

EXAMINERS REPORT 2025

ICE Adjudicators Qualifying Examination

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Pass Marks

The pass mark is set at 65%

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

To apply for the 2025 examination please email contractsanddisputes@ice.org.uk

A certificate is issued to a candidate who passes The ICE Adjudicators Qualifying Examination

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

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

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Adjudicators' Qualifying Examination 2025 – Paper 1

Examiner's Feedback – Paper 1

11 candidates sat the exam. Five candidates achieved the pass mark of 65%. The pass marks were from 70%, 80%, 84%, 86% and 94%. The purpose of paper 1 is to assess the candidates' ability to produce an enforceable decision.

Three exam scripts were very good. This year's performance is broadly similar to last year's. The papers that did not pass exhibited: mis-reading of the question and submissions; incorrect/irrelevant issues (taking a 'scatter-gun' approach); repetition and 'copy and paste' from the question; failure to exhaust issues; failure to accept decision from Adjudication 1; poor grammar and formatting; lack of reasoning; mis-application of statutory law (Late Payment of Commercial Debts Act); apparent avoidance of addressing the matter by wholesale acceptance of responding party's position; poor costs' allocation; and some were incomplete. It is suggested that future candidates be advised to undertake decision writing courses/exercises before presenting for examination. It is appreciated that sitting the examination hones candidates' decision-making and writing skills and exam techniques.

Candidates are required to answer the question set. The question clearly asked for issues to be identified and succinctly listed separately to the decision (for which ten marks (20%) were allowed). Two candidates did not do this. Two candidates only partly identified the issues. One candidate answered on a notified sum ('smash and grab') basis, which the referral expressed was not the basis. Two candidates did not complete what may have otherwise been good decisions.

The paper required candidates to draft a decision, encompassing the essential elements, in good format and structure and succinctly identifying and addressing the issues arising in the dispute using plain English, proper grammar and with sensible reasons. The scenario required identification of seven principal issues, including procedural and substantive matters, any five of which would attract full marks. The issues arising included:

1. Whether jurisdiction exists.
2. The effect of the decision in Adjudication 1.
3. The method of assessment (retro/prospective).
4. The extent of work done and time of assessment.
5. Whether adjustment of the Completion Date is merited.
6. Whether damages should be re-paid.
7. What payment, if any, arises.

Marks were available for identifying the issues, for proper structure (preambles, appointment, the dispute, redress etc.), analysis, and for a disposal section.

**Institution of Civil Engineers
Adjudicators' Qualifying Examination 2025**

Tuesday 11th February 2025

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

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

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

Reference to Documents during the Examination

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

References to Cases and Acts should be quoted where possible.

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

Question 1

PLEASE READ THIS CAREFULLY BEFORE STARTING TO WRITE YOUR DECISION

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

- Both parties have invited you to give reasons for your Decision. Deal in your Decision with.
 - any jurisdictional challenges; and proceed, whether or not you conclude that you have jurisdiction
 - deal with all substantive issues whether or not they are determinative of the dispute.
 - do not use your own name as the Adjudicator
- The maximum mark for this question is 50
- You should set out, separately from your Decision, a concise list of the issues you have considered in your Decision. **10 marks are allocated to this exercise.**
- The preambles setting out your nomination and describing the submissions of the parties should be set out very briefly. **5 marks are allocated to this exercise.**
- If you think any further information is required for your Decision you should make the necessary assumptions, and explain, in your Decision, what steps you took during the adjudication to obtain this information.
- **Note: The Examiner is looking for a good reasoned and enforceable decision and this will be taken into account when marking.**

IN THE MATTER OF AN ADJUDICATION PURSUANT TO THE HOUSING GRANTS,
CONSTRUCTION AND REGENERATION ACT 1996 AND OPTION W2 OF THE NEC4
ENGINEERING AND CONSTRUCTION JUNE 2017

Between:

DEVINE CARPENTER & MOLLOY LIMITED THE REFERRING PARTY

and

SOUTH WEST COUNCIL THE RESPONDING PARTY

NOTICE OF ADJUDICATION

THE PARTIES

- 1 The Referring Party is Devine Carpenter & Molloy Limited, a company established under the laws of England and Wales (company number XX555XX), and having its registered office at Trench Street, Wetown ('DCM').
- 2 The Responding Party is South West Council, a local authority established under the Local Government etc. (Wales) Act 1994, having its head office at Council Headquarters, Wetown ('SWC').

THE CONTRACT

- 3 In May 2020, the Parties entered into a contract, based on Option A of the NEC4 Engineering and Construction Contract June 2017 Edition incorporating Secondary Options X4, X5, X7, X13, X16, Y(UK)2, Dispute Resolution Option W2 with additional conditions contained in Option Z ('the Contract'), for DMC to carry out works at the River Tiveto, Wetown ('the Project').
- 4 The Contract and any dispute or claim arising out of or in connection with it, are subject to the Laws of England and Wales.
- 5 The Contract is a 'Construction Contract' for the purpose of the Housing Grants, Construction and Regeneration Act 1996.

THE DISPUTE

- 6 The Project is one of the largest flood protection schemes in the UK and is currently the biggest flood scheme ever carried out in Wales. It is part of a £92m investment for SWC and involves the construction of c.6km of sheet piled reinforced concrete flood walls and embankments through the town of Wetown.
- 7 The tendered total of the Prices for the Project was £52,204,975.18.
- 8 The Works themselves are divided into various Work Sections ('WS').
- 9 Under the Contract the Parties agreed upon sectional completion, including Option X5, together with Option X7 in relation to Delay Damages. In the Contract Data the Parties agreed the following in relation to each:

'Option X5:

- The *completion date* for each *section* of the *works* is X5.1
30th September 2023 for all work sections except
Work Section 42 and,
31st January 2022 for Work Section 42.'

'Option X7:

- Delay damages for each section of the works are X7.1
All work sections except for Work Section 42:
£3,610.00 per day.
For Work Section 42:
£1,805.00 per day.'

- 10 The Works are split into two contractual Sections. The present dispute relates to the first of these Sections, ie. all Work Sections except for Work Section 42 ('Section 1').
- 11 Section 1 was originally planned to complete on 30 September 2023. DMC's position is that the Works have been delayed and impacted by Compensation Events ('CEs').
- 12 Given the size of the Project, and the number of CEs, in this adjudication, DMC refers only one CE in relation to Work Section 22 ('WS22') - being CE238 notified by the Project Manager ('the PM') on 8 August 2022. DMC's position is that

WS22 is on the critical path for the Project and that it is entitled to an extension of time, alleviation of Delay Damages and an increase to the Prices because of CE238.

- 13 In February 2023 DMC provided SWC with an independent delay analysis in relation to WS22. Rather than engage with DMC on this, however, the PM carried out a Project Manager's Assessment (PMA 26) of CE238 on 1 April 2023, assessing the impact of the CE238 as requiring no change to the completion date and no change to the Prices. Then two weeks later, on 14 April 2023, SWC (via the PM) unilaterally omitted WS22 from DMC's scope and reduced the Prices by c.£300,000.
- 14 As a result, £527,388.35 of Delay Damages, have been deducted from sums otherwise due to DMC in relation to Section 1 and £0 has been paid by SWC in relation to the delays and costs associated with CE238.
- 15 Given the approach by SWC, DMC had no choice but to refer the matter to adjudication. On 5 July 2024, Mr Peter Smith issued his decision in the first adjudication referred by DMC, confirming that the omission of the remainder of WS22 was a breach of contract by SWC ('Adjudication 1').
- 16 Adjudication 1 did not consider DMC's entitlement to any additional time and/or costs. DMC now accordingly refers the present dispute to adjudication.
- 17 The *Adjudicator* is asked to open up, review and revise PMA 26 and declare that CE238 ought to have been assessed and implemented under Clause 65.4 of the Contract as follows:
 - (1) An extension of time of 347 calendar days, changing the completion date for Section 1 to 8 September 2024; and
 - (2) An increase in the Prices of £6,630,676.88.
- 18 Having made this assessment, the *Adjudicator* is then asked to: (a) order repayment of the liquidated damages wrongfully deducted in relation to Section 1; and (b) revise the Activity Schedule and order payment of £6,630,676.88 to DMC on the basis that this sum became payable following the wrongful omission of the remainder of WS22.

19 DMC seeks the following redress:

- (1) That the *Adjudicator* find and declare that DMC is entitled to an extension of time to the Completion Date for Section 1 (as defined at paragraph 12 of the Notice of Adjudication) of 347 calendar days, or such other period as the *Adjudicator* decides.
- (2) That the *Adjudicator* open up, review and revise the Project Manager's Assessment 26 such that the assessment of the effect of CE238 is:
 - a. To revise the Completion Date for Section 1 (as defined in paragraph 11 of the Notice of Adjudication) to 8 September 2024 or such other date as the *Adjudicator* shall decide; and
 - b. An increase to the Prices of £6,630,676.88 or such other sum as the *Adjudicator* shall decide.
- (3) That the *Adjudicator* find and declare that, at the date of the Referral, DMC is entitled to repayment of £527,388.35 of delay damages in relation to Section 1 (as defined in paragraph 12 of the Notice of Adjudication), or such other sum as the *Adjudicator* shall decide.
- (4) An order that SWC repay the delay damages so ordered at Redress 3 within 7 days of the date of the decision, or such other date as the *Adjudicator* shall decide.
- (5) An order that DMC is entitled to, and SWC pay, interest at the interest rate under the Contract on the sum so ordered at Redress 3 from the date of payment of the delay damages by DMC until the date of repayment by SWC, or between such other dates or at such other rate as the *Adjudicator* shall decide.
- (6) That the *Adjudicator* find and declare that the Activity Schedule under the Contract, in so far as it relates to WS22, is revised to include CE238 in the sum of £6,630,676.88, or such other sum as the *Adjudicator* shall decide.
- (7) That the *Adjudicator* order SWC to pay to DMC £6,630,676.88 within 7 days of the date of the decision, or such other sum or in such other time period, as the *Adjudicator* shall decide.
- (8) An order that DMC is entitled to, and SWC pay, interest at the interest rate under the Contract on the sum so ordered at Redress 7 from 26 May 2023 until the date of repayment by SWC; or between such other dates or at such other rate as the *Adjudicator* shall decide.

(9) That the *Adjudicator* orders that SWC pay the *Adjudicator's* fees and expenses in this adjudication.

20 Reasons, for the *Adjudicator's* decision, are requested.

Solicitor for the referring party

8 January 2025

IN THE MATTER OF AN ADJUDICATION PURSUANT TO THE HOUSING GRANTS,
CONSTRUCTION AND REGENERATION ACT 1996 AND OPTION W2 OF THE NEC4
ENGINEERING AND CONSTRUCTION JUNE 2017

Between:

DEVINE CARPENTER & MOLLOY LIMITED THE REFERRING PARTY

And

SOUTH WEST COUNCIL THE RESPONDING PARTY

REFERRAL NOTICE

THE PARTIES

- 1 The referring party is Devine Carpenter & Molloy Limited, as described in the notice of adjudication ('DCM'). The responding party is South West Council, as described in the notice of adjudication ('SWC').

THE CONTRACT

- 2 On or around May 2020 DCM was engaged by SWC to carry out the construction of flood defence structures, erosion protection, culverts, river diversion works, bridges, pumping stations, landscaping and environmental improvements at the River Tiveto, Wetown ('the Project').
- 3 The contract is based on an Option A of the NEC4 Engineering and Construct Contract June 2017 Edition incorporating Secondary Options X4, X5, X7, X13, X16, Y(UK)2, Dispute Resolution Option W2 with additional conditions contained in Option Z ('the Contract').
- 4 The works are described in the Contract Data as:

‘... construction of flood defence structures, erosion protection, culverts, river diversion works, bridges, pumping stations, landscaping and environmental improvements all as described in detail in the Scope. Bridge decks, pumping station MEICA works, precast concrete elements, flood gates, glass panels and demountable barriers will be Contractor designed, along with other elements as identified in the relevant parts of the Scope’ (‘the Works’).

ADJUDICATION PROVISIONS

- 5 Pursuant to clause W2.1(1) a dispute arising under or in connection with the Contract is referred to and decided by the *Adjudicator*. Under clause 11.2(10), the *Adjudicator* is to be agreed by the Parties, failing which, under clause W2.2(3), the *Adjudicator* nominating body is the Institution of Civil Engineers (‘the ICE’).
- 6 By notice of adjudication dated 8 January 2025, DCM gave SWC notice of its intention to refer the present dispute to adjudication. Following application, the ICE nominated Fran Barker as the *Adjudicator* and by email dated 10 January 2025, Ms/Mr Barker confirmed willingness to act as the *Adjudicator*.
- 7 In terms of Clause W2.2 the *Adjudicator* is appointed under the NEC Dispute Resolution Service Contract current at the starting date. The Contract Data confirms the starting date under the Contract was 18 May 2020. The NEC Dispute Resolution Service Contract at the starting date was June 2017 and was signed by both Parties and the *Adjudicator*.

THE DISPUTE

- 8 The Project is one of the largest flood protection schemes in the UK and is currently the biggest flood scheme ever carried out in Wales. It is part of a £92m investment for SWC and involves the construction of c.6km of sheet piled reinforced concrete flood walls and embankments through the town of Wetown.
- 9 The tendered total of the Prices for the Project was £52,204,975.18.
- 10 The Works are divided into various Work Sections (‘WS’).
- 11 Under the Contract the Parties agreed upon sectional completion, including Option X5, together with Option X7 in relation to Delay Damages. In the Contract Data the Parties agreed the following in relation to each:

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30th September 2023 for all work sections except
Work Section 42 and,
31st January 2022 for Work Section 42.’
 - ‘Option X7:
 - Delay damages for each section of the works are X7.1
All work sections except for Work Section 42:
£3,610.00 per day.
For Work Section 42:
£1,805.00 per day.’

- 12 The Works are split into two contractual Sections. The present dispute relates to the first of these Sections, i.e. all Work Sections except for Work Section 42 (‘Section 1’).

- 13 As can be seen, Section 1 was originally planned to complete on 30 September 2023. DCM’s position is that the Works have been delayed and impacted by Compensation Events (‘CEs’).

- 14 Given the size of the Project, and the number of CEs, in this adjudication, DCM refers only one CE in relation to Work Section 22 (‘WS22’) - being CE238 notified by the Project Manager (‘the PM’) on 8 August 2022. DCM’s position is that WS22 is on the critical path for the Project and that it is entitled to an extension of time, alleviation of Delay Damages and an increase to the Prices because of CE238.

- 15 In February 2023 DCM provided SWC with an independent delay analysis in relation to WS22. Rather than engage with DCM on this, however, the PM carried out a *Project Manager’s* assessment (PMA 26) of CE238 on 1 April 2023, assessing the impact of the CE238 as requiring no change to the completion date and no change to the Prices. Then two weeks later, on 14 April 2023, SWC (via the PM) unilaterally omitted WS22 from DCM’s scope and reduced the Prices by c.£300,000.

- 16 As a result, £527,388.35 of Delay Damages, have been deducted from sums otherwise due to DCM in relation to Section 1 and £0 has been paid by SWC in relation to the delays and costs associated with CE238.

- 17 Given the approach by SWC, DCM had no choice but to refer the matter to adjudication. On 5 July 2024, Peter Smith issued his decision in the first adjudication referred by DCM, confirming that the omission of the remainder of

WS22 was a breach of contract by SWC ('Adjudication 1'). At paragraph 85 of his decision, Mr Smith confirmed that it was 'more likely than not' that SWC omitted WS22: 'because it considered that it would enable the PM to avoid having to give DCM an extension of time'.

18 Adjudication 1 did not consider DCM's entitlement to any additional time and/or costs. DCM now refers the present dispute to adjudication.

19 The *Adjudicator* is asked to open up, review and revise PMA 26 and declare that CE238 ought to have been assessed and implemented under Clause 65.4 of the Contract as follows:

(1) An extension of time of 347 calendar days, changing the completion date for Section 1 to 8 September 2024; and

(2) An increase in the Prices of £6,630,676.88.

20 Having made this assessment, the *Adjudicator* is then asked to: (a) order repayment of the liquidated damages wrongfully deducted in relation to Section 1; and (b) revise the Activity Schedule and order payment of £6,630,676.88 to DCM on the basis that this sum became payable following the wrongful omission of the remainder of WS22.

21 DCM's position is that SWC cannot seek to benefit from its breach and avoid assessing and paying the costs associated with a CE by wrongfully omitting works.

22 DCM's claim is founded upon the legal submissions set out in this Referral together with the independent opinions of Andy Parnie (on delay), Chris Atlas (quantum) and the witness statement of Robbie Edwards of DCM.

METHOD OF ASSESSMENT

23 Clause 63 of the Contract governs 'Assessing compensation events'. The standard form and its approach have not been amended by the Parties.

24 The Contract accordingly requires (1) that the impact on both time and costs are assessed at the same time and that (2) that in relation to each CE, parties identify what is often referred to as the 'dividing date' or 'switch date'.

