too.

**Institution of Civil Engineers**

**Examination in Civil Engineering Law and Contract Management 2013**

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

Monday 10th June 2013
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.

## Section 1

### Question 1

Chris is interested in purchasing a luxury yacht and goes to a yacht expo where he meets Dreamyachts Ltd. Chris is told that if he buys a yacht from Dreamyachts "he will be the envy of all his friends". Chris enters into negotiations with Dreamyachts after the expo. Chris is an international swimmer and decides to purchase a yacht, "the Goddess", from Dreamyachts after being guaranteed during negotiations that the Goddess contained an Olympic sized swimming pool. No other yacht provider sold yachts with Olympic sized swimming pools. Chris enters into a contract with Dreamyachts, but the written contract makes no reference to the size of the pool. Dreamyachts thought that the Goddess did contain an Olympic sized pool when it was negotiating with Chris, but before the contract was concluded was told by the yacht's previous owner that "I lied about the pool, it's nowhere near Olympic sized". Dreamyachts did not pass this information on to Chris.

After purchasing the yacht Chris realises that the pool is not Olympic sized. He is therefore unable to train and as a result loses a number of sponsorship deals.

Chris is also not the envy of his friends because they tease him that he is flash and extravagant for buying the yacht.

**a)** **Does Chris have a claim against Dreamyachts for breach of contract as a result of the statements made by Dreamyachts?** **[5 marks]**

**b)** **Advise Chris on whether he has any other grounds to bring a claim against Dreamyachts and, if so, what remedies would be available because:**

**i) He is not the envy of his friends?** **[4 marks]**

**ii) The swimming pool is not Olympic sized?** **[13 marks]**

**c)** **If Chris was not an Olympic swimmer, but simply wanted an Olympic sized pool to impress his friends and the size of the pool made no difference to the value of the yacht, would he still be able to recover damages?** **[3 marks]**

## Section 1

### Question 2

Brilliant Badges Ltd ("Brilliant Badges") sells badges featuring logos both in its shop and elsewhere and enters into a contract with Perfect Pins Ltd ("Perfect Pins") for the purchase, supply, and delivery of 50,000 badges to Brilliant Badges. The contract provides that Perfect Pins will complete the supply and delivery of the badges in a period not exceeding 6 months. Perfect Pins is aware that Brilliant Badges has entered into a potentially lucrative contract to sell 30,000 of the badges to Football Logos Limited ("Football Logos") who will ultimately sell the badges at football stadiums across the UK. Unbeknown to Perfect Pins, Football Logos have promised Brilliant Badges that it will enter into a long term contract with it if this first order is successful. Perfect Pins is only able to supply 20,000 badges in the six month period and informs Brilliant Badges of this fact 2 weeks before the deadline. Although Brilliant Badges supplied the said 20,000 badges to Football Logos, they did not attempt to obtain a further supply of badges from other sources, and after the 6 months deadline passes, Football Logos terminates its contract with Brilliant Badges, refusing to accept any more badges. Brilliant Badges commences proceedings against Perfect Pins seeking to recover:

1) the loss of profit on the 20,000 badges it had intended to sell in its store

2) the sums it would have received from Football Logos had it supplied the contract for 30,000

3) sums claimed by Football Logos from Brilliant Badges as a result of Brilliant Badges being unable to provide the badges to Football Logos, and

4) the loss of profit Brilliant Badges would have made on repeat orders with Football Logos if its first order had been successful.

**a)** **Advise Perfect Pins on its potential liability to Brilliant Badges in respect of each of the claimed matters sought to be recovered.** **[11 marks]**

**b)** **Explain, if Brilliant Badges had in fact obtained the short-fall of 10,000 badges elsewhere in order to fulfil its contract with Football Logos and in so doing had paid double the market price, would it have been able to recover the additional cost of doing so from Perfect Pins?** **[4 marks]**

**c)** **If Perfect Pins had informed Brilliant Badges during the course of the 6 months contract that it could only provide the 30,000 badges within the 6 months if it was paid an additional £5,000 and Brilliant Badges agreed, would Perfect Pins have been able to enforce that agreement?** **[10 marks]**

## Section 1

### Question 3

Fresco Ltd ("Fresco") enters into a contract with Superfreeze Ltd ("Superfreeze"), an extremely specialist freezer manufacturer, to supply and install 100 freezers in a new Fresco store. The contract price is £50,000 and the contract states that:

1) Superfreeze must deliver all the freezers over a period of 6 months;

2) "time is of the essence" in respect of the delivery of the freezers;

3) Superfreeze will be liable to pay liquidated damages of £10,000 per day if it fails to deliver all of the freezers on time; and

4) Fresco will provide information reasonably required by Superfreeze.

Superfreeze only delivers 50 freezers within the 6 month period, but claims that it was unable to deliver the other 50 in time because Fresco failed to provide essential information and that it should therefore have been entitled to an extension of time.

Fresco purports to accept Superfreeze's failure to deliver on time as repudiation of the contract and pursues Superfreeze for liquidated damages. Fresco also alleges that Superfreeze was in breach of contract by engaging a sub-contractor to manufacture and deliver some of the freezers.

Fresco refuses to pay any of the contract price to Superfreeze. Superfreeze considers that it should be entitled to recover at least 50% of the contract price given that it delivered 50% of the freezers.

**Advise Superfreeze on:**

**a) whether Fresco can accept the failure to deliver the freezers on time as repudiatory breach; [6 marks]**

**b) if Fresco accept the failure to deliver as repudiatory breach, what are the consequences if Fresco is wrong in doing so; [6 marks]**

**c) the enforceability of liquidated damages provisions; [5 marks]**

**d) whether Superfreeze was in breach of contract by sub-contracting [3 marks]**

**e) whether Superfreeze is entitled to be paid 50% of the contract price [5 marks]**

## Section 2

### Question 4

Xcav8 Ltd is a groundwork's contractor. Xcav8's assets include a quantity of shovels and wheel-barrows. It hires in all heavy plant and equipment, on a job-by-job basis, from Plant2U.

On 1 April 2009, Xcav8 commenced work to repair a fractured sewerage pipe at No.13 Lucky Street. The job was allocated to Darren, an employee, as he was particularly good with a shovel. When Darren arrived on site he phoned the office to ask for help. Xcav8 had no labourers spare and so hired in a mechanical digger from Plant2U. The only digger available at short notice was a Yakimotec X9000 large capacity excavator. Plant2U told Xcav8's manager, "don't worry that the X9000 is a big beast, any fool can operate it, you'll be fine with it".

Darren had never used a digger anywhere near the size or complexity of the X9000. Darren thought he would have a play and commenced to pull and push on all of the levers to see what would happen. Unfortunately he failed to see a high voltage overhead electric power cable. He raised the digger bucket to its full height and as he did so the bucket severed the power cable. Pleasant Valley Power Transmission owned the power cable.

The power cable fell onto a 1978 Ford Transit van (owned by Ted Stoke, a ceramic artist), parked in the driveway of No.15 Lucky Street. The van caught fire and was completely burnt out. The burnt out van contained tea sets (with a retail value of £2,000) that had to be scrapped. Ted had bought the Transit the previous year for £150. He had recently restored it to showroom condition at the cost of £6,700. The week before, Ted had advertised the restored Transit for sale at £9,595. He had turned down offers of £5,000 and £7,250 and had been holding out for his advertised price, which he thought was a bargain for such a rare vehicle.

Ted works from a purpose built studio in his back garden, where he has his potter's wheel and various kilns. When the cable was cut, his power went down and all of the pieces in the kilns were ruined. He was unable to use his workshop until power was restored the following week.

Ted had been in the middle of manufacturing a series of fine ceramic sculptures in performance of a contract for a London interior designer. The batch of ceramics was to have been the first batch to be delivered later that week. When he informed the London designer, the contract was cancelled. As the power was down, Ted was unable to carry out any pottery, so rented space in another potter's studio at a cost of £1,000. Ted values the ruined ceramics in the kiln at £15,000. The contract with the London designer would have made him a further £50,000 in sales. Ted wants to claim against someone for all of his losses.

**a) Advise Ted of any potential claim he may have and against whom; [5 marks]**

**b) If so, against which party (ies) can Ted make a claim? [4 marks]**

**c) Advise Ted on the extent of which he can recover his losses, from whom and why; [8 marks]**

**d) Do any other parties have any rights and remedies arising from the facts and, if so, what? [8 marks]**

## Section 2

### Question 5

Miss Violet Smith is leading violinist in the Pleasant Valley Symphony Orchestra. She lives in a remote rural village on the outskirts of Pleasant Valley, on a very quiet, narrow, winding, country lane bordered by high hedges and trees. It is a very quiet place to live, as any cars that do go past are generally leisure drivers or delivery vans. Because of tight bends, passing drivers have usually slowed down to around 5mph by the time they pass Primrose Cottage, where she lives alone with her four cats.

Violet drives an old Morris Minor Traveller. Daisy, as Violet affectionately calls the Morris Traveller, is kept in a pull-in outside Primrose Cottage, just off the carriage way.

On the day in question Violet was due to perform a Bach violin concerto, at the prestigious Pleasant Valley Hall. She carried her precious irreplaceable Stradivarius violin in its travelling case and went to open the car to load it before setting off. Just as she was about to put the violin in the car, she remembered she needed to check she had left Radio 3 on for the cats. She left her music case and her violin by the open door of the car, and nipped back into the house.

Just as Violet was returning to her car, she saw her prize violin crushed and the door of her car narrowly missed by an approaching Vauxhall Nova car, driven by Mr Dave Jones. Mr Jones was unable to control the car and swerved out of control, turning over in the opposite ditch.

Violet went to help the passenger, Dave's girlfriend, Miss Beryl Right, a teacher from the car. Beryl was crying and exclaimed to Violet: "Dave was driving much too fast round these country lanes – thinks he's Jenson Button – I told him 'one day you'll run someone over' – it could have been a child. I should've listened to my Mum. He's such a show off."

Violet's violin was damaged beyond repair. Violet was so shocked by the incident that she has had to give up playing the violin and is unable to enjoy listening to anything by Bach.

Dave saw it as a matter of honour never to wear a seat belt. Unrestrained, he badly broke his wrist and had to take four weeks off work. Beryl later complained of whiplash symptoms, but did not have to take time off school, as it was the beginning of the summer holidays.

Violet wants to make a claim against Dave for the loss of her violin, her emotional suffering of having to witness the accident and loss of earnings at the Bach concert. Since the incident Violet has been diagnosed with post-traumatic stress disorder: PTSD is a recognised clinical condition.

**a) Advise Violet whether she can make a claim against Dave and, if so, what for? [11 marks]**

**b) Can Violet make any use of Beryl's comments at the scene? [3 Marks]**

**c) Can Dave make a claim against Violet, and, if so, on what basis? [6 marks]**

**d) Can Beryl make a claim against Dave, and, if so, on what basis? [5 marks]**

## Section 2

### Question 6

Mr and Mrs Grey live in an 18th century cottage called "The Stumps", the garden of which borders Pleasant Valley Cricket Club. The Stumps has wonderful open views across the pitch, to the picturesque Cricketers public house and the duck pond beyond.

Before they bought The Stumps, the Greys were concerned that the cottage might be at risk from stray cricket balls during matches. They thought the best way to find out if there would be any problem would be to call in for a drink at the Cricketers and speak to the landlord, Bernard.

Mr Grey ordered his drinks and asked the landlord: *"We're thinking about buying The Stumps, is there any problem with stray cricket balls or any reason it might not be a peaceful place to retire to?"* Bernard finished pulling Mr Grey's pint saying: *"Lovely cottage, the Stumps. Must be over 100 yards away from the crease. You got more chance of being stuck by lightening than any of our lads being able to get as far as them little windows. Pleasant Valley doesn't have any Ian Bothams that I know of. No, you'll be fine. You have nothing to worry about. This village is the most peaceful place I've ever lived. You'll be very welcome in here".*

Mr and Mrs Grey were so pleased with the Bernard's assessment that they went ahead and exchanged contracts, moving into The Stumps later the same month.

When the new cricket season began, Mr and Mrs Grey were horrified to watch the Cricket Club erect practice nets on the outfield, at the edge of their garden. Throughout the summer the Under 15's, the Under 18's, the Seconds, the Dad's team and the Firsts all took turns practicing their batting and bowling at the nets. As a result the Stumps' cottage garden was anything but peaceful and for much of the time the cricket ground resembled a noisy school playing field rather than the idyll the Greys had expected. To make matters worse the 1st 11 had been promoted to the first division of the Pleasant Valley Regional Cricket League and they recruited new players. As a result every Saturday and Sunday, when the matches took place, the Greys were forced to stay indoors to escape from cricket balls which were raining down on them like a hail stones. Mr Grey has had his kitchen window broken so many times that he has given up repairing it and has had it boarded up.

