September 2021: Marker Guidance: Unit 2

The marking rubric and guidance is published as an aid to markers, to indicate the requirements of the examination. It shows the basis on which marks are to be awarded by examiners. However, candidates may provide alternative correct answers and there may be unexpected approaches in candidates' scripts. These must be given marks that fairly reflect the relevant knowledge and skills demonstrated. Where a candidate has advanced a point that is not included within the marking rubric please do make a note of the same so that it can be raised at the standardisation meeting.

Mark schemes should be read in conjunction with the published question paper and any other information provided in this guidance about the question.

Before you commence marking each question you must ensure that you are familiar with the following:

- ☑ the requirements of the specification
- ☑ these instructions
- ☑ the exam questions (found in the exam paper which will have been emailed to you along with this document)
- ☑ the marking rubric

The marking rubric for each question identifies indicative content, but it is not exhaustive or prescriptive and it is for the marker to decide within which band a particular answer falls having regard to all of the circumstances including the guidance given to you. It may be possible for candidates to achieve top level marks without citing all the points suggested in the scheme, although the marking rubric will identify any requirements.

It is imperative that you remember at all times that a response which:

- ☑ differs from examples within the practice scripts; or,
- ☑ includes valid points not listed within the indicative content; or,
- ☑ does not demonstrate the 'characteristics' for a level

may still achieve the same level and mark as a response which does all or some of this.

Where you consider this to be the case you should make a note on the script and be prepared to discuss the candidate's response with the moderators to ensure consistent application of the mark scheme.

SECTION A (all compulsory – 40%)

Question 1:	Explain how a failure to file an Acknowledgment of Service or a Defence, within the time limits laid down in the Civil Procedure Rules, may result in the Claimant entering Judgment in Default.

Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	**Marks**
Required: Candidate should set out that an application should be made for Default Judgment under Part 12 Civil Procedure Rules (CPR), e.g ***CPR 12:*** Defendant does not respond after 14 days, or acknowledges service within 14 days, but does not file and serve a defence within 28 days, the claimant can apply for 'judgment by default'. ***CPR 12.1:*** Default judgment means judgment without trial where a defendant has failed to file an acknowledgment of service; or has failed to file a defence. ***CPR 12.3(1):*** The claimant may obtain judgment in default of an acknowledgment of service only if at the date on which judgment is entered the defendant has not filed an acknowledgment of service or a defence to the claim (or any part of the claim); and the relevant time for doing so has expired. ***CPR 10.2:*** If a defendant fails to file an acknowledgment of service and does not within that period file a defence in accordance with Part 15 or serve or file an admission in accordance with Part 14, the claimant may obtain default judgment if Part 12 allows it. ***CPR 15.3:*** If a defendant fails to file a defence, the claimant may obtain default judgment if Part 12 allows it.	Up to 4 marks A pass must refer to CPR 12 and set out what it means to apply for a default judgment
Credit any other relevant point to explain the procedure, e.g: ***CPR 6:*** Date of service is determined by the rules set out within. ***Form N225:*** A default judgment is requested by completing and returning to the court Form N225 - Request for judgment and reply to admission. This form is also used in cases of admissions,	Up to 4 marks A pass must refer to CPR 12 and set out what it means to apply for a default judgment

considered in the next section. ***CPR PD 12, para 4.1:*** Both on a request and on an application for default judgment the court must be satisfied that the particulars of claim have been served on the defendant (a certificate of service on the court file will be sufficient evidence), either the defendant has not filed an acknowledgment of service or has not filed a defence and that in either case the relevant period for doing so has expired, the defendant has not satisfied the claim, and the defendant has not returned an admission to the claimant or filed one with the court under rule.	
Could also include a discussion on circumstances when a default judgment may not be obtained or when permission of the court may be needed, e.g: ***CPR 12.2:*** A claimant may not obtain a default judgment on a claim for delivery of goods subject to an agreement regulated by the Consumer Credit Act 1974; where he uses the procedure set out in Part 8 (alternative procedure for claims); or in any other case where a practice direction provides that the claimant may not obtain default judgment. ***CPR 12.10:*** May only be obtained by a claimant with the permission of the court (for which an application under CPR Part 23 will be required) in the following cases: D was served outside the jurisdiction, D is a child or protected party, C seeks costs (other than fixed costs), Tort claims between spouses or civil partners and C wants delivery of goods, not simply damages.	Up to 3 marks To achieve more than a pass a candidate must not simply cite the rules but should show a deeper understanding of the rules including an appreciation of when a DJ may not be obtained or permission may be needed.
Credit a discussion on setting aside a default judgment, e.g: ***CPR 13.2:*** The mandatory grounds, upon which the court must set the judgment aside. D has filed an admission with request for time to pay. D had applied for summary judgment against the claimant. The claim was satisfied before judgment. D has complied with the rules. ***CPR 13.3:*** In any other case, the court may set aside or vary a judgment entered under Part 12 if the defendant has a real prospect of successfully defending the claim; or it appears to the court that there is some other good reason why the judgment should be set aside or varied; or the defendant should be allowed to defend the claim. ***Page v Champion Financial Ltd [2014]:*** A lack of promptness is a factor for the court to consider when deciding whether to set aside a default judgment. However a lack of promptness (and even a positive decision not to act promptly) does not prevent the court setting a judgment aside if the defendant can show a real prospect	Up to 3 marks To achieve more than a pass a candidate must not simply cite the rules but should show a deeper understanding of the rules which may include an explanation about setting aside a DJ.

of successfully defending the claim. ***Gentry v Miller [2016]:*** 4 months after DJ was obtained, D's insurance company sought to have the DJ set aside on the grounds that the parties had colluded in a fraudulent claim. Although the insurer had shown that it had a real prospect of successfully defending the claim, it had not made the application promptly when, by the exercise of reasonable diligence, it ought to have done so. The application to set aside the default judgment was refused. ***Stanley v London Borough Tower Hamlets [2020]:*** The claimant's solicitor posted particulars of claim on 25 March – two days after the UK went into lockdown – knowing the council had to acknowledge service by 9 April. The judgment in default was set aside. The judge acknowledged the need to enforce compliance with the rules and to conduct litigation at proportionate cost, but said it was 'unconscionable' for the claimant to benefit from the Covid-19 crisis.	
Credit a discussion on the costs consequences of such an application, e.g: ***CPR 45.1(1):*** This section sets out the amounts which, unless the court orders otherwise, are to be allowed in respect of legal representatives' charges. ***CPR 45.1 (2) (a)(i):*** This section applies where judgment in default is obtained. ***CPR 45.1 (3):*** No sum in respect of legal representatives' charges will be allowed where the only claim is for a sum of money or goods not exceeding £25. ***CPR 45.1 (4):*** Any appropriate court fee will be allowed in addition to the costs set out in this Section. ***CPR 45.1 (5):*** The claim form may include a claim for fixed commencement costs. ***CPR 45.2:*** Amount of fixed commencement costs in a claim for the recovery of money or goods ***CPR 45.2 (1):*** The amount of fixed commencement costs in a claim will be calculated by reference to Table 1; and the amount claimed, or the value of the goods claimed if specified, in the claim form is to be used for determining the band in Table 1 that applies to the claim. ***CPR 45.2 (2):*** The amounts shown in Table 4 are to be allowed in addition, if applicable. These are miscellaneous costs in respect of	Up to 2 marks

service. ***CPR 45.4:*** Where the claimant has claimed fixed commencement costs under rule 45.2; and judgment is entered the amount to be included in the judgment for the claimant's legal representative's charges is the total of the fixed commencement costs; and the relevant amount shown in Table 2. For default judgment these will depend on whether the default was on an acknowledgment of service or default of a defence. These range between £22-£35.	