25 The impact of the CE on the Accepted Programme and Prices is then assessed at

this dividing date. With the Accepted Programme being impacted, and Prices assessed, with as-built records up to the dividing date; and then the impact on the works after the dividing date being a forecast.

- 26 As clause 63.1 makes clear, where the CE arose from a matter the PM should have notified under clause 61.1, the dividing date is the date of the communication which led to the CE. In all other cases the dividing date is the date when the CE was notified. This need to carry out a prospective analysis after the dividing date, remains the case even when CEs are being assessed by the Adjudicator, with the benefit of hindsight. This is confirmed in secondary Option W2 clause W2.3(7), which requires the *Adjudicator* to assess any additional cost or delay in the same way as a compensation event. This therefore requires the *Adjudicator* to follow the process in clause 63, rather than assessing the effects of a compensation event after the dividing date in a retrospective manner, using records of the actual time and cost consequences.
- 27 Further, as DCM understand it, SWC agree with this approach. As, in Adjudication 1, SWC stated they rejected DCM's previous delay analysis because it was (in their opinion) retrospective rather than a contemporaneous assessment. Both parties therefore agree that what is required under the Contract is a contemporaneous, rather than a retrospective assessment of CEs.
- 28 The relevant dividing date for CE238 is 8 August 2022, the date it was notified by the PM.

FACTUAL BACKGROUND

- 29 WS22 runs along the southern bank of the River Tiveto and western side of the Statrig Water between Albert Bridge and Drum Bridge:



- 30 The permanent works design for WS22 was carried out by SWC's consulting engineers (Fox), direct. The design for WS22 required the construction of 128m of flood defence walls between the Albert Bridge and Drum Bridge.
- 31 The initial 95m long section of cantilever wall from Albert Bridge was to be constructed from AZ18 sheet piles, with a reinforced concrete upper flood defence wall, encapsulating the piles. The remaining wall up to Drum Bridge was then a reinforced concrete gravity wall.
- 32 Access to WS22 was, however, limited. This is because WS22 directly abuts existing buildings and structures, and access was not permitted/possible from the adjacent roadway (in particular using the existing lane way shown in the photograph below).
- 33 WS22 therefore had to be constructed from within the river, requiring the construction of a temporary platform, with access being taken from WS23 on the other side of the Statrig Water. As can be seen from the marked up drawing below produced as part of DCM's tender:



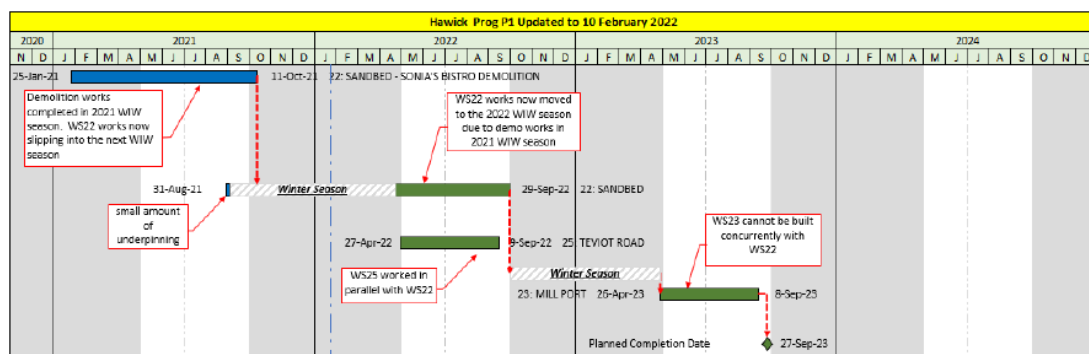
- 34 Further, as can be seen WS22 runs parallel to WS23. The design for WS23 is a cantilever sheet pile retaining wall, which is situated in the river channel. WS23 abuts Mill Port Road. Whilst Mill Port Road could be closed to vehicles, it required to remain open to pedestrians during the *works*, meaning (as with WS22) it was necessary to build a temporary platform to allow the works to be constructed from in the Statrig Water.
- 35 The impact of these constraints and the design by Fox meant that it was not possible to construct all of WS22 and WS23 at the same time. As each temporary platform was approximately 9m wide taking up 50% of the channel – meaning if both had been constructed at the same time, the Statrig Water would have been blocked which would have contravened EPA/River Commissioner/Scope requirements.
- 36 Given access to WS22 was taken through WS23, WS22 required to be (and was planned to be) completed, before WS23 could commence.
- 37 Indeed, Mr Smith confirmed this at paragraph 69 of his decision in Adjudication 1, stating:
- ‘Whilst it is not for me to decide why this was so, or who was responsible, it is clear from the evidence provided that there were delays affecting the progress of WS22 during 2022 and also to WS23, since much if not all of WS23 could not commence until WS22 was complete due to restrictions on in-river working in Statrig Water.’

completion would directly impact WS23 and in turn the completion date. As if WS23 could not be completed in the Summer of 2023, it would delay the works past the planned completion date to the next in water working season in the Summer 2024.

- 44 With this in mind, DCM now turn to consider the events leading up to CE238 and the instruction of CE238, leading to the planned completion date becoming September 2024, rather than September 2023, and a significant increase in the Prices.

THE BRIDGEHOUSE DEOMOLITION WORKS

- 45 Additional demolition works (of the adjacent Bridgehouse Guesthouse) were instructed by SWC (via the PM) which meant DCM were unable to commence and complete WS22 as planned in the Summer of 2021. Instead, WS22 was pushed back to the Summer of 2022.
- 46 DCM mitigated this delay by changing the Accepted Programme logic, to carry out WS22 and WS25 at the same time in the Summer of 2022. Whilst this lead to additional costs for DCM, DCM did this in order to preserve the original completion date and prevent WS23 being pushed into the Summer of 2024. This change to the Accepted Programme logic can be seen in the table below:



- 47 DCM’s mitigation measures meant the additional demolition works did not impact planned completion. They did, however, mean that DCM lost the 2021 in water working season, increasing the risks associated with a further delay to WS22. This loss of the 2021 in-water working season was accepted as a client risk, as can be seen from the below extract from the risk register submitted in relation to the additional works:

Risk Register

Description	Potential risk
Loss of Working in Water Season - Programme impact due to the re-sequencing of Contractor's Programme to facilitate the demolition of Bridgehouse Guesthouse	Client risk - excluded

48 The CEs associated with these additional demolition works were all notified and accepted by the PM as CEs.

REQUIREMENT FOR A REVISED CAR LICENCE

- 49 Following completion of the demolition work, WS22 was then planned to commence in the 2022 Summer working season.
- 50 On 15 February 2022, however, Fox advised DCM that the CAR Licence that SWC had obtained did not accommodate part of the works required for WS22.
- 51 SWC therefore had to obtain a further licence. In order to obtain the licence Fox were required to provide revised hydraulic modelling outputs and a new step pool design.
- 52 Following receipt of this further design information from Fox, on 12 May 2022 the revised licence was issued by EPA allowing works to commence.
- 53 Receipt of the revised CAR licence did not have a critical delay impact. Instead, receipt of the licence on 12 May 2022, together with the removal of some underpinning works, meant that planned completion of the works remained as 27 September 2023.

PROCUREMENT OF ROCK ANCHORS

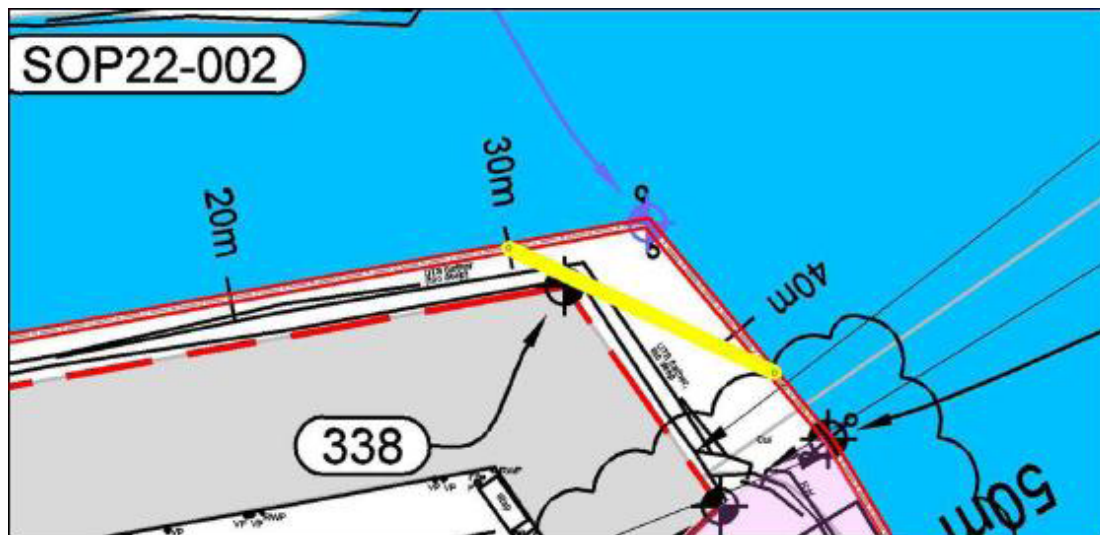
- 54 On 2 June 2022, SWC, via the PM, issued CE201 and instructed DCM to procure 21 rock anchors. As of 2 June 2022, however, there was no requirement in the design for rock anchors in WS22.
- 55 When issuing the CE, the PM stated that the Rock Anchors were required for a 'WS22 re-design' and that a 'full set of drawings will be issued shortly'. As explained below, however, the initial design for these Rock Anchors was not

produced until 8 August 2022.

PERMANENT WALL RE-ALIGNMENT

56 As noted above, following completion of the demolition work, WS22 was planned to commence in the 2022 Summer in water working season. It became apparent, however, that a change to the alignment of the permanent sheet piles shown in Fox's design was required.

57 As a result, on 30 June 2022 and 2 July 2022 the PM notified CE211 and CE214 changing the Scope and instructing a different wall alignment for the piles. The changed pile alignment instructed under CE214 can be seen in yellow in the drawing below:



58 Following receipt of the revised design DCM commenced the WS22 piling, but not all piles could not be driven to the design depth. This did not come as a surprise to SWC, however, given they had already instructed DCM to procure Rock Anchors on the basis:

‘Fox have carried out a geotechnical review of the situation and have concluded that a series of inclined rock anchors will be required to adequately support the sheet piles.’

59 As noted above, and explained below, the initial design the Rock Anchors was not received until 8 August 2022 - as the Summer 2022 in river season was coming to an end.

CE238 – ROCK ANCHOR DESIGN CHANGE

60 DCM's position in relation to the time and cost impact of CE238 is as follows:

CE	CE DESCRIPTION	CE CLAUSE(S)	DIVIDING DATE	CRITICAL DELAY CAUSED BY CE	REVISED SECTIONAL COMPLETION DATE	INCREASE TO PRICES
CE238	Rock Anchors Drawing	60.1 (1)	08-Aug -22	347 days	08 September 2024	£6,630,676.88

61 The *Adjudicator* is accordingly asked to open up review and revise the PM’s assessment of CE238, being Project Manager’s Assessment 26, such that under Clause 65.4, the assessment of the effect of CE238 was:

- (1) To revise the Completion Date for Section to 08 September 2024; and
- (2) An increase to the Prices of £6,630,676.88.

Background

62 On 8 August 2022, the PM notified CE238, changing the Scope providing DCM with part of a revised design for the permanent piles, requiring Rock Anchors to be used to support the floodwall structure. However, as of 8 August 2022, the design was incomplete. The design information issued then identified where 7 of the 21 rock anchors were to go, on an ‘indicative basis’. As DCM’s independent experts explain, as of 8 August 2022 (being the dividing date), the estimated duration of the works required to undertake the installation of all 21 new anchors was 49 Calendar Days.

63 The result being that, even if the full design had been provided, these works could not have been completed in the Summer 2022 Season and would not have been completed until September 2023.

64 Indeed, this is confirmed at paragraph 70 of the decision in Adjudication 1, with Mr Smith stating:

‘... it is clear that there was insufficient time to commence construction of the revised design before the 1st September 2022 and the end of the 2022 summer season. In consequence, DCM was instructed, CE254, to prepare the area for winter, installing temporary rip rap to protect the site.’

65 The effect of WS22 not being completed until September 2023 was then that, at the dividing date, WS23 could not have commenced until the 2024 summer season, and would not be completed until 8 September 2024. Almost a year

after the original planned completion date of 30 September 2023. As a result, CE238 had a critical delay impact on the completion date of 347 calendar days, resulting in a revised completion date of 08 September 2024.

66 Further, whilst SWC now dispute DCM’s entitlement, at the time SWC was aware of the delay impact of its revised design. In March 2023 (prior to the wrongful omission) when the planned approach was still that DCM carry out WS22 followed by WS23 in the different Summer seasons, SWC sent an email, discussing works to WS23, where it stated:

‘This will likely be one of the last areas we construct in 2024.’

67 It is clear that, at the time, both parties knew that the impact of the CE238 was that it would push WS23 into the Summer of 2024. Rather than acknowledge this, however, SWC wrongfully omitted the works from DCM. As such DCM now ask the *Adjudicator* to grant the extension of time and change to the Prices they are entitled to.

68 In relation to the cost impact of CE238, reference is made Mr Atlas’ report which explains that, taking all matters into account, his independent view on the appropriate change to the Prices in relation to CE238 is £6,630,676.88 (‘... taking into account my review of the DCM time related costs and of the direct works in relation to CE-238, I would set down that my opinion on the appropriate change to the Prices in relation to CE-238 is £6,630,676.88.’). The position can be summarised as follows:

<u>Sub-heading</u>	<u>Amount</u>
1. People	£2,334,872.52
2. Plant	£581,372.51
3. Equipment	£857,958.17
4. Material - time related	£11,626.40
4. Material - direct works	£24,279.49
5. Charges	£310,304.69
6. Subcontract - time related	£1,294,563.27
6. Subcontract - direct works	£453,954.83
Fee	£761,745.00
Total	£6,630,676.88

69 Where relevant, the assessment has been carried out using rates agreed by the *Project Manager* and the *Contractor* for use in assessment of compensation events, in accordance with clause 63.14.

REPAYMENT OF DELAY DAMAGES AND INTEREST

70 The parties included Option X7 as part of the Contract. SWC have withheld £527,388.35 of delay damages from sums otherwise due to DCM, as follows:

Payment Certificate	Date of Certificate	No of days for which delay damages were deducted in relation to Section 1	Delay Damages deducted in relation to Section 1	Cumulative total deducted
41	06-Nov-23	31	£92,325.75	£92,325.75
42	06-Dec-23	61	£89,347.50	£181,673.25
43	06-Jan-23	92	£92,325.75	£273,999.00
44	07-Feb-24	123	£70,124.25	£344,123.25
45	07-Mar-24	152	£81,134.75	£425,258.00
46	04-Apr-24	183	£102,130.35	£527,388.35

71 For the reasons outlined above, DCM’s position is that the completion date should be changed to 8 September 2024, equating to an extension of time of 347 days.

72 Option X7.2 states that:

‘If the Completion Date is changed to a later date after delay damages have been paid, the *Employer* repays the overpayment of damages with interest. Interest is assessed from the date of payment to the date of repayment and the date of repayment is an assessment date.’

73 DCM is accordingly entitled to repayment of all delay damages deducted, on the basis an extension of time of 347 days, reliefs DCM from the current deduction based on 183 days delay.

74 As regards interest, under Option X7.2, DCM is entitled to interest from the date the delay damages were paid, until repayment at the next assessment date. This being confirmed in clause 51.3 of the Contract, with clause 51.4 confirming interest is calculated on a daily basis at the interest rate, compounded annually.

75 The Contract Data confirms, ‘The *interest rate* is two (2)% per annum above the Official Bank rate of the Bank of England.’

WRONGFUL OMISSION OF REMAINING WORKS SCOPE OF WS22

76 As noted at paragraph 16 above, a year after CE238 was instructed, SWC unilaterally omitted WS22 from DCM’s scope on 14 April 2023.

77 In Adjudication 1, Mr Smith declared:

- (1) The omission of the remainder of WS22, in order to give that work to others, in the absence of DCM's consent was a breach of contract.
- (2) SWC cannot reduce the Prices as a result of the omission; and
- (3) SWC cannot fix an earlier Completion Date, than the completion date in the Contract Data, as a result of the omission.

78 DCM now seek to apply this decision in the present dispute.

79 Firstly, as outlined above, DCM's position is that PMA 26 should be opened up, reviewed and revised such that the assessment of CE238 was as follows:

- a. That the Completion Date for Section 1, as stated in the Contract Data, is revised to 8 September 2024; and
- b. That the Prices in relation to WS22 are increased to £6,630,676.88.