**a) What are Mr and Mrs Grey's rights and remedies, if any, against the Cricket Club? [12 marks]**

**b) Consider any defences which might be available to the Cricket Club; [6 marks]**

**c) Advise Mr and Mrs Grey on their rights against Bernard the landlord in respect of his assurances given to Mr Grey. [7 marks]**

**Law and Contract Management points for answer**

**Module 1**

**Section 1**

**Question 1**

**(a)** Candidates should consider whether the statements made are representations or Contractual terms.The first statement should be dismissed as "puffery". The parol evidence rule should be considered and applied (Henderson v Arthur (1907). If the importance of the second statement made by Dreamyachts was communicated to them by Chris, it may be a term of the contract as Chris appears to have relied upon it (Bannerman v White (1861). The strength of the statement made will also be a factor (Schawel v Reade (1913). A conclusion should be drawn as to whether the statements formed part of the contract. **5 marks**

**b)** **i)** Candidates should consider whether this statement may give rise to a claim for misrepresentation. A representation must be a statement of fact and not opinion (Bisset vWilkinson (1927) and must be more than "mere puff". This statement should be dismissed as"sales talk" which will not give rise to a claim. **4 marks**

**ii)** This statement is a false statement of fact, which was addressed to Chris and induced him into entering into the contract. It is therefore a misrepresentation. Although Dreamyachts did not know the statement was untrue at the time of making it, it was under a continuing duty to correct it and at the very least it should have notified Chris when it became aware it was untrue. Candidates should consider the types of misrepresentation (innocent, negligent and fraudulent) and apply them to this scenario. The statement would constitute an innocent misrepresentation under s2 Misrepresentation Act 1967 and may also be a negligent misrepresentation under s2 Misrepresentation Act as certainly by the time the contract was entered Dreamyachts did not have reasonable grounds for believing the statement was true. The test for fraudulent misrepresentation should also be applied (*Derry v Peek (1889).* Candidates should acknowledge that the test for fraud is very narrow and difficult to prove and the position both at the time the statement was made and at the time the contract was concluded should be considered. **13 marks**

Candidates should then discuss the remedies available for the different types of misrepresentation (i.e. when recission/damages (or both) are available).

**c)** If Chris was not a swimmer he may only be able to recover for "loss of amenity". Candidates should consider that this is likely to be recoverable where a party has not been provided with something which it is contractually entitled to and which is of value to them and where the cost of remedying the breach is disproportionate (Ruxley v Forsyth (1996) and Farley v Skinner (2001). **3 marks**

**Question 2**

**a)** Candidates should acknowledge that Perfect Pins is in breach of contract and therefore will be liable for losses required to put Brilliant Badges in the same position it would have been in but for the breach, subject to remoteness. The two limbs of (Hadley v Baxendale (1854) should be correctly stated and applied to the three types of loss. Candidates should reach a conclusion as to which limb, if any, the four losses fall within. Better candidates will consider and apply other case law on remoteness (e.g. Jackson v RBS (2005), Diamond v Campbell-Jones (1961) and Cottril v Steyning (1966) regarding loss of profits). The fact that Perfect Pins was aware of the contract with Football Logos means that the losses in connection with that contract should be recoverable, whereas the repeat business may not. Better **11 marks**

candidates will also consider whether Brilliant Badges can recover the full value of the badges that Football Logos would have paid or simply the loss of profit on them and the significance of whether Brilliant Badges could have sold them in its store.

**b)** Candidates should acknowledge that this question concerns mitigation. A defendant is under a duty to take reasonable steps to mitigate its losses and the reasonable costs of mitigation can be recovered (British Westinghouse v Underground Electric (1912). A conclusion should be drawn as to whether the cost of procuring the badges was reasonable. **4 marks**

**c)** This question concerns consideration. Candidates should identify that consideration is required to form a binding contract and state the general rule that a promise to perform a pre-existing duty does not amount to good consideration (Stilk v Myrick (1809). The exceptions are where the nature of the duty has changed (Hartley v Ponsonby (1957) and where there is a practical benefit (Williams v Roffey Bros (1991). The nature of the duty does not appear to have changed but Brilliant Badges would have received a benefit in being able to meet their contract with Football Logos. For this exception to apply there must be no duress. Candidates should conclude as to whether in these circumstances the exception would be applied. **10 marks**

**Question 3**

**a)** Candidates should conclude that because the contract included a "time of the essence"clause and an express term requiring delivery in 6 months Fresco would normally be entitled to accept a failure to deliver on time as amounting to repudiation. However, Fresco was itself in breach of contract by failing to provide the information to Superfreeze. Better candidates will consider the "prevention principle" (although this could also be considered in response to b): Superfreeze was "prevented" from performing on time by Fresco's breach and Fresco should not be entitled to benefit from its own breach (Thornton v Abbey National (1993). **6 marks**

**b)** If Fresco does not have the right to accept Superfreeze's actions as repudiating the Contract Fresco may be in repudiatory breach of the contract itself by acting as if it no longer intended to be bound by the contract. This would give Superfreeze the right to accept Fresco's actions as a repudiation of the contract and to recover the value of work undertaken and loss of profit on future work. **6 marks**

**c)** A Liquidated Damages provision could be held to be a penalty clause and therefore unenforceable. The test is whether the damages are a genuine pre-estimate of the losses arising from the breach at the time of the contract. They do not need to be the same as the actual losses suffered and, if they are common in the industry, will generally be enforced unless they are substantially different to those likely to be suffered. Candidates should refer to (Dunlop v Pneumatic Tyre and Alfred McAlpine v Tile Box (2005). **5 marks**

**d)** If a contractor has been selected with reference to their particular skill or competency there is an inference that he is required to "personally perform" the works and therefore cannot sub-contract without consent unless the contract permits him to do so. Whether personal performance is essential depends upon the common intention of the parties, the nature of the services and the circumstances of the case (Southway Group Ltd v Wolff (1991). By sub-contracting Superfreeze may in fact have been in repudiatory breach. **3 marks**

**e)** Candidates should consider whether the contract is an "entire contract" under which Superfreeze is only entitled to be paid on performance of all of its obligations (Cutter v Powell (1975), or a severable contract which entitles Superfreeze to be paid in **5 marks**

respect of the services carried out. The doctrine of "substantial performance" should also be considered (Hoenig v Isaacs (1952) and Bolton v Mahadeva (1972). Better candidates will also consider whether or not Superfreeze could claim in quantum merit.

## Section 2

### Question 4

**a)** Candidates to identify what must be proved to succeed in a claim in negligence, namely, that Darren owed Ted a duty of care, that the duty of care was breached and that breach caused Ted to suffer the loss. **5 marks**
Candidates to discuss the "neighbour principle" and consider whether Ted was owed a duty by reference to *Donaghue v Stevenson [1932].* Test for determining the existence of a duty of care: (a) foresight; (b) proximity; and (c) justice and reasonableness.

Candidates should identify that it was foreseeable that people with property within the vicinity of the works would be affected by Darren's care and attention (or lack of it). There was sufficient proximity between the operator of the excavator and the owner of vehicles parked nearby for the operator to owe a duty of care to carry out its works so as to avoid damaging Ted's vehicle. In all the circumstances, it is just and reasonable for a duty to be extended to those with property (in this case the van) within the vicinity of the work.

The failure to take note of the risk of bringing down a power line and hitting it with the digger was a breach of Darren's duty. Test of whether this would appear to be a breach of duty by 'a reasonable man' *Blythe v Birmingham Waterworks (1865.*
The falling of the power line caused Ted to suffer loss, which is considered in part (c).

**b)** This part of the question is primarily concerned with XCav's vicarious liability for Darren's negligent act. *Limpus v London General Omnibus [1862]; Lister v Hesley Hall Ltd [2001]* – 2 questions to consider: was the person who committed the tort (Darren) an employee; and was he acting in the course of employment when the tort was committed. **4 marks**
When the accident happened was Darren on a frolic (playing with the controls) such that he would not be considered to be an employee at the time? *Hilton v Thomas Burton (Rhodes) Ltd [1961].*
Candidates to consider whether Ted should claim against Darren, the operator, or his employer, Xcav8. Practical considerations relating to the difficulties in suing a workman, such as traceability and financial means to meet a claim, whereas the employer can be expected to carry Public Liability Insurance.
Ted might possibly have a contractual claim against his electricity provider, but candidates should note that whether this would give rise to a claim would depend upon limitations contained within the terms of his supply agreement.

**c)** This part of the question is about causation, remoteness and economic loss. It requires candidates to analyse the nature of each item or group of items of Ted's loss and the causation of those items of loss. Ted will need to establish in respect of each head of loss that it was of a kind of damage that was reasonably foreseeable. **8 marks**
Candidates should show an understanding of the 'but for' test (*McWilliams v Arrol [1962]*) and the measure of damages in tort i.e. to put the claimant in the position he would have been had the tort not been committed. Show understanding that this is not same as contract where claimant to be put in position as if contract properly

performed.
Remoteness – damage had to be a direct consequence of the negligent act and foreseeable. *Re Polemis and Furness, Withey & Co (1921), The Wagon Mound (No1)(1961)*
The damage to the van – physical damage - complete loss of the value of the van. Ted will be entitled to claim the market value of the van. The fact he has received an offer of £7,000 may be used as evidence of value. If Ted wishes to recover more independent valuation evidence will be required.
Contents of van damaged – Ted can claim the value of the stock, not the retail price. *Spartan Steels and Alloys v Martin & Co [1973].* In Ted's case there was no damage to any property other than the ruined work in the kiln. Candidates to consider distinction between pure economic loss and loss consequent on physical damage.
Loss of profits on lost contracts. Candidates to identify issue with remoteness. Loss foreseeable but remote.

**d)** Candidates to consider whether the statement to Xcav8 by Plant2U :"don't worry that the X9000 is a big beast, any fool can operate it, you'll be fine with it" gives Xcav8 a right of action for negligent misstatement against Plant2U. Candidates to consider the test in *Hedley Byrne & Heller [1964].* Candidates should consider whether a special relationship exists between the Xcav8 and Plant2U and whether Xcav8 relied upon the statement. Xcav8 also needs to show that it was reasonable to rely on the statement. Candidates should conclude that on the facts of this case, Plant2U would not have expected Xcav8 to rely upon the statement. **8 marks**
Good candidates will also consider whether Plant2U's statement caused Darren cause the damage or whether Darren's action of experimenting with the controls and not paying attention was a *novus actus interveniens* breaking the chain of causation.

Pleasant Valley Power Transmission has a claim in negligence against Xcav8 / Darren for its recoverable losses arising from the damage to its cable.

Plant2U's rights against XCav8 for any damage to the digger (which is not in the facts) are likely to be governed by the terms of the hire agreement between them.

Similarly there is nothing in the facts to suggest that Darren sustained any injury, but if he had done so, he would be able to claim against his employer for breach of either the common law or statutory duty to ensure employees' health and safety. The fact that Darren was let loose with a complicated dangerous digger with no training, is indicative of a breach of duty to provide safe systems of work and provide training and warnings. However, note that an employer is entitled to assume as a starting point that an employee will exercise common sense. This is closely linked to the questions arising in respect of vicarious liability.

**Question 5**

**a)** Candidates to identify what must be proved to succeed in a claim in negligence, namely, that Mr Jones owed Violet a duty of care as the owner of the violin, that the duty of care was breached and that breach caused her loss. Candidates to discuss the "neighbour principle" and consider whether Ted was owed a duty by reference to *Donaghue v Stevenson [1932].* Test for determining the existence of a duty of care: (a) foresight; (b) proximity; and (c) justice and reasonableness. *Caparo Industries plc v Dickman [1990]* **11 marks**

The standard of care to be exercised by Mr Jones is that of the reasonable road user. A road user should drive at such speed as to be able to stop in the distance he can see to be clear.

Candidates to demonstrate awareness of the need to consider the between foreseeability of the damage in assessing the standard of care. Driving at speed down winding country creates a greater risk of injury and damage to property, other road users, passengers and passersby. The increased risk requires drivers to expect "the unexpected" and take greater care. *Wells v Cooper 1958; Bolton v Stone [1951]*

It will be a matter of evidence whether Mr. Jones ought to have seen the parked car and the violin case by the side of its open door and to have been able to stop or take other evasive action. Test of whether this would appear to be a breach of duty by 'a reasonable man' *Blythe v Birmingham Waterworks (1865),* The violin case being crushed does not prove negligence. It is possible that it would have been damaged even had Jones been driving sensibly and carefully – i.e. non negligently. No liability if no tort committed. *Bradford Corp v Pickles [1895]*

The only 'evidence' in the question that Mr Jones breached that duty is the statement of Miss Right, which if accepted would indicate that Mr Jones fell below the standard of a reasonable driver.