Question 2:	Describe what is meant by Qualified One-way Costs Shifting and outline the circumstances where a Defendant may recover their costs from a losing Claimant.
Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	**Marks**
Required: Candidates are required to explore what QOCS is: ***CPR 44.2(1):*** The Court retains discretion as to costs and QOCS does not impact this. ***CPR 44.2(2)(a):*** The normal rule that the losing party to litigation is ordered to pay the winning party's costs is not displaced by QOCS. ***Para 12.7 PD to CPR 44:*** QOCS does not prevent the court from making an order for costs – Where costs are ordered against a claimant, this may be on a standard or indemnity basis and may be subject to a summary or detailed assessment. ***QOCS limits:*** The circumstances in which such costs orders can be enforced and provides for circumstances where they can be enforced with or without court permission.	Up to 3 marks
Any other relevant point to describe where QOCS does/doesn't apply (credit any case law/points of law correctly cited and applied) e.g: ***CPR 44.13:*** QOCS applies to personal injury and fatal accidents claims both under the Fatal Accidents Act 1976 and under section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 ***QOCS:*** will not apply to applications for pre-action disclosure. ***CPR 44.17:*** QOCs will not apply where the claimant had entered	Up to 2 marks

into a 'pre-commencement funding arrangement'. ***CPR 48:*** defines a pre-commencement funding arrangement (essentially a CFA entered into before 1 April 2013). ***Examples of case authority that may be considered:*** Wagenaar v Weekend Travel Ltd (trading as Ski Weekend) & Serradj [2014], Catalano v Espley-Tyas Development Group [2017], Price v Egbert Taylor & Co. [2016] and Landau v Big Bus Co Ltd [2014].	
Any other relevant point to describe the enforcement of costs orders, under CPR 44.14, where QOCS applies (credit any case law/points of law correctly cited and applied) e.g: ***CPR 44.14(1):*** Orders can be enforced to the extent that the amount of the costs does not exceed the damages awarded to the claimant. The claimant can be ordered to pay the defendant's costs up to the amount awarded to him. ***CPR 36:*** This covers a situation where a claimant fails to beat a defendant's Part 36 offer. ***CPR 44.14 (2):*** May only be enforced after the proceedings have been concluded and the costs have been assessed or agreed.	Up to 2 marks
Any other relevant point to describe the enforcement of costs orders, under CPR 44.15, where QOCS applies and the court's permission is not required to enforce the order (credit any case law/points of law correctly cited and applied) e.g: ***CPR 44.15:*** Orders can be enforced where proceedings are struck out because there were no reasonable grounds for bringing the proceedings, there is an abuse of process or the conduct of the claimant (or a person acting on his behalf with his knowledge) is likely to obstruct the just disposal of the proceedings. ***Examples of case authority that may be considered:*** Wall v British Canoe Union [2015] (claim no. A38YP644) (Unreported), Brahilka v Allianz Insurance (Claim No. A93YP597 in the Romford County Court) (unreported), Reckitt Benckiser (UK) Ltd v Home Pairfum Ltd [2004], Kite v Phoenix Pub Group [2015] and Shaw v Medtronic Corevalve LLC and others [2017].	Up to 2 marks
Any relevant point to describe the enforcement of costs orders, under CPR 44.16, where QOCS applies and the court's permission is required to enforce the order (credit any case law/points of law correctly cited and applied) e.g: ***CPR 44.16(1):*** costs orders against claimants can be enforced to their full extent only with court permission where the claim is found,	Up to 4 Marks

on the balance of probabilities, to be fundamentally dishonest. ***Examples of case authority that may be considered:*** Menary v Darnton [2016], Gosling v Hailo and Screwfix Direct [2014], Zurich Insurance v Bain [2015], Wagett v Witold [2015] and Howlett v Davies [2017]. ***CPR 44.16(2)(a):*** Where the proceedings include a claim which is made for the financial benefit of a person other than the claimant or a dependant within the meaning of section 1(3) of the Fatal Accidents Act 1976 (other than a claim in respect of the gratuitous provision of care, earnings paid by an employer or medical expenses) the court can make an order for costs against that other person. ***CPR 44.16(2)(b):*** Costs orders against claimants can be enforced to their full extent providing the court has given permission where the claim includes a claim for financial benefit unrelated to personal injury either for the claimant or for another party. This part therefore gives the court the power to deny a claimant QOCS protection in a claim, for example, which is primarily a property damage claim but which includes a personal injury claim. ***CPR PD 44, para 12.2:*** Includes examples of when CPR 44.16(2)(b) may apply and the examples given are subrogated claims and claims for credit hire. ***Examples of case authority that may be considered:*** Howlett and Howlett v Davies and Ageas [2017], Jeffreys v Commissioner of Police for the Metropolis [2017] and Brown v Commissioner of Police of the Metropolis & Anor [2019]. ***CPR 44.16(3):*** The orders under CPR 44.16 against claimants can be enforced to their full extent only with court permission.	
Any relevant point to describe set-off of costs orders, under CPR 44.12, (credit any case law/points of law correctly cited and applied) e.g: ***CPR 44.12(1):*** Where a party entitled to costs is also liable to pay costs, the court may assess the costs which that party is liable to pay and either set off the amount assessed against the amount the party is entitled to be paid and direct that party to pay any balance; or delay the issue of a certificate for the costs to which the party is entitled until the party has paid the amount which that party is liable to pay ***Examples of case authority that may be considered:*** Howe v Motor Insurers' Bureau [2017], Faulkner v Secretary of State for Energy and Industrial Strategy [2020], Ho v Adelekun (no.2) [2020] and Jeffrey	Up to 2 marks

Cartwright v Venduct Engineering Limited [2018]	

Question 3:	Outline what the Costs Lawyer Standards Board Code of Conduct means when it says that Costs Lawyers must act at all times to ensure the client's interest is paramount.
Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	**Marks**
Required: Discussion of the costs lawyer's duty to the client and court, e.g: ***CLSB Code of Conduct Principle 2:*** Costs Lawyers must comply with their duty to the court in the administration of justice. Costs Lawyers must at all times act within the law. Costs Lawyers must not knowingly or recklessly either mislead the court or allow the court to be misled. Costs Lawyers must comply with any court order which places an obligation on them and they must not be in contempt of court. Costs Lawyers must advise clients to comply with court orders made against them. ***Credit reference to any authority cited in relation to Principle 2 of the CLSB Code of Conduct, e.g:*** CLSB Code of Conduct Principle 2, CLSB Code of Conduct Principle 2.1, CLSB Code of Conduct Principle 2.2, CLSB Code of Conduct Principle 2.3 and CLSB Code of Conduct Principle 2.4. ***CLSB Code of Conduct Principle 3:*** Costs Lawyers must act in the best interests of their client. Costs Lawyers must act at all times to ensure the client's interest is paramount except where this conflicts with your duties to the court or where otherwise permitted by law. You must decline to act if it would not be in the client's best interests or if that client's interests conflict directly with your own or with those of another client. ***Credit reference to any authority cited in relation to Principle 3 of the CLSB Code of Conduct, e.g:*** CLSB Code of Conduct Principle 3 and CLSB Code of Conduct Principle 3.1. ***Responsibility and authority on an assessment hearing:*** The solicitors are responsible for the conduct of the detailed assessment proceedings and cannot avoid that responsibility merely by instructing a costs draftsman. Costs draftsmen can appear on behalf of the party only as a duly authorised representative of the	Up to 6 marks To achieve more than a pass, candidates must not simply cite law but should show a greater depth to their knowledge base and apply the authority to the question posed

solicitor who has instructed him to be there. Work undertaken by independent costs draftsmen could be treated as part of the instructing solicitor's profit costs such as to attract a success fee. The costs draftsman has the same authority as the solicitor would have had to consent to orders. ***Credit reference to any authority cited in relation to the responsibility and authority on an assessment hearing, e.g:*** Crane v Canons Leisure Centre [2007], Ahmed v Powell [2003] and Waterson Hicks v Eliopoulos [1997]. ***Negligence:*** Initially, claimant's civil actions for negligence could not be sustained: a barrister's immunity was justified by public policy. This immunity extended to pre-trial work if and only if it is so intimately connected with the conduct of the case in court as to amount to a preliminary decision about it. However, it has subsequently been recognised that the advocate, like other professional men, undertaking a duty to his client to conduct his case, subject to the rules and ethics of his profession, should do so with proper skill and care. ***Credit reference to any authority cited in relation to negligence, e.g:*** Rondel v Worsley [1967], Saif Ali v Sydney Mitchell [1978] and Arthur J S Hall & Co v Simmons [2007]. ***Approach to advocacy:*** The principle that an advocate is liable to his client for professional should not stifle the manner in which they conduct litigation and advise their clients. This might lead to defensive advocacy, where barristers would hedge their opinions with qualifications and be reluctant to give clients the advice which they require in their best interests. The courts have not yet developed a clear set of principles governing the terms in which an advocate's advice should be given. If a point is not properly arguable, it should not be argued. It is the duty of an advocate to draw the judge's attention to authorities that are in point, even if they are adverse to that advocate's case. ***Credit reference to any authority cited in relation to approach taken to advocacy, e.g:*** Moy v Pettmann Smith (A Firm) & Anor [2005], Buxton v Mills-Owens [2010] and Copeland v Smith [2002].	
Candidates should include an explanation of the legislative framework governing the regulation of authorised persons / reserved legal activities, e.g: ***The legislative framework governing the regulation of authorised persons:*** Authorised persons are people who are authorised to carry out the relevant activity by a relevant approved regulator or a licensable body which, by virtue of such a licence, is authorised to carry on the relevant activity by a licensing authority in relation to the reserved legal activity. An approved regulator is a body which	Up to 4 marks To pass candidates must demonstrate their understanding of the legislative framework governing the regulation of