80 Had the effect of CE238 been properly assessed, this change to the Completion Date and Prices would have been implemented under clause 65.4, prior to the wrongful omission. The dividing date of CE238 was 8 August 2022 with the PM's eventual PMA 26 being dated 1 April 2023.

81 Following implementation, in accordance with the Adjudicator's decision in Adjudication 1, neither the Prices nor the revised Completion Date can be reduced as a result of the later wrongful omission. To do so would be to allow SWC to benefit from their breach.

82 The only impact of the wrongful omission is to bring forward the date when DCM became entitled to payment in relation to WS22 under the Contract.

83 This is on the basis that, as an Option A NEC4 Contract, DCM becomes entitled to payment on completion of an activity or group of activities (see clause 11.2(28)). Clause 63.12 makes clear that assessments for changed Prices for compensation events are in the form of changes to the Activity Schedule. This means that the change to the Prices required due to CE238 would be reflected in the Activity Schedule at the point of the wrongful omission.

84 A copy of that Activity Schedule, revised to properly include CE238, is produced as an appendix to the referral. The total of the Prices in this revised Activity Schedule in relation to WS22 being £8,279,491.97.

- 85 When the remainder of WS22 was then unilaterally omitted by SWC on 14 April 2023, the associated activities on the Activity Schedule, including CE238, became deemed complete.
- 86 DCM accordingly became entitled to payment of the total of the Prices for WS22, including the costs associated with CE238 at the date of the omission, under clause 50. This amount should have been assessed and paid at the next assessment date following the omission, with interest accruing from this date under clause 51.3. As Mr Atlas explains, interest began to run from 26 May 2023 and continues to accrue.
- 87 In line with this approach, at the date of this referral, the PM has already recognised and paid DCM the WS22 activities and CEs shown in the Activity Schedule at the date of the omission and (following Adjudication 1) has not reduced the Prices. See PM-44 issued by email on 07 February 2024.
- 88 The PM certified £1,648,815.08 in respect of WS22. Given the PM assessed the impact on the Prices of CE238 as £0, however, nothing has been certified or paid in relation to CE238.
- 89 As such DCM asks the *Adjudicator* to amend the Activity Schedule and order payment of £6,630,676.88 plus interest, with interest continuing to accrue until payment is made.

REDRESS SOUGHT

- 90 DCM seeks the following redress:
- (1) That the *Adjudicator* find and declare that DCM is entitled to an extension of time to the Completion Date for Section 1 (as defined at paragraph 12 of the Notice of Adjudication) of 347 calendar days, or such other period as the *Adjudicator* decides.
 - (2) That the *Adjudicator* open up, review and revise the Project Manager's Assessment 26 such that the assessment of the effect of CE238 is:
 - a. To revise the Completion Date for Section 1 (as defined in paragraph 11 of the Notice of Adjudication) to 8 September 2024 or such other date as the *Adjudicator* shall decide; and
 - b. An increase to the Prices of £6,630,676.88 or such other sum as the *Adjudicator* shall decide.

- (3) That the *Adjudicator* find and declare that, at the date of the Referral, DCM is entitled to repayment of £527,388.35 of delay damages in relation to Section 1 (as defined in paragraph 12 of the Notice of Adjudication), or such other sum as the *Adjudicator* shall decide.
- (4) An order that SWC repay the delay damages so ordered at Redress 3 within 7 days of the date of the decision, or such other date as the *Adjudicator* shall decide.
- (5) An order that DCM is entitled to, and SWC pay, interest at the interest rate under the Contract on the sum so ordered at Redress 3 from the date of payment of the delay damages by DCM until the date of repayment by SWC, or between such other dates or at such other rate as the *Adjudicator* shall decide.
- (6) That the *Adjudicator* find and declare that the Activity Schedule under the Contract, in so far as it relates to WS22, is revised to include CE238 in the sum of £6,630,676.88, or such other sum as the *Adjudicator* shall decide.
- (7) That the *Adjudicator* order SWC to pay to DCM £6,630,676.88 within 7 days of the date of the decision, or such other sum or in such other time period, as the *Adjudicator* shall decide.
- (8) An order that DCM is entitled to, and SWC pay, interest at the interest rate under the Contract on the sum so ordered at Redress 7 from 26 May 2023 until the date of repayment by SWC; or between such other dates or at such other rate as the *Adjudicator* shall decide.
- (9) That the *Adjudicator* orders that SWC pay the *Adjudicator's* fees and expenses in this adjudication.

91. Reasons, for the *Adjudicator's* decision, are requested.

Solicitor for the referring party
15 January 2025

RESPONSE TO REFERRAL NOTICE

THE PARTIES

- 1 The Parties are agreed.

THE CONTRACT

- 2 The Contract is agreed.

ADJUDICATION PROVISIONS

- 3 The adjudication provisions are agreed.
- 4 Points on jurisdiction and natural justice, however, arise, there being no dispute. This response is issued under full reservation of SWC's stated positions in those respects, which SWC continues to assert.

THE DISPUTE

- 5 Agreed. The River Tiveto runs through the town of Wetown. The Statrig Water is a tributary of the River Tiveto, entering it at WS22/23. Wetown has a history of damaging floods. In 2013, SWC approved the preferred scheme for flood protection and SWC itself commenced advanced works before DCM were contracted to carry out works in 2020. The primary purpose of the WFPS is to provide a flood protection scheme to protect against a 1 in 75-Year Flood Event in Wetown (ie. a 1.33% Annual Exceedance Probability Flood Event). The residents of Wetown had suffered major flood events in 2005 and 2015, and two notable near-flood events in October 2021 and December 2022 amongst many others. Works were programmed to complete on 30 September 2023. It was imperative that the WFPS was completed before winter 2023 to an extent sufficient to avoid further risk of autumn and winter flood events.
- 6 The tendered total of the Prices is agreed.
- 7 The referred dispute relates to Section 1, as defined in the referral notice.
- 8 As can be seen, Section 1 was originally planned to complete on 30 September 2023. SWC's position is that, while a number of CEs arose during the Works,

there was no impact on the Completion Date.

- 9 Only one CE is referred. SWC's position is that CE238 does not give rise to DCM being entitled to any change to the Completion Date, or repayment of any Delay Damages levied against it for failure to achieve Completion of Section 1 by 30 September 2023.
- 10 It is necessary to understand the impact of preceding events up to the issue of CE238. It is critical to the analysis of the impact of CE238 for the *Adjudicator* to consider the impact of any preceding or concurrent delays including those for which DCM is responsible. Mr Parnie fails to take account of existing DCM delays in his analysis (referred to as the 'Parnie-1 Report' by Mr Parnie). That was presented as part of DCM's revised quotation for CE238 on 28 February 2023 (having already provided its quotation on 27 January 2023). Under clause 64.4 of the Contract, the PM decided that DCM had not assessed CE238 correctly. Accordingly, he issued his own assessment on 1 April 2023. The parties had also discussed the removal of the remainder of WS22 from the Works and SWC's understanding, as of February 2023, was that an agreement in principle had been reached with DCM on the omission of the remaining WS22. From the perspective of SWC, the principal reason for omitting the remaining works at WS22 was because of the risk to the town of Hawick if WS22 and WS23 were not completed by September 2023 (or at least to a stage of completion that provided protection to the town over Winter 2023/24). DCM's position was that it could not complete WS22 and WS23 in summer 2023. The summary of events in the following paragraphs below gives some detail of that.
- 11 Discussions took place as early as September 2022 about obtaining access to WS22 from the dry however, DCM advised that it was not able to access from the dry due to the size of its plant. Between September 2022 and April 2023, SWC and DCM held several meetings to discuss a number of matters impacting on the WFPS including the removal of the remainder of the works to WS22. Both parties were fully engaged in that process and DCM were fully aware of any proposals to descope the remainder of WS22. At a meeting on 18 January 2023, chaired by Mr Renwick, SWC's then Capital Projects Manager, DCM indicate delay in a number of work sections including its ability to continue to construct WS12 and 14 and DCM suggested that removal of WS22 and 23 from its scope would achieve completion by 30 September 2023. On 19 January 2023 DCM

indicated that it was willing to agree to the de-scope of the remainder of WS22:

‘Regarding yesterday can I make it clear that regarding section 22 that we have no objection to the descope of the remaining works in 22 provided we reach agreement (which I am sure we will) on the value of the negative CE that ensues as a result.’

- 12 By email of 2 February 2023, parties were negotiating on the final form of the agreement to reflect that including transfer of materials procured by DCM to SWC, what works had been done to that date and which were yet to be completed. SWC considered that was an agreement in principle that the remaining works at WS22 would be removed from the Scope. SWC always considered that the removal of the remaining works would be a compensation event under clause 60.1.
- 13 On 8 February 2023, DCM sought to widen the negotiations (albeit identified as a separate matter) to include final account agreement, agreement on extensions of time (including preliminaries) to December 2023, agreement to postpone the period in which liquidated damages were to be applied (only starting from March 2024 rather than 30 September 2023) and acceptance of an agreed programme. Both SWC’s and DCM’s legal teams sought to agree written terms for the removal of the remaining scope of WS22. DCM returned the draft of the agreement to remove WS22 including the separate issues listed above on 5 April 2023.
- 14 On 8 March 2023 the *Project Manager* issued PMI-658 seeking a quotation for the proposed descope of the remainder of WS22. In that he directed DCM to provide that quotation on the basis set out in clause 63.1 or alternatively use the activity schedule sums which included profit (in the fee).
- 15 On 29 March 2023, DCM submitted its quotation for PMI658 for £1,274,533.09 including matters unrelated to the removal of WS22 (including DCM’s full preliminaries to December 2023). As such, the quotation included not only the full activity schedule price for WS22 in relation to which DCM had already been paid a significant sum (see paragraph 41 below) but sought an opportunity to deal with unrelated matters calculating a sum which neither reflected the activity schedule sums for WS22 or the method of assessing a compensation event set out in clause 63.1.
- 16 On 30 March 2023, the *Project Manager* rejected DCM’s quotation and sought a

revised quotation. None was received and on 14 April 2023, the Project Manager issued CE352 and PMI698.

- 17 SWC's position is that DCM altered its approach to the removal of the remaining WS22 scope from (i) agreeing in principle to the removal with the impact to be assessed separately, to (ii) making the agreement conditional upon agreement of a number of other issues which, as DCM said itself on 8 February 2023, were separate.
- 18 Delay damages of £527,388.35 have been deducted from sums otherwise due to DCM as at the date of the referral notice. Under explanation that SWC is contractually entitled to apply delay damages as the works had not achieved Completion by the Completion Date.
- 19 DCM did not require to initiate Adjudication 1. DCM could instead have done what it had said on 19 January 2023 it would do, namely: 'reach agreement on the negative value of the CE that ensues as a result [of the descoping of the remaining works in WS22 to which DCM had indicated it otherwise had no objection]'.
- 20 SWC has issued a notice of dissatisfaction in relation to the Adjudicator's decision in Adjudication 1. In any event, the decision in Adjudication 1 is of no relevance to this adjudication, which concerns CE238. As paragraphs 103 to 111 of the reasons for the decision in Adjudication 1, and paragraphs 1 to 3 of the decision itself, make clear such redress as was granted in DCM's favour in Adjudication 1 concerned only the later CE352 (omitting the outstanding aspects of WS22 from DCM's works).
- 21 What DCM asks the Adjudicator to do in this adjudication is derived solely from CE238. As DCM itself accepts, CE238 was notified on 8 August 2022. Thus, DCM has chosen to wait almost 27 months before identifying and referring a dispute about CE238 to adjudication.
- 22 There is no intention for SWC to benefit from the removal of the remainder of WS22. The removal of that work is its own compensation event, but DCM does not seek any redress in this adjudication in that respect. The redress sought by DCM in this adjudication is derived solely from CE238. It is SWC's position as supported by the Quantum and Delay Reports that if the *Adjudicator* were to order redress in the terms sought, DCM will be placed in a substantially better

position than it should be in given that DCM was already in delay as at the date of issue of CE238 on 8 August 2022. DCM will, for all intents and purposes, have been awarded a windfall.

- 23 SWC relies on the independent opinions of Andy Parnie (on delay), Chris Atlas (quantum) and the witness statements of Gary Parker and Steven Vittorio.

METHOD OF ASSESSMENT

- 24 Agreed clause 63 governs ‘Assessing compensation events’ and has not been amended by the Parties.

- 25 DCM’s position is materially misconceived. In particular, it has failed to appreciate that clause 63.3 contains the contractual method of assessment for delay and clause 63.1 contains the contractual method of assessment of costs.

- 26 There is no concept of a ‘dividing date’ in the contractual process of assessment of delay. Rather the contractual test is solely one of whether planned Completion is later than planned Completion as shown on the Accepted Programme, due to the compensation event (ie. due to CE238). That is a matter of analysis on the facts as known at the time of the assessment ie. as at the date of the *Adjudicator’s* decision in this adjudication. If planned Completion is not made later by CE238 than planned Completion as shown on the Accepted Programme, then there is no delay to the Completion Date.

- 27 Clause 63.1 deals with ‘The changes to the Prices’ and in that context prescribes the contractual method of assessment thereof as being:

‘assessed as the effect of the compensation event upon

- the actual Defined Cost of the work already done and
- the forecast Defined Cost of the work not yet done ...’

- 28 Clause 63.1 identifies what is commonly known as the dividing date (or switch date) as being the point in time dividing ‘the work already done’ from ‘the work not yet done’, for the purpose of the foregoing method of assessment. That is the only relevance and purpose of the dividing date: the allocation of work to one of the foregoing two categories. Thereafter for work in the pre-dividing date category the assessment to be carried out is one of ‘the effect of the compensation event upon the actual Defined Cost of [that work]’ and for work in the post-dividing date category the assessment is one of ‘the effect of the

compensation event upon ... the forecast Defined Cost of [that work]. In each case it is a matter of analysis on the facts as known at the time of the assessment (ie. as at the date of the Adjudicator's decision in this adjudication). So, for the pre-dividing date work it is a matter of assessing the effect of CE238 upon the actual Defined Cost of that work at the time of assessment by the Adjudicator. Similarly, for the post-dividing date work it is a matter of assessing the effect of CE238 upon the forecast Defined Cost of that work at the time of assessment by the *Adjudicator*.

- 29 The ascertainment of the dividing date (for its sole purpose of any changes to the Prices) is an uncomplicated matter of fact in every case. It is simply, on the wording of clause 63.1, either: (1) the date of SWC giving an instruction, changing an earlier decision or correcting an assumption; or (2) in all other cases, the date of notification of the compensation event i.e. CE238 (in this case 8 August 2022). The assessment process in relation to changes to the Prices necessarily always post-dates the dividing date, as the process cannot begin under clause 63.1 until the dividing date is known. Clause W2.3(7) requires the *Adjudicator* to make his assessment in the same way as a compensation event is assessed. The concept of a 'prospective analysis' is nowhere to be found in the process of assessment under either clause 63.1 (in relation to assessment of changes to the prices) nor in clause 63.3 (in relation to assessment of delay).
- 30 The processes found in both clause 63.1 and clause 63.3 prescribe neither a retrospective manner of assessment nor a prospective one. Instead, they each prescribe methods of assessment to be applied as at the date of assessment. In relation to delay (clause 63.3) that is the familiar method of assessing, as at the date of assessment, the extent to which (if at all) planned Completion is later than planned Completion as shown on the Accepted Programme, due to the compensation event (ie. due to CE238). In relation to changes to the Prices (clause 63.1) it is a method of first identifying the date when the CE was notified (8 August 2022), which is the dividing date and which does not change, and then assessing, as at the date of assessment, the actual Defined Cost of the work already done up to that date and the forecast Defined Cost of the work not yet done after that date. In all cases the assessment must necessarily take account of the facts as they are at the time of assessment, otherwise a patently inaccurate result would be arrived at. To take but one example, if the

compensation event involved the instruction of the use of a novel material and at the time of the notification of the compensation event (the dividing date) the material were cheap, it would be inappropriate for the assessment of the Prices to be constrained to that cheap price if the assessment were being made at a later date and that price had risen sharply in the market by that time. The change in the market price would not itself be a compensation event and it is only by applying a system of accurate assessment in light of the facts that a contractually accurate assessment of changes in the Prices can be arrived at. In addition, and to adopt the words of the learned authors of *Keating on NEC* (2nd Edition; 2022), paragraph 7-170: common sense suggests that it would be wrong to ignore any actual costs that have been incurred or avoided by the time of the later assessment. It would not result in a reasonable assessment. The construction of clause 63.1 that SWC and the learned authors of *Keating on NEC*, favour is the one most consistent with well-established principles of contract construction including, in particular, the principle that one should arrive at a construction of the clause that reflects what a reasonable person, having the background knowledge available to the parties, would have understood from the language selected by them. Such a notional reasonable person would not, on any view, have understood that assessments by the *Project Manager* and thereafter by the *Adjudicator* were to be made in a way divorced from, or indeed deliberately ignoring, relevant facts that would impact on the assessment to be made at the time it is contractually being made.