If Jones were to be convicted of a driving offence arising from the accident, then the conviction would be evidence in the negligence claim.
If Dave was in breach of his duty, then candidates to consider whether he caused Violet's losses. *Barnett v Chelsea Hospital [1969]*
Violet will need to establish in respect of each head of loss that it was of a kind of damage that was reasonably foreseeable.
Candidates should show an understanding of the 'but for' test (*McWilliams v Arrol [1962]*) and the measure of damages in tort i.e. to put the claimant in the position he would have been had the tort not been committed. Show understanding that this is not same as contract where claimant to be put in position as if contract properly performed.
Remoteness – damage had to be a direct consequence of the negligent act and foreseeable. *Re Polemis and Furness, Withey & Co (1921), The Wagon Mound (No1)(1961)*

Candidates to consider recoverability of Violet's losses (damage to property; loss of earnings and psychiatric injury).
Foreseeability and remoteness of the effect of the damage to the violin upon her

future. *Roe v Minister of Health [1954]*

Nervous shock. Candidates to consider whether it was foreseeable that a normal person of reasonable fortitude in the same circumstances would suffer psychiatric injury as a result of damage to a possession and whether this limits the extent of any duty of care owed by Dave.

Candidates should consider under the current law whether a claimant could ever make out a case for nervous shock where it is property rather than a person that is involved in the accident. Candidates do not need to demonstrate a detailed knowledge of the case law relating to nervous shock, but will be awarded marks if they show an understanding of the basic principles.

Only when it is established that it was foreseeable that a bystander to an accident of this nature would suffer psychiatric injury does the eggs-shell skull rule come into play.

Candidates to consider whether Violet guilty of contributory negligence in that she left her door open and left her possessions in a potentially vulnerable place. Law Reform (Contributory Negligence) Act 1945. Consider possible apportionment by reference to reasoning in case law. *Froom v Butcher [1976]; O'Connell v Jackson [1972]*

**b)** Candidates to refer to Civil Evidence Act 1995. If Miss Smith gives evidence of what Miss Right told her, it is hearsay evidence. **3 marks**
"Hearsay" means a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matters stated.
Under section 1 of the Civil Evidence Act, hearsay is admissible provided the party relying upon it follows the procedure set out in the Act
Candidates to demonstrate an understanding of the weight of hearsay evidence in civil proceedings compared to other evidence.
Violet's evidence as to Beryl's comments can prove what Beryl said, but not the truth of what she said.

**c)** Candidates should consider by reference to the facts the extent of Violet's duty of care to Dave; breach; causation of damage; and loss. **6 marks**
Was it the door being left open and the cases protruding onto the road, or the driver not being in control of his car?
Candidates to consider Dave's possible contributory negligence.

- Failure to wear a seat belt.
- Too high speed.

Law Reform (Contributory Negligence) Act 1945.
Consider possible apportionment by reference to reasoning in case law. *Froom v Butcher [1976] O'Connell v Jackson (1972).*
Candidates should identify that Dave has a right to claim special damages and general damages in a personal injury action and apply that to the facts.

Some candidates may choose to consider whether Dave has a claim in nuisance due to her obstruction of the highway with her violin, but ought to conclude that the temporary nature of the obstruction means that this is not a worthwhile avenue to pursue, especially in the light of the more straightforward claim in negligence.

**d)** Miss Right as passenger in the car would have a claim against Mr Jones in negligence, as the driver owes a duty not to cause injury to his passengers just as he would to a passer-by. **5 marks**
There is no suggestion that Jones had been drinking, but in her comment to Violet, Beryl states that she was aware of the increased risk of Mr Jones causing an

accident by driving too fast. Candidates should consider the impact of this upon her claim and whether the established principles and cases are relevant.
Candidates should consider whether Dave would have a defence of *volenti non fit injuria* (consent) and/or *ex turpi causa non oritur action (*illegality e.g. if she was egging him on to drive recklessly*)*. Beryl had ridden as passenger notwithstanding she had assessed that Dave was a dangerous driver and at risk of causing an accident by driving too fast.
Law Reform (Contributory Negligence) Act 1945. Consider possible apportionment by reference to reasoning in case law. *Froom v Butcher [1976]; O'Connell v Jackson [1972]*
Beryl might be guilty of contributory negligence by travelling with him when she knew he was a dangerous driver likely to cause an accident.
Candidates to examine Beryl's remedies for her personal injury. Candidates to avoid the temptation to skip over the legal tests in considering Beryl's losses, but should apply the tests referred to in the points to answer for part (a).

**Question 6**

**a)** Candidates to identify that Mr & Mrs Grey can bring a claim in private nuisance and that this is a tort that relates to their ownership of land. It is not public nuisance as, on the facts, they are the only party affected. They are entitled to the use and enjoyment of their land unaffected by unlawful interference. **12 marks**
The interference usually has to be continuous rather than temporary in nature. Here the nuisance is a regular temporary event, which is actionable.

Candidates to consider that there are two separate causes of action, one in respect of the disturbance from the practice nets and one in respect of the balls entering the property during matches. Candidates should apply each set of facts to the requirements of an action in private nuisance.
They need to be able to show damage. They are suffering loss of amenity as they are unable to use their garden whilst matches are on. They have suffered physical damage to the property.
Candidates should note that the Greys have an alternative cause of action in negligence and discuss with reference to the facts the advantages and disadvantages of a claim in negligence compared to a claim in nuisance. Negligence not an essential element in nuisance. *The Wagon Mound (No 2) [1967].*
Candidates should also consider whether this is a *Rylands v Fletcher* case and conclude that cricket balls are not of themselves hazardous materials that escape from the cricket ground; rather they are hit by the batsman. Candidates should understand that Private Nuisance gives the Greys a cause of action, and so there is no need to try to shoe-horn the facts into *Rylands v Fletcher*.
Remedies available would include damages for diminution of the amenity of the property; damages for the physical damage to the property; and injunctive relief to prevent future nuisance. Candidates to consider limitations on the availability of injunctive relief.

**b)** General tort defences apply to nuisance. **6 marks**
The Greys purchased the Stumps knowing that the cricket pitch adjoined their land. The cricket club is a public amenity and the club has not acted unreasonably. Public benefit is not a defence to nuisance the court may refuse an injunction to stop and awarded damages.
Consider prescriptive rights. On these facts the nuisance had not continued for 20 years without interruption since claimant became aware. Candidate to identify that the nets have only recently been erected and the cricket club's promotion appears linked to the regularity of the balls landing in the garden. *Surges v Bridgeman [1897]*

Cricket club may have a defence that its use of its land was not unreasonable. The

erection and use of the practice nets should be considered separately. It is unlikely that there was any foresight of harm in respect of the actual cricket matches, but candidates to consider the changes in use, i.e. use for first division matches, where there were likely to be more balls kit over the boundary and the erection of nets which were likely to cause noise and disturbance. *Cambridge Water Co v Eastern Counties Leather [1994].*

Cricket club may have a defence that Mr & Mrs Grey are unusually sensitive claimants.

Prescriptive right based on over 20 years of use – but nets only re moved there.

**c)** Candidates to identify this as a potential claim for negligent misstatement and apply the facts to the requirements set out in *Hedley Byrne v Heller [1964]* **7 marks**

There must be reasonable reliance within a special relationship.

Candidates should conclude that no special relationship existed between Bernard and the Greys.

On the facts, there may have been reliance upon Bernard's statement, but not reasonable reliance.

There is no special relationship. At best the relationship with Bernard is a social relationship. Social relationships are excluded unless the circumstances make it obvious that carefully considered advice is being sought. Mr Grey asked Bernard his question whilst Bernard was working behind a bar.

It is not obvious on the facts that the statement that Bernard made was false at the time he made it.

Candidates should demonstrate awareness that a cause of action in negligent misstatement does not require Bernard to be a party, or providing a service, in respect of the transaction for the sale and purchase of the property.

**Institution of Civil Engineers**
**Examination in Civil Engineering Law and Contract Management 2013**
**Module 2 NEC (English and Scots Law)**
Monday 17th June 2013
Time permitted: 14:00 to 17.20 (3 hours 20 minutes)

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

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

**You may consult un-marked copies of the NEC3 Engineering and Construction Contract (ECC), NEC3 Engineering and Construction Subcontract (ECS), Statutes, CDM Regulations and CESMM3.**
**All questions must be answered using NEC3 Contracts.**

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

## Section 1

### Question 1

You are the *Project Manager* under an ECC Option A contract for a new industrial estate. Secondary option X7 is used. The contract has been running for 18 months and planned Completion is programmed 2 months from now. The Completion Date is 3 months from now. Two of the eight planned industrial units are now finished.

The *Employer* wants the temporary fences removed from around the two finished units, making them available to tenants. He believes they could be occupied and earning him a return within a few weeks.

**a) Is the *Employer* contractually entitled to use part of the *works* and move tenants in before Completion? [4 marks]**

**b) Which secondary option would have been appropriate for the *Employer* to include in the Contract, considering he wants to use part of the *works* early? Explain why. [4 marks]**

**c) You instruct the removal of the temporary fencing and additional safety constraints necessary to afford occupation of the units. Once the *Employer* has started to use the two finished units, what further communication must you give, by when and to whom? [4 marks]**

The *Contractor* argues he will need compensating for revised access arrangements, less efficient working and storage of the remaining Plant and Materials.

**d) Is the *Contractor* entitled to a compensation event? If so, how would he assess the effects? Discuss time and money considerations in your answer. [8 marks]**

Three months after the Completion Date the *works* are still incomplete. The *Employer* has a number of prospective tenants keen to occupy all finished units.

**e) How would your advice to the *Employer* regarding take over differ now that the Completion Date has passed? Additionally, what might you explain to the *Employer* in relation to X7? [5 marks]**

**Section 1**

**Question 2**

You are assisting the *Project Manager* on an NEC3 ECC option C contract. The next assessment date is in four days and the *Project Manager* has not received the *Contractor*'s application for payment. The *Project Manager* has telephoned the *Contractor* and warned him he risks not getting paid. He gives the *Contractor* a deadline of 5pm tomorrow to submit his application for payment.

**a) Can the *Project Manager* insist that the *Contractor* submits an application for payment? When and how does the *Project Manager* assess the amount due? [4 marks]**

In a subsequent month when looking through the *Contractor*'s application for payment, you notice the *Contractor* has applied the *direct fee percentage* to the cost of some precast concrete sections delivered to site. The sections were designed and manufactured as a one off, specifically to span an existing culvert. The *Contractor*'s own labour will be installing them into the *works* later this week.

The *direct fee percentage* is 8% and the *subcontracted fee percentage* is 10%.

**b) Is the *Contractor*'s treatment of these Defined Costs correct in his application for payment? [6 marks]**

The Price for 'Install Water Pump' is shown on the Activity Schedule as £10,000. The *Contractor* intended to start this work using his own workforce next month. He has included the £10,000 Price in his application for payment.

**c) Given this Contract is under main option C, comment on the *Contractor*'s inclusion of this Price in his application for payment. How should the *Project Manager* assess the amount due with respect to the Pump? Include any comments on cash flow you think are relevant. [7 marks]**

**d) How would your answer to part c. differ if this were an option A contract? [4 marks]**

Several months later the *Contractor* submits an application for payment that includes costs for 'Tom Smith'. Tom is a member of the *Contractor*'s corporate legal team based at their head office. Tom has spent 2 hours a day for 2 days a week checking the preparation of compensation event quotations.

**e) How would you advise the *Project Manager* in relation to these costs and why? [4 marks]**

**Section 1**

**Question 3**

You are the *Project Manager* on a standard NEC3 ECC Contract. During a Risk Reduction Meeting, the *Employer* bangs the table and tells the *Contractor* he doesn't want to see another early warning this month. He says he is 'fed up with the *Contractor* starting off hundreds of claims in this way'.

The *Employer* instructs you to reject all early warnings received from the *Contractor* unless you are certain the risk will come to fruition.

