September 2021: Marker Guidance: Unit 3

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:	Distinguish, with reference to the form and content, between an interim invoice on account and an interim statute bill.
Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	**Marks**
Required: Candidates must explain what a bill is and demonstrate knowledge of the types of bill, e.g: **There are two kinds of interim 'bill': Interim invoices on account and interim statute bills;** the difference between them is crucial. Depending on what sort of interim bill has been sent out, a lawyer may be able to: sue the client on such bills (and not just the final bill) or seek a different amount from the client at the end of the case for the period that the interim bill covers. **Interim invoices on account:** Are merely requests for money on account of work undertaken. They must be for a reasonable sum. If these have been rendered, a solicitor will be able to seek a different amount from the client at the end of the case for the period that the interim bill covers. A solicitor cannot enforce them and a client cannot request an assessment of them. **An interim statute bill:** Is an invoice which is fully compliant with the requirements of s 69(2) of the Solicitor's Act 1974 (signed and delivered). A solicitor can enforce them and a client can request an assessment of them. Interim Statute bills are full and final for the work which they cover (i.e. no additional sums/adjustment for further work can be requested from the client later). **Final statute bills:** Are the same as interim statute bills, but rendered upon the termination of the contract of retainer rather than at an interim stage. Statute bills can be either "gross sum" bills or detailed.	Up to 4 marks

A gross sum bill: Will simply contain the total to be paid to the lawyer, without any breakdown of the figure.	
Any other relevant point to describe interim bills/invoices on account (credit any of the following and/or any other relevant point): **Section 65(2) of the Solicitors Act 1974**: A solicitor may seek a payment on account in respect of any contentious business. If the request is for a reasonable amount and the client does not pay then there is good cause to terminate. **Turner & Co v O Palomo SA [2000]:** If the client refuses to pay an interim invoice on account then the solicitor's remedy is to terminate the contract of retainer and render a final statute bill. 5 bills rendered during the course of the litigation had been headed 'on account of charges and disbursements incurred or to be incurred' could not be construed as final or statute bills. The time for assessment would not begin to run until a final bill had been rendered and served. **At the conclusion of a matter:** The solicitor should render a FINAL INVOICE, containing the required statutory information and taking into account the payments made to that date. **Rule 17 of the SRA Account Rules 2017:** Interim invoices on account must be restricted to costs incurred to ensure compliance with the Solicitor Accounts Rules 2011. Once a bill has been rendered, solicitors would be entitled to treat money that may previously have been client money as money belonging to the office so this will impact money held on account and money received once the bill has been rendered (rule 17.4 of the SRA Account Rules 2017).	Up to 3 marks
Any other relevant point to describe interim/final statute bills (credit any of the following and/or any other relevant point): **Contents of a statute bill:** A statute bill will specify the period of work covered and will describe the work done, as well as complying with section 69(2) of the Solicitors Act 1974. **Kingstons Solicitors v Reiss Solicitors [2014]:** This was held not to amount to a statute bill. A bill must be drafted in such a way as to be regarded as a demand for payment. **Carter-Ruck v Mireskandari [2011]:** An interim statute bill with insufficient information may not be considered an interim	Up to 4 marks

statute bill, but may be deemed to be a request for payment on account. **Entire contracts and natural breaks:** A retainer is deemed to be an entire contract and, as such, an interim statute bill cannot be rendered before the end. of the contract, other than in contentious work where it can be rendered by agreement or at a natural break. **Davidsons v Jones-Fenleigh [1980]:** Lawyers are entitled to require a bill to be treated as a completely self-contained bill of costs to date; they must make it clear to their clients, either expressly or by implication, that this is the purpose of sending the bill for that amount at that time. Where a client pays a bill in its entirety without question, it is not difficult to infer that the bill is to be treated as a complete self-contained bill of costs to date. **Abedi v Penningtons (a firm) [2000]:** Agreement to interim statute bills could be both inferred by the client's behaviour and from the express agreement. **Re Romer v Haslam [1893]:** Not entitled to payment because the solicitors had never asked for payment of any of their bills; they had simply asked for and received payments on account. **Wilson v William Sturges & Co (a firm) [2006]:** The bill delivered at the end of the first stage of proceedings was held to be a statute bill. This was despite the fact the court held the bill to be 20% in excess of the proper amount. The solicitors insisting on it being paid before proceeding further did not terminate the retainer and disentitle the solicitors to the reasonable costs. **Bari v Rosen (trading as RA Rosen & Co Solicitors) [2012]:** Interim statute bills are final bills in respect of the work they cover in that there can be no subsequent adjustment in the light of the outcome of the business. **Richard Slade and Company v Boodia and Boodia [2017]:** The QBD, in an appeal from the SCCO, upheld Master James' finding that interim statute bills must include disbursements. **Sprey v Rawlison Butler LLP [2018]:** High Court ruled monthly bills under discounted CFA were not statute bills but interim invoices. CFA provided that claimant would pay 40% of firm's	