- 31 SWC's quantum and delay experts approach reflects the foregoing approach derived from the Contract. Support for which can also be found in *Northern Ireland Housing Executive v Healthy Buildings (Ireland) Ltd*. Although the case is not on all fours with the dispute between DCM and SWC, not least as it concerned a consultant's NEC3 Professional Services Contract rather than the NEC4 Engineering and Construction Contract and concerned a court making the assessment of the effect of the compensation event rather than an *Adjudicator*, the rhetorical question in the following passage can nonetheless be seen to have application in this adjudication:

[54] Faced with seeking to award compensation to the consultant here for any cost to it as a result of the instruction of 10 January 2013 why should I shut my eyes and grope in the dark when the material is available to show what work they actually did and how much it cost them?

32 Ultimately the court in that case went so far as to decide that the assessment of the compensation event was not to be calculated by reference to a forecast and instead was to be calculated by reference to actual costs incurred (paragraphs 6 and 59). Therefore, as a matter of contract construction, it is only proper for the *Adjudicator* to take into account later facts and knowledge in assessing the effect of the compensation event on the forecast costs. Support can further be found more widely in *Keating on NEC*, paragraph 7-170. There the learned authors consider, in particular, the issues of the passage of time and occurrence of events between the dividing date and the date when the *Project Manager* carries out his assessment of the change to the Prices (the contractual provisions relating to assessment can be found see clauses 61.4, 63.1 and 64) and give their view concisely as follows (emphasis added):

‘After that [dividing] date the assessment is of the effect on forecast Defined Cost of work not yet done at that date. However, it is significant that what clause 63.1 requires is an assessment of the effect of the compensation event on the forecast Defined Cost of the work not yet done at the time the quotation was (or should have been) instructed. Whilst in reality this may simply be a forecast of the costs that will be caused by the event, **the clause does not require assessment on the basis of a forecast made as at that [dividing] date. There is nothing to exclude the consideration of later information available at the date of assessment. The deeming provision determines what has to be assessed, not how or the date as at which it is to be assessed.**

Common sense also suggests that it would be wrong to ignore any actual costs that have been incurred or avoided by the time of the quotation or later assessment by the *Project Manager*. This would not result in a reasonable assessment and would be inconsistent with general principles applied in assessing damages.’

33 The practical effect of the foregoing analysis could be either positive or negative on the central question of delay (clause 63.3). As the learned authors of *Keating on NEC* properly point out:

‘The planned dates may be either earlier or later than the contractual completion dates and key dates. This may be because there is float in the Contractor’s programme or the Contractor is in delay. In either event, assessment of a compensation event is not an opportunity for the *Employer/Project Manager* to deprive the *Contractor* of his float or to enable the *Contractor* to shift the risk of his own delay onto the *Employer*. To avoid either of these possibilities, the basis for the assessment of the compensation event is the effect on planned completion and key dates, and not the contractual completion date and key dates. The contractual dates are then changed by the same amount as the planned dates are delayed’.

- 34 An application, of the approach required by contract to both the assessment of costs and the assessment of delay, is required.
- 35 It is agreed that the dividing date for CE238 is 8 August 2022, being the date of notification of that CE. At the risk of repetition, the dividing date is only relevant, and then only in one particular way, to the clause 63.1 method of assessment for changes to the Prices and not to the assessment of delay under clause 63.3.

FACTUAL BACKGROUND

- 36 WS22 runs 94 metres along the Statrig Water (from the Drum Bridge) and 34 metres along the River Tiveto (to Albert Bridge). The permanent works design for WS22 was carried out by Fox who was engaged by SWC. DCM was responsible for stonework and temporary works (including the in-river platform).
- 37 The construction of the initial 95m long section of cantilever wall from Albert Bridge and remaining wall up to Drum Bridge is agreed. WS22 comprises 128 metres of flood defence wall, of which 95 metres has a sheet piled core. The wall is reinforced concrete up to 1.6m above existing ground level and is partially clad with grey masonry and coping stones. WS23 comprises 125 metres of flood defence wall, of which 90 metres has a sheet piled core. The wall is reinforced concrete up to 1.7m above existing ground level and is partially clad with grey masonry and coping stones, plus one glass viewing panel.
- 38 The limited access to WS22 is agreed and was known to DCM from the tender drawings.
- 39 Agreed that DCM proposed accessing WS22 from WS23 using a temporary bridge and from the riverbed.
- 40 DCM was responsible for devising the method of performing the works, including a temporary platform to allow the works to be constructed from in the Statrig Water.
- 41 DCM's portrayal of the method of construction of WS22 and WS23 is inaccurate. It is accepted that some works could not be carried out concurrently in river on WS22 and WS23 in the Statrig Water. However, method statement shows an access track extending into the water where the Statrig enters the River Tiveto (around the area of the demolished Bridge House Guesthouse). The river here is

wide enough to accommodate two working platforms without breaching the constraints set out in clause Z19.01. Therefore, DCM is incorrect that ‘... it was not possible to construct WS22 and WS23 at the same time’. It would have been possible to simultaneously construct the parts of WS22 and WS23 which are located on the River Tiveto, representing around 35m (26%) of WS22 and 32m (26%) of WS23 as well as works on WS22 between chainages 30 and 45 (the section where DCM requested the wall realignment) could have been constructed alongside WS23.

- 42 The excerpt from Mr Smith’s decision (which formed part of the reasoning) clearly states he does not make any determination on the cause of the delays to WS22 and WS23.
- 43 Delay is resolved by the application of clause 63.3, as explained above. That is what is done in the Delay Report. At the time of assessment, it is known that the remaining WS22 works were omitted from the Contract. Planned Completion is accordingly not affected by what were the remaining WS22 works, as they do not require to be completed by DCM. As a result, there is no aspect of what were the remaining WS22 works that could result in CE238 causing planned Completion to be later than planned Completion as shown in the Accepted Programme. The further consequence is that there is no length of time to be added to the Completion Date due to CE238. Reference is made to the statements of Gary Parker and Steven Vittorio and the Delay Report.

CRITICAL PATH

- 44 There were several restraints placed on and constraints within the site including those set out in the licence granted by EPA to SWC under the Controlled Activities Regulations (CAR licence CAR/L/1156840). DCM was responsible for obtaining any CAR licence or approval for its temporary works, including the in-river platforms. In particular, there were constraints on the extent to which any temporary platforms could span the river bed and restrictions on periods when the river bed could be disturbed (so as not to interfere with the seasonal salmon spawning). DCM was aware of these restrictions at the time of tendering and under the Contract is responsible for designing the method of carrying out the work and the use of a temporary platform is set out in DCM’s method statement:
- ‘Acceptances, Consents and Licences ...

The following consents will be required, sought and obtained by DCM prior to commencement ...

EPA for Temporary in-channel works – As detailed below, it will be necessary to construct an in-channel working platform to the bank of the watercourse to facilitate the works. This will comply with the requirements set out in the Works Information and CAR licence previously obtained by South West Council. However, a river crossing from WS23 will be required to allow access to the works area from the opposite bank, consisting of a temporary bridge with associated substructure. It will be necessary to apply for consent from EPA for these measures to demonstrate that they do not temporarily increase flood risk. A detailed Method Statement will be prepared for this Work Section and issued to EPA for approval a minimum of 4 weeks prior to commencement of the work section ...’

- 45 DCM proposed the method of carrying out WS22 which was to use a temporary platform within the riverbed. While works could not be carried out to WS22 and WS23 within the Statrig water, some works on those work sections could be carried out contemporaneously in the wider sections where the Statrig Water enters the River Tiveto. Therefore, it is incorrect to state that WS22 and WS23 could not be constructed at the same time as there are parts of those sections that could be constructed concurrently.
- 46 There were two constraints: (i) a restriction on the maximum width DCM could occupy areas: Z19.02 as referred to in the referral notice and (ii) Z19.02 which relates to seasonal working. Z19.02 relates to work directly to the riverbed. It does not mean no work can be carried out during the period from October to April. For example, DCM could carry out work from an over wintered platform subject to obtaining the relevant consents. It was open to DCM to propose this method of working (particularly to mitigate any delays). This approach had been successfully achieved at WS25, WS27 and WS30. WS22, WS23 and WS25 were not linked on the critical path.

THE BRIDGEHOUSE DEOMOLITION WORKS

- 47 The demolition works to the Bridgehouse Guesthouse were an instructed change. Even though the works on WS22 were moved into 2022, the demolition works had no impact on the Completion Date. That was confirmed by DCM in its quotations submitted in response to the PMIs (contained in CE61, CE81, CE115 and CE126) and the accepted programmes.
- 48 WS25 was not linked to WS22 and could always have been carried out

simultaneously. DCM employed different sub-contractors to carry out the works on WS22 (FCK) and WS25 (Dadform). There was no mitigation on the part of DCM and no evidence to support the contention that the actions taken by DCM were required to prevent WS23 being pushed into 2024.

- 49 DCM did not and is not seeking a change to the Completion Date in respect of WS22 having to be carried out in 2022 because that movement had and does not impact on the Completion Date.
- 50 The loss of the in-water season in 2021 did not impact on the Completion Date. DCM did not seek any change to the Completion Date of the in river working season or increased the risk of further delay.
- 51 The CEs associated with the demolition of the Bridgehouse Guesthouse were issued by the Project Manager and the subsequent quotations from DCM were accepted and have been paid.

REQUIREMENT FOR A REVISED CAR LICENCE

- 52 Works on WS22 were planned to commence in early May 2022 but could not because DCM had not obtained the relevant sediment licence (for which it was responsible). Clause 191AR of Part 7.1 Specification v_2 of the Contract sets out the approvals and licences to be obtained by SWC. The approval required by DCM is not listed in that clause. Clause 191AR.3 goes on to say that '[DCM] shall obtain all other licences, consents and permissions for all other activities which require such permission to be sought.'
- 53 EPA's requirement for a sediment management licence was to accommodate DCM's method of working on the riverbed. That is separate from the engineering licence obtained by EPA.
- 54 SWC did not, as DCM puts it, 'have to obtain' a further licence. That was DCM's responsibility under the Contract (see clause 191AR/2 and Appendix 1/13 of Part 7.1 Specification). DCM was responsible for obtaining the sediment licence in advance of WS22 commencing (Appendix 1/13). However, DCM advised SWC that it did not have the technical experience to develop the technical design which had to be submitted with the application for the licence. To assist DCM, and to ensure progress on WS22 was maintained, SWC and its designer Fox carried out the design. If SWC and Fox had not assisted DCM in this way to

mitigate the delays caused by DCM's failure to obtain the sediment licence it is not known when DCM would have engaged the necessary expertise to develop the design for the temporary in river platform and obtained the licence. The impact would have been a further delay to the start of WS22. The licence was determined and issued on 12 May 2022.

- 55 Agreed that the receipt of the CAR licence did not have a critical delay impact and that planned completion of the works remained as 27 September 2023 (as shown in Accepted Programme Rev P1).

PROCUREMENT OF ROCK ANCHORS

- 56 The requirement for rock anchors (and therefore the instruction to procure those in CE201) was as a result of the demolition work at the Bridgehouse Guesthouse between chainages 30 and 65. There was sufficient detail in CE201 to show the position of the rock anchors. DCM was instructed to proceed to install the piles per the original design as they would always have to be in position before they were anchored. However, the instruction in CE201 was superseded by subsequent events detailed below (concerning the wall re-alignment). The requirements for rock anchors at this stage is completely unrelated to subsequent events about which SWC was unaware.

PERMANENT WALL RE-ALIGNMENT

- 57 Agreed that following the demolition of the Bridgehouse Guesthouse, that WS22 was planned to commence in May 2022. No change was required to the alignment of the permanent sheet piles shown in Fox's design except for the reasons set out below.
- 58 While the PM notified CE211 and CE214, it is misleading for DCM not to explain the background to those instructions. DCM is responsible for designing the method of working and any temporary works including the in-channel platform from which it was required to carry out WS22. DCM cannot dispute the content of its own method statement which sets out its method of working from the scour hole. The sheet piled flood wall was designed to accommodate the scour hole. DCM was aware of the scour hole as early as tender stage as the scour hole was evident on the topographic survey provided to DCM as part of the Tender Site Information and forms part of the Works Information. Nowhere in DCM's tender method statement for the work does it highlight any issues caused

by the riverbed. DCM carried out a full bathymetric survey of the channel in July 2020. Any problem with the in-channel platform or piling operations created by the scour hole would and should have been identified in that survey. DCM's method statement issued with the application for the sediment licence setting out the method of working from the scour hole was approved by EPA and the River Commissioners in early June 2022. The change in alignment was made at DCM's request, two years after it was provided with site information and surveyed the physical site conditions and only three days before piling was programmed to commence in this area. Under clause 60.2 of the Contract, DCM is assumed (for the purposes of assessing a compensation event) to have taken into account the factors set out in that clause including the Site Information, information available from a visual inspection of the site and other information which an experienced contractor could reasonably be expected to obtain. The change to SWC's pile design was driven by DCM's request to avoid carrying out the piling in the deeper water. CE214 was issued to assist DCM by allowing it to carry out the works to avoid the scour hole.

- 59 The position advanced by DCM is factually incorrect and misleading for the following reason: the statement (concerning Fox's geotechnical review) and the instruction to procure rock anchors does not refer to the need for rock anchors in the newly aligned flood wall. DCM wrongly conflates two separate events, which for different reasons required rock anchors. The statement related to the superseded need for rock anchors as a result of the demolition of the Bridgehouse Guesthouse in the same location and, not as a result of the failure to meet toe depth. However, it is then correct that when DCM did start to pile drive between chainages 30 and 45 it was discovered that the piles would not meet depth. After SWC accommodated DCM's request to re-align the flood wall (to allow DCM (or its sub-contractor to avoid carry out the works on WS22 from the scour hole) DCM commenced pile driving.

CE238 – ROCK ANCHOR DESIGN CHANGE

- 60 SWC's position is that there is no impact on the Completion Date as a consequence of CE238. If the omission of the remaining works in WS22 was ignored (which it should be), the delay is 33 days. SWC explains that its analysis of DCM's own analysis shows a delay of 28 days. It is not unusual to expect a discrepancy between two differing analyses.

Background

- 61 Agreed that, on 8 August 2022, the PM notified CE238. However, as of 8 August 2022, the design was incomplete. CE238 contained an element of rock anchor design as a direct consequence of DCM's request to realign the flood wall on 30 June 2022. Seven inclined rock anchors were required between chainages 45 and 65. Those were unaffected by the failure to meet depth on chainages 30 to 45. However, DCM had all the information it required to for the construction of chainages 65 - 128 of WS22 from early June. DCM did not commence concreting until 4 August 2022 as its subcontractor, FCK was delayed on WS08. The works at chainage 128 were ready for concreting on 6 July 2022 but DCM did not start work on the reinforced concrete works until 4 August 2022. DCM's unaccepted programme rev Q1 showed construction of the concrete structures starting on 12 July. As such, DCM was in delay by 3½ weeks at that point. DCM could also have carried out construction of chainages 0 to 30 which were unaffected by either the failure to meet depth or the requirement for rock anchors.
- 62 The design issued on 8 August 2022 was sufficient to allow DCM to install seven rock anchors along chainages 45 to 65. That also allowed DCM to use the rock anchors procured under CE201 (the requirement for those being related to the demolition of the Bridgehouse Guesthouse). CE201 set out that 21 rock anchors were required to stablish the flood wall as a result of the demolition of the Bridgehouse Guesthouse. However, the number of rock anchors required following the wall realignment was seven and could have been completed within two or three weeks from the date of the instruction on 8 August 2022 (ie. well before the end of the in-river season). The design was to be executed in the same way as WS10 and WS11. The rock anchors could also have been completed following the floodwall construction from the dry side. This had been the solution carried out by DCM on WS10, WS11 and WS27.
- 63 DCM's programme Q1 (which was not accepted) included a period of four weeks for the installation of 21 rock anchors in relation to CE201 (due to the demolition of the Bridgehouse Guesthouse) but ultimately only seven were required for the re-aligned flood wall.
- 64 The works set out in CE238 could have been completed in September 2022. In

particular, DCM were already in critical delay before 8 August 2022. Critically, Mr Parnie's report proceeds on an incorrect assessment of progress on the flood defence base and mass concrete backfill work. He proceeds on the basis of (unsubstantiated) offsite activities. That assessment of the programme is unsustainable. For example, Mr Parnie assesses completion of the flood defence base and mass concrete backfill as 48% complete when, on site only 13m of the 125m length of WS22 had been completed by 8 August 2022. The proper progress was 10%. Likewise, Mr Parnie suggests that the flood defence wall was 25% complete when no work had been carried out onsite.