**a)** **Is the *Project Manager* authorised to reject early warning notifications from the *Contractor*? Comment on the *Employer*'s pronouncement at the meeting.** **[4 marks]**

**b)** **Does the *Contractor* need to give prior early warning to qualify a matter for consideration as a compensation event?** **[4 marks]**

**c)** **The *Contractor* has become aware of a serious risk matter that should be notified under clause 16. If he doesn't give the *Project Manager* an early warning notification, what consequences might there be for the *Contractor*? Explain the process.** **[7 marks]**

**d)** **Is there a sanction on the *Project Manager* for not giving an early warning notification that he should give? Explain your answer.** **[4 marks]**

The *Contractor* has notified a compensation event for late access to part of the Site. The corresponding *access date* was last Wednesday, but the farmer who owns the land has still not harvested his crop.

You discuss this with the *Employer* who suggests you check Contract Data part 2. On checking you notice within the section titled "The following matters will be included in the Risk Register" the *Contractor* has included the words "Possible delays to access due to late or un-harvested crops".

**e)** **Explain how you should reply to the *Contractor*'s compensation event notification and why. Briefly explain the process that would follow?** **[6 marks]**

**Section 1**

**Question 4**

**a) Under an NEC3 ECC, when should the *Contractor* submit a revised programme for acceptance? [3 marks]**

**b) Which condition of contract seriously impacts the *Contractor*'s cash flow if, several months into the contract he still has not submitted a first programme to the *Project Manager* for acceptance? Explain any limitations. [4 mark]**

The *Contractor* has submitted a revised programme to the *Project Manager* for acceptance. The programme is compliant with clause 31.2 and 31.3. Due to inclement weather and an unreliable Subcontractor, the programme shows planned Completion as 29th March 2014.

The *Employer* is not happy and tells the *Project Manager* he wants the programme rejected. He reminds him the Completion Date in Contract Data part 1 is 12th March 2014 and missing this deadline is not acceptable.

**c) Explain what the *Project Manager* should do and why. [5 marks]**

The *Project Manager* cannot make up his mind as to how to proceed so he decides the best option for the time being is to ignore the submission. The *Contractor* reminds the *Project Manager* several times over the following weeks that he needs to reply to his submission.

**d) Will the *Contractor*'s programme eventually become accepted automatically? [1 mark]**

**e) What could the *Contractor* do if he felt disadvantaged by the *Project Manager*'s silence? [4 marks]**

A couple of months later several compensation events have been implemented and the Completion Date is 1st May 2014. The *Employer* is desperate to bring the Completion Date to an earlier time.

**f) What could the *Project Manager* do, assuming the *Contractor* is willing, in order to bring the Completion Date forward? Explain any limitations with this option. [4 marks]**

**g) What is the *Project Manager* required to do if the last programme submitted for acceptance was rejected for a reason stated in the contract? Why might this motivate the *Contractor* to submit compliant programmes? [4 marks]**

**Section 2**

**Question 5**

On a contract under the NEC3 Engineering and Construction (ECC) under Option B with W1 and X7 good progress is being made when a weather report is received suggesting very strong winds are very likely to hit the Site in the next few days. This period of poor weather is likely to last for 24 hours.

**a) From the position of both *Project Manager* and *Contractor*, what actions should the *Project Manager* and *Contractor* take both contractually and practically? [7 marks]**

Sometime later, the *Contractor* receives a revised Risk Register with a record of the decisions made at a risk reduction meeting. The *Contractor* immediately notifies a compensation event in respect of changes to the Risk Register, not referring to any specific clause.

**b) What actions should the *Project Manager* take in this situation? [6 marks]**

Later again, the *Contractor* decides that the *Project Manager* has wrongly rejected a number of notified compensation events. The *Contractor* feels that he has worked really hard to get this project finished on time and would like some financial recognition for the extra effort he has put in. The *Project Manager* is very unsympathetic to the *Contractor*'s cause. X7 delay damages have been included in the sum of £2,000 per day and in a recent progress meeting the *Project Manager* indicated he will ask the *Employer* to deduct this.

**c) What advice would you give to both the *Contractor* and the *Project Manager*? [8 marks]**

A few implemented compensation events are missed from the Bill of Quantities, the *Project Manager* failed to include them in his assessment. They total some £3,000. The *Contractor* only realises this after Completion, when he is trying to determine where he may have lost money. He is of course pleased with this but the *Project Manager* says Completion has passed and unfortunately the mistake cannot be rectified.

**d) How much, if anything, is the *Contractor* due here? [4 marks]**

**Section 2**

**Question 6**

A local authority awarded a contract to build a new roundabout for £300,000. The contract was under ECC Option B, with secondary Option W2 and Y (UK) 2. In the first month of the contract the *Project Manager* instructs a change to the Works Information to add some drainage works. The *Project Manager* notified this as a compensation event and instructed the *Contractor* to submit a quotation.

The quotation is quite a bit higher than the *Project Manager* expected.

**a) What does the contract require the *Project Manager* to do? [6 marks]**

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

**b) What does the contract permit the *Contractor to do*? [5 marks]**

In the end, the compensation event is implemented in the amount of £50,000 the *Contractor* originally submitted in his quotation. When the additional works are actually undertaken, the *Project Manager* asks the *Contractor* for resource allocation sheets.

**c) What powers does the *Project Manager* have under the contract to ask for this? [4 marks]**

The *Project Manager* writes to the *Contractor* stating that the quotation is approximately twice as much as the cost of the resources actually used on the additional works. He states that he considered this was the case all along and now asks for the *Contractor* to re-submit the quotation according to the actual resources used.

**d) As *Contractor*, how may you respond? [5 marks]**

At the next assessment, the *Contractor* includes the implemented compensation event of £50,000. The *Project Manager* amends this down to £25,000 in his payment certificate, which is paid by the *Employer*.

**e) What may you do now, as *Contractor*? [5 marks]**

**Section 2**

**Question 7**

You are the *Project Manager* on the construction of a new asset. Under an ECC Option C secondary Options X1, X2, W2 and Y (UK).The tendered total of the Prices was approximately £5m. The *Contractor* started works on the Site some six weeks ago and has set up his site compound, commenced site clearance, started erecting some temporary fencing and arranged a number of subcontracts, all using the NEC3 Engineering and Construction Short Subcontract (ECSS). On Monday of the seventh week, the *Supervisor* notes that the earthworks Subcontractor appears to be leaving Site with his earthmoving equipment.

**a) What may the *Supervisor* do under the contract? [2 marks]**

The *Contractor* learns during the day that the Subcontractor is probably going into administration.

**b) What may the *Contractor* do under the main and subcontracts? [8 marks]**

The *Contractor* was extremely concerned that already the critical path was being affected and quickly sourced a new earthworks subcontractor during that week.

**c) May the *Contractor* appoint the new earthworks subcontractor and, if so, how? [5 marks]**

Part of the obligations of the earthworks subcontractor was to design and build an earth retaining structure. The design was submitted to the *Contractor*, who in turn submitted this to the *Project Manager*. The *Project Manager* had some concerns with the design, and did not comply with the Works Information.

**d) What actions should the *Project Manager* take? [4 marks]**

At a meeting, the *Contractor* considers that the *Project Manager* is being pessimistic in his analysis of his design and asks the *Project Manager* if it would be acceptable to proceed at his risk. He says that he has done this sort of thing before with this *Employer* on a similar contract and it worked well.

**e) What action should the *Project Manager* take? [6 marks]**

**Section 2**

**Question 8**

You are the *Project Manager* on an ECC Option C contract. Most of the design of the *works* has been carried out by the *Employer*, but some minor parts of the *works* are to be designed by the *Contractor*. The *Contractor* calls a design review meeting and suggests to the *Project Manager* that some *Employer*-designed aspects are over-designed. The *Contractor* asks if an alternative design that reduces the total Defined Cost will be of interest to the *Employer*.

**a) As *Project Manager*, how would you deal with this suggestion? [8 marks]**

There follows a series of intense design meetings for 2 weeks. The *Project Manager* and *Contractor* are both satisfied with the alternative design put forward, with the design to be carried out by the *Contractor*.

**b) How is this put into effect and is there any change to the Prices? [7 marks]**

Part way through the contract, the *Employer* asks the *Project Manager* to make a separate change to the Works Information in place. He also wants an agreement with the Contractor before the change is made as it may affect the Completion Date.

**c) Are there any provisions in the contract the *Project Manager* can utilise here? [3 marks]**

At a later date, the *Project Manager* instructs a further change to the Works Information, notifies this as a compensation event, and instructs the *Contractor* to submit a quotation. The *Contractor* says he will not put the additional works into effect until the quotation is agreed as he feels he has lost out on a few previous occasions.

**d) Has the *Project Manager* done anything wrong here and what should he do in this instance? [7 marks]**

**Law and Contract Management points for answer**

**Module 2**

**Section 1**

**Question 1**

**a)** Yes the *Employer* can use a part of the *works* before Completion has been certified. If he does so, he takes over the part of the *works* when he begins to use it. There are two exceptions, neither which appear relevant to this example. Clause 35.2 **4 marks**

**b)** X5 Sectional Completion would have been an appropriate secondary option allowing for a 'planned' take-over. Whilst the tender total of the Prices may have been slightly higher, this might have resulted in a better financial outcome overall as the work would have been efficiently planned from the start. **4 marks**

**c)** The scenario does not qualify under either of the bulleted exceptions in clause 35.2. Therefore the ***Employer's*** use of this part of the *works* means they have been taken over. The *Project Manager* certifies the date upon which the *Employer* takes over this part of the *works* and its extent within one week of the date. **4 marks**

The *Project Manager* issues the certificate of take over to the *Employer* and the *Contractor.*

**d)** Yes the *Contractor* is entitled to a compensation event 60.1(15) as the *Project Manager* has certified takeover of part of the *works* before both Completion and the Completion Date **8 marks**

All compensation events are assessed for their impact on actual Defined Cost, forecast Defined Cost and the resulting Fee.

To demonstrate this impact he assesses the difference in Defined Cost between the *Employer* using and not using these parts of the *works.* This will likely cover things like additional traffic management and safety arrangements for the interface between the *Employer*'s tenants and the on-going work. It may also include disruption e.g. access and regress, storage of the remaining Plant and Materials, etc.

For additional time (delay to the Completion Date), the *Contractor* must demonstrate how planned Completion, due to the compensation event, is now later than planned Completion on the Accepted Programme – clause 63.3.

He will be entitled to include risk allowances for cost and time.

**e)** Use of further parts of the *works* would still require the *Project Manager* to certify take over within one week. However this is not a compensation event since takeover of these parts of the *works* is not occurring 'before both Completion and the Completion Date'. **5 marks**

The *Contractor* pays delay damages for each day until Completion (or when the *Employer* takes over all of the *works*).

However the rate of delay damages stated in Contract Data Part 1 would be reduced given the *Employer* has already had the benefit of the use of part(s) of the *works*. The *Project Manager* assesses the benefit and calculates the proportionate reduction to delay damages.

**Question 2**

**a)** There is no contractual requirement for the *Contractor* to submit an application for payment and the *Project Manager* cannot insist that he does. **4 marks**

The *Project Manager* assesses the amount due at each assessment date. In making his assessment he considers any application for the payment the *Contractor* may have submitted (within time).

He provides details of how he has assessed the amount due.

**b)** The definition of Subcontractor 11.2(17) includes for the supply of Materials that have been wholly or partly designed specifically for the *works*. The fact the *Contractor*'s own labour resources will be installing them into the *works* is irrelevant. **6 marks**

The use of the *direct fee percentage* is incorrect. The works are Subcontract works and so the *subcontracted fee percentage* needs to be used.

The *Project Manager* should make this clear when providing details of his assessment.

**c)** This is an option C contract. Therefore the Price for Work Done to Date is not assessed using the Prices in the Activity Schedule. The £10,000 will not be paid. **7 marks**

The PWDD is assessed as the total Defined Cost forecast to have been paid by the *Contractor* by the next assessment date plus the Fee.

Not all of the pump installation may be finished by the next assessment date. Given this work is not to be undertaken by a Subcontractor, the forecast Defined Cost is calculated using the Schedule of Cost Components.

The PWDD may include amounts for the pump, amounts for people, Equipment and Materials in accordance with the SCC. This achieves a more neutral cash flow for the *Contractor*.

**d)** Under option A the PWDD is the total of the Prices for completed activities. Therefore he won't get paid anything for the pump installation in this assessment. **4 marks**

There is no element of forecasting, therefore the *Contractor* would not be able to consider activities completing after the current assessment date.

There is no percentage complete facility. The Contractor's cash flow is less healthy than under option C.