is designated as an approved regulator by Schedule 4 of the LSA 07. ACL is approved regulator, as an approved regulator under the LSA ACL regulate those undertaking reserved legal activities who are known as Costs Lawyers. However, there is a memorandum of understanding between ACL and the CLSB delegating the regulatory function to the CLSB. ***Credit reference to any authority cited in relation to the legislative framework governing the regulation of authorised persons, e.g:*** Section 18 of the Legal Services Act 2007, Section 20 of the Legal Services Act 2007, Section 20(5) of the Legal Services Act 2007 and Schedule 4 of the Legal Services Act 2007. ***Undertaking reserved legal activities:*** The reserved legal activities relevant to Costs Lawyers include: the exercise of rights of audience, the conduct of litigation and the administration of oaths. A person is entitled to carry on a reserved legal activity where that person is authorised in relation to the activity in question. If a person is not authorised, they may still be entitled to carry out a reserved legal activity if they are an "exempt person" in relation to the activity. Costs Lawyers must adhere to CLSB code of Conduct. Breach will result in disciplinary proceedings by CLSB. An individual who is not authorised by the CLSB, but who is a manager or employee of an authorised person, is also considered a regulated person under the LSA and must comply with all relevant regulatory arrangements. ***Credit reference to any authority cited in relation to undertaking reserved legal activities, e.g:*** Section 12 and Sch 2 of the Legal Services Act 2007, Section 13(1) of the Legal Services Act 2007, Section 13(2)(a) of the Legal Services Act 2007, Section 13(2)(b) of the Legal Services Act 2007, Section 176(1) of the Legal Services Act 2007 and Section 176(2)(b) of the Legal Services Act 2007.	authorised persons
Credit a discussion on the CLSB Practising Rules, e.g: ***CLSB Practising Rules:*** These Rules govern the practice of Costs Lawyers and the issue and revocation of practising certificates by the CLSB. No person shall be entitled to practise as a Costs Lawyer unless they have qualified as a Costs Lawyer in accordance with the Training Rules, they have a current Practising Certificate which has been issued in accordance with these Rules and which is not suspended and they comply with CPD requirements set out in the CPD Rules. An applicant or Costs Lawyer must disclose certain information when making an application for a Practising Certificate or throughout the lifetime of a Practising Certificate. This includes criminal convictions. A Practising Certificate may be revoked by the CLSB. Costs Lawyers must ensure that they have professional indemnity insurance. ***Credit reference to any authority cited in relation to the practising***	Up to 2 marks To achieve more than a pass, candidates must not simply cite law but should show a greater depth to their knowledge base and apply the authority to the question posed

rules, e.g: Rule 1 of the CLSB Practising Rules, Rule 4 of the CLSB Practising Rules, Rule 8 of the CLSB Practising Rules and Rule 10 of the CLSB Practising Rules.	

Question 4:	Explain the exceptions to the principle that a Costs Lawyer cannot handle client money.	
Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+		10
Indicative Content		**Marks**
Required: Students must include a discussion as to what client money is, e.g: ***No Definition:*** There is no definition of client money within any rules set by the CLSB and therefore you must look to either CILEx or SRA rules for the definition. ***Rule 2.1(a) of the SRA Account Rules 2019:*** "Client money" includes money held or received relating to regulated services delivered to a client. ***Rule 2.1(b) of the SRA Account Rules 2019:*** "Client money" includes money held or received on behalf of a third party in relation to regulated services (such as money held as agent, stakeholder or held to the sender's order). ***Rule 2.1(c) of the SRA Account Rules 2019:*** "Client money" includes money held or received as a trustee or as the holder of a specified office or appointment, such as donee of a power of attorney, Court of Protection deputy or trustee of an occupational pension scheme. ***Rule 2.1(d) of the SRA Account Rules 2019:*** "Client money" includes money held or received in respect of fees and any unpaid disbursements if held or received prior to delivery of a bill for the same. ***CILEx Account Rules:*** define client money as money beneficially owned by anyone other than the Authorised Entity.		Up to 4 marks
Credit discussion on the protection of the public and minimising risks, e.g: ***Principle 3 of the CLSB Code of Conduct:*** Generally is about acting		Up to 5 marks

in the best interests of the client ***Principle 3.6 of the Costs Lawyer Code of Conduct:*** A costs lawyer must not accept client money save for disbursements and payment of your proper professional fees. ***CLSB Practising Rules:*** There is no mention of the CLs handling client money in the CLSB Practising Rules. ***Section 1 LSA 07:*** 8 regulatory objectives. ***Section 20 LSA 07:*** Approved regulators. ACL is named as the approved regulator but the CLSB have the delegated functions.	
Credit discussion on the definition of "proper professional fees" and disbursements e.g: ***CLSB Guidance Note Handling Client Money (Principle 3.6):*** Fees incurred on having complied with a client instruction, made up of payment for services provided; and disbursements paid on behalf of the client. ***CLSB Guidance Note Handling Client Money (Principle 3.6):*** A disbursement is a sum that a Costs Lawyer spends on behalf of their client including the VAT element. Disbursements include, but are not limited to, court fees, counsel's fees, travel costs, postal costs (if exceptional sum e.g. courier), photocopying costs (if exceptional sum). ***CLSB Guidance Note Handling Client Money (Principle 3.6):*** Disbursements do not include hourly rates, telephone calls made or received, faxes made or received, or general office overheads.	Up to 2 marks
Credit discussion on Costs Lawyer request payment in advance for their services or the difference where a Costs Lawyer works for an SRA regulated firm, e.g ***A costs lawyer can request payment in advance of their services when:*** A Costs Lawyer is employed (PAYE) by, or is a partner in, a firm authorised and regulated under the Legal Services Act 2007 (LSA). For example, a firm of solicitors regulated by the Solicitors Regulation Authority (SRA), in which case prevailing SRA rules and regulations apply. ***A costs lawyer cannot request payment in advance of their services when:*** Where a Costs Lawyer is working for a firm not authorised and regulated under the LSA or is a sole practitioner. ***Interim billing:*** Arrangements can be agreed with a client to reduce financial exposure on payment for services provided and reimbursement for disbursements.	Up to 2 marks

SECTION B (choice of 3 out of 5 – 60%)

Question 5:	You work in the Litigation department of an SRA regulated firm, Tremble and Taylor LLP. You are contacted by a fee earner, Mary Contrary, who has requested help on the file of Havisham Ltd. Havisham Ltd are the Defendant in proceedings, they are a small department store based in Whitby. They sell some children's clothes and shoes. They entered into a contract with Kids Kicking Shoes Ltd for the supply of £15,000 worth of children's shoes to be delivered to their warehouse in Whitby on the 6 May 2021. However, the shoes did not arrive until 5 June and, having inspected the shoes, Havisham Ltd was of the opinion that too many of the boy's pairs were of a poor standard. Havisham Ltd sought to reject the consignment on the same day. They contacted Kids Kicking Shoes Ltd to come and collect the shoes. The Managing Director of Kids Kicking Shoes Ltd, Henry Marvin, telephoned on 12 June, stating that they would not collect the shoes and that they wanted their invoice to be paid. On 14 June, Havisham Ltd received an incorrect invoice for £15,500, which it refused to pay. Kids Kicking Shoes Ltd has since issued proceedings. Mary Contrary has filed a defence on behalf of Havisham Ltd, but she considers that the claim is weak and has advised Havisham Ltd to apply for a Summary Judgment. Mary Contrary has approached you and asked for you to write a letter of advice to Havisham Ltd explaining what a Summary Judgment is, how a Judgment may be obtained and the possible outcomes of an application for Summary Judgment. Write the body of a letter to Havisham Ltd providing advice on Summary Judgments.
Total Marks Attainable	20

Fail	up to 9.9	This mark should be awarded to candidates whose papers fail to address any of the requirements of the question, or only touch on some of the more obvious points without dealing with them or addressing them adequately.
Pass	10+	An answer which addresses MOST of the following points: Definitions and salient points in respect of summary judgment, consideration of what summary judgment is, how it can be obtained and the possible outcomes. Candidates will demonstrate a good depth of knowledge of the subject (i.e. a good understanding of the civil procedure rules concerning summary judgment) with good application and some analysis having regard to the facts, although

		candidates may demonstrate some areas of weakness.
Merit	12+	An answer which addresses ALL of the following points: consideration of what summary judgment is, how it can be obtained and the possible outcomes. The answer is also likely to include some discussion on costs consequences and other aspects of the process (e.g. setting aside). Candidates will demonstrate a very good depth of knowledge of the subject (i.e. a good understanding of the relevant civil procedure rules) with good application and some analysis having regard to the facts, although candidates may demonstrate some areas of weakness.
Distinction	14+	An answer which includes ALL the requirements for a pass and merit (as set out above) PLUS the candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. Candidates will provide an excellent advice setting out when summary judgment will be obtained and the provisions around such an order. All views expressed by candidates should be supported by relevant authority and/or case law. Work should be written to an exceptionally high standard taking into consideration that it is written in exam conditions.