- 65 Mr Smith made no decision on the cause of the delay. He was not asked to do so, and he certainly made no decision that is binding on the present *Adjudicator* about the cause of delay.
- 66 The statement taken from March 2023 ('This will likely be one of the last areas we construct in 2024') is denied. It is not relevant to the underlying cause of the delay as claimed by DCM. As at 8 August 2022, it was clear that the works would be Complete by the original Completion Date of 30 September 2023 (or in the alternative, 28 days later). DCM seeks to support its position by reference to Mr Atlas' report. In the Quantum Report, Ms Macdonald explains why Mr Atlas' reasoning and assessment of the change to the Prices is unsound.
- 67 Mr Atlas calculates the change in Prices including periods where no work would be done on WS23 between 27 September 2023 and April to May 2024 based on DCM's programme Rev S. There is no basis for DCM seeking preliminary costs between September 2023 and April/May 2024 nor for seeking full preliminary costs from April/May 2024 to September 2024²¹. DCM's quantum assessment proceeds improperly on the basis of allowing for full preliminary costs between September 2023 and April/May 2024. That is improper because:
- It is based on levels of resource for peak construction activity rather than what was required for completion of WS23;
 - After September 2003 there was only c£1,000,000 of work to be done out of a c£52,000,000 work scope. Such limited work did not require the preliminaries that would have been required for the full work scope; and
 - The correct approach is to assess the cost for the hire of localised

preliminaries between April/May and September 2004. There should be no preliminary hire following demobilisation at the planned completion date of 27 September 2023 through to setting up again in April 2024 to deliver WS 23.

- 68 Mr Atlas' assessment is based on estimates or presumed costs, rates and quantities of resource rather than evidence which could have been provided to him by DCM, including using historic cost records, allocation sheets, site barrier entry (which Mr Atlas includes but does not produce) and site diaries. DCM's quantum assessment is flawed not least because it is provided without appropriate contemporaneous records to establish the accuracy of information contained in the programmes relied upon and the assessment made for CE238. The assumption made by Ms Macdonald that the dates relied upon by DCM are accurate is no more than that - an assumption - and such dates should in fact be held not to have been established, given the absence of evidence to support them. His assessment includes costs for resources which did not arise as a result of CE238.
- 69 Ms Macdonald summarises her position neatly in terms of the four assessments she has carried out and the quantum to be attributed to each of them. DCM's claim is significantly overstated. If Mr Atlas' assessment is preferred, that will result in a considerable windfall for DCM to the substantial prejudice and detriment of SWC.

REPAYMENT OF DELAY DAMAGES AND INTEREST

- 70 On the basis that DCM did not achieve Completion of the Works by the Completion Date, SWC is entitled to apply delay damages from sums otherwise due. SWC has withheld the sum of £527,388.35 from DCM to the date of the Referral Notice. DCM is not entitled to any change to the completion date.
- 71 The terms of Option X7.2 are accepted.
- 72 DCM is not entitled to repayment of delay damages deducted.
- 73 As regards interest, under Option X7.2, DCM is entitled to interest from the date the delay damages were paid, until repayment at the next assessment date. This being confirmed in clause 51.3 of the Contract, with clause 51.4 confirming interest is calculated on a daily basis at the interest rate, compounded annually.

74 The *interest rate* (of 2% per annum above the Official Bank rate of the Bank of England) is agreed.

WRONGFUL OMISSION OF REMAINING WORKS SCOPE OF WS22

75 CE238 was instructed on 8 August 2022. On 14 April 2023 (eight months following rather than ‘a year after’ the issue of CE238), the remainder of WS22 was omitted from DCM’s scope. SWC did so on the basis that it believed that DCM was agreeable to the works being removed from its scope in principle and the omission was required to enable the works on WS22 to achieve a state of completeness (through the work being carried out by SWC Contracts) so as to protect the town of Wetown from the risk of flooding in the winter 2023/2024 season.

76 Mr Smith’s decision was one of principle. When that principle is applied to the facts in this case, there is no support for the redress sought by DCM. DCM is not entitled to a change to the Completion Date to 8 September 2024 nor an increase in the Prices to £6,630,676.88.

77 SWC has neither sought to reduce the Prices nor the Completion Date because of the omission of the balance of WS22 on 14 April 2023.

78 Denied that to refuse any change to the Completion Date and the Prices would be to allow SWC to benefit. On the contrary, to grant the redress sought by DCM would be to afford DCM a windfall by placing DCM in a considerably better position than it would have been in had it carried out the works.

79 DCM issued its programme Revision S following the issue of CE238 on 8 August 2022. That showed all sections including WS22 completing by the original Completion Date of 30 September 2023 with the exception of WS23 which would be completed in 2024. Mr Parnie’s delay analysis is predicated upon that programme Revision S. However, Mr Atlas’ quantification is not. Therefore, DCM’s own position is that its claim (for a change to the Prices and adjustment of the Completion Date) is premised on the basis of the impact on WS23 as a result of CE238 (which is not related to the omission of WS22). It is not, therefore, relevant to the WS22 activity which has, been paid in full, as set out elsewhere in the response. In terms of clause 51.3, a later certificate of the PM can be corrected following the decision of the *Adjudicator*. The change to any sum due is something that follows as a matter of operation of the contract by

- the *Project Manager* following the *Adjudicator's* decision. The *Adjudicator* should not himself make any award that would be to pre-empt the contractual payment mechanism. The Contract clearly envisages the decision of the *Adjudicator* being the basis of an amount due being corrected in a later certificate.
- 80 DCM is seeking payment, not for WS22 activities but for a change in the Prices related to the alleged delay to WS23 activities. As such, DCM's claim lacks foundation.
- 81 Denied that DCM is entitled to payment of the total of the prices for WS22. The costs claimed in this adjudication under CE238 relate to the delay to Completion on WS23 as set out above.
- 82 The *Adjudicator* should not make any award for payment which would not have fallen due under the Contract. Reference is made to the provisions of clause 51.3 of the Contract.
- 83 The *Adjudicator* should not himself award any contractual interest on any principal sum awarded as that would be to pre-empt the contractual payment mechanism. However, in terms of the Contract, if there is any entitlement to interest, the date from which interest starts to run is determined by reference to clause 51.2 of the Contract
- 84 SWC has paid DCM the Prices due in respect of the WS22 activities in full. DCM is not entitled to an amendment of the Activity Schedule and an order for payment plus interest.
- 85 The terms of clause 51.3 are clear: it contemplates that a decision of the *Adjudicator* could give rise to a need for the *Project Manager* to issue a new certificate, conform to the *Adjudicator's* decision and when that is done then interest is due on the balance certified, from the date when the incorrect amount was certified until the date when the correcting amount is certified.
- 86 The terms of clause 51.3 are such that interest arising under that clause is not a matter for the *Adjudicator* to deal with. Rather it is something that follows as a matter of operation of the contract by the *Project Manager* following the *Adjudicator's* decision. The *Adjudicator* should not himself award any contractual interest on any principal sum awarded as that would be to pre-empt the contractual payment mechanism.

REDRESS SOUGHT

87 Based upon the submissions above, SWC submits that the following are the consequences for each of the redress sought by DCM:

- (1) that the *Adjudicator* should refuse to find and declare that DCM is entitled to an extension of time to the Completion Date.
- (2) that the *Adjudicator* should refuse to open up, review and revise the Project Manager's Assessment 26 as sought by DCM.
- (3) that the *Adjudicator* refuses to find and declare that DCM is entitled to repayment of delay damages as sought by DCM.
- (4) that the *Adjudicator* refuses to order repayment of delay damages within seven days as sought by DCM.
- (5) that the *Adjudicator* refuse to award contractual interest on the basis that he should not himself award any contractual interest on any principal sum awarded as that would override the contractual operation of clause 51.3.
- (6) that the *Adjudicator* refuses to find and declare that the Activity Schedule under the Contract should be revised on the basis sought by DCM.
- (7) that the *Adjudicator* refuse to order payment by SWC on and within the time sought by DCM.
- (8) that the *Adjudicator* refuse to award contractual interest on the basis that he should not himself award any contractual interest on any principal sum awarded as that would override the contractual operation of clause 51.3.
- (9) SWC submits that the *Adjudicator* should order DCM to pay his fees and expenses of this adjudication.

88 Reasons, for the *Adjudicator's* decision, are requested.

Solicitor for the responding party
29 January 2025

REPLY

ADJUDICATION 1

- 1 DCM consider it is important to address SWC's blatant attempts to ignore and misconstrue the Decision in Adjudication 1.
- 2 Firstly, contrary to what is suggested in the Response, DCM did not seek orders in relation to the time and cost impact of CE238 in Adjudication 1. What DCM sought in Adjudication 1, was confirmation that SWC had omitted WS22 in breach of contract. Mr Smith confirmed this and also that it was 'more likely than not' that SWC omitted WS22: 'because it considered that it would enable the PM to avoid having to give DCM an extension of time'.
- 3 In reaching his decision, Mr Smith reviewed and dismissed SWC's position (which they try to resurrect in the current Response) that DCM agreed 'in principle' to the omission. This is not an argument SWC can re-run. Likewise, Mr Smith has already confirmed that: 'much if not all of WS23 could not commence until WS22 was complete due to restrictions on in-river working in Statrig Water' and that '... it is clear that there was insufficient time to commence construction of the revised design before the 1st September 2022 and the end of the 2022 summer season.'
- 4 SWC cannot rely on assertions that DCM could have carried out WS23 and WS22 in parallel to mitigate the delay, nor that DCM should have commenced and carried out the works under CE238 in the Summer of 2022. These are points which have already been reviewed and decided.

METHOD OF ASSESSMENT

The requirements of the contract

- 5 SWC characterise their proposed method of assessment as being 'neither a retrospective manner of assessment nor a prospective one'. As with the rest of the Response their approach is both confused and disingenuous.
- 6 SWC's position is that the method of assessment to be applied under the Contract depends on the date the assessment is being carried out. Meaning, they say, that because the *Adjudicator* is carrying out the assessment after the fact, that assessment should be based on evidence of actual time and cost, rather than a forecast.

- 7 As the *Adjudicator* will appreciate such an approach to contract interpretation is absurd. How you interpret and apply a contract does not change depending upon when it is being read. The whole point of entering into commercial contracts is to fix the parties' relative rights and obligations and achieve certainty.
- 8 The rules on the interpretation of contracts are well established. Parties' intentions are most obviously gathered from the language which they have chosen to use and by looking to ascertain what a reasonable person, having the background knowledge of the parties, would have understood from the language selected by them. The relevant reasonable person being one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. Contracts should be interpreted in accordance with common sense, with the commercial purpose of the agreement being considered. SWC's approach is clearly not in line with this.
- 9 The Parties have not amended Clause 63 and instead agreed to apply a pure NEC approach to assessment of Compensation Events. That approach requires (1) that both the time and cost impact of CEs are assessed together: and (2) that the assessment takes place at the dividing date with the assessor being required to consider the effect of the compensation event up to the dividing date (also referred to as the switch date) based the actual time and cost impact, and then forecast the impact on the works after the dividing date.
- 10 This approach flows from a natural reading of the words in the. DCM's interpretation is reinforced by clause 65.2 of the Contract, which expressly rejects the suggestion that subsequent information as to actual costs incurred overrides or changes the forecast required under Clause 63. The *Adjudicator* is also required to use the switch date when assessing compensation events. This is not a point SWC has addressed in the Response, because they cannot. Indeed, if SWC's 'interpretation' was to be adopted, parties could 'game' the system and undermine the entire ethos of NEC. Refusing to quote, assess and implement CEs when they arise in the hope that a later assessment based on actual time and cost impact will be more favourable.
- 11 DCM has obtained expert opinion, from Professor Ian Hillman:

The application of the dividing date has to apply to both the assessment of cost and delay as both of these have to be assessed together as part of the same quotation to be submitted by the *Contractor* or assessed by the *Project Manager*. This is confirmed in clause 62.2 and evidenced in the other clauses relating to the assessment of and implementation of compensation events that treat the change to the Prices and Completion Date as part of the same process.

The method of assessment for the effects of a compensation event does not change in relation to the date of the assessment. If the intent was that the assessment changed based on when the assessment took place, as opposed to the dividing date, then the contract would state this. There is no reference to an assessment date in the contract other than in relation to payment under clauses 50 and 51, which is clearly not applicable in relation to the assessment of the effects of a compensation event. Instead, the contract clearly states that the assessment is made on a forecast basis after the dividing (or switch) date and this cannot be substituted with the actual effect of the event at a later date.

A retrospective analysis should not be used to assess the effects of a compensation event that was or should have been assessed on a forecast basis as required in clause 63.1.

In secondary Option W2, clause W2.3(7) requires the *Adjudicator* to assess any additional cost or delay in the same way as a compensation event. This requires the *Adjudicator* to follow the process in the clauses 60 – 65 including clause 63.1 and does not give any power to the *Adjudicator* to assess the effects of a compensation event, after the dividing date, using the actual time and cost of the compensation event as recorded.’

- 12 The opinion addresses SWC’s reliance on *Northern Ireland Housing Executive v Healthy Buildings (Ireland) Ltd* and has confirmed it is at odds with what is required under the Contract. The reality is *Healthy Buildings* does not assist the *Adjudicator* in this dispute. The parties here followed the procedure under Clause 63 and the *Adjudicator* is asked to open up, review and revise the *Project Manager’s* contemporaneous assessment under PMA 26.
- 13 The decision also does not consider the wider position in relation to the assessment of the delay effect of compensation events. In the subsequent English case of *Fluor v Shanghai Zhenhua Heavy Industry Co*, the Court commented that a prospective approach is ‘the correct approach when considering matters such as the award of an extension of time’.

Lack of analysis

- 14 SWC’s retrospective approach amounts to nothing more than an assertion that, because of their wrongful omission, CE238 had no time or cost impact. SWC’s

expert has not carried out any recognised form of retrospective delay analysis. This means that there is fundamentally nothing before the *Adjudicator* to allow him to adopt a retrospective approach.

- 15 As such DCM's position remains as set out in the Referral. SWC accept the dividing date is 8 August 2022. This is the date at which the *Adjudicator* must stand to carry out an assessment of the time and cost impact of CE238. Using actual costs to assess the time and cost impact of CE238 up to 8 August 2022 and then forecasting the impact thereafter, based on the information which would have been available to the parties at the dividing date.

THE TIME IMPACT OF CE238

- 16 Parties' experts appear to agree on the methodology for assessment of the delay impact of CE238: that the Accepted Programme at the time of CE238, and so baseline for the analysis, is revision P1; P1 has a data date of 23 January 2022; the dividing date is 8 August 2022; Step 1 of the analysis requires Revision P1 to be updated with as built data to reflect the progress as at 8 August 2022; and, once updated, Step 2 of the analysis then requires Revision P1 to be updated to reflect the forecast delay impact of CE238.
- 17 The only material points of dispute between the two experts are factual ones, namely:
1. Whether Mr Parnie's position in relation the % complete status of the works at 8 August 2022 is correct. SWC's expert's position is that DCM was in delay meaning the works were not as advanced as Mr Parnie suggests and, irrespective of CE238, DCM would not have been able to complete WS22 in the Summer 2022 in river working window.
 2. Whether Mr Parnie's assessment for how long the works under CE238 would take to complete is reasonable and whether some of these works could have been undertaken in the WS22 In river working window.

- 18 Taking each point in turn:

As Built Position as at 8 August 2022

- 19 Both parties agree that there were 3 main activities on the P1 Programme being undertaken as of 8 August 2022: (1) Excavate to Formation; (2) Flood Defence

Base & Mass Concrete Backfill; and (3) Flood Defence Wall.

20 SWC considers that Mr Parnie's assessment of progress in relation to the second and third of these activities is overstated. As Mr Parnie explains, however at paragraph 22 to 41 of his Second Report his position is based on the contemporaneous factual records. These records are talked to and verified by Mr Robin Erskine who was on site at the time, overseeing these works.

21 Looking at each activity:

Flood Defence Base & Mass Concrete Backfill

22 DCM has provided, photographs, concrete pour records, and minutes of subcontractor co-ordination meetings showing that this activity commenced on 18 July 2022 and that by 8 August 2022 the majority of the reinforcement and formwork needed for all 7 bases having been fabricated and built, with Base 7 being poured on 4 August 2022 and Base 6 poured on 11 August 2022.

23 SWC's expert does not appear to dispute these records but instead suggests that the progress of the reinforcement and formwork should not be considered. His position is that progress should be measured only by reference to how many meters of concrete has been poured. This is not a credible position and fundamentally misunderstands what is involved in this activity.

24 The time consuming aspect of this activity is the fabrication of steel reinforcement and the building of the formwork, which has to be complete before you can pour the units. The concrete pour itself is a 2/3 hour activity. Further, fabrication of the steel reinforcement and the building of the formwork is part of this activity in the Programme, there is no separate line. Indeed, all parties agreed this activity commenced in July 2022, rather than with the first pour in August 2022.

Flood Defence Wall

25 SWC's expert does not appear to dispute the as built evidence in relation to the Flood Defence Wall but considers progress should be assessed only by reference to how much of the wall itself had been poured and cast.

26 Before the wall can be poured, it is necessary to install the reinforcement and formwork which forms part of the wall. Therefore, by focusing solely on whether the wall had been poured SWC's expert artificially suppresses progress.