**e)** Tom Smith's costs would only qualify as Defined Cost if this work was undertaken within the Working Areas. See Schedule of Cost Components, 'People 1'. **4 marks**

'Working Areas' is a defined term - 11.2(18) and are those parts of the *working areas* which are necessary to provide the *works* and used only for work in 'this contract'.

The *Contractor* can propose that areas are added to the Working Areas

under clause 15, but this should not be accepted by the *Project Manager* given the head office is an area used for work not in 'this contract'.

Clause 52.1 states that *Contractor's* costs which are not included in the Defined Cost are treated as included in the Fee. Tom Smith's costs are therefore to be treated as included in the Fee.

## Question 3

**a)** **4 marks**

There is no formal requirement to accept or reject an early warning notification.
On receipt of an early warning notification, either party may instruct the other to attend a risk reduction meeting.
Where a notification does not fall within 1 or more of the 5 categories under clause 16.1, the *Project Manager* may consider replying to this effect.
The Employer's comments are unhelpful and likely to hinder collaboration.

**b)** **4 marks**

No.
Clause 16.1 explicitly states that early warning if a matter for which a compensation event has previously been notified is not required. That said it may be sensible to give early warning of any knock-on effects that are not obvious.

**c)** **7 marks**

When the *Project Manager* instructs quotations for a compensation event, he may give notification of his decision that the *Contractor* did not give him early warning of the event that an experienced *Contractor* could have - clause 61.5.
The event is then assessed as if the *Contractor* had given early warning.
The changes to the Prices will be based on the difference between what Defined Cost would have been without the event and what Defined Cost would have been with the event but [crucially] considering any mitigating measures likely to have been taken in view of the early warning, plus the Fee.
The same logic applies to delay to Completion also.
Worthy of note, if this were an option C, D, E or F contract then the difference would also qualify as a Disallowed Cost.

**d)** **4 marks**

Not directly. If the *Project Manager* does not give early warning as required under the contract, he is disadvantaging the project and ultimately the *Employer*. Such inaction is self-defeating.
However the *Project Manager* is in breach of clause 10 and 16 of the contract.

**e)** **6 marks**

You should notify him you have decided the compensation event is valid and instruct him to submit quotations.
The event is correctly notified 60.1(2).
The Risk Register is a management tool, not a contract document. It cannot be used to allocate or assign risk, neither pre or post contract.

## Question 4

**a)** **3 marks**

Within the *period for reply* after the *Project Manager* instructs him to.
Whenever he chooses to, but no less frequently than the interval stated in Contract Data.

**b)** **4 mark**

Clause 50.3 requires the *Project Manager* to retain one quarter of the Price for Work Done to Date until a first programme is submitted showing the information the Contract requires. This represents a significant impact on the

*Contractor's* cash flow and should incentivise him to submit a first programme for acceptance showing the information required; upon which retained amounts are released.
Clause 50.3 can only be used if no programme is identified in the Contract Data.

**c)** The revised programme shows the information which the contract requires. If it's also realistic and practicable, the *Project Manager* should accept the programme. **5 marks**
He may withhold acceptance for the reason that planned Completion is shown later than the Completion Date, but this is not a reason under the contract and so will trigger a compensation event.

**d)** No. There is no provision for 'silent or automatic' acceptance of the programme. **1 mark**

**e)** If the *Project Manager* does not reply to a communication from the *Contractor* within the period required, then the *Contractor* could notify a compensation event - 60.1(6). **4 marks**
Changed Prices and delay to Completion Date could be assessed based on; e.g. uncertainty, abortive actions, standing time and general disruption of not having the degree of surety that an Accepted Programme affords the *Contractor*.

**f)** The *Project Manager* could instruct a quotation to be submitted for acceleration - clause 36. **4 marks**
Acceleration cannot be imposed on the *Contractor*. There are no rules for quotation preparation and no sanctions in the event the *Contractor* does not reply to the instruction to submit a quotation. Relies on negotiation.

**g)** Clause 64.1 requires the *Project Manager* to assess a compensation event if, when the *Contractor* submits quotations for a compensation event, the *Project Manager* has not accepted the *Contractor*'s latest programme for one of the reasons stated in the contract. **4 marks**

This sanction should motivate the *Contractor* to submit programmes that comply with the requirements of the contract.

## Section 2

### Question 5

**a)** Whoever first received the weather report should immediately notify an early warning to the other party. Either the *Project Manage*r or the *Contractor* should instruct the other to attend a risk reduction meeting. The *Project Manager* enters the early warning matter in the Risk Register. **7 marks**

At the risk reduction meeting, which of course would be arranged as soon as possible, those who attend co-operate in making and considering proposals for how the effect of the registered risks can be avoided or reduced. Whilst the parties can obtain statistics and information on wind speed, duration, likelihood and so on, there is of course nothing they can do to prevent this. They are left to avoid or reduce the effects of the risk by securing what they can on the Site in terms of loose materials, part-built works, Equipment and the like. Items can be placed in secure containers, materials and Equipment can be lashed down as necessary and so on. The attendees are trying to seek solutions that will bring advantage to all those who will be affected.

The attendees will decide on the actions which will be taken and who, in accordance with the contract, will take them. The *Project Manager* would then revise the Risk Register to record the decisions made at the risk reduction meeting and issue the revised Risk Register to the *Contractor*.

**b)** The revision of the Risk Register itself is not a stated compensation event. The only compensation events the *Contractor* is able to notify are those specifically stated as being a compensation event. **6 marks**

In the risk reduction meeting, decisions are made on the actions to be taken. If a decision needs a change to the Works Information, the *Project Manager* instructs the change at the same time as he issues the revised Risk Register. The parties should be absolutely clear who is doing what and whether in fact a change to the Works Information will be needed.

If this was an over-sight by the *Project Manager* then he should immediately change the Works Information which on the face of it will be a compensation event under clause 60.1(1). If not an over-sight and this is something which would be the Contractor's responsibility/risk/cost then the *Project Manager* should notify the *Contractor* of his decision that this is not one of the compensation events stated in the contract and that the Prices, the Completion Date and the Key Dates are not to be changed.

**C)** The advice to the *Contractor* would be that unless he can establish that the 'extra effort' is one of the stated compensation events in the contract, and then he will not be due any money for this. Sympathy may be a nice quality to have but does not find its way into the contractual clauses and the *Project Manager* has a duty to operate the contract as it is stated, not as he sees fit. **8 marks**

If the *Contractor* disagrees with an action of the *Project Manager* (rejecting compensation events) then W1 states that it is the *Contractor* who may refer this to the *Adjudicator*. This must be referred between 2 and 4 weeks after the *Contractor*'s notification of the dispute to the *Employer* and the *Project Manager*, the notification itself being made not more than 4 weeks after the *Contractor* becomes aware of the action (Adjudication Table, W1.3(1)). The clock therefore is ticking on how long the *Contractor* has on each action by the *Project Manager* to take the matter to adjudication. The times for notifying and referring a dispute may be extended by the *Project Manager* if the *Contractor* and the *Project Manager* agree to the extension before the notice or referral is due. This is stated in W1.3 (2) but is only available before the notice or referral is due. Once this passes the right to adjudication under W1 has been lost.

The *Project Manager* does not advise the *Employer* whether he may or may not deduct delay damages. If the *Contractor* is late achieving Completion beyond the Completion Date then clause X7.1 states the *Contractor* pays delay damages at the rate stated in the Contract Data. The clause goes on to determine the period for which it is payable by the *Contractor*. There are no notice requirements, the *Project Manager* deducts such monies as part of calculating the amount due under clause 50.2, in particular 'less amounts to be paid by or retained from the *Contractor'*.

**d)** Assessment run until four weeks after the *Supervisor* issues the Defects Certificate. There are regular assessments until this time. Clause 50.2 states the amount due is the Price for Work Done to Date which will now pick up the implemented compensation events previously missed off. **4 marks**

Clause 50.5 states that the *Project Manager* corrects any wrongly assessed amount due in a later payment certificate. Clause 51.3 goes on to say that if this is done in relation to a mistake, interest on the correcting amount is paid with interest being assessed from the date the incorrect amount was certified until the date when the correcting amount is certified and is included in the assessment which includes the correcting amount.

The *Contractor* will be due the amount of £3,000 together with interest.

## Question 6

**a)** **6 marks**

Just because the quotation is more than anticipated, it does not mean it is wrong. The *Project Manager* should spend some time trying to understand why it is in the amount that the *Contractor* considers is correct. Maybe the *Contractor* has misunderstood the extent of additional works; maybe the *Project Manager* was being unrealistic with what he expected it to be. So, talk to the *Contractor* and try and understand the quotation from the *Contractor*'s perspective.

If the *Project Manager* is not satisfied the *Contractor* has assessed correctly, then he should reply in accordance with clause 62.3, within two weeks of the *Contractor*'s submission.

In this case there are three replies the *Project Manager* can make. He could instruct the *Contractor* to submit a revised quotation, but, as cause 62.4 demands, only after explaining his reasons for doing so to the *Contractor*. The *Project Manager* could accept the quotation, probably unlikely in this case. Finally, he could notify the *Contractor* that he will be making his own assessment.

**b)** **5 marks**

Clause 62.3 gives the *Project Manager* two weeks only to reply to the *Contractor*'s submission. If the *Project Manager* needed more time to reply to the quotation, he should have spoken with the *Contractor* before the two weeks had elapsed, as required by clause 62.5. There could be an extension but only if agreed between the *Project Manager* and the *Contractor*.

As the *Project Manager* has not replied to a communication from the *Contractor* within the period required by the contract, then a compensation event arises clause 60.1(6). It is difficult in this instance to see what the cost effect of the delayed reply will be, but that would be something for the *Contractor* to demonstrate.

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

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

**c)** **4 marks**

The *Project Manager* has no automatic right to ask for this, unless perhaps such a provision was stated in the Works Information. This is probably most

unlikely.

The *Project Manager* could instruct a change to the Works Information, for the *Contractor* to keep records of the cost of such additional works, but that instruction itself would also be a compensation event under clause 60.1(1).

The *Contractor* would then be able to submit a quotation for this cost recording, if there is an effect of the compensation event upon Defined Cost, as stated in clause 63.1.

**d)** **5 marks**

This is not a right that the *Project Manager* has under the contract. Clause 65.2 states that the assessment of a compensation event is not revised if a forecast upon which it is based is shown by later recorded information to have been wrong.

Would this discussion be taking place if the works had cost twice as much as the quotation?

You cannot undo an implemented compensation event, nor of course can you undo a tendered amount that proves to be higher or lower when carried out.

As *Contractor*, you should talk this through with the *Project Manager*, explaining the provisions in the contract for implemented compensation events and that most likely other such implemented compensation events have gone the other way and the *Contractor* has 'lost' money. You should explain there is no provision in the contract to re-submit a quotation after the event has been implemented and therefore you will not be taking the action required.

**e)** **5 marks**

As *Contractor*, there are a few provisions available to him. This would appear to be something the *Contractor* could notify as a dispute and take it off to adjudication through Option W2. This would seem to be a bit of a drastic step but is the sort of issue that adjudication was most likely created for.

This is something that the *Contractor* considers will likely be corrected in a later certificate by the *Project Manager* under clause 51.3. In that case, interest will paid by the *Employer* to the Contractor in accordance with clause 51.3.

Interest will be accruing, a dispute could be taken to adjudication and the *Contractor* is probably best advised to talk to the *Project Manager* to try and convince him of the error of his ways. The contract does not permit the *Project Manager* to do what he has done, and the *Project Manager*'s actions will likely cause the *Employer* to end up paying more money (at least in interest) to the *Contractor*. If the *Project Manager* does not respond favourably, then it falls to the *Contractor* to decide the best way forward, which will most likely be adjudication.

## Question 7

**a)** **2 marks**

There are no relevant provisions for the *Supervisor* in the ECC that covers this situation. The best course of action for the *Supervisor* would be to advise the *Project Manager* as soon as he can and assist the *Project Manager* if required.

**b)** **8 marks**

The *Contractor* needs to deal with this within the subcontract and the main contract.