Required: Candidate should set out the grounds for a summary judgment and the proceedings in which a summary judgment is available, e.g ***Grounds for summary judgment and proceedings in which a summary judgment is available:*** CPR 24 sets out a procedure by which the court may decide a claim or a particular issue without a trial. The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if it considers that the claimant has no real prospect of succeeding on the claim or issue or the defendant has no real prospect of successfully defending the claim or issue; and there is no other compelling reason why the case or issue should be disposed of at a trial. The court may give summary judgment against a claimant in any type of proceedings. The court may give summary judgment against a defendant in any type of proceedings except proceedings for possession of residential premises (against a mortgagor; or a tenant or a person holding over after the end of his tenancy whose occupancy is protected within the meaning of the Rent Act 1977 or the Housing Act 1988) and proceedings for an admiralty claim in rem. ***Credit reference to any authority cited on grounds for summary judgment and proceedings in which a summary judgment is available, e.g:*** ***CPR 24.1***: sets out a procedure by which the court may decide a claim or a particular issue without a trial. ***CPR 24.2***: The court may give summary judgment against a	Up to 5 marks A pass must refer to CPR 24 and set out what it means to apply for a summary judgment

claimant or defendant on the whole of a claim or on a particular issue if it considers that – (i) that claimant has no real prospect of succeeding on the claim or issue; or (ii) that defendant has no real prospect of successfully defending the claim or issue; and (b) there is no other compelling reason why the case or issue should be disposed of at a trial. ***CPR 24.3(1)***: The court may give summary judgment against a claimant in any type of proceedings. ***CPR 24.3(2)***: The court may give summary judgment against a defendant in any type of proceedings except proceedings for possession of residential premises against (a) a mortgagor; or (b) a tenant or a person holding over after the end of the tenancy whose occupancy is protected within the meaning of the Rent Act 1977(1) or the Housing Act 1988(2).	
Credit any relevant point to explain the procedure, e.g: ***Procedure applicable to summary judgments:*** A claimant may not apply for summary judgment until the defendant against whom the application is made has filed an acknowledgement of service or a defence. This is unless the court gives permission; or a practice direction provides otherwise. Where a summary judgment hearing is fixed, the respondent (or the parties where the hearing is fixed of the court's own initiative) must be given at least 14 days' notice of the date fixed for the hearing and the issues which it is proposed that the court will decide at the hearing. ***Credit reference to any authority cited on the procedure applicable to summary judgments, e.g:*** ***CPR 24.4(1)***: A claimant may not apply for summary judgment until the defendant against whom the application is made has filed (a) an acknowledgement of service; or (b) a defence, unless – (i) the court gives permission; or (ii) a practice direction provides otherwise. ***CPR 24.4(3)***: Where a summary judgment hearing is fixed, the respondent (or the parties where the hearing is fixed of the court's own initiative) must be given at least 14 days' notice of – (a) the date fixed for the hearing; and (b) the issues	Up to 6 marks A pass must refer to CPR 24 and set out what it means to apply for a summary judgment

which it is proposed that the court will decide at the hearing. ***Making an application:*** Under CPR 23 an application notice means a document in which the applicant states his intention to seek a court order and respondent means the person against whom the order is sought and such other person as the court may direct. The general rule is that a copy of the application notice must be served on each respondent. An application may be made without serving a copy of the application notice if this is permitted by a rule a practice direction or a court order. An application notice must state what order the applicant is seeking and briefly, why the applicant is seeking the order. A copy of the application notice must be served as soon as practicable after it is filed and except where another time limit is specified in these Rules or a practice direction, must in any event be served at least 3 days before the court is to deal with the application. When a copy of an application notice is served it must be accompanied by a copy of any written evidence in support and a copy of any draft order which the applicant has attached to his application. ***Credit reference to any authority cited on the application, e.g:*** CPR 23.1, CPR 23.4(1), CPR 23.4(2), CPR 23.6, CPR 23.7(1) and CPR 23.7(3).	
Could also include a discussion on the evidence required for the purpose of a hearing and the power of the court, e.g: ***Evidence for the purposes of a summary judgment hearing:*** If the respondent to an application for summary judgment wishes to rely on written evidence at the hearing, he must file the written evidence and serve copies on every other party to the application, at least 7 days before the summary judgment hearing. If the applicant wishes to rely on written evidence in reply, he must file the written evidence and serve a copy on the respondent, at least 3 days before the summary judgment hearing. ***Credit reference to any authority cited on the evidence for the purposes of a summary judgment hearing, e.g:*** CPR24.5(1) and CPR24.5(2). ***Court's powers when it determines a summary judgment application:*** When the court determines a summary judgment application it may give directions as to the filing and service of a defence and give further directions about	Up to 8 marks To achieve more than a pass a candidate must not simply cite the rules but should show a deeper understanding of the rules including an appreciation of the approach the court will take to an application for a SJ

the management of the case. When dealing with an application under CPR 24 it does not involve the court conducting a mini trial and the criteria that the court needs to apply is not one of probability but is an absence of reality. ***Swain v Hillman [2001]***: Lord Woolf, the then Master of the Rolls, held that while the words speak for themselves, the court needs to determine whether there is a real or realistic, as opposed to a fanciful, prospect of success, and that if a claimant has a case that is bound to fail, it is in his interests to know that as soon as possible. ***Three Rivers District Council v Bank of England (No. 3)[2001]***: Lord Hobhouse of Woodborough – "what matters is not probability but "an absence of reality" ***Credit reference to any authority cited on the court's powers when it determines a summary judgment application and possible outcomes, e.g:*** ***CPR 24.6***: When the court determines a summary judgment application it may – (a) give directions as to the filing and service of a defence; (b) give further directions about the management of the case. ***Para 5.1 of PD to CPR 24*** : The orders the court may make on an application under Part 24 include (1) judgment on the claim, (2) the striking out or dismissal of the claim,(3) the dismissal of the application,(4) a conditional order. ***Para 5.2 of PD to CPR 24*** : A conditional order is an order which requires a party (1) to pay a sum of money into court, or (2) to take a specified step in relation to his claim or defence, as the case may be, and provides that that party's claim will be dismissed or his statement of case will be struck out if he does not comply. ***Para 10 of PD to CPR 24*** : Where the court dismisses the application or makes an order that does not completely dispose of the claim, the court will give case management directions as to the future conduct of the case. ***Credit reference to setting aside an order for summary judgment e.g:*** ***Para 8.1 of PD to CPR 24*** : If an order for summary judgment is made against a respondent who does not appear at the hearing of the application, the respondent may apply for the	

order to be set aside or varied ***Para 8.2 of PD to CPR 24*** : On the hearing of an application under paragraph 8.1 the court may make such order as it thinks just.	
Credit a discussion on the costs consequences of such an application, e.g: ***CPR 45.1(1):*** This section sets out the amounts which, unless the court orders otherwise, are to be allowed in respect of legal representatives' charges. ***CPR 45.1 (2) (a)(i):*** This section applies where summary judgment is obtained. ***CPR 45.1 (3):*** No sum in respect of legal representatives' charges will be allowed where the only claim is for a sum of money or goods not exceeding £25. ***CPR 45.1 (4):*** Any appropriate court fee will be allowed in addition to the costs set out in this Section. ***CPR 45.1 (5):*** The claim form may include a claim for fixed commencement costs. ***CPR 45.2:*** Amount of fixed commencement costs in a claim for the recovery of money or goods ***CPR 45.2 (1):*** The amount of fixed commencement costs in a claim will be calculated by reference to Table 1; and the amount claimed, or the value of the goods claimed if specified, in the claim form is to be used for determining the band in Table 1 that applies to the claim. ***CPR 45.2 (2):*** The amounts shown in Table 4 are to be allowed in addition, if applicable. These are miscellaneous costs in respect of service. ***CPR 45.4:*** Where the claimant has claimed fixed commencement costs under rule 45.2; and judgment is entered the amount to be included in the judgment for the claimant's legal representative's charges is the total of the fixed commencement costs; and the relevant amount shown in Table 2. For default judgment these will depend on whether the default was on an acknowledgment of service or default of a defence. These range between £22-£35.	Up to 6 marks

Question 6:	You work in the Costs department of Carpenter and Harris LLP which is a firm regulated by the Solicitors Regulatory Authority. The firm specialise in clinical negligence and catastrophic injury claims.