- 27 Instead, by 8 August, DCM had carried out most of the works needed for the first unit. With the remainder of the units making up the wall then being completed by 10 September 2022.
- 28 Further, the delay at 8 August 2022 was minimal. It could have been recovered by implementing acceleration measures, such as installing the cladding and copes from the landside and by working increased hours and weekends. Both measures have been used elsewhere in the Project.
- 29 It is necessary to apply a commonsense check and appreciate that from when CE201 was issued instructing DCM to procure 21 Rock Anchors, the parties were aware that the design was going to change. The parties were also aware that that revised design was not available. Meaning unless that design was provided WS22 was never going to be completed in the Summer 2022 working window.
- 30 However, the design was needed to allow WS22 to be completed and was never received. Indeed, SWC has now confirmed that the final revised design for WS22 was not issued until August 2023 and, at the very least, accepts that the design was not available in 2022 for Ch25 to Ch45 of WS2239. It also accepts that: 'With no rock anchor design available for Ch 20-45 delays to WS22 would be expected.' Given this, it is neither reasonable nor credible to suggest that it was DCM delay which was preventing the completion of WS22 in the Summer of 2022. The reality is that DCM had completed all works they had the design for by the end of September 2022.

Impact of CE238

- 31 The second material point of dispute between the parties is whether Mr Parnie's assessment for how long the works under CE238 would take to complete is reasonable and whether some of these works could have been undertaken in the WS22 in river working window.

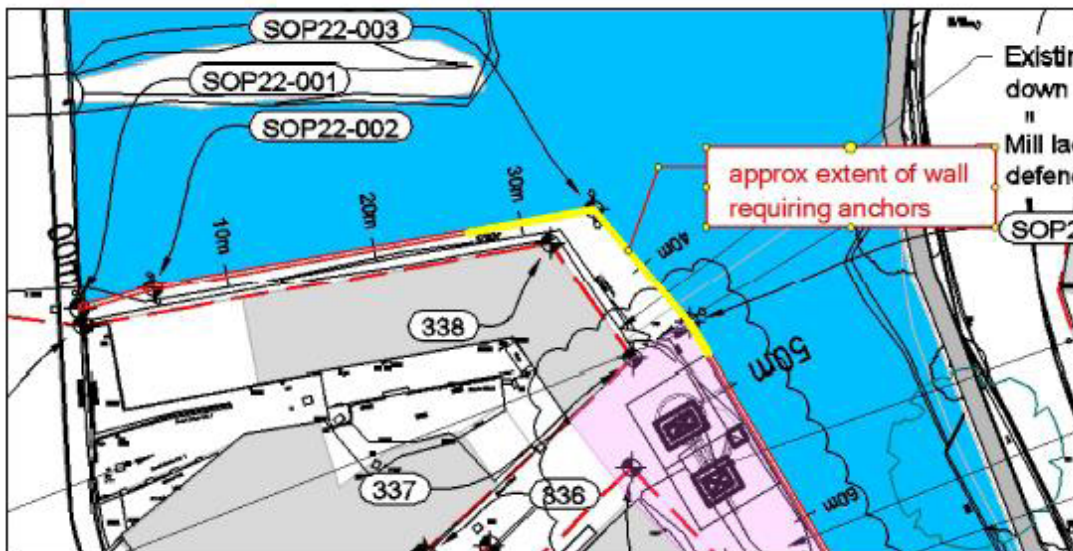
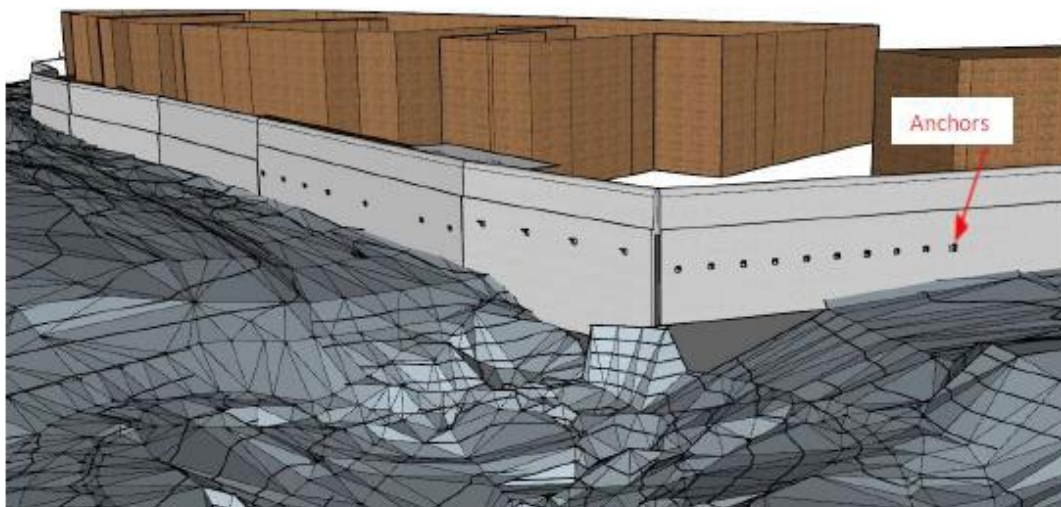
What design information did CE238 provide?

- 32 The first point to address is SWC's new suggestion that DCM were provided with the design information for the rock Anchors in June 2022 under CE201 and so could have constructed these works in the Summer of 2022. This was an instruction to procure 21 Rock Anchors, not an instruction to install them. The

instruction states:

Further to recent discussion, please see attached schedule of tie rods required for WS22 re-design. A full set of drawings for these ties and their connections will be issued shortly and attached to this PMI/CE. Please commence procurement and programme discussions with your specialist Subcontractor.

- 33 The instruction confirms that design information ‘will be issued’ and all that was provided with CE201 was the below:



- 34 Clearly, even if CE201 had been an instruction to install Rock Anchors in WS22 (which it wasn't), there was no design information to install to. Likewise, when CE238 was issued two months later, the extent and nature of design information did not materially improve. All that was provided was a single drawing, which confirmed the indicative location of 7 anchors, with no design being provided at all for Ch 20 to Ch45:



35 This clearly is not a detailed design showing the ties and connections needed to install the rock anchors. Nor does it provide DCM with typical anchor details; testing sequences; hole diameter details; details of sacrificial anchors (if required); or setting out information for the anchors. All of which would be required to allow construction to commence.

36 Indeed, SWC appear to accept there was a lack of design information but try to blame this (and the associated delay) on DCM. SWC's position appears to be that the lack of complete design information under CE238 was due to an earlier change to pile realignment instructed (they say) at DCM's request. All this argument does is undermine SWC's credibility. This is because:

(1) The change to Fox's design for the permanent pile alignment was instructed under CE214. CE214 was instructed as a change to the Scope under Clause 60.1(1). If, as SWC now suggest, the change arose because of DCM's temporary works design, then the PM would not have issued a CE as it would have fallen under the second exception under clause 60.1(1). The CE was assessed and implemented on this basis.

(2) SWC's position is now that the need for Rock Anchors was known in 2020 following the partial collapse of the Bridgehouse. The pile realignment

occurred 2 years after this, CE214 being issued on 02 July 2022. On SWC's own case, therefore, the re-alignment cannot have led to the need for the Rock Anchors. Indeed, if the need for the anchors had been known from 2020 the design should have been provided long before piling commenced.

(3) The reality is this is a hindsight argument to try and avoid the time and cost impact of CE238. The argument is, however, flawed as the pile realignment under CE214 affected Ch 30 to Ch45. The area shown as being 'remedial works detail to be provided' on the drawing issued with CE238 is Ch20 to Ch45.

37 The timing and nature of CE238 was such that DCM could not have carried out these additional works in the Summer of 2022. Instead, as explained above, DCM completed all works for which they had design information and prepared the area for winter as instructed.

Forecast time period to carry out works under CE238

38 The point of dispute here is whether DCM's assessment of 7 weeks is reasonable or whether this could be bettered and an allowance of only 4 weeks should be made. The 7-week allowance is based on their experience on the Project and the other areas where rock Anchors had been installed. It allows for all activities associated with the Rock Anchor installation, in comparison SWC focuses on the installation itself with no allowance for risk and/or the necessary Rock Anchor testing.

39 Clause 63.6 of the Contract expressly allows for the inclusion of such a risk allowance. Mr Parnie has confirmed that, in his opinion, it is reasonable to be cautious given the complexities of WS22 and the difficulties experienced with rock anchor installation elsewhere. In any event, there was no time available in the Accepted Programme for the additional 4 weeks (as suggested by SWC) or 7 weeks (as assessed by DCM) to complete the rock anchor works in the 2022 Summer season.

THE COST IMPACT OF CE238

40 Ms Macdonald, either purposively to reduce the period of assessment, or through a fundamental misunderstanding of how such an assessment should work, adopts the wrong period of delay in relation to the time related/prolongation costs. The 'period of delay' to be considered for the

purpose of the CE238 assessment is from August 2022 (when CE238 was notified) to September 2023 (when the works in question, as a result of CE238, are planned to be complete). The period of delay is not, as Ms Macdonald suggests September 2023 (the planned completion date prior to CE238) to September 2024 (the planned completion date after CE238). This is confirmed by the SCL delay and disruption protocol, which explains that an assessment of prolongation costs is ‘made by reference to the period when the effect ... was felt, not by reference to the extended period at the end of the contract.’

41 Similarly, Ms Macdonald uses the incorrect period of delay to suggest that the preliminary costs should be reduced as (she says) DCM would have had less people on site in the final year of the works. The Parties’ planned approach did not reduce the People and prelim costs in the final year of the Project. This reflects the fact that DCM remains responsible for the whole Site up to Practical Completion. Indeed, whilst Ms Macdonald tries to support her position by reference to the Rev S programme, what she has not addressed is the fact this programme: (1) expressly stated the position in relation to the Rock Anchors was (‘Design TBC’); and (2) in his PMA 26, the *Project Manager* refused to use Revision S as a basis for assessing the impact of CE238 as it was not an Accepted Programme. In comparison DCM’s approach considers the correct period of delay, reflects its wider obligations under the Contract and aligns with the Parties’ planned approach and that shown in the later Rev T programme. Quite simply, there is no proper basis upon which to reduce the People and prelims which are recoverable in relation to CE238.

42 To further reduce the People and prelim costs, Ms Macdonald suggests the *Adjudicator* should ignore the amended definition of the Working Area in Contract Data Part 2 and exclude the cost of DCM staff working on the Project in the DCM offices. Contract Data Part 2 expressly states that the Working Areas includes DCM offices:

‘The *working areas* are the Site and

11.2(8)

Any areas required for temporary works and Devine Carpenter & Molloy offices.’

43 The *Adjudicator* should prefer and adopt DCM’s assessment of both the time and cost impact of CE238. DCM’s assessment is the only one which accords with

the Parties' Contract, has been assessed and analysed by two truly independent experts and accords with how the Parties have interpreted and applied the Contract to date.

DELAY DAMAGES, PAYMENT AND INTEREST

Repayment of Delay Damages

44 There is no dispute between the Parties in relation to DCM's contractual right to repayment of liquidated damages. SWC's 'defence' in this regard is that DCM has no entitlement to an extension of time and so SWC are entitled to deduct liquidated damages. For the reasons set out in the Referral and this Reply, that position is disputed.

Payment of the Prices

45 SWC accept that, on wrongful omission of WS22, the Prices due in relation to WS22 become payable in full. The dispute (as with Delay Damages) relates to the wider assessment of CE238 and whether DCM has any entitlement to an increase to the Prices. The arguments in relation to this have been addressed early in this Reply.

46 SWC do, however, appear to dispute the mechanism and timing of payment, suggesting that it is not for the *Adjudicator* to make payment of either the principal sum, or interest and instead that should be left to be corrected in a later certificate. This is a point which can, however, be dealt with quickly by reference to Clause W2.3(7). This confirms payment becomes due within 7 days of the decision.

THE REDRESS

47 DCM's position accordingly remains as per the Referral, save that:

- In light of SWC pointing out that the planned completion date in the Rev P1 programme was 14 September 2023 rather than 27 September 2023,

Mr Parnie has revised his assessment of delay to be 360 Days from 14 September 2023 to 8 September 2024;

- DCM has revised its assessment of the impact on the Prices from £6,630,676.88 to £6,432,516.76.

Solicitor for the referring party
31 January 2025

Adjudicators' Qualifying Examination 2025 – Paper 2

Examiner's Feedback – Paper 2

Seven candidates sat Paper 2 of the Adjudicators' Qualifying Examination in 2025. Marks ranged from 48% to 82%. Six candidates achieved a mark of 50% or greater, three of whom attained the pass mark of 65% or more.

The examiners would like to acknowledge the considerable effort shown by all candidates. This feedback is intended to guide both current and future candidates on the standards expected and the typical reasons why certain answers achieved higher or lower marks.

This examination is the penultimate step toward joining the Institution of Civil Engineers' Register of Adjudicators. It is designed to test whether candidates understand the challenges they will face and are equipped to meet them. Each of the four questions is drawn from real-life adjudications, reflecting common and critical issues.

General Observations

The 2025 paper again tested key adjudicator competencies: understanding jurisdiction, procedural fairness, NEC contract knowledge, and the ability to manage the adjudication process efficiently and lawfully. Candidates who showed strong legal reasoning and applied the NEC4 ECC and DRSC correctly were rewarded.

However, some candidates fell into common traps:

- Answering a different question than was asked.
- Ignoring important facts presented in the scenario.
- Failing to engage with the consequences of real case law.

Key Areas of Note

1. Jurisdiction and Concurrent Adjudications

Many candidates correctly identified the importance of adjudication sequencing and the principle from *S&T v Grove*. Those who also discussed *Henry Construction Projects Ltd v Alu-Fix (UK) Ltd [2023]* and its implications on jurisdiction underlined their grasp of current legal thinking.

However, a number of candidates wrongly concluded they had jurisdiction to proceed despite a conflicting, unsatisfied adjudication decision. High marks were awarded to those who reasoned that jurisdiction must be established at the point of appointment and supported their answers with proper reference to NEC4 Clause W2.2 and DRSC 2.2.

2. Management of Late Submissions

All candidates identified the tension between timetabled decision-making and procedural fairness. Good answers drew from *Amec v Thames Water* and *GPS Marine v Ringway*, recognising that fairness does not always mean accepting late documents, but that such decisions must be justified and communicated transparently.

Top answers proposed practical steps, such as requesting extensions or limiting the weight of late materials, while protecting the rights of both parties.

3. NEC Contract Knowledge Questions around Disallowed Costs, Defined Costs, and the assessment of Compensation Events revealed varied understanding. The best answers demonstrated:

- A strong grasp of the NEC4 approach to risk and assessment.
- That adjudicators must engage with, not delegate, technical detail.
- Awareness that adjudicators can sample data or adopt proportionate approaches (*Amey LG v Cumbria*, *BDP v Standard Life*).

Some candidates over-relied on external experts without justifying why such support was necessary, which was marked down.

4. Insolvency and Resignation The question regarding receivership and whether to resign highlighted understanding of *Bresco v Lonsdale* and *Meadowside v Hill Street*. Most candidates correctly stated that insolvency alone does not deprive an adjudicator of jurisdiction or mandate resignation. Stronger candidates also noted that futility is a question of enforceability, not jurisdiction, and that adjudicators must act in accordance with their obligations unless resignation is the only lawful and fair option.

Recommendations for Future Candidates

- Always ground your answer in the specific facts given.
- Cite key legal authorities but explain how they apply to the scenario.
- Address the practical steps an adjudicator would take, not just the legal theory.
- Demonstrate that you can manage the adjudication proactively and fairly.
- Maintain clarity—concise, structured answers are easier to follow and mark.

Candidates who passed this year demonstrated the ability to apply adjudication principles under pressure, reflecting what will be required in practice.

The examiners congratulate the successful candidates and encourage all candidates to continue developing their adjudication expertise.

**Institution of Civil Engineers
Adjudicator's Qualifying Examination 2024**

Tuesday 17th February 2025

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

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

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

Reference to Documents during the Examination

- Housing Grants, Construction and Regeneration Act 1996, as amended by the Local Democracy, Economic Development and Construction Act 2009 and equivalent legislation in Northern Ireland
- The Scheme for Construction Contracts (England and Wales) Regulations 1998, as amended by the Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011 and equivalent legislation in Wales, Scotland and Northern Ireland
- NEC4 Engineering and Construction Contract (June 2017) (as amended)

No other reference documents are permitted.

ANSWER ALL QUESTIONS AND ALL PARTS OF EACH QUESTION.

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

References to Cases and Acts should be quoted where possible.

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

Question 1

You have been appointed as adjudicator in a dispute between Owens (the Contractor) and Schickore (the Client) under a NEC4 Engineering and Construction Contract (ECC), incorporating Option W2 for resolving disputes. Your appointment is governed by the NEC4 Dispute Resolution Service Contract (DRSC).