normal rates if lost the claim and if won, he would pay the normal rates plus a 50% success fee. A statute bill cannot be amended and the CFA provided that the 40% invoices were liable to be changed later on. **Masters v Charles Fussell & Co LLP [2021] EWHC B1 (Costs)** – Master Rowley held that in order to "make it plain" to a client that he is receiving an interim statute bill, the information given at the outset needs to make clear that there are time limits and indeed give some indication of what those time limits are. Reference to Solicitors Act likely to be persuasive. **Section 69(1) of the Solicitor's Act 1974:** No action shall be brought to recover any costs due to a solicitor before the expiration of one month from the date on which a statute bill is delivered; a solicitor may also issue proceedings to recover the sums owed in that bill.	
Any other relevant point to describe final statute bills/Gross sum bills (credit any of the following and/or any other relevant point): **Section 64 (1) of the Solicitors Act 1974:** In respect of contentious business provides that a bill may be, at the option of the solicitor, either a bill containing detailed items or a gross sum bill. **Section 64(2) of the Solicitors Act 1974:** If a gross sum bill is delivered then, within 3 months, the party charged with the bill may require the solicitor to deliver a detailed bill. This must be done before the solicitor issues proceedings to recover costs. **Detailed bill following gross sum:** The gross sum bill is no longer effective and the detailed bill can therefore be for a different sum than the original bill.	Up to 2 marks

Question 2:	Explain what is meant by an entire contract and when a retainer may be terminated before an action has concluded.
Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	**Marks**
Required (a description of a retainer and principle of an	Up to 2 marks

entire contract): **J H Milner & Son v Percy Bilton Ltd [1966]:** A retainer is the business agreement between solicitor and client, it serves as the right to payment & is fundamental to the recovery of costs. Where there is no retainer there is no entitlement to charge. **Underwood, Son v Piper Lewis [1894]:** The law must imply that the contract of the solicitor upon a retainer in the action is an entire contract to conduct the action till the end.	To pass a response must include an explanation of what a retainer is
Candidate should refer to when a solicitor may terminate a retainer (good reason and reasonable notice) e.g: **Solicitors Act 1974 Section 65 (1)&(2):** Client's failure to make a payment on account of costs. **Wong v Vizards (a firm) [1997]:** Solicitor declined to act at a hearing unless substantial payment made on account of a disputed bill. Amount claimed by the solicitor was unreasonable, they had wrongfully terminated the retainer on non- payment and were not entitled to any payment at all for the work done in preparing for the hearing. **Warmingtons v McMurray [1936] 2 All ER 745:** It is not reasonable that a solicitor should engage to act for an indefinite number of years, winding up estates, without receiving any payment on which he can maintain himself. **Hilton v Barker Booth & Eastwood [2005]:** Conflict of interest/Professional embarrassment **Re Jones [1896]:** Suspected duress or undue influence. If the Solicitor is not confident the client is giving instructions freely they can cease to act. **Richard Buxton (Solicitors) v Huw Llewelyn Paul Mills-Owens & Law Society (intervener) (Second Appeal)[2010]:** Requirement to act improperly **Gill v Heer Manak Solicitors [2018]:** Reasonable notice will be case sensitive.	Up to 4 marks To achieve more than a pass candidates must not simply cite the examples but should show a holistic understanding of how the law operates in relation to the termination of a retainer.

Candidate should also raise some of the following points on the implications of wrongful termination by a solicitor: **Re Romer & Haslam [1893] 2 QB 286:** If a solicitor wrongfully terminates the retainer, he is not entitled to be paid. **Wild v Simpson [1919] 2 KB 544:** Where a solicitor terminates a retainer unreasonably he may not be entitled to payment even on a quantum meruit basis. **Gill v Heer Manak Solicitors [2018]:** Where reasonable notice has not been given there will be no entitlement to payment. Reasonable notice will be case sensitive. **Murray & Anor v Richard Slade and Company Ltd [2021] EWHC B3 (Costs)** – Solicitor did not advise client that request made in an e-mail would cause the retainer to be terminated. The Master held that the client had not terminated the agreement. The agreement had been terminated by the solicitor with no good reason. Consequently the solicitor was not entitled to costs.	Up to 3 marks To achieve a distinction candidates must show that they understand the link between payment and termination with good cause and reasonable notice
Candidate should refer to the form and content of a retainer e.g: **Groom v Crocker [1939]:** Can be in writing, made orally, or implied by conduct **Parrott v Etchells [1839]:** Leaving files at a solicitor's office may be sufficient to establish a retainer **Section 58(3) of the Courts and Legal Services Act 1990:** Some agreements must follow specific formalities, such as a CFA which needs to be in writing. **Section 13 of the Supply of Goods and Services Act 1982:** A retainer is a contract for legal service between a lawyer and client and there is an implied term that the service will be carried out with satisfactory care and skill **The SRA Code of Conduct:** has the effect of implying terms into the retainer between solicitor and client O(1.1) clients will be treated fairly, O(1.3) in deciding to terminate instructions solicitors will comply with the law and code and O(1.5) solicitors will provide competent and timely service. **IB (1.26):** implies a term into a retainer that where a solicitor ceases to act for a client they must have good reason and provide reasonable notice	Up to 2 marks To pass a response must demonstrate an understanding of the nature and form of a retainer.