	Your colleague, Sarah Chileno, has requested your help on the file of Miss Cleo Morgan. Miss Morgan successfully brought a claim against Dr Timothy Tarpan. The claim concerned the Defendant's negligent treatment and a misdiagnosis. The matter settled during negotiations for £20,000 and a Consent Order was sealed by Central London County Court on 15 January 2021. You drafted the Bill of Costs, which totalled £35,201.22. This included the recoverable element of the ATE insurance premium of £6,139. The policy was a block-rated policy. Sarah Chileno has now received the Respondent's Points of Dispute. She has emailed you expressing concern, particularly in relation to point 5, and has asked for you to provide your preliminary views before you draft the Replies. You have had the chance to consider the points and are of the view that they are lengthy, that many of the points are generic and some of the points are repetitive. Point 5 of the points raises a number of challenges to the insurance premium, those are: i. the premium does not comply with section 58(C) of the Courts and Legal Services Act 1990; ii. the premium does not comply with the Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No 2) Regulations 2013; and iii. the premium is not reasonable and proportionate. Write the body of a memo to Sarah Chileno that sets out your advice in how to respond to point 5 of the Respondent's Points of Dispute.
Total Marks Attainable	20

Fail	up to 9.9	This mark should be awarded to candidates whose papers fail to address any of the requirements of the question, or only touch on some of the more obvious points without dealing with them or addressing them adequately.
Pass	10+	An answer which addresses MOST of the following points: Definitions and salient points in respect of ATE and premiums, recoverability pre and post LASPO and the exception to the general rule in respect of clinical negligence matters. Candidates will demonstrate a good depth of knowledge of the subject (i.e. a good understanding of the legislative framework around the recoverability of premiums and the rules concerning replies to Points of Dispute) with good application and some analysis having regard to the facts,

		although candidates may demonstrate some areas of weakness.
Merit	12+	An answer which addresses ALL of the following points: Definitions and salient points in respect of ATE and premiums, recoverability pre and post LASPO, the exception to the general rule in respect of clinical negligence matters and replies to Points of Dispute. The answer is also likely to include some discussion on the reasonableness of premiums. Candidates will demonstrate a very good depth of knowledge of the subject (i.e. a good understanding of the legislative framework around the recoverability of premiums) with good application and some analysis having regard to the facts, although candidates may demonstrate some areas of weakness.
Distinction	14+	An answer which includes ALL the requirements for a pass and merit (as set out above) PLUS the candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. Candidates will provide an excellent advice setting out when a premium is recoverable from another party. All views expressed by candidates should be supported by relevant authority and/or case law. Work should be written to an exceptionally high standard taking into consideration that it is written in exam conditions.

Fail = 0-9.9
Pass = 10+
Merit = 12+
Distinction = 14+

Indicative Content:	**Marks**
Required: Candidates must demonstrate knowledge of the legislative framework governing the recoverability of ATE premiums, e.g: ***Generally:*** The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) renders that ATE premiums are no longer recoverable from the paying party. ***Section 46(1) of the Legal Aid Sentencing and Punishment of Offenders Act 2012:*** Introduced a new section 58C of the Courts and Legal Services Act 1990 which prevents recovery of any premium for an after the event insurance policy. ***Section 58C(1) of the Courts and Legal Services Act 1990:*** A costs order made in favour of a party to proceedings who has taken out a costs insurance policy may not include provision requiring the payment of an amount in respect of all or part of the premium of the policy, unless permitted under subsection section 58C(2) of the Courts and Legal Services Act 1990. ***Section 58C(2) of the Courts and Legal Services Act 1990:*** The Lord Chancellor may make regulations in clinical negligence cases permitting for the recovery of ATE premiums in relations to medical experts reports.	Up to 6 marks

Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No 2) Regulations 2013: Insurance premiums are recoverable where the insurance is against the risk of incurring experts fees re liability and causation in clinical negligence proceedings, the part of the policy recoverable relates to the experts reports, and the damages claimed are valued at £1000.00 or more. ***Peterborough & Stamford Hospital NHS Trust v McMenemy [2017]:*** There are no other rules or practice directions to give guidance on the assessment and recoverability of premiums and it was commented in the C of A decision that this ought to be looked at by the Rules Committee.	
Credit any discussion on the court's discretion, e.g: ***Section 51 of the Senior Courts Act 1981 and CPR 44.2:*** Court has discretion as to costs BUT emphasis on proportionality because of the standard basis of assessment (CPR 44.3(2) and the overriding objective). ***CPR 44.3(2):*** Where the amount of costs is to be assessed on the standard basis, the court will only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party. ***CPR 44.3 (3):*** Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.	Up to 2 marks
Candidates should include some discussion on the rules/practice direction concerning replies to Points of Dispute, e.g: ***CPR 47.13(1):*** Where any party to the detailed assessment proceedings serves points of dispute, the receiving party may serve a reply on the other parties to the assessment proceedings. ***CPR 47.13(2):*** The receiving party may do so within 21 days after being served with the points of dispute to which the reply relates. ***Para 12.1 of PD to CPR 47:*** A reply served by the receiving party under Rule 47.13 must be limited to points of principle and concessions only. It must not contain general denials, specific denials or standard form responses. ***Para 12.2 of PD to CPR 47:*** Whenever practicable, the reply must be	Up to 3 marks

set out in the form of Precedent G.	
Credit any discussion on potential challenges, e.g: ***There have been a number of challenges to ATE premiums:*** Not all sum paid was premium, the premium is too high compared to others available on the market and the formula used leads to disproportionate premium. ***Emily Nokes v Heart of England Foundation NHS Trust [2015]:*** Identifying which part of the premium relates to experts' reports may be difficult. In this case the defendant argued that the premium was not recoverable because there were two separate parts to the premium and it was argued the policy did not comply with the new regulations.	Up to 2 marks
Candidate should refer to the proportionality tests, e.g: ***The tests of proportionality:*** Lownds v Home Office 2002 for old test and CPR 44.3(2) and (5) for new test. ***Lownds v Home Office 2002:*** Approach (item by item then stand back) (items disproportionate but necessary are recoverable) applicable. ***CPR 44.3(5)(a) to (e):*** Lists the factors to be taken into account when considering if costs are proportionate. costs are proportionate if they bear a reasonable relationship to sums in issue, value of non-monetary relief, complexity of litigation, additional work generated by conduct, wider factors. ***Whatever basis:*** Reasonableness would always be considered.	Up to 2 marks
Candidates should have developed their discussion on what challenges may be made as to the proportionality of the premium, e.g: ***BNM v MGN Ltd [2016]:*** Master Gordon-Saker, amongst other things, considered whether the new test of proportionality should apply to recoverable premiums. In this case, at first instance, it was decided that the new test of proportionality does apply to recoverable premiums. ***King v Basildon & Thurrock Hospital NHS Trust [2016]:*** The test of proportionality in CPR 44.3(5) did not apply to additional liabilities. The proportionality of additional liabilities should be dealt with under the old rules which existed before the Legal Aid, Sentencing and Punishment of Offenders Act 2012 came into force. ***Murrell v Cambridge University Hospital NHS Trust [2017]:*** confirmed the old test was applicable, the new definition of costs under CPR	Up to 9 marks

44.1 did not include additional liabilities. ***BNM v MGN Ltd [2017]:*** Two stage approach: Line by line reduction considering reasonableness and then a line by line reduction considering proportionality. New definition of costs does not include additional liabilities in pre-LAPSO CFAs. CPR44.3(5) does not apply to additional liabilities even if ATE incepted after 1 April 2013. ***May v Wavell Group [2016]:*** **T**wo stage approach: Line by line considering reasonableness and then a broad brush deduction to reach a 'proportionate' figure. ***May v Wavell Group [2017]:*** The CPR do not state that test has to be undertaken in two stages but likely that when the test is applied there would be a two-stage assessment. Whether the relationship is reasonable is a matter of judgment, rather than discretion, which requires attribution of weight, and sometimes no weight, to each of the factors in CPR 44.3(5)(a) to (e). ***Mitchell v Gilling Smith [2017]:*** An unreported SCCO decision, held that CPR 44.3(5) did apply to post LASPO premiums and that arguments based on hindsight were irrelevant for the purpose of CPR 44.3(5). In this case an after-the-event insurance premium of £10,000 for costs relating to medical experts' reports was held not to be disproportionate in a clinical negligence claim that settled for £200,000 even though only the sum of £2,000 was ultimately paid for expert evidence. ***Peterborough & Stamford Hospital NHS Trust v McMenemy [2017]:*** ATE premium taken out after 1 April 2013, Court of Appeal held that the new proportionality test applies to post-LASPO clinical negligence ATE premiums. The CPR is engaged when assessing recoverability of ATE premiums and they are subject to the scrutiny of the Court. The Court require expert evidence if a premium is to be challenged. *Callery* remains good law. ***West and Demouilpied v Stockport NHS Foundation Trust [2020]:*** Proportionality is a two stage test and once reasonableness has been considered the Court should remove all unavoidable costs before making any deduction to reach a proportionate figure. Unavoidable costs may include ATE premiums. The Court require expert evidence if a premium is to be challenged. *Callery* remains good law.	
Candidates should have developed their discussion on what challenges may be made as to the reasonableness of the premium, e.g: ***Callery v Gray (No 2) [2001]:*** A costs judge was asked by the Court	Up to 3 marks

of Appeal to investigate the reasonableness of the ATE premium. The following points were made: a high limit of indemnity does not of itself indicate an unreasonable premium; block risk policies are not unreasonable; the premium to be allowed is the total premium paid, not the pure underwriting risk premium; assessment fees and profit costs of complying with the policy are recoverable; the receiving party need not have made the best choice, it just needs to be a reasonable choice when choosing the particular ATE insurer; it is reasonable to insure before sending the pre-action letter to the other side; it is reasonable to wait until the defendant's reaction to the claim is known; and if the premium is at or above the top of the range of other policies, the purchaser needs to explain why it chose this insurance—the court may disallow some elements of the premium if they are inflated or do not relate to insuring a costs liability. ***Callery v Gray (No 2) [2002]:*** Costs judges do not have the expertise to second guess the insurance market, still less to deconstruct a policy that is offered as a package into its constituent parts. This was a Supreme Court decision. ***Rogers v Merthyr Tydfil [2007]:*** Followed the decision in Callery v Gray. ***Peterborough & Stamford Hospital NHS Trust v McMenemy [2017]:*** Confirmed that Callery v Gray and Rogers v Merthyr Tydfil were still good law. ***Allan Coleman v Medtronic Ltd [2016]:*** The case determined that a claimant will not be held to be unreasonable even when taking out ATE insurance to protect.	