At subcontract level, the *Contractor* needs to establish exactly the situation of the Subcontractor. Is there a chance that administration might be avoided, is it a short term finance issue or something else? The *Contractor* should notify an early warning to the Subcontractor under clause 16.1 and call a meeting as soon as practicable to see if and how the effect of this matter can be avoided or reduced. The *Contractor* may find that the Subcontractor is not responding to any calls, requests or the like. If this meeting could be joined up at main contract level, then all the better to involve the *Project Manager* too. If the Subcontractor's obligation to Provide the Works is to be terminated, then the provisions of clause 90.1 should be followed by both parties. This will involve notification of wish to terminate followed by the *Contractor* issuing a termination certificate. The procedures and payment provisions of clause 91 and 92 should then be followed.
In the main contract, either the *Contractor* or the *Project Manager* should notify an early warning under clause 16.1 and a risk reduction meeting should be called in accordance with clause 16.2. At the risk reduction meeting those who attend co-operate in making and considering proposals for how the effect of the registered risks can be avoided or reduced. The effect of the delays to the earthworks would be considered through a series of questions including:

- Was the Subcontractor definitely going into administration?
- How quickly could another Subcontractor be found?
- What delay might this have on the programme, if any?
- What might the additional Defined Cost be as a result of this?

Those attending the risk reduction meeting would need to seek solutions that will bring advantage to all those who will be affected, as stated in clause 16.3. The attendees will then need to decide on the actions to be taken and who, in accordance with the contract, will take them.

**c)** The subcontracting provisions in the ECC are found in clause 26. **5 marks**

Clause 26.2 requires the *Contractor* to submit the name of each proposed Subcontractor to the *Project Manager* for acceptance. There are fairly limited grounds for the *Project Manager* to not accept a proposed Subcontractor, but this process must be adhered to. The *Contractor* can talk with the *Project Manager* about the situation, notify another early warning, hold a further risk reduction meeting and do whatever he can to assist the *Project Manager* expedite the acceptance of the proposed Subcontractor.

The *Contractor* is also obliged to submit the proposed conditions of contract for each subcontract to the *Project Manager* for acceptance, except for the circumstances stated in clause 26.3.

As this is an Option C contract, the *Contractor* is also obliged to submit the proposed contract data for each subcontract for acceptance to the *Project Manager* if an NEC contract is proposed and the *Project Manager* instructs the *Contractor* to make the submission. This is stated in clause 26.4.

If the *Contractor* ignored these provisions and just appointed the Subcontractor, then this could be grounds for termination if this was substantial work and the appointment was made before the *Project Manager* has accepted the Subcontractor.

**d)** The *Contractor*'s design provisions are covered in clause 21. **4 marks**
Clause 21.1 states that the *Contractor* designs the parts of the *works* which the Works Information states he is to design.

There are two stated reasons in clause 21.2 for the *Project Manager* not to accept the *Contractor*'s design; one of these is that it does not comply with the Works Information. That seems to be the reason here and the action the *Project Manager* should take is to not accept the submitted design.
The *Project Manager* could notify the problems with the *Contractor*'s design as quickly as possible, holding a meeting to talk them through and co-operating as best he can. Ultimately though, the *Project Manager* needs to make sure that the design complies with the Works Information and the applicable law.

**e)** There are no provisions in the contract that cover the eventuality of the *Contractor* proceeding at his risk. In fact, clause 21.2 is quite clear on this matter that the *Contractor* does not proceed with the relevant work until the *Project Manager* has accepted his design. **6 marks**
It is not for the *Project Manager* to add, delete or waive a contract which he is not a party to. He is there to make sure, as best he can, that the procedures in the contract are properly followed. Nothing more, nothing less.
All of that said, such a change could be considered if the *Employer* and *Contractor* were minded to agree this. It would need some very careful thought and implementation, and it would be put into effect through the provisions of clause 12.3.

**Question 8**

**a)** The early warning process would be a good way to further this matter. As *Project Manager* you would firstly notify an early warning. The early warning matter is entered in the Risk Register by the *Project Manager*. **8 marks**

Under clause 16.2 the *Contractor* or the *Project Manager* can instruct whoever they feel could positively contribute to the risk reduction meeting. It would probably be beneficial to have the original designer attend along whoever is suggesting the potential over-design/alternative. Such other people may only attend if the other agrees, as stated in clause 16.2.

At the risk reduction meeting, those who attend co-operate in making and considering proposals for how the effect of the registered risks can be avoided or reduced. They also seek solutions that will bring advantage to all those who will be affected.

Those attending can look at the *Contractor*'s proposals and compare this to the original design. From the alternative design's perspective, they should consider the whole life implications, the time/cost implications of the re-design, the effects this change may have on the Accepted Programme and what the effect will likely be on the total Defined Cost.

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 *Contractor*-designed *works*

**b)** The *Project Manager* should instruct a change to the Works Information in accordance with clause 14.3. This is a change of design responsibility from *Employer* to *Contractor*. **7 marks**

This will be a compensation event under clause 60.1(1) as it is not a change to the Works Information provided by the *Contractor* for his design, which is what the 2nd bullet of this clause deals with.

Clause 63.11 deals with the effect this has on the Prices.

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 *Employer* which the *Contractor* proposed and the *Project Manager* has accepted, the Prices are reduced.

As the *Contractor* proposed the change to the Works Information provided by the *Employer*, then the Prices (target) are not reduced.

The Prices are not reduced as the expectation is that the total Defined Cost will be reduced. The Parties should then benefit from the *Contractor*'s share calculations

**c)** The *Project Manager* could instruct the *Contractor* to submit quotations for a proposed instruction. This is under clause 61.2. The *Contractor* does not put the proposed instruction into effect. Using this provision means that the time/cost effect of the instruction would need to be agreed before the *Contractor* carries out the additional works. Within two weeks of the *Contractor*'s submission, the *Project Manager* replies to this as stated in clause 62.3. **3 marks**

**d)** The *Project Manager* has properly followed the contract in terms of issuing the instruction to change the Works Information (clause 14.3), notifying this as a compensation event 60.1(1) under clause 61.1 and instructing the *Contractor* to submit a quotation also under clause 61.1. The *Project Manager* has therefore done nothing wrong here. **7 marks**

The *Contractor* on the other hand must obey an instruction which is in accordance with the contract and is given to him by the *Project Manager*, clause 27.3.

As this compensation event arises from the *Project Manager* giving an instruction then the *Contractor* puts the instruction into effect, clause 61.1.

The *Project Manager* should therefore remind the *Contractor* of his obligations under these clauses, insisting the *Contractor* both gets on the putting the instruction into effect and submits the quotation for the compensation event.

Ultimately, the compensation event assessment is based upon the assumption that the *Contractor* reacts competently and promptly to the compensation event, that any Defined Cost and time due to the event are reasonably incurred and that the Accepted Programme can be changed. This could affect the compensation event assessment, the *Contractor* needs to realise he is acting both in breach of contract and the assessment of his compensation event could be lower than it should have been.

**Institution of Civil Engineers**

**Examination in Civil Engineering Law and Contract Management 2013**

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

Monday 17th June 2013

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

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

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

All questions carry equal marks.

**You may consult un-marked copies of the ICC Conditions of Contract Measurement version August 2011, ICC Conditions of Contract for Design and Construct version August 2011 and ICC Conditions of Contract Target Cost Version August 2011. The CECA/FCEC form of Sub-Contract, NEC3 Engineering and Construction Contract (ECC), NEC3 Engineering and Construction Subcontract (ECS), NEC3 Engineering and Construction Short Subcontract (ECSS), Statutes, CDM Regulations, CESMM3.**

**The candidate should answer all questions assuming that the contracts were entered into before 1st September 2011. All questions involving NEC3 Contracts must be answered using the NEC3 Engineering and Construction Contract.**

**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

## Section 1 - Compulsory

### Question 1

The construction of the new pier at Portnabackobeyond has been swift and dynamic. The *Contractor* under this NEC Option A Contract produced a programme indicating the regular construction of the pier *works* over a 12 month period with each 40m section of the 400m pier being finished in the second through to eleventh month. This programme had been accepted by the *Project Manager*. However, the blisteringly good weather in the initial three months of the Contract, coupled with the generous early completion bonuses which the *Contractor* included in his sub-contracts, meant that the *Contractor* has completed 360 metres of the pier *works* in that three month period and is now reaching completion of the *works*.

The *Project Manager* has emailed the *Contractor* a number of times asking him to issue a revised programme because the original programme clearly did not reflect the progress being made on site. The *Contractor* failed to produce the required revised programme. The *Project Manager* raised this with him during the site meeting on the 8th week of the job when the rather tired and hassled Contractor's agent told the *Project Manager, "For goodness sake, can't you see that we are working night and day to try and get this work done? Why are you annoying me about producing some programme? We thought you would be pleased with how fast we are getting on with the works".* Subsequently the *Project Manager* became slightly distracted by having to go and explain to the Portnabackobeyond town council's finance director why he was going to have to produce a significant amount of money 9 months ahead of the predicted financial profile.

Meanwhile the local Mayor, staring at the rapidly developing pier in the brilliant sunshine of the glorious summer weather, hatched an idea to have a Pavilion constructed at the end of the pier. He spoke to his design team about this and they quickly developed an outline design for the proposed new construction. This has been leaked to the press with much positive comment. The Mayor is pleased.

The *Project Manager* was asked to provide some outline costs and suggested that the costs would be relatively modest, as it was quite clear that the *Contractor* could finish the *works* within the original time. He had hoped to discuss this with the *Contractor* at an early warning meeting, but the agent was too busy.

Consequently he has issued the instruction to have a new Pavilion built. He is astonished to receive a quotation indicating that the *Contractor* requires six weeks of additional time to build the pavilion beyond the end of the contract next summer and that he should be paid the full amount of his site overheads for this period.

Advise the *Project Manager* on:

**a) The implications of the *Contractor* failing to produce a revised programme and his failing to attend a risk reduction meeting. (10 marks)**

**b) The correct method to establish the change to the completion date due to the instruction. (8 marks)**

**c) The correct method to establish the additional sums to be paid to the Contractor. (7 marks)**

**Section 1**

**Question 2**

**Part 1** – You have been approached by a tenderer for an NEC Contract. The *Employer* is a well-known retail chain who are building a new mega-store. They have a reputation for ruthlessness in their business dealings. However, the *Project Manager* is known to you and is an experienced NEC *Project Manager* who has acted collaboratively on similar projects in the past. The *works* Information is well put together and includes provision for holding a team building session. However, the Contract Data Part 1 of the NEC contract contains only the following clause under option Z:

> Z101 – Clause 10.1 is amended to remove the words *"and in a spirit of mutual trust and cooperation".*

**a)** **Advise the tenderer, discussing the effect of this provision and the practical implications for the *Project Manager*, *Employer* and *Contractor*. Your answer should include practical examples of how this provision would affect the implementation of the contract.** **[12 Marks]**

**Part 2** – In an unamended NEC Contract, the *Contractor* has submitted a programme for acceptance within the time scales required in Clause 31. The *works* Information states:

"*Any programme for acceptance must include all the drawing reference numbers for the sections of works to be undertaken by particular operational statements*".

3 weeks after having received the programme, the *Project Manager* has rejected it because he has discovered 6 operational statements (out of the 200) in which the drawings are not cross- referenced, or are not cross-referenced correctly. In the meantime, the *Project Manager* has reduced the price for work done to date in the *Contractor's* payments by 25%.

**b)** **Advise the *Contractor* on the *Project Manager's* conduct and what he should do about it.** **[13 marks]**

**Section 1**

## Question 3

In an NEC Option C Contract, the *Contractor* has subcontracted as follows:

*1)* With a piling Subcontractor based on a bill of quantities and a standard order form. The subcontract is not in the form of an NEC subcontract but is a simple document stating "*we will continue to work the way we always have and get this job done as effectively as possible."* The *Contractor* tells the *Project Manager* at a meeting who the Subcontractor will be and emails through the "contract documentation". This consists of a pdf attached to the email containing:

*I.* 2 pages of what looks like an extract from a bill of quantities for piling works with various rates against the items;

*II.* A hand written note entitled "*Telecom Geoff/Dickie 6pm*" then the above statement followed by *"mark-ups and fees as usual"* and finishes *"will discuss mobilisation at the Duck and Crown at 6 – beers on him";*

*III.* A proforma document entitled "*Purchase Order*" with a number and a note saying "*see attached*".

The *Project Manager* does not acknowledge receipt of the information but is happy with the rates in the bill.

In the same NEC Option C Contract, the *Contractor* has further subcontracted as follows:

*2)* For the mechanical and electrical elements of the *works*, which include a considerable proportion of contractor design. The subcontract is an NEC Option C subcontract which has been amended by a Z Clause which states:

Z101 add to Clause 11.2(25) a further bullet point "*sums incurred as a direct result of the gross negligence or stupidity of the subcontractor".*

The *works* continue and the piling subcontractor enters the site and completes his *works* promptly. The *Contractor* then includes, as part of this application for payment, records of payments to the subcontractor including a 100% mark-up on the bill rates for "*prompt completion*". The *Project Manager* identifies that this is not part of the express contract provisions and doubts that the sum will be paid to the subcontractor.