Question 3:	Explain the distinction between assignment and novation and

	outline the relevance of these principles to the transfer of conditional fee agreements that were entered before 1 April 2013.

Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	**Marks**
Required Content: **Circumstances when a CFA may need to be transferred:** There are a number of situations when a CFA may need to be transferred. A firm may go into administration, close or close a department. A solicitor may move firms and client wants to retain the same agreement. A firm may be bought by another firm or merges. A firm may changes its name. **Definition of assignment:** The agreement between one of the original parties and a new party. It does not create new rights, but transfers existing rights under a contract from one party to another. There are two parties to the agreement. In writing, by deed, same agreement, client not involved but can accept/reject, benefit and burden must pass. **Novation:** Where parties to the original contract agree with a new party that the original agreement comes to an end and a new agreement comes into being between one of the original parties and the new party, in relation to the same subject matter and on the same terms.	Up to 3 marks In order to achieve a pass, candidates must provide an explanation of assignment and novation.
Credit any discussion regarding success fee recoverability: **Key priority for transferring a CFA:** Assignment should be distinguished from novation. It was thought that there must be assignment to maintain the ability to collect a success fee from a losing party in relation to work done after 31 March 2013 when the client moves firms after that date. This is now not the case, there must be assignment or novation and not a termination to recover additional liabilities and first solicitors' costs. **If the CFA is dated after 1 April 2013:** then the success fee will not be recoverable from the losing party unless it relates to a matter that falls under the following exceptions (CPR 48.2(1)(a)): • publication and privacy proceedings; and	Up to 3 marks

• mesothelioma cases. **If the CFA is pre 1 April 2013:** then the success fee can be recovered from the client if the 'win' under the terms of the CFA is triggered.	
Credit any other points relevant to the scenario in relation to CFAs e.g **Conditional Fee Agreements:** introduced by Courts and Legal Services Act 1990: are contingency agreements or 'no win no fee agreements' for advocacy and litigation services. **Section 58(1) of the Courts and Legal Services Act 1990:** A conditional fee agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a conditional fee agreement; but (subject to subsection (5)) any other conditional fee agreement shall be unenforceable. **Section 58(3) of the Courts and Legal Services Act 1990:** Requires that CFAs must comply with formalities, e.g they must be in writing. **Section 58(4) of the Courts and Legal Services Act 1990:** Requires that if a CFA includes the provision for a success fee they must be stated and must not exceed the amount set by the Lord Chancellor. **Access to Justice Act 1999:** amended section 58 CLSA 1990 to allow for recovery of success fee (section 27), ATE insurance premiums (section 29). **Legal Aid, Sentencing & Punishment of Offenders Act 2012:** abolished recovery of success fees (section 44) and ATE premiums (section 46). **If the CFA is dated after 1 April 2013:** then the success fee will not be recoverable from the losing party unless it relates to a matter that falls under the following exceptions (CPR 48.2(1)(a)): • publication and privacy proceedings; and • mesothelioma cases. **If the CFA is pre 1 April 2013:** then the success fee can be recovered from the client if the 'win' under the terms of the CFA is triggered.	Up to 3 marks
Credit any other relevant points cited in relation to the problems the courts have faced and the arguments raised by the paying party e.g:	Up to 4 marks