Question 7:	You work in the Costs department for an SRA regulated firm, Turner and Grey LLP. You have been asked to advise on the Standard Ways Ltd file. Standard Ways Ltd are clients of your firm and they are Defendants in proceedings. On 7 September 2019, before proceedings were started, Standard Ways Ltd offered £5,000 in settlement. This offer was not accepted. Proceedings were issued on 31 March 2020 and the Claim Form quantified the claim at approximately £150,000. On 13 September 2020 Standard Ways Ltd made a Part 36 offer of £2,000. On 7 January 2021 the offer was increased to £4,000. On 27 January 2021 the Claimant accepted the £4,000 and thereby became entitled to his costs of the proceedings up to the date of serving notice of acceptance on the standard basis if not agreed. The Claimant's solicitors started detailed assessment proceedings.

	The total sum claimed in the bill of costs was £27,029.63. The bill was certified by the solicitor who had conduct of the matter. The certificate as to accuracy read as follows: *"I certify that this bill is both accurate and complete and… the costs claimed herein do not exceed the costs which the receiving party is required to pay me/my firm."* You drafted points of dispute, which included a request for disclosure of the retainer, a point challenging the hourly rates and a point arguing that the costs were disproportionate because of the manner in which the claim had been conducted by the Claimant's solicitor. When you received the replies, you discovered that the hourly rates claimed in the bill were not the rates included within the retainer and that there was no evidence that a higher rate had been agreed with the Claimant. You are of the view that there has been misconduct in the way in which the bill was certificated because the indemnity principle has been breached. You believe that the Court should be asked to make a Wasted Costs Order against the Solicitor with conduct of the matter. Prepare the body of an advice to Standard Ways Ltd setting out what a Wasted Costs Order is and when the Court can make a Wasted Costs Order against a legal representative.
Total Marks Attainable Fail = 0-9.9 Pass = 10+ Merit = 12+ Distinction = 14+	20

Fail	up to 9.9	An answer which deals with the basic requirements of the question, but in dealing with those requirements only does so superficially and does not address, as a minimum, all the criteria expected of a pass grade (set out in full below). The answer will only demonstrate an awareness of some of the more obvious issues. The answer will be weak in its presentation of points and its application of the law to the facts.
Pass	10+	An answer which addresses MOST of the following points: An outline of the court's discretion as to costs, the factors the court may consider when making a costs order, what a wasted costs order is, when a wasted costs order would be made and the court's approach to making a wasted costs order. Candidates should identify the relevant issues in the case and deal with the circumstances in their advice.

Merit	12+	An answer which includes ALL the requirements for a Pass (as set out above) PLUS candidates will demonstrate a very good depth of knowledge of the subject (i.e. a very good understanding of the personal liability of a legal representative, including costs lawyers) with very good application and some analysis having regard to the facts. Most views expressed by candidates should be supported by relevant authority and/or case law.
Distinction	14+	An answer which includes ALL the requirements for a Pass (as set out above) PLUS candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. Work should be written to an exceptionally high standard with few, if any, grammatical errors or spelling mistakes etc.

Indicative Content	**Marks**
Required: Candidates must explain what a wasted costs order is and the stages for obtaining one, e.g: ***Wasted costs:*** The court shall have full power to determine by whom and to what extent the costs are to be paid. The court may disallow or order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with rules of court. Where the court orders a legal representative to pay wasted costs it must inform an approved regulator or the Director of Legal Aid Casework as it considers appropriate. ***Credit reference to any relevant authority cited on wasted costs, e.g:*** Section 51(3) of the Senior Courts Act 1981, Section 51(6) of the Senior Courts Act 1981 and Section 51(7A) of the Senior Courts Act 1981 ***Two stages:*** As a general rule the court will consider whether to make a wasted costs order in two stages at the first stage the court must be satisfied that it has before it evidence or other material which, if unanswered, would be likely to lead to a wasted costs order being made and the wasted costs proceedings are justified notwithstanding the likely costs involved. At the second stage, the court will consider, after giving the legal representative an opportunity to make representations in writing or at a hearing, whether it is appropriate to make a wasted costs order in accordance with paragraph 5.5 above. ***Credit reference to any authority cited on the two stage approach, e.g:*** CPR PD 46 para 5.7(a) and CPR PD 46 para 5.7(b). ***Making the Order:*** The court will give the legal representative a reasonable opportunity to make written submissions or, if the legal representative prefers, to attend a hearing before it makes such an order. When the court makes a wasted costs order, it will specify the amount to be disallowed or paid or direct a costs judge or a district judge to decide the amount of costs to be	Up to 9 marks

disallowed or paid. ***Credit reference to any relevant authority cited on making an order, e.g:*** CPR 46.8(1), CPR 46.8(2), CPR 46.8(3)(a) and CPR 46.8(3)(b). ***Guidance from the common law:*** The Court should only make a Wasted Costs Order where the legal representative has acted improperly, negligently or unreasonably - a mistake is not enough. Wasted Costs Orders are discretionary and should be reserved for unjustifiable conduct. Wasted Costs Orders should not be used as a threat to intimidate the other party. Wasted Costs Orders should not be motivated by a resentment or inability to obtain an effective costs order against an impecunious litigant. Wasted costs were neither a punitive nor a regulatory jurisdiction, but rather a compensatory one. ***Credit reference to any case authority cited, e.g:*** Ridehalgh v Horsefield (1994), Orchard v SE Electricity Board (1987), Harley v McDonald (2001), Kiam v MGN Limited No2 [2002], Wates Construction Limited v HGP Greentree Alchurch Evans Limited [2006], Cancino [2015], Noorani v Calver [2009], Awuah and Others [2017].	
Candidates must explain the court's discretion as to costs, e.g: ***Discretion of the court:*** Costs payable by one party to another are the discretion of the court. Court may consider a number of factors when determining what type of order to make. Court can consider conduct when making an order for costs. ***Credit reference to any relevant authority cited on the discretion of the court, e.g:*** Section 51 of the Senior Courts Act 1981, CPR 44.2, CPR 44.2(4) and CPR 44.2(5).	Up to 3 Marks An explanation should be given as to what is meant by the court's discretion
Credit a discussion on applications for wasted costs orders, e.g: ***Application or court's own initiative:*** The court may make a wasted costs order against a legal representative on its own initiative. A party may apply for a wasted costs order by filing an application notice in accordance with Part 23, or by making an application orally in the course of any hearing. ***Credit reference to an application or court's own initiative, e.g:*** CPR PD 46 para 5.3 and CPR PD 46 para 5.4 ***Making an application:*** A party may apply for a wasted costs order by filing an application notice in accordance with Part 23 or by making an application orally in the course of any hearing. Under CPR 23 an application notice means a document in which the applicant states his intention to seek a court order and respondent means the person against whom the order is sought	Up to 8 Marks

and such other person as the court may direct. The general rule is that a copy of the application notice must be served on each respondent. An application may be made without serving a copy of the application notice if this is permitted by a rule a practice direction or a court order. An application notice must state what order the applicant is seeking and briefly, why the applicant is seeking the order. A copy of the application notice must be served as soon as practicable after it is filed and except where another time limit is specified in these Rules or a practice direction, must in any event be served at least 3 days before the court is to deal with the application. When a copy of an application notice is served it must be accompanied by a copy of any written evidence in support and a copy of any draft order which the applicant has attached to his application. Wasted costs applications should be left until the end of the trial. Applications are usually raised by the aggrieved party but can be made by the court of its own initiative. ***Credit reference to any authority cited on making an application, e.g:*** CPR PD 46 para 5.4, CPR 23, CPR 23.1, CPR 23.4(1), CPR 23.4(2), CPR 23.6, CPR 23.7(1) and CPR 23.7(3).	
Credit a discussion on the indemnity principle, e.g: ***The indemnity principle and retainer:*** The indemnity principle simply provides that the receiving party cannot recover more costs from the paying party than he himself would be liable to pay his own solicitors. The retainer is fundamental to the right to recover costs. Where there is no retainer there is no entitlement to charge, there is no business relationship. A retainer must be enforceable in order to charge the client and recover costs inter partes. The indemnity principle does not apply in certain circumstances e.g. legal aid. ***Credit reference to the citation of any authority cited on the retainers and the indemnity principle, e.g:*** JH Milner v Percy Bilton [1966], Scott v Hull and East Yorkshire Hospitals NHS Trust [2014] and Bailey v IBC (1998).	Up to 2 Marks To achieve a distinction candidates should demonstrate a sound ability to apply the law to the facts of the scenarios presented.