The *Project Manager* adopts a laid back approach to acceptance of the M&E design. He receives various documents (usually late) and is aware that his M&E specialist is talking to the Subcontractor. The M&E works progress but do not go well and the first testing of them sets fire to the buildings around the site. The *Supervisor* notifies the *Project Manager* and the *Contractor* that the *works* are defective and comments that "the *M&E designer must be a complete idiot to have thought that this would work".*

Advise the *Project Manager* on his and the *Contractor's* compliance with the contract and entitlement in relation to payment for:

**a) The piling works; [10 Marks]**

**b) The M&E works. [15 Marks]**

**Section 1**

**Question 4**

Mr Smart is a *Project Manager* with a very clear sense of what he regards as right and wrong. He is *Project Manager* for a local authority road scheme under an NEC Option C Contract. Dodgy and Dodgy are the *Contractors* and they have been on site for six months. The *works* information includes a statement that "*the documentation supporting claims must be clear and comprehensive".*

Within a month of commencement Dodgy and Dodgy had submitted an application for payment to Mr Smart which included:

1. Circa £100,000 for equipment costs. This was supported only by a written statement from Dodgy and Dodgy's Commercial Manager saying that this was the sum to be paid;

2. £150,000 for material costs for imported quarried material. These were supported by "*sample*" invoices which account for 10% of the material received; and

3. Sub-contractor costs for initial drainage works which the supervisor had condemned as defective and which had to be replaced by the sub-contractor.

Mr Smart refused to certify these sums making the following comments at the end of the certificate, *"For the other sums you have claimed for these alleged plant costs, imported material and that rubbish subcontractor, I do not allow anything because in my view you are clearly not entitled".*

Dodgy and Dodgy disputed these elements of the valuation and presented them in adjudication to Mr Tweedledum, the Adjudicator named under the Contracts. Mr Tweedledum issued a decision in favour of the *Contractor* including the following statement, "*I decide that the documentation provided by the Contractor in respect of the equipment cost and the material costs referred to me are perfectly adequate for the purposes of an NEC Option C Contract and I have no hesitation in deciding that the full amount should be paid to the Contractor. The subcontract costs I also decide are due to the Contractor because of the nature of an NEC Option C Contract and allow these costs in full."*

Subsequently the *Employer* paid the *Contractor* the sum stated in the Adjudicator's decision. The *Employer* and Mr Smart had something of a tiff about it all and they decided to put the whole thing behind them. Now Dodgy and Dodgy have made a further application for over £1,000,000 of equipment costs and £500,000 of material costs based on exactly the same type of documentation. Mr Smart is very concerned that the equipment costs are grossly inflated and the application has no resemblance to the equipment that was on site. It has also come to his attention that the sums which were decided by the Adjudicator were never paid to the subcontractor in question for the defective work because the Subcontract did not allow for payment of defective works.

**Advise Mr Smart in relation to:**

**a) The appropriate mechanism for dealing with the equipment and material costs, bearing in mind the Adjudicator's decision. [15 Marks]**

**b) How he should advise the *Employer* to deal with the sums decided by the Adjudicator for the subcontractor costs. [10 Marks]**

## Section 2

### Question 5 Compulsory

A manufacturer awarded a £760,000 contract to Sky Contracting under the ICC Measurement Version for the building of a large steel framed warehouse. The first 2m of wall height was to be constructed in block-work and the upper sections clad. Before block laying started Sky requested a change to the specification for block work, offering hollow blocks with a 25mm facing made from the same material as the specified solid blocks. Sky also offered a saving of £80,000 for the change. The Employer accepted the offer and the Engineer issued a variation under Clause 51.

The blocks were delivered to site and block laying commenced but a problem was identified in that the blocks were only faced on one side, and at corners and openings unmatching, unfaced ends of blocks were exposed. The Contractor said that this consequence would have been clear to the Employer as the blocks being laid were the same as the sample panel provided before the variation was issued. The Employer did not expect this result and was concerned about contravening planning permission and possible delay to his expanding business operations. The following options were identified:

1) Provide special matching blocks for corners and openings. Estimated cost £5,000 and critical path delay of 10 weeks;

2) Provide matching solid blocks for corners and openings. Estimated cost £40,000 and critical path delay of 4 weeks.

Site preliminaries are £5,000/week and liquidated damages for delay are £12,000/week.

**a) What options are available to the Employer and how could the Engineer implement these? [10 marks]**

**b) If the planning authority requires the wall to be demolished, what possible claims might the Employer have against:**

**(i) the Contractor [5 marks]**

**(ii) the Engineer [5 marks]**

**c) If the foundations were found to be defective during demolition, how might this affect your answers to b (i) and b(ii) above? [5 marks]**

## Section 2

### Question 6

A Contractor was awarded a new bridge construction contract by a local Council under the ICC Design and Construct Contract. The work comprised the design and construction of a new footbridge over a river. During the contract the Contractor went into Administrative Receivership, due to financial problems on another contract. At the time the structural work had just been completed with the foundations and bridge deck in place, but surfacing of the deck and approach footpaths and balustrading were yet to be undertaken. All work stopped on the contract and the site was secured. The original contract value was £950,000; £570,000 has been paid to the Contractor with £30,000 being held in retention. A further certificate (No.6) for £200,000 (less £10,000 retention) is pending with payment due in 7 days. The Administrator contacts the Employer and requests payment of Certificate No 6 on the due date, plus another £100,000 for works carried out up to the date of the Administrative Order. The Administrator also advises that she is seeking to sell the Contract if the Employer is willing to assign it. At the same time a number of other contractors approach the Employer, offering to complete the bridge works.

**Advise the Employer of his rights and obligations in relation to;**

**a) payment to the original Contractor; [9 marks]**

**b) assignment of the Contract; [8 marks]**

**c) appointing another Contractor to complete the Works. [8 marks]**

## Section 2

### Question 7

An Employer was in tender discussions with contractor A to construct a flood relief tunnel but could not reach agreement on the price. The Employer entered into discussions with contractor B and provided the outline tunnel design (limited to line and level) undertaken by contractor A (which the Employer paid for). A tender price was agreed by the new parties but they did not agree on responsibility for design of the new tunnel. Contractor B agreed to undertake the structural design of the tunnel based on the outline design provided. The Contract was based on the ICC Measurement Version.

During construction, the Contractor's Tunnel Boring Machine (TBM) encountered rock some 15m below ground level and it became stuck. No rock was identified in any of the boreholes in the site investigation provided by the Employer, which only went to a depth of 10m (assume the ground is level).

**a)** **Advise the Contractor on how to proceed with a claim for additional costs, including the contract clauses he could rely on and any mitigation measures he should take.** **[10 marks]**

**b)** **How would your answer vary if Clause 12 had been deleted?** **[8 marks]**

**c)** **Advise the Employer on potential vulnerabilities in the Contractor's claim.** **[7 marks]**

## Section 2

### Question 8

You are a Director of a firm of Consulting Engineers which is advisor to a car component manufacturer. Your client wishes to construct a new factory but it has not been involved in a construction project since its factory was built over 30 years ago and does not understand what it might have to do as a client or why.

**a) Prepare a short report for your client, listing its obligations under the CDM Regulations 2007; [10 marks]**

**b) Using the ICC suite of contracts, propose and briefly justify the most appropriate form of contract for each of the following examples, highlighting any key issues; [15 marks]**

**(i) A town council, with a maximum budget of £20,000, wishes to replace an existing footbridge over a local stream.**

**(ii) A contract for foundations for a supermarket to be built on reclaimed ground against a tight programme with significant damages for delay.**

**(iii) A contractor wishing to subcontract difficult formwork and reinforcement work worth around £50,000.**

**(iv) An electricity company wishing to award hundreds of different cable laying contracts over the next 10 years.**

**(v) A new 1km long, large diameter tunnel under an existing harbour for lorry and coach access to the port.**

**Law and Contract Management Points for answer**
**Module 3**

**Section 1**

**Question 1- Compulsory**

**a)** Candidates should examine the obligations for providing a programme and Clause 31 and 32 and identify the responsibility of the Contractor to revise the programme when instructed under Clause 32. That there is no system for *"unaccepting*" a programme should be noted. The importance of having the programme to warn of cash flow changes and to deal with compensation events should also be noted. **10 marks**

Clause 16 should be discussed, but it should be noted that the decision had already been made and there is likely to be little relevance to the meeting if the Contractor cannot influence the key decisions.

**b)** This relates to 63.3 and the allocation of time risk allowance. The contractor is very likely not to actually need the additional time. However, the compensation event time assessment must be based on the completion date in the Accepted Programme. The answer may explore the wording of 63.3 and the potential absurdity of the adding the time to the overall completion date. This may include a discussion of the terminal float on the contract and risk allocation. The problems of encaging clause 64 might be discussed where there is no programme rejection in accordance with the contract. **8 marks**

**c)** This completes the issues with the compensation events. The provisions of 63.1 and 63.6 are relevant. As so potentially are 63.5. The answer might include a discussion of the project manager's role in accepting and rejecting the quotation. **7 marks**

**Question 2**

a) Part 1 is designed to examine the practical effects of the obligation to work as stated in the Contract and in a spirit of mutual trust and cooperation. **12 marks**

Candidates should identify that the overarching and simple obligation is to comply with the requirements for the Contract or to act as stated in this Contract and that the removal of the exhortation will have an uncertain practical effect. They should discuss the nature of the exhortation and whether it is a standalone provision or a qualification of the first part of Clause 10.1. Candidates may identify that there is little case law in respect of this and therefore little judicial interpretation. Candidates should receive marks for discussing the aim of the provision and perhaps that it was considered important by many commentators, including Sir Michael Latham. But most marks should be awarded for practical examples. The implementation of the Clause 16 and the risk reduction system might be included. Along with other contractual provisions that are designed to build trust through transparency. The relative importance of the provisions on the Employer and the Project Manager might also be explored and how the culture of the organisations might

have a practical effect in conjunction with the amendment.

**b)** Part 2 is designed to examine the alternative position and juxtapose the strict requirements of clause 50.3. Candidates may point out that the Project Manager's actions will be wrong if there is a programme identified in the contract data. However, the correct conclusion is that his actions are correct. **13 marks**

The answer should be phrased as advice to the contractor. That advice should be to submit a compliant programme. Better answers may include a discussion the possibility of recovering interest for the withheld money under Clause 51.3 and that Clause 50.3 may be an unenforceable penalty.

**Question 3**

**a)** The question concerns the procedure for approving disallowed cost and approval of subcontractors **10 marks**

The piling works – The contractor has notified the PM as he should, but not awaited approval before appointing per clause 26. The PM has failed to accept. Both are breaches. The PM has also failed to spot the terms which have increased the liability unexpectedly. The contractor may or may not have forecast appropriates (Clause 52). The prompt completion bonus may not even be a term of the subcontract and may be disallowed per 11.2(25). The PM should check and may be entitled to disallow the cost as not justified by the records, but probably not. The principle advice should be the sum is due. The detail of the sub-contract may also be criticised. The answer might explore the effect this problem may have on the contractual reasons to withhold acceptance under Clause 26 or Clause 13.

**b)** The M&E – The PM is probably in breach for not accepting the design properly but there is a possibility that his M&E Specialist has delegated authority (Clause 14) and has accepted. It seems likely that the M&E specialist was aware and the PM should have been aware of the design. So the sub-contractor may argue an estoppel. The correction of the defective design would not normally be disallowed unless after completion (11.2(25)), so the relevance of completion should be noted. The amendment is obviously relevant and so the extreme test suggested by it. The interrelation between it and avoidance of liability by 14.1 could be discussed. **15 marks**

**Question 4**

This question looks at disallowed cost under NEC Option C and the interaction between on-going project management and the decision of an adjudicator. In particular, it examines the binding nature or otherwise of an adjudicator's decision in relation to how he reached that decision rather than the necessary sums due.

**a)** The candidates should examine the obligations under the NEC Option C to provide documentation and how they should be disallowed and compare these to the documentation provided by the contractor. The Contractor's application is clearly inadequate. The question allows an opportunity to explore clause 11.2(25) in detail. Tangentially it might include the contractor's obligations under Clause 52. **15 marks**

Candidates must then discuss the implications of the adjudicator's decision. That the decision is clearly wrong should be identified as irrelevant. Clause W2.3 (11) obliges the parties to comply with the decision. There may be some discussion about the actual decision and that the reasons may not be binding. The conclusion being that the Project Manager can come at the problem with fresh eyes, rather than be bound to rely on the documents.