Halsall v Brizell [1957]: The party could not take the benefit under a contract without the corresponding burden. **Jenkins v Young Brothers Transport [2006]:** Where the client was loyally following the solicitor as they changed firms a few times, there was an exception to the rule that prevented personal contracts from being assigned as the benefit and burden of the contract was allowed. **Davies v Jones [2009]:** It was held that the exception in Jenkins could not be relied upon. This case re-iterated that the burden of a contract cannot be assigned. **Jones v Spire Healthcare 2015:** At first instance the first CFA was deemed to be at an end and the subsequent CFA was deemed to be a new retainer, so a novation had taken place. Therefore the existing rights under the CFA were not transferrable. **Budana v Leeds Teaching Hospitals [2016]:** Telling the client the personal injury department was closing and seeking no further instructions amounted to termination of the first retainer. Had the CFA not been terminated an assignment may have been permitted as the higher court decision in Jenkins showed it was possible for a burden to be assigned. In light of the first CFA being terminated, a novation had taken place. **Webb v Bromley [2016]:** The CFA did not comply with section 58 of the Courts and Legal Services Act 1990 and the Conditional Fee Agreements Order 2013, having more than a 25% success fee, and was therefore unenforceable. **Jones v Spire Healthcare [2016]:** On appeal, the case of Jenkins was determined to be authority that allowed the burden under a CFA to be assigned to a new firm and the CFA in this case was validly assigned. It was also suggested at the time that the decision was likely to be appealed further however it was not. **Budana v Leeds Teaching Hospitals NHS Trust [2017]:** It is possible to transfer a CFA. The judiciary were divided on whether a novation or assignment had taken place but it was decided it did not matter which had taken place and that the intention of parliament, when they legislated and LASPO was passed, would not have been that the first solicitor could not be paid or that the additional liabilities would not be recovered where a CFA was transferred. This case was thought to have settled the arguments on the transfer of a CFA. **Roman v Axa Insurance [2019]:** This case held that the CFA had not been assigned or novated but that it had in fact been terminated. This has created potential uncertainty in relation to the transfer of CFAs. It will be a question of evidence and each individual case	

must be considered based on the individual circumstances surrounding the purported transfer. Where there has been a termination the first solicitor will not be entitled to payment and the pre LASPO benefits, i.e recoverability of additional liabilities, will not be transferable.	

Question 4:	Discuss whether Third Party Funding should be recognised as an acceptable option for mainstream litigation.
Total Marks Attainable Fail = 0-7.4 Pass = 7.5+ Merit = 9+ Distinction = 10.5+	10
Indicative Content	**Marks**
Candidates must explain what third party funding is, e.g: **Third party funding:** is an alternative method of litigation funding where a commercial funder with no connection to the proceedings will pay some or all of the costs of the case in return for a share of any sum of money awarded in damages if the case is won.	Up to 1 mark A pass must include the demonstration that the candidate understands what Third Party Funding is.
Credit the chronological developments (and the change in stance to such funding arrangements) e.g: **Seear v Lawson (1880):** Third Party funding is permitted in matters arising out of insolvencies. **British Cash & Parcel Conveyors v Lamson. Store Service Co [1908]:** maintenance is said to be the procurement, by direct or indirect financial assistance, of another person to institute, or carry on or defend the civil proceedings without lawful justification. **Chitty 28 Ed Vol 1 17 – 054:** Champerty 'occurs when the person maintaining another stipulates for a share of the proceeds of the action or suit'. **The Legal Aid and Advice Act 1949:** The availability of	Up to 7 marks To achieve more than a pass, candidates must not simply cite law but should show a greater depth to their knowledge base.

government funding for litigation suggested a shift in attitude towards the use of funding from outside parties for litigation. **Section 13 of the Criminal Law Act 1967:** Abolished the criminal offences and torts of champerty and maintenance. **Section 14 of the Criminal Law Act 1967:** Agreements may still be unenforceable on the grounds of public policy. **Section 58 CLSA 1990:** Contingency Fee Agreements (CFAs) expressly permitted by statute. These agreements would have historically been deemed champertous. **Arkin v Borchard Lines Ltd & Ors [2005]:** The court gave tacit approval to this type of litigation funding **Merchant bridge & Co Ltd & Another v Safron General Partner Ltd [2011]:** Third party funders could be liable to the full extent of the claimant's costs. **Section 45 LASPO 2012:** A new form of contingency fee agreement was permitted by statute. **JEB Recoveries LLP v Linstock [2015]:** The judge held that given the current climate and changing attitudes to litigation funding, the agreement did not offend public policy. **Davey v Money and Others [2019]:** The Arkin cap is not a principle that Courts are bound by and third party funders may be liable to the full extent of costs.	
Credit a discussion on whether the availability of this type of funding facilitates access to justice, e.g: **Control and free decision making:** Historically such funding arrangements have been unlawful because of the influence that a funder may have on the decisions of the litigator. Today, agreements tend to be structured so that the client retains full control over the way in which they conduct their action. However, even though third party funders are, in theory, unable to control proceedings, there is a concern that they may influence some of the decisions because they are ultimately funding all or part of the claim. **Restrictions:** Agreements based on champerty and maintenance still remain. Courts still have to decide on the facts of each litigation funding agreement whether the contract is unenforceable on the grounds of public policy.	Up to 6 marks To achieve a distinction, candidates will provide some commentary on the regulation.

This may restrict access