Question 8:	You are a Costs Lawyer working for an external costs firm, Expert Costings, in Brighton. Your firm is acting for Miss Lucy Sweeny who engaged your firm to look at what her previous solicitors had charged her in her personal injury claim. An application was made for the delivery of a Bill of Costs. The court found that Miss Sweeny had a statutory right to challenge the charges through detailed assessment and that she could not exercise that right until a Final Statute Bill had been delivered to her.

	For this reason, the application was successful and an order was made for the delivery of the bill. Costs of the application are to be paid by the Defendant and the assessment of those costs is listed for a 30 minute Summary Assessment Appointment. You had undertaken the bulk of the work in this case, but were assisted by Jenny Harper and Dominic Adams, who are Costs Draftsmen who work at your firm. The Defendant has told you that they will be arguing that a Costs Lawyer cannot delegate reserved legal activities such as the exercise of a right of audience or the conduct of litigation and that you cannot recover the cost of any of your colleagues' work. You now need to write to Miss Sweeny and advise on the Defendant's argument. Write the body of a letter to Miss Sweeny setting out what an authorised person is, what a reserved legal activity is and whether, in your view, the costs of the work undertaken by Jenny Harper and Dominic Adams are recoverable.
Total Marks Attainable Fail = 0-9.9 Pass = 10+ Merit = 12+ Distinction = 14+	20

Fail	up to 9.9	An answer which deals with the basic requirements of the question, but in dealing with those requirements only does so superficially and does not address, as a minimum, all the criteria expected of a pass grade (set out in full below). The answer will only demonstrate an awareness of some of the more obvious issues. The answer will be weak in its presentation of points and its application of the law to the facts.
Pass	10+	An answer which addresses MOST of the following points: An outline of what it means to be an authorised person, an explanation of the costs lawyers duty to the court, an explanation of what a reserved legal activity is and whether this work can be undertaken by non-qualified costs professionals. Candidates should identify the relevant issues in the case and deal with the circumstances in their advice.
Merit	12+	An answer which includes ALL the requirements for a Pass (as set out above) PLUS candidates will demonstrate a very good depth of knowledge of the subject (i.e. a very good understanding of authorised persons/reserved legal activities) with very good application and some analysis having regard to the facts. Most views expressed by candidates should be supported by relevant authority and/or case law.
Distinction	14+	An answer which includes ALL the requirements for a Pass (as set out above) PLUS candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. Work should be written to an exceptionally high standard with few,

		if any, grammatical errors or spelling mistakes etc.

Indicative Content	Marks
Required: Candidates must explain the legislative framework governing the regulation of authorised persons / reserved legal activities, e.g: ***Section 18 of the Legal Services Act 2007:*** Defines authorised persons as a person who is authorised to carry on the relevant activity by a relevant approved regulator in relation to the relevant activity or a licensable body which, by virtue of such a licence, is authorised to carry on the relevant activity by a licensing authority in relation to the reserved legal activity. ***Section 20 of the Legal Services Act 2007:*** Defines an approved regulator as a body which is designated as an approved regulator by Schedule 4. ***Section 20(5) of the LSA 07 and Schedule 4:*** ACL is approved regulator, approved regulators under the LSA regulate those undertaking reserved legal activities who are known as authorised persons. ***Memorandum of Understanding:*** Between ACL and the CLSB delegates the regulatory function to the CLSB.	Up to 4 Marks An explanation should be given as to what it means to be an authorised person
Candidates should explain the what it means to be an authorised person, specifically a costs lawyer, e.g: ***Section 12 and Sch 2 of the Legal Services Act 2007:*** Defines reserved legal activities. Exercise of rights of audience – relevant to Costs Lawyer's Role, Conduct of litigation – relevant to Costs Lawyer's Role, Reserved instrument activities, Probate activities, Notarial activities, Administration of oaths – relevant to Costs Lawyer's Role. ***Section 13(1) of the Legal Services Act 2007:*** Any question of entitlement is determined solely in accordance with the LSA 07. ***Section 13(2)(a) of the Legal Services Act 2007:*** A person is entitled to carry on a reserved legal activity where that person is authorised in relation to the activity in question. ***Section 13(2)(b) of the Legal Services Act 2007:*** If a person is not authorised, they may still be entitled to carry out a reserved legal activity if they are an "exempt person" in relation to the activity. ***Section 176(1) of the LSA 2007:*** Costs Lawyers must adhere to CLSB	Up to 6 marks

code of Conduct. Breach will result in disciplinary proceedings by CLSB. ***Section 176(2)(b) of the LSA 2007:*** An individual who is not authorised by the CLSB, but who is a manager or employee of an authorised person, is also considered a regulated person under the LSA and must comply with all relevant regulatory arrangements.	
Credit discussion of the costs lawyer's duty to the court and the use of costs draftsmen, e.g: ***CLSB Code of Conduct Principle 2:*** Comply with your duty to the court in the administration of justice. ***CLSB Code of Conduct Principle 2.1:*** Costs Lawyers must at all times act within the law. ***CLSB Code of Conduct Principle 2.2:*** Costs Lawyers must not knowingly or recklessly either mislead the court or allow the court to be misled. ***CLSB Code of Conduct Principle 2.3:*** Costs Lawyers must comply with any court order which places an obligation on them and they must not be in contempt of court. ***CLSB Code of Conduct Principle 2.4:*** Costs Lawyers must advise clients to comply with court orders made against them. ***CLSB Code of Conduct Principle 3:*** Act in the best interests of your client. ***CLSB Code of Conduct Principle 3.1:*** Costs Lawyers must act at all times to ensure the client's interest is paramount except where this conflicts with your duties to the court or where otherwise permitted by law. You must decline to act if it would not be in the client's best interests or if that client's interests conflict directly with your own or with those of another client. ***Legal Services Act 2007, Sch 3:*** The court is able to hear from any person to whom it grants permission to be heard. ***Ahmed v Powell [2003]:*** The solicitors are responsible for the conduct of the detailed assessment proceedings and cannot avoid that responsibility merely by instructing a costs draftsman. Costs draftsmen can appear on behalf of the party only as a duly authorised representative of the solicitor who has instructed him to be there. ***Crane v Canons Leisure Centre [2007]:*** Work undertaken by independent costs draftsmen could be treated as part of the instructing solicitor's profit costs such as to attract a success fee.	Up to 10 Marks

Waterson Hicks v Eliopoulos [1997]: The costs draftsman has the same authority as the solicitor would have had to consent to orders. ***Arthur J S Hall & Co v Simmons [2007]:*** Lord Hoffman (at page 691): "*The fact is that the advocate, like other professional men, undertaking a duty to his client to conduct his case, subject to the rules and ethics of his profession, with proper skill and care*" ***Buxton v Mills-Owens [2010]:*** If a point is not properly arguable, it should not be argued. ***Rondel v Worsley [1967]:*** A claimant's civil action for negligence could not be sustained: a barrister's immunity was justified by public policy. ***Saif Ali v Sydney Mitchell [1978]:*** The immunity conferred by *Rondel v Worsley* extends to pre-trial work if and only if it is so intimately connected with the conduct of the case in court as to amount to a preliminary decision about it. ***Moy v Pettmann Smith (A Firm) & Anor [2005]:*** The barrister was not negligent. The principle that an advocate is liable to his client for professional negligence in *Arthur JS Hall v Simons [2002]* should not stifle the manner in which they conduct litigation and advise their clients. This might lead to defensive advocacy, where barristers would hedge their opinions with qualifications and be reluctant to give clients the advice which they require in their best interests. Lady Hale said that the courts "have not yet developed a clear set of principles governing the terms in which an advocate's advice should be given". ***Copeland v Smith [2002]:*** It is the duty of an advocate to draw the judge's attention to authorities that are in point, even if they are adverse to that advocate's case.	
Credit a discussion on the CLSB Practising Rules, e.g: ***CLSB Practising Rules:*** These Rules govern the practice of Costs Lawyers and the issue and revocation of practising certificates by the CLSB. ***Rule 1 of the CLSB Practising Rules:*** The right to practise as a Costs Lawyer. No person shall be entitled to practise as a Costs Lawyer unless they have qualified as a Costs Lawyer in accordance with the Training Rules, they have a current Practising Certificate which has been issued in accordance with these Rules and which is not suspended and they comply with CPD requirements set out in the CPD Rules. ***Rule 4 of the CLSB Practising Rules:*** An applicant or Costs Lawyer must disclose certain information when making an application for	Up to 3 Marks To achieve a distinction candidates should demonstrate a sound ability to apply the law to the facts of the scenarios presented together with knowledge of how funding certificates

a Practising Certificate or throughout the lifetime of a Practising Certificate. This includes criminal convictions. ***Rule 8 of the CLSB Practising Rules:*** A Practising Certificate may be revoked by the CLSB. ***Rule 10 of the CLSB Practising Rules:*** Costs Lawyers must ensure that they have professional indemnity insurance.	operate generally.