The dispute arises from Schickore's Payment Notice, which states a negative amount due of £0.8m and asserts that the "true value" of the work as of the Payment Notice date is £2.5m. Schickore has previously paid £3.3m. Schickore seeks a declaration that its Payment Notice is valid and reflects the correct amount due.

Owens challenges your jurisdiction on several grounds:

- Owens claims there is a valid Default Payment Notice indicating an amount due of £0.5m, based on a total value of £3.8m. This amount has not been paid by Schickore.
- Owens asserts that Schickore cannot seek adjudication of the "true value" until it complies with its primary obligation to pay the amount in the Default Payment Notice.
- Owens argues that the dispute is already subject to another adjudication (Adjudication No.1).

Schickore, on the other hand, disputes the validity of the Default Payment Notice and contends that its Payment Notice satisfies the primary payment obligation.

1a)	Do you have jurisdiction to proceed with Adjudication No.2? Justify your answer with reference to the NEC4 ECC, the DRSC, and relevant legal principles.	[6 Marks]
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Having investigated the matter, you conclude that the Default Payment Notice is invalid and that you have jurisdiction to proceed with Adjudication No.2.

After receiving the Reply, Owens informs you that the adjudicator in Adjudication No.1 has decided that:

1. The Default Payment Notice is valid.
2. Schickore's Payment Notice is invalid.
3. Schickore must pay Owens £0.5m based on the Default Payment Notice.

Owens now challenges your jurisdiction on two grounds:

- The outcome of Adjudication No.1 conflicts with your preliminary finding on the validity of the Payment and Default Payment Notices.
- The dispute concerning the Payment Notice has already been decided and cannot be re-adjudicated.



1b)	Do you have jurisdiction to continue? Discuss, with reference to the NEC4 ECC, the DRSC, and relevant legal principles.	[7 Marks]
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You are advised that Schickore has now complied with the decision in Adjudication No.1 by paying the £0.5m ordered.

Owens raises a further jurisdictional challenge, arguing that Schickore has improperly referred two disputes to Adjudication No.2:

1. The validity of the Payment Notice.
2. The “true value” of the account.

Owens asserts that these constitute separate disputes, which cannot be adjudicated together.

Schickore denies this, arguing that both issues form part of a single dispute concerning the payment obligations under the contract. Additionally, Schickore claims that Owens has waived its right to challenge your jurisdiction by participating in the adjudication without raising this issue earlier.

1c)	Do you have jurisdiction to continue? Discuss with reference to the NEC4 ECC, the DRSC, and relevant legal principles.	[6 Marks]
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Having complied with the decision in Adjudication No.1, Schickore has now entered into Administrative Receivership. The appointed Receiver informs you that the company has been authorised to continue with the adjudication proceedings.

Owens protests, arguing that:

1. You no longer have jurisdiction due to Schickore’s insolvency.
2. Continuing the adjudication would be futile, as any decision in favour of Schickore will not be enforced by the courts.

Owens invites you to resign from your appointment as adjudicator.

1d)	Should you resign? Discuss with reference to the NEC4 ECC, the DRSC, and relevant legal principles.	[6 Marks]
	Total	[25 marks]



Question 2

You are conducting an adjudication under the NEC4 Engineering and Construction Contract (ECC), incorporating Dispute Avoidance and Resolution Option W2. The Parties have agreed to an extended timetable that includes a Surrejoinder stage.

Key dates and submissions are as follows:

- **Rejoinder deadline:** 5 October 2018.
- **Surrejoinder deadline:** 15 October 2018.

After thoroughly examining the Rejoinder submitted by the Responding Party on 5 October, you determine that it largely comprises material that should have been included in the original Response, rather than addressing points raised in the Reply.

On **10 October 2018**, the Responding Party submits a substantial bundle of additional documents, labelled as a "further part of the Rejoinder." On **15 October 2018**, when the Surrejoinder is submitted, the Responding Party provides another bundle of documents, described as a continuation and completion of the Rejoinder.

The additional documents submitted on 10 October and 15 October collectively exceed the volume of the original Response and Rejoinder submissions combined.

At this stage, you have already started drafting your decision and are substantially through it.

The Referring Party raises an objection to the additional documents, arguing that they amount to an abuse of process and should not be considered. The Responding Party insists the documents are critical and claims procedural fairness requires that they be admitted.

2a)	What powers do you have under NEC4 ECC Option W2 to address the additional documents submitted on 10 October and 15 October? Discuss whether you are entitled to reject or ignore these documents and how principles of procedural fairness may influence your decision.	[10 marks]
2b)	Outline the steps you should take to manage the submissions while balancing procedural fairness, your obligations under NEC4 ECC and W2, and the need to produce a legally robust decision.	[10 marks]
2c)	Could the inclusion or exclusion of these documents affect the enforceability of your decision? Justify your answer with reference to NEC4 ECC and relevant case law.	[5 marks]
	Total	[25 marks]

Question 3

You have been appointed as adjudicator in a dispute between Telford (the Contractor) and Harlington (the Client). Telford is carrying out drainage and roadworks on a large infrastructure project under an NEC4 Engineering and Construction Contract (ECC) with Main Option C, incorporating Dispute Avoidance and Resolution Option W2.

Telford claims £2.395 million in respect of 1,045 compensation events (CEs). The assessments for these compensation events are as follows:

- **Largest CE (CE15):** £1 million
- **Second-largest CE (CE380):** £450,000
- **Third-largest CE (CE76):** £350,000
- **Fourth-largest CE:** £25,000
- **Remaining 1,041 CEs:** Total assessed value of £570,000

Further details on the remaining 1,041 CEs:

- **791 CEs** have a contested value of under £500.
- **250 CEs** have a contested value of under £200, with a total value of £70,000.

3a)	The Parties have asked you to propose an expeditious method of assessing the total amount due for the compensation events.	
(i)	<ul style="list-style-type: none"> • With reference to case law, what proposals could you make? 	[6 marks]
(ii)	<ul style="list-style-type: none"> • Are there any other approaches or proposals you might suggest? 	[4 marks]
3b)	In CE15, Harlington has disallowed £500,000 of people costs due to a lack of supporting accounts and records. Telford argues that it cannot provide proof of employees' salaries and wages due to data protection concerns. How should you address these costs?	[5 Marks]
3c)	Building on your response to part 3b, how could you use your authority as adjudicator to obtain further information to aid your decision-making in this matter?	[5 Marks]
3d)	CE380 was implemented when the Project Manager failed to respond to Telford's quotation and subsequent reminder, resulting in its acceptance under clauses 62.6 and 66.1. Harlington now argues that the assessment of £450,000 is "overstated" and that the correct value should be £225,000. Telford contends that under clause 66.3, the assessment cannot be revised. What decision could you make in this situation?	[5 Marks]
	Total	[25 marks]

Question 4

You are the adjudicator properly nominated by ICE Dispute Resolution Service (ICE DRS). For each of the following discrete scenarios, provide your response based on your professional duties, legal principles, and best practices. Answer each part individually, unless otherwise stated.

A party to the adjudication presents you with a document titled “Expert Report.”

4a)	What key elements or characteristics would you expect to find in the report to justify its designation as an "expert" report?	[6 marks]
4b)	Explain the primary differences between the evidence provided by an expert witness and that of a witness of fact.	[4 Marks]

After receiving a large Referral document, you notice that one of the witness statements was authored by a former school friend. Although you have not had contact with her since your school days, you were in the same class for several years. Her witness statement appears to have minimal relevance to the dispute.

4c)	What steps, if any, should you take in this situation? Shortly after your appointment, solicitors for the responding party send you a letter, copied to the referring party, stating that you previously delivered contract law training to the responding party three years ago. They express concern that participants in the training may have discussed aspects of this dispute with you, potentially disclosing sensitive information. You have no recollection of such discussions	[5 marks]
4d)	How should you address this issue? Building on the previous scenario, the Referring Party subsequently writes to you, demanding a detailed record of all interactions you have had with the Responding Party over the past five years.	[5 marks]
4e)	How should you respond to this request?	[5 marks]
	Total	[25 marks]

Points for Answer Paper 2

Question 1

Q1a) Do you have jurisdiction to proceed with Adjudication No.2?

(6 Marks)

1. **Understanding the Jurisdiction Issue (1 Marks):**

- Adjudication under NEC4 ECC and DRSC is a contractual process governed by Clause W2 and the Housing Grants, Construction and Regeneration Act 1996 (as amended).
- Jurisdiction derives from the referral of a dispute, which is defined broadly as "any matter" under the NEC4 ECC.
- The adjudicator must determine if the dispute is properly referred, distinct from other adjudications, and falls within their remit.

2. **Analysis of the Payment Notices (3 Marks):**

- **Schickore's Payment Notice:** States a negative amount due of £0.8m, asserting that the "true value" of the work is £2.5m, with £3.3m already paid.
- **Owens' Default Payment Notice:** Claims £0.5m due based on a valuation of £3.8m.
- The validity of these notices determines the basis for adjudication. A valid Payment Notice or Default Payment Notice under NEC4 ECC must meet timing and content requirements.
- Case law (*S&T (UK) Ltd v Grove Developments Ltd [2018]*) confirms the principle of "pay now, argue later," whereby the payer must pay the notified sum unless it disputes the true value and complies with procedural requirements.
- Owens argues Schickore cannot adjudicate the "true value" without paying the £0.5m in the Default Payment Notice.
- Case law (*S&T (UK) Ltd v Grove Developments Ltd [2018]*, *Lidl GB Ltd v Closed Circuit Cooling Ltd [2023]*) confirms that payment of the notified sum is required before adjudicating the true value unless the payer contests the validity of the notice.
- Case Law *Henry Construction Projects Limited v Alu-Fix (UK) Limited [2023]* EWHC 2010 (TCC), if the default payment notice claim is valid then de facto the prior Schickore's payment notice is invalid AND the second adjudicator, i.e. you, do not have jurisdiction *ab initio*. DJ Baldwin applied the well-established principle of *S&T (UK) Ltd v Grove Developments Ltd [2018]* EWCA Civ 2448 (the Grove case), that a party could not

commence a true-value adjudication until it had discharged its immediate payment obligation

- If Schickore's Payment Notice is valid, and precedes the Default Payment Notice within the same payment cycle the Payment Notice invalidates the Default Payment, allowing adjudication of the true value. But if the Default Payment concerns a payment cycle preceding the Schickore Payment Notice, the Adjudicator is without jurisdiction per *Henry v Alu-Fix*

3. Concurrent Adjudications (1 Marks):

- **Overlap with Adjudication No.1:** Assess whether Adjudication No.2 concerns the same issues as Adjudication No.1.
- Under *Fastrack Contractors Ltd v Morrison Construction Ltd [2000]*, a single dispute can only be decided once. However, if Adjudication No.2 addresses a distinct issue (e.g., the true value of the account rather than the procedural validity of notices), jurisdiction may exist.
- *Exyte Hargreaves Ltd v NG Bailey Ltd [2023]* highlights that multiple adjudications are permissible if disputes are narrowly defined.

4. Conclusion (1 Marks):

- If Schickore's Payment Notice is valid and Adjudication No.2 addresses a distinct dispute, jurisdiction exists.
- However, if the issues overlap with Adjudication No.1 or the Payment Notice is invalid, jurisdiction may be precluded.

Conclusion: Jurisdiction likely exists if the disputes are distinct and the Payment Notice is valid.

Q1b) Do you have jurisdiction to continue?

(7 Marks)

1. Understanding of Adjudication Jurisdiction and Binding Nature of Decisions (1 Marks):

- Adjudication decisions are binding until revised by court or arbitration.
- NEC4 ECC Clause W2.3 empowers adjudicators to resolve disputes but prevents re-adjudication of the same dispute unless distinct new issues arise.

2. Impact of Adjudication No.1 Decision (3 Marks):



- Adjudication No.1 found the Default Payment Notice valid and Schickore's Payment Notice invalid, requiring payment of £0.5m.
- This binding decision precludes adjudication of the same issues (*Quietfield Ltd v Vascroft Construction Ltd [2006]*, *Sudlows Ltd v Global Switch Estates 1 Ltd [2023]*).
- In any event, the Adjudicator would appear to be without jurisdiction *ab initio* per *Henry Construction Projects Limited v Alu-Fix (UK) Limited [2023]* EWHC 2010 (TCC)

3. Principle of No Re-Adjudication (1 Marks):

- Assess whether Adjudication No.2 concerns materially the same issues.
- Under *Bouygues UK Ltd v Dahl-Jenson UK Ltd [2000]*, an adjudicator cannot revisit disputes resolved in prior adjudications.

4. Conflicting Decisions and Jurisdiction (1 Marks):

- Conflicting findings on the validity of Payment Notices undermine jurisdiction.
- NEC4 ECC and DRSC prohibit adjudication of issues already decided, ensuring procedural fairness and consistency.

5. Conclusion (1 Marks):

- If Adjudication No.2 concerns the same issues as Adjudication No.1, jurisdiction ceases.
- Distinct disputes may allow continuation, but caution is warranted to avoid conflicting decisions.

Conclusion: The Adjudicator is very unlikely to have jurisdiction.

Q1c) Do you have jurisdiction to continue?

(6 Marks)

1. Single vs. Multiple Disputes (3 Marks):

- The facts described virtually match those in *Henry Construction Projects Limited v Alu-Fix (UK) Limited [2023]* EWHC 2010 (TCC), the 2nd Adjudicator is without jurisdiction.
- *Fastrack Contractors Ltd v Morrison Construction Ltd [2000]* defines a single dispute as arising from the same facts or contractual provisions.
- If validity of the Payment Notice and true value of the account are interconnected, they form a single dispute.
- Assess whether the issues are distinct (e.g., procedural validity vs. substantive valuation).

- If interconnected, NEC4 ECC permits their simultaneous adjudication.

2. Principle of Waiver (1 Marks):

- Owens may have waived jurisdictional objections by participating without raising concerns early (*Bresco Electrical Services Ltd v Michael J Lonsdale Ltd [2019]*, *Macob Civil Engineering Ltd v Morrison Construction Ltd [1999]*).

3. Procedural Framework (1 Marks):

- NEC4 ECC and DRSC allow adjudicators to address interconnected disputes unless explicitly prohibited.
- Procedural fairness requires clarity and transparency in decisions.

4. Conclusion (1 Marks):

- If issues form a single dispute, jurisdiction exists.
- Waiver by Owens strengthens the case for continuation.

Conclusion: Jurisdiction is very likely to be invalid.

Q1d) Should you resign?

(6 Marks)

1. Impact of Administrative Receivership (2 Marks):

- If it was not already necessary to resign per *Henry Construction Projects Limited v Alu-Fix (UK) Limited [2023]* EWHC 2010 (TCC).
- Insolvency does not terminate adjudication (*Bresco Electrical Services Ltd v Michael J Lonsdale Ltd [2020]*).
- Receivership permits continuation if the Receiver authorises proceedings.

2. Jurisdiction of the Adjudicator (1 Marks):

- Jurisdiction persists under NEC4 ECC and DRSC if the Receiver endorses continuation.

3. Futility Argument (1 Marks):

- Futility of enforcement does not negate adjudication's purpose to resolve disputes (*Meadowside Building Developments Ltd v Hill Street Management Co Ltd [2019]*).

4. Resignation Considerations (1 Marks):



- Resignation is unwarranted unless procedural fairness or impartiality is compromised.

5. Conclusion (1 Marks):

- Continue adjudication unless clear evidence invalidates jurisdiction or fairness.

Conclusion: Resignation is unwarranted by reason of administration alone as jurisdiction and purpose remain intact despite insolvency.

Question 2

Q2.a: What powers do you have under NEC4 ECC Option W2 to address the additional documents submitted on 10 October and 15 October? Discuss whether you are entitled to reject or ignore these documents and how principles of procedural fairness may influence your decision?

(10 Marks)

1. Powers Under NEC4 ECC Option W2 and the Scheme (3 Marks):

- Under NEC4 ECC Option W2 and Paragraphs 13 and 14 of the Scheme for Construction Contracts, adjudicators have discretion to manage the adjudication process, including setting deadlines and deciding whether to accept evidence.
- The agreed timetable set specific deadlines:
 - Rejoinder: 5 October.
 - Surrejoinder: 15 October.
- Submissions after the agreed deadlines are a breach unless exceptional circumstances justify them.

2. Procedural Fairness (4 Marks):

- Procedural fairness obliges the adjudicator to ensure both parties have an equal opportunity to present their case (*ABB Ltd v BAM Nuttall Ltd [2013]*).
- Late submissions risk prejudicing the Referring Party by limiting their ability to respond adequately.
- Case law (*Carillion Construction Ltd v Devonport Royal Dockyard Ltd [2005]*) emphasises balancing procedural fairness with efficiency.



- Submissions received after the Reply are not automatically admissible, and adjudicators are not obligated to accept them (*Barry M Cosmetics v Merit Holdings [2019]*).