Clause W2.4 (2) and the permanently binding nature of the decision might also be discussed.

**b)** This turns on W2.4 (2) and whether the Employer is bound by the Adjudicator's previous decision. Candidates may not be aware of the intercracies of Clause W2.4, but should be able to identify that the evidence is relevant but the adjudication process is cannot be reopened except by the tribunal. They may discuss that this may amount to the Tort of fraud and the termination provisions of the contract may be engaged. But much of it will be hopeless if there has been no referral to the tribunal in time. **10 marks**

## Section 2

### Question 5-Compulsory

**a)** The obvious options available to the Employer have been identified in the question. **10 marks**

For option 1 the estimated costs are £55,000, the delay is 10 weeks and the potential liabilities for liquidated damages are £120,000.

For option 2 the estimated costs are £60,000, the delay is 4 weeks and the potential liability for liquidated damages is £48,000.

Option 2 appears to be the best choice. The costs are slightly more than option 1 but the Works should be delayed by much less, thereby reducing the Contractor's liability to liquidated damages or the Employer's ability to use the Works.

To meet planning permission the provision of matching corner blocks is necessary for completion of the Works.

The Engineer needs to order a variation under Clause 51(1) (a). He should determine whether the Contractor is liable for the additional cost of providing the corner blocks. To do this he would need to review all documentation associated with the variation and consult with the contractor. As well as the difference in direct costs of the two alternatives, the extent of the delay is important. Critical delays incur preliminary costs and possibly liquidated damages for delay. The Employer wants the Works completed on time.

The variation should include the Engineer's determination of liability and estimated valuation. In this case the new corner blocks do not meet the requirements of the specification/planning permission. In issuing the original variation did the Engineer vary the specification to allow corners and opening not to match? It does not appear so and the Employer was entitled to have the same

facing on the block work for the whole of the building.

To meet the Employer's desire to avoid delays the Engineer should also explore the possibility of accelerating the overall programme of Works by issuing an instruction under Clause 46(3) or by negotiation. The Contractor may decide to do this to avoid or reduce any liquidated damages liability. Taking this theme further, the parties to the Contract could seek to agree an accelerated programme to meet the Employer's original requirements, perhaps by negotiating an agreed additional cost/waiving of liquidated damages? This could be facilitated by the Engineer who should have been talking to both parties to establish the best solution, notwithstanding who should pay for it.

**b)** If the planning authority requires the wall to be demolished this work incur additional cost and time and probably delay completion even further, so it is undesirable to both parties. **10 marks**

(i) The Employer's claim against the Contractor would be in the form of liquidated damages at £12,000.00 per week, provided that the Engineer has certified that the Works ought to have been completed earlier than the date of substantial completion certified under Clause 48(2). The Employer's claim is limited by the inclusion in the contract of liquidated damages for delay and no losses associated with his business can be claimed from the Contractor. Furthermore, any claim would be limited to full weeks of delay and any part weeks would not be admissible,

Under Clause the weekly rate would be reduced if the Employer had beneficial use of the Works before substantial completion, for example if he started fitting out the warehouse or storing his goods in it.

The Contractor could challenge the build-up of the £12,000 per week rate. This must be a genuine pre-estimate of the Employer's costs made before the Contract was signed. If it is shown to be excessive or without justification, it could be regarded as a penalty and reduced in adjudication or later proceedings.

(ii) The Employer might have a claim against the Engineer if the Engineer advised acceptance of the variation without recognising the problem that has now become apparent. The test would usually be did the Engineer exercise reasonable skill and care in his advice? The Engineer would have Professional Indemnity insurance to cover such claims and he would need to notify his insurers accordingly.

If the Engineer advised on or prepared the pre-estimate for liquidated damages, or failed to advise the Employer appropriately, the Employer might have a claim if he incurs a loss which could have been avoided with appropriate advice at the time.

There are other ways to meet the requirements of the planners, to avoid demolition of the wall and further delay. It is likely that both parties would wish to explore them, such as extending the cladding to cover the blockwork or painting it to match (although this would incur an ongoing maintenance liability for the Employer).

Finally, it should be remembered that the Employer received a saving of £80,000 for the alternative blocks and so is in a position to contribute to the solution, hopefully without exceeding the pre-saving price for the Works.

**c)** The problems with the foundations and blockwork are two separate issues. **5 marks**

If the blockwork was demolished and the foundations found to be defective the cost of rectification including the cost of critical delays would fall to the party responsible under the Contract.

A thorough investigation would be required to determine the cause of the defects in the foundations, Clause 36.

If the responsibility was found to be the Contractor's, say due to defective workmanship not in accordance with the specification, he would be responsible for the cost of rectification (Clause 39) and may incur additional liquidated damages for delay.

If the responsibility was found to be the Engineer's, say for incorrect specification of concrete mix for the foundations, the Employer would have to pay the Contractor the cost of rectification but he could separately seek recovery of those additional costs from the designer.

The responsibility might also prove to be the Employers, say settlement from ground conditions that were not apparent at the time of construction of the foundations.

**Question 6**

**a)** Payment to the original Contractor **9 marks**

Default of the Contractor is covered in Clause 65.

As the Contractor has an administration order made against him the Employer may give notice to the Contractor under Clause 65 (1) (b) (ii). The notice allows the Employer to expel the Contractor from the Site after 7 days without releasing the Contractor from any of his obligations or liabilities under the Contract. The period of notice can be extended to give the Contractor an opportunity to complete the works (via the Administrator). Having done this, Clause 65 (5) removes the Employer's obligation to pay the Contractor any money under the Contract unless further certification is made by the Engineer. A notice should be given under Clause 60 (10) to withhold payment of Certificate No. 6.

If the contract is terminated by the Employer it will be necessary for the Engineer to carry out a valuation at the date of termination Clause 65(4). Any payment after termination is covered by Clause 65(5). The original Contractor is only entitled to further payment if the costs of completing the works are less than the sum which would have been due if the original Contractor had completed the works himself.

In this case the Employer holds £330,000 for work done by the original Contractor. This, together with the £50,000 balance of tender monies (£950,000 less £570,000 less £330,000) should be sufficient money to pay for completion of the works and might leave a balance due to the original Contractor. If the Employer paid Certificate No 6 to the original Contractor in Administration, he would only have £190,000 available to complete the works, rather than £380,000 this might not be sufficient and could leave him at a loss.

The Employer has to decide on the best way to complete the works either by

- Himself
- Employing another Contractor
- Agreeing to assign the Contract

As the site is secure (and presumably safe) the Employer does not have to rush to make his decision. This situation is unusual and the Employer ideally wants the Contract to be completed at no additional cost than the original tender sum. To protect his financial position the first thing the Employer could do is to stop all payment to the Contractor and give notice of his intention to pay less to the Contractor via the Administrator. Clause 60 (10) requires this to be done in writing not less than one day before the final date for payment of Certificate No. 6. Such a course of action would mean that the Employer could be in breach of the Contract but the Administrator wishes to sell the Contract on, which usually requires the agreement of the Employer to a novation, and so the Employer is in a strong bargaining position, given the circumstances.

**b)** Assignment of the Contract **8 marks**

The Administrator will probably hold discussions with other Contractors with a view to novating the Contract. She is seeking to sell the Contract to what would be a substitute contractor. The substitute contractor would receive the benefit of any monies due on the Contract (£230,000 plus the value of work carried out after the date of the last payment certificate until the date of the Administration Order say £100,000). The substitute contractor would buy the contract from the original Contractor (in Administration) for a price unknown to the Employer.

This is probably the most straightforward way for the Employer to get the work finished. To novate the Contract all three parties must agree (Employer, Contractor via the Administrator and the substitute contractor. The substitute contractor stands in place of the old one and assumes all the benefits and liabilities as if he was the original contractor.

The Employer must satisfy himself as to the capability of a substitute contractor, including H&S, CDM and financial considerations. He does not have to accept any of the contractors put forward by the Administrator.

**c)** (Completing the works himself (65(2) (a)) or employing another contractor to complete the works (65(2) (b). **8 marks**

The Employer might have the resources to complete the works himself but it is much more likely that he would need to employ another contractor to do so. As a public authority the Employer would need to follow the Council's Tendering Procedures. To do so, tender documents would be required for the complete works. Tenderers would want to inspect the works to ascertain what condition they were left in.

This approach is more risky for the Employer. He takes the risk of the standard of workmanship of the original contractor (although he would have redress to the original contract for any costs of rectification). It might also cost the Employer more than the original contract. However, a tender process would demonstrate the reasonableness of the cost of completing the works.

Before a tender could be awarded the original contractor must be terminated by the Employer as is Clause 65(1).

The Employer may sell any of the original contractor's equipment, goods or materials left on site towards the costs of completing the works, providing the original contractor owned them.

**Question 7**

**a)** The Contractor should give notice to the Engineer, in writing, under Clause 12(1) that he has encountered physical conditions which could not reasonably have been foreseen by an experienced contractor. In accordance with Clause 12(2), the Contractor should also give notice of his intention to make a claim for additional payment under Clause 53 and for an extension of time under Clause 44. **10 marks**

As soon as is practicable the Contractor should provide details of the effects of encountering the rock, the measures he is taking, their estimated costs and any anticipated delays. These could include recovery of the TBM, mobilisation of a different TBM and it should include a plan for completion of the Works. This information is needed by the Engineer and the Employer to decide on the action to be taken.

The Contractor has to mitigate costs and this should be an important part of his submission to the Engineer.

**b)** With Clause 12 deleted the Contractor would look elsewhere to try to recover his costs. Design responsibility was not agreed and the Contractor could argue that the design provided by the Employer was deficient. The tunnel was to be constructed 15m below ground but the site investigation only went to a depth of 10m. **8 marks**

Clause 8(2) indicates if the contractor is to be responsible for design of the Permanent Works that should be expressly provided in the Contract. In this case responsibility for structural design was accepted by Contractor B but not line or level. As in (a) the Contractor should also give notice of his intention to make a claim for additional payment under Clause 53 and for an extension of time under Clause 44.

**c)** On vulnerabilities, did the Contractor exercise all reasonable skill, care and diligence as required by Clause 8(2)? The site investigation appears to have been lacking, an experienced contractor should have pointed this out to the Engineer. The contractor is responsible for interpretation of the Site investigation information for the structural design of the tunnel (Clause 11(1)). **7 marks**

The Contractor could be vulnerable to the lack of agreement on responsibility for design when the contract was formed. The Contractor agreed to undertake the structural design based on the outline design provided but is that the limit of his liability? The Contractor was apparently prepared to be responsible for the structural design of the tunnel at 15m deep, with a site investigation only to a depth of 10m. We do not know how clear the correspondence between the parties was before and after award or who wrote the last words on the matter before contract award. Liability could turn on this. It would have been in both parties interest to have clarity on design responsibility.

The Contractor should also recognise that this event has the potential to turn to a dispute and look to the provisions of Clause 66. Under Clause 66(2) the Contractor should advise the Employer (copy to the Engineer) and request a meeting, preferably with the Engineer in attendance too. In doing this the

Contractor should have information on the actions to be taken, costs thereof and any implications on delivery.

**Question 8**

**a)** (The report on client obligations under CDM Regulations should include **10 marks**

- Explanation of the objectives of the CDM regulations ( to reduce the risk of harm to those that have to build, use, maintain and demolish structures)
- Notifiable project if construction period is more than 30 days or 500 person days
- Check competence and resource of all appointees
- Ensure suitable management arrangements, including welfare
- Allow sufficient time and resources for all stages
- Provide pre-construction information
- Appoint CDM co-ordinator
- Provide CDM co-ordinator with information
- Appoint Principal Contractor
- Ensure Construction does not start without welfare arrangements and Construction Stage Health and Safety Plan
- Retain and provide access to Health and Safety File

**b)** Suggested versions and reasons, other versions possible if adequately justified **15 marks**

(i) Minor Works version; small value project. Extra marks - consider lump sum price

(ii) Design and Construct version; more control for contractor. Extra marks – incentivise with pain/gain share or use Target Cost version

(iii) No ICC Form of Sub-Contract available; use measurement version with CESMM Extra marks – recommend CESMM 3 but note new version 4 now available

(iv) Term Version; large number of similar operations Extra marks – suggest means of measurement e.g. simplified schedule of rates, recognising similarity in operations

(v) Measurement Version; full Clause 12 provision for unforeseen physical conditions Extra marks – recognise higher risk associated with tunnelling suggest mitigation e.g. appropriate site investigation