Question 9:	You are a Costs Lawyer working in-house for a firm of solicitors in Blackpool, Aman Legal LLP. The Costs department works closely with the Accounts department and you have been asked to assist by putting together some guidance on Money Laundering for the firm's Compliance Officer For Finance and Administration (COFA), Mrs Nadine Wong. The guidance needs to highlight why the firm must be able to show a reasonable connection between the underlying legal transaction for which they have been instructed to advise on with any funds the firm are asked to hold, or payments the firm are asked to make. The guidance must emphasise that a client account should not be used as a banking facility for funds unrelated to any underlying transaction that the fee earner is carrying out. The guidance also needs to cover the requirement of the firm to undertake proper due diligence before accepting any funds into a client account and why the firm should decline to act if they do not fully understand the transaction on which they are being asked to advise. Prepare the body of the guidance that covers the risks associated with the use of client accounts.
Total Marks Attainable	20

Fail	up to 9.9	An answer which deals with the basic requirements of the question, but in dealing with only does so superficially and does not address, as a minimum, all the criteria expected of a pass grade (set out in full below). The answer will only demonstrate an awareness of some of the more obvious issues. The answer will be weak in its presentation of points and its application of the law to the facts. There will be little evidence that candidates have any understanding of the regulatory framework governing client accounts and money laundering.
Pass	10+	An answer which addresses MOST of the following points: A definition of money laundering, an explanation of what money laundering is,

		identification of the relevant legislation/regulations, an outline of the due diligence requirements and the principle offences. Some key authority should be included, but this may not be specifically applied or only superficially.
Merit	12+	An answer which includes ALL the requirements for a Pass (as set out above) PLUS candidates will demonstrate a very good depth of knowledge of the subject (i.e. a very good understanding of the operation of the money laundering regulations) with very good application to the scenario, i.e recognition that the firm must be SRA regulated and/or an explanation of the relevant governance that a firm must have in place. There will be some analysis having regard to the facts. Most views expressed by candidates should be supported by relevant authority and/or case law.
Distinction	14+	An answer which includes ALL the requirements for a Pass (as set out above) PLUS the candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. All views expressed by candidates should be supported by relevant authority and/or case law throughout. Candidates should be able to show critical assessment and capacity for independent thought on the topics. Work should be written to an exceptionally high standard with few, if any, grammatical errors or spelling mistakes etc.

Fail = 0-9.9
Pass = 10+
Merit = 12+
Distinction = 14+

Indicative Content	**Marks**
Required: Candidates must explain what money laundering is, e.g: ***Legal Guidance, Proceeds Of Crime Act 2002 Part 7 - Money Laundering Offences:*** Money laundering is "the process by which criminal proceeds are sanitised to disguise their illicit origins". ***Relevant Legislation and Regulations:*** The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, the Proceeds of Crime Act 2002 and the Terrorism Act 2000.	Up to 2 marks To achieve a pass, an explanation should be given as to what money laundering is and the governing legislation
Candidates may discuss the SRA requirements and applicability, e.g: ***Paragraph 7.1 of the SRA Code of Conduct for Solicitors, RELs and RFLs, and paragraph 3.1 of the SRA Code of Conduct for Firms:*** Require individuals and firms respectively to make sure they keep up to date with, and remain aware of, their responsibilities under any new legislation as and when it is introduced. ***Regulation 8 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017:*** The regulations apply to certain categories of persons acting in the course of business carried on in the UK.	Up to 2 marks

Regulation 12(1) of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017: The regulations apply to independent legal professionals participating in certain financial or real property transactions.	
Credit a discussion on the governance, systems and controls a firm should have in place, e.g: ***Regulation 18 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017:*** Firms must take appropriate steps to identify and assess the risks of money laundering and terrorist financing to which its business is subject. They must also keep records of any identified risks. ***Regulation 19 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017:*** Firms must establish and maintain policies, controls and procedures to mitigate and manage effectively the risks of money laundering and terrorist financing identified in any risk assessment undertaken by the relevant person. They must review any such policies and maintain records of them. ***Regulation 21 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017:*** Where appropriate with regard to the size and nature of its business, firms must appoint one individual who is a member of the board of directors (or if there is no board, of its equivalent management body) or of its senior management as the officer responsible for the relevant person's compliance with the Regulations (MLCO). Firms should also appoint a nominated officer, usually referred to as the Money Laundering Reporting Officer (MLRO), to receive internal reports of suspicious activity, and make Suspicious Activity Reports (SARs) to the National Crime Agency where necessary. ***Regulation 24 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017:*** Firms must provide staff with appropriate training on money laundering and terrorist financing, and keep a record of the training staff have undertaken. This now includes an obligation to make staff aware of the law on data protection, insofar as it is relevant to the implementation of the regulations.	Up to 5 marks
Credit a discussion on customer due diligence, e.g: ***Regulation 27 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017:*** Must apply customer due diligence measures if they establish a business relationship; carry out an occasional transaction that amounts to a transfer of funds exceeding 1,000 euros; suspects money laundering or terrorist financing; or doubts the veracity or	Up to 7 marks

adequacy of documents or information previously obtained for the purposes of identification or verification ***Regulation 28 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017:*** A firm must identify the customer unless the identity of that customer, verify the customer's identity and assess the purpose and intended nature of the business relationship or occasional transaction. ***Regulation 33 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017:*** Under the regulations, Enhanced due diligence measures must include, as a minimum, examining the background and purpose of the transaction and increasing the monitoring of the business relationship. ***Regulation 33(1) of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017:*** Sets out a list of circumstances in which EDD measures must be applied, which includes any transaction or business relationship involving a person established in a 'high risk third country', any transaction or business relationship involving a 'politically-exposed person' (PEP), or a family member or known associate of a PEP and any other situation that presents a higher risk of money laundering or terrorist financing. ***Regulation 37 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017:*** Simplified due diligence is permitted where a firm determines, after individual risk assessment of the client, that the business relationship or transaction presents a low risk of money laundering or terrorist financing, taking into account their risk assessment. ***Regulation 39 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017:*** Firms may rely on another person (another regulated individual) who is subject to the MLR or equivalent to carry out CDD, but you remain liable for any failings. To rely on a third party, firms must enter into a written agreement with the third party under which they agree to provide copies of any identification and verification data on the customer or its beneficial owner within two working days, and to keep records in accordance with MLRs.	
Candidates may discuss the principal money laundering offences, e.g: ***Section 327 of the Proceeds of Crime Act 2002:*** A person will be liable if he conceals, disguise, converts, transfers or removes criminal property. Concealing or disguising criminal property includes concealing or disguising its nature, source, location,	Up to 6 marks

disposition, movement or ownership or any rights with respect to it. ***Section 328 of the Proceeds of Crime Act 2002:*** A person commits an offence if he enters into, or becomes concerned in, an arrangement which he knows or suspects facilitates the acquisition, retention, use or control of criminal property by or on behalf of another person. ***Section 329 of the Proceeds of Crime Act 2002:*** If a person acquires, uses or possesses property for which he has not given adequate consideration, he may be liable of an offence. ***Section 45 of the Serious Crime Act 2015:*** Introduced the offence of participating in an organised crime group into English law. It has the potential to seriously widen the scope of criminal liability for lawyers and other professionals working in the non-regulated sector. ***Section 15 of the Terrorism Act 2002:*** It is an offence to be involved in fundraising if you have knowledge or reasonable cause to suspect that the money or other property raised might be used for terrorist purposes. ***Section 16 of the Terrorism Act 2002:*** It is an offence to use or possess money or other property for terrorist purposes, including when you have reasonable cause to suspect the money or property might be used for these purposes. ***Section 18 of the Terrorism Act 2002:*** It is an offence to enter into or become concerned in an arrangement facilitating the retention or control of terrorist property by, or on behalf of, another person (unless you did not know, and had no reasonable cause to suspect, that the arrangement related to terrorist property).	
Credit any discussion on who may investigate and prosecute offences, e.g: ***Money laundering offences are principally investigated by:*** The police, the National Crime Agency (NCA) or HM Revenue & Customs (HMRC), or, if the offence has been committed by an entity in the City of London, the Financial Investigations Unit of the City of London Police. ***The Crown Prosecution Service:*** usually conducts criminal proceedings. ***The Serious Fraud Office:*** investigates and prosecutes matters involving serious or complex fraud or corruption. ***The Financial Conduct Authority:*** Where the allegations are linked to financial firms, the matter may be investigated or prosecuted	Up to 2 marks

by the Financial Conduct Authority (FCA).	