3. Justification for Rejection or Consideration (3 Marks):

- Reject the documents if:
 - They are repetitive or could have been included earlier.
 - Their inclusion disrupts the agreed timetable or prejudices the Referring Party.
- Consider accepting the documents if:
 - They introduce genuinely new and critical evidence necessary to resolve the dispute.
 - Procedural fairness can be preserved by allowing the Referring Party time to respond.
 - Adjudicator request additional time for decision

Conclusion:

You are entitled to reject the documents if their inclusion disrupts procedural fairness or breaches the agreed timetable without justification. However, careful evaluation of their relevance and criticality is essential before making a decision.

Q2.b: Outline the steps you should take to manage the submissions while balancing procedural fairness, your obligations under NEC4 ECC and W2, and the need to produce a legally robust decision.

(10 Marks)

1. Duty Under NEC4 ECC Option W2 (2 Marks):

- **Key Obligations:** The adjudicator must act impartially, avoid unnecessary delays, and ensure a fair process for both parties..
- **Timetable Focus:** Procedural efficiency is critical; compliance with the agreed timetable takes precedence unless fairness would otherwise be compromised.

2. Procedural Assessment of Additional Documents (3 Marks):

- **Document Review Criteria:**
 - Assess whether the additional documents are a direct response to points raised or are duplicative of earlier submissions.



- Determine whether the documents are **relevant and necessary** to resolving the dispute.
- **Decision-Making Approach:**
 - If the documents are duplicative or irrelevant, exclude them to maintain procedural efficiency.
 - If they contain critical new information, consider admission but note the impact on fairness.

3. Balancing Procedural Fairness and Timetable Compliance (3 Marks):

- **Fairness Considerations:**
 - Procedural fairness requires ensuring both parties have equal opportunities to present their case.
 - If admitting the documents, allow the Referring Party reasonable time to respond to preserve balance.
- **Timetable Enforcement:**
 - Ensure that any adjustments to the process, such as an extension for the Referring Party, do not unduly delay the decision..

4. Practical Steps (2 Marks):

- **Procedural Directions:**
 - Issue a clear directive to both parties prohibiting further submissions without prior approval to avoid further disruptions.
 - Reinforce the importance of adhering to the agreed timetable..
- **Transparent Communication:**
 - Clearly explain your reasoning for including or excluding the additional documents, focusing on fairness, relevance, and efficiency.
 - Provide written confirmation of your decision and its impact on the process.

Conclusion:

- Ensure your actions reflect a balance between fairness and efficiency while adhering to your obligations under NEC4 ECC Option W2.
- Document your decisions clearly, considering their potential impact on the enforceability of your determination.



Q2.c: Could the inclusion or exclusion of these documents affect the enforceability of your decision? Justify your answer with reference to NEC4 ECC and relevant case law.

(5 Marks)

1. Transparency and Disclosure (1 Mark)

- **Principle:** Ensure both parties are aware of any submissions and have the opportunity to comment if those submissions are considered.
- **Action:**
 - Document your reasoning for including or excluding the documents clearly.
 - Follow best practices outlined in **Amec Group Ltd v Thames Water Utilities Ltd [2010]**, which emphasised the need for transparent communication and fair disclosure.

2. Balancing Procedural Fairness and Practicality (1 Mark)

- **Key Consideration:**
 - If the documents introduce material that could significantly affect the outcome, excluding them without proper evaluation could risk a breach of natural justice.
 - Conversely, including irrelevant submissions can undermine procedural efficiency.
- **Best Practice:** Admit the documents if they are material and provide the other party with sufficient time to respond, as supported by **Global Switch Estates 1 Ltd v Sudlows Ltd [2020]**.

3. Materiality Test (1 Mark)

- **Approach:** Briefly review the submission to determine its relevance and materiality:
 - **Relevant and Material:** Admit and allow both parties to address its content.
 - **Irrelevant or Immaterial:** Exclude and document the reasons for your decision.
- **Legal Basis:** In **Cantillon Ltd v Urvasco Ltd [2008]**, adjudicators were permitted to decide procedural matters, including whether evidence falls within their jurisdiction, provided they act fairly.

4. Avoiding Breaches of Natural Justice (1 Mark)

- **Key Principle:**
 - Ignoring submissions without considering their potential relevance could lead to a natural justice challenge, particularly if the documents contain critical evidence.
- **Case Law:**



- **Carillion Construction Ltd v Devonport Royal Dockyard Ltd [2005]** emphasised the importance of fairness in allowing both parties to present their case.
- In **Global Switch 2020**, the failure to consider defences central to the dispute was a key factor in rendering the decision unenforceable.

5. Handling Late Submissions (1 Mark)

- **Best Practice:**
 - Consider any reasonable explanations for the late submission (e.g., newly discovered evidence or unforeseen circumstances).
 - **Action:** Only admit the documents if their inclusion is necessary to ensure procedural fairness.
- **Legal Basis:** As per **John Roberts Architects Ltd v Parkcare Homes Ltd [2006]**, adjudicators should consider whether late submissions could materially impact the outcome.

Conclusion

The inclusion or exclusion of documents can affect the enforceability of a decision. The adjudicator must balance fairness, relevance, and procedural compliance while ensuring transparency in decision-making. Proper consideration of materiality and the opportunity for both parties to respond are critical to avoiding challenges.

Overall Conclusion

1. Rejection or Consideration of Documents:

- You are entitled to reject the additional documents if they breach the agreed timetable and fairness principles. However, assess their relevance carefully before making a decision.

2. Management of the Situation:

- Review the submissions for criticality and relevance, ensure procedural fairness by allowing responses if necessary, and issue clear directions to prevent further delays.

3. Impact on Enforceability:

- Decisions are enforceable unless procedural errors result in significant unfairness. Transparency and fairness in handling the submissions are key to avoiding enforceability challenges.

This approach ensures compliance with NEC4 ECC principles, procedural fairness, and the overarching purpose of adjudication.



Question 3

Q3.a) Proposing an Expedient Method for Assessing Compensation Events (10 Marks)

With Reference to Case Law (6 Marks)

1. Proportionality and Efficiency:

- NEC4 ECC emphasises timely and proportionate assessments of compensation events (CEs).
- Adjudicators must prioritise efficiency while ensuring fairness, particularly in disputes involving numerous small-value claims.

2. Case Law Guidance:

- *Carillion Construction Ltd v Devonport Royal Dockyard Ltd [2005] EWHC 778 (TCC)*: Adjudicators should adopt practical approaches to manage tight deadlines and high volumes of claims.
- *Cantillon Ltd v Urvasco Ltd [2008] EWHC 282 (TCC)*: Decisions should address core issues and adopt pragmatic resolutions. Sampling and focusing on material claims are supported.
- *Amey LG Ltd v Cumbria County Council [2016] EWHC 2856 (TCC)*: Probability sampling was endorsed to resolve disputes involving numerous claims.
- *HS Works Ltd v Enterprise Managed Services Ltd [2009] EWHC 729 (TCC)*: Spot checks are valid for assessing overall credibility in voluminous claims.
- *Building Design Partnership Ltd v Standard Life Assurance Ltd [2021] EWCA Civ 1793*: Sampling and extrapolation approaches can provide cost-effective resolutions in complex cases.

3. Proposals:

- Sampling Approach: Analyse a representative subset of smaller CEs (e.g., the 250 with contested values under £200) and extrapolate results to similar claims.
- Focus on High-Value CEs: Prioritise the resolution of the largest claims (CE15, CE380, CE76) to address a significant portion of the disputed value.
- Agreement on Uncontested Elements: Direct parties to agree on uncontested or minimally contested claims (e.g., those under £500).

Other Proposals (4 Marks)



1. Threshold-Based Resolution:

- Group small-value claims (e.g., those under £500) into bands and assess them collectively using simplified methods or agreed rates.

2. Cost Models:

- Use historical data or previously agreed CEs as benchmarks to assess small-value claims efficiently.

3. Expert Input:

- Appoint technical experts to assess specific categories of claims, provided this is permissible under the contract.

4. Facilitated Agreement:

- Encourage parties to use alternative resolution mechanisms, such as mediation, for low-value claims.

Q3.b) Treatment of Disallowed People Costs in CE15 (5 Marks)

1. Contractual Requirements (2 Marks):

- NEC4 ECC clauses (e.g., 11.2(26), 50.2, 52.2, 52.4, 61.3, 62) require substantiation of costs. The contract requires the Contractor to keep specified accounts and records of Defined Cost (clause 52.2) and provide access to those records for the PM (52.4). If Adjudicator is assessing costs in accordance with W2.3(7), the same rules apply. Disallowed Cost includes costs not supported by accounts and records, so you should disallow these costs in the event evidence is not provided.

2. Data Protection Concerns (2 Marks):

- Telford's refusal to provide payroll records due to data protection must be addressed. Data protection law does not prevent the sharing of information.
- Practical solutions include anonymised payroll summaries, redacted documentation, or third-party verification.
- The adjudicator must distinguish between the evidential burden (proving costs) and the legal burden (providing sufficient evidence to substantiate claims).

3. Conclusion (1 Mark):

- Request Telford to submit redacted evidence or third-party-verified summaries.

- If insufficient evidence is provided, Harlington's disallowance stands as proportionate under NEC4 ECC.
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Q3.c) Use of Adjudicator's Authority to Obtain Further Information (5 Marks)

1. Authority Under NEC4 ECC (2 Marks):

- Clause W2.3 empowers the adjudicator to request additional information.
- Procedural fairness requires clear directions and opportunities for both parties to respond.

2. Practical Steps (2 Marks):

- Issue directions for specific documents or clarifications.
- Request payroll evidence in anonymised or redacted form.
- Consider appointing neutral experts for disputed aspects, subject to contractual allowances.

3. Ensuring Fairness (1 Mark):

- Establish reasonable deadlines for responses to maintain efficiency and avoid prejudice.
-

Q3.d) Decision Regarding CE380 and Clause 66.3 (5 Marks)

1. Contractual Background (2 Marks):

- Clauses 62.6 and 66.1 stipulate that failure to respond to a CE quotation results in its deemed acceptance.
- Clause 66.3 prohibits revisions to implemented CEs unless based on a change in stated assumptions.
- Clause W2.3(4) nevertheless empowers the adjudicator to revise any inaction of PM and alter a matter which has been treated as accepted therefore answer is incorrect

2. Analysis (3 Marks):

- Harlington's failure to respond resulted in the quotation's deemed acceptance.
- No evidence of changed assumptions exists, so the implemented CE cannot be revised.
- ICI v Merit Merrell Technology [2017] EWHC 1763 (TCC) the Court confirmed that in the context of clause 65.2 of the NEC3 ECC Form that provided 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”, this did not preclude the court from revisiting a project manager’s decision [210]. To argue otherwise ignore the dispute resolution clause (Option W2).

- As such, by providing that an adjudicator has the power to “review and revise any action ... of the project manager”, by implication an adjudicator is authorised to review and revise a project manager’s determination of a compensation event.
- Such a review is what happened in the case of Northern Ireland Housing Executive v. Healthy Buildings (Ireland) Limited [2017] NIQB 4, where Northern Ireland’s High Court looked at the “no-revision” rule in the context of a NEC professional services contract, which had similar provisions regarding the assessment of compensation events to the Engineering & Construction Contract.

Overall Conclusion

1. Use practical and proportional methods (e.g., sampling, thresholds, high-value focus) to address voluminous CEs.
2. Address people costs in CE15 by balancing substantiation requirements with data protection concerns.
3. Leverage adjudicator powers to request further evidence or expert input.
4. Clause 66.3 prohibits retrospective adjustments without a valid basis save that Clause W2.3(4) empowers the adjudicator to revise any inaction of the Project Manager

This approach ensures procedural fairness, contractual compliance, and efficient resolution of the dispute



Question 4

Q4.a) Key Elements of an Expert Report (6 Marks)

1. Qualifications and Expertise (2 Mark):

- The expert report must clearly state the expert's qualifications, credentials, and experience relevant to the matter at hand.
- It should establish the expert's authority to provide opinions and explain their specialised knowledge's relevance to the dispute.

2. Impartiality and Independence (2 Marks):

- The expert must explicitly declare their duty to the adjudicator and not the party instructing them, ensuring objectivity.
- The report should confirm that the expert has no conflicts of interest or bias.

3. Content and Methodology (2 Marks):

- The report should:
 - Identify the scope and purpose of the assessment.
 - Analyse facts or evidence and explain the methodology used.
 - Present well-reasoned conclusions, distinguishing clearly between factual evidence and professional opinion.
 - Compliance with **Civil Procedure Rules (CPR 35)** or equivalent guidelines is essential, particularly in ensuring the report's transparency and objectivity.
-

Q4.b) Differences Between Expert Evidence and Witness of Fact Evidence (4 Marks)

1. Expert Evidence (2 Marks):

- **Specialised Knowledge:** Provided by an expert with specialised knowledge or skills beyond ordinary experience.
- **Opinions and Analysis:** Includes professional opinions, interpretations, and analyses of technical issues.
- **Duty to Adjudicator:** The expert's primary duty is to assist the adjudicator impartially, irrespective of the party instructing them.

2. Witness of Fact Evidence (2 Marks):



- **Factual Knowledge:** Based on the witness's direct knowledge or observation of events.
- **No Opinions:** Testimony is limited to recounting factual occurrences without interpretation.
- **Duty to the Parties:** A witness of fact does not owe a duty to the adjudicator but provides evidence to the party presenting their testimony.

Q4.c) Witness Statement by Former School Friend (5 Marks)

1. Potential Issues (2 Marks):

- **Perception of Bias:** The prior personal relationship may raise concerns, even though the relationship ended years ago and no contact has occurred since. *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256
- Adjudicators must avoid both actual bias (direct interest or prejudice) and perceived bias (appearance of partiality).
- The test for perceived bias is established in *Porter v Magill* [2001] UKHL 67:
- Would a fair-minded and informed observer, having considered the facts, conclude that there is a real possibility of bias?
- Section 108(2)(e) of the Housing Grants, Construction and Regeneration Act 1996 (as amended) mandates adjudicators to act impartially.
- **Relevance of Evidence:** If the witness statement is minimally relevant to the dispute, the risk of bias or undue influence is reduced.

2. Appropriate Response (3 Marks):

- **Disclosure:** Inform both parties of the prior relationship, explaining its historical and limited nature.
- **Confirmation of Impartiality:** Reaffirm that the prior relationship has no bearing on your impartiality or decision-making.
- **Opportunity for Objections:** Allow parties to raise objections. If either party raises legitimate concerns, consider stepping down to preserve the process's integrity.

Q4.d) Previous Contract Law Training Provided to Responding Party (5 Marks)

1. Potential Issues (2 Marks):



- **Perception of Bias:** The training could create concerns about undue familiarity with the responding party.
- *Amec Capital Projects Ltd v Whitefriars City Estates Ltd* [2004] EWHC 393 (TCC): Failure to disclose prior involvement undermined the adjudicator's impartiality.
- *Fileturn Ltd v Royal Garden Hotel Ltd* [2010] EWHC 1736 (TCC): Adjudicators must disclose relationships that might influence their independence.
- *Cofely Ltd v Bingham & Knowles Ltd* [2016] EWHC 240 (Comm): Frequent appointments by one party created a perception of bias.
- **Alleged Prior Discussions:** The solicitors' concern about sensitive matters being discussed during the training, though unsubstantiated, warrants transparency.

2. Appropriate Response (3 Marks):

- **Disclose the Training:** Write to both parties confirming the training occurred three years ago and asserting no recollection of any discussions relating to the dispute.
- **Reaffirm Impartiality:** Emphasise your impartiality and confirm that the prior training has no impact on your ability to adjudicate fairly.
- **Invite Formal Objections:** Allow both parties to submit formal objections if they remain concerned, ensuring transparency and procedural fairness.

Q4.e) Request for a Detailed Record of Interactions (5 Marks)

1. Transparency and Proportionality (2 Marks):

- **Transparency:** Acknowledge the importance of addressing concerns about potential conflicts of interest.
- **Proportionality:** Ensure responses are relevant to the current dispute and avoid unnecessary or excessive disclosures.
- *Cofely v Bingham and Knowles – Adjudicator should remain impartial*

2. Appropriate Response (3 Marks):

- **Provide a Summary:** Offer a factual summary of professional interactions with the responding party over the past five years, limited to relevant and material instances.
- **Reaffirm Independence:** Confirm that no prior interactions compromised your impartiality.
- **Invite Formal Objections:** Reiterate willingness to step down if the requesting party provides reasonable grounds for concern.

Conclusion

In these scenarios, the adjudicator must act transparently and proactively to address potential conflicts or perceptions of bias. By:

1. Ensuring expert reports meet required standards.
2. Clarifying the distinctions between expert and factual evidence.
3. Disclosing prior relationships or interactions.
4. Reaffirming impartiality when concerns arise.

The adjudicator maintains the integrity of the adjudication process and upholds the principles of fairness and independence under English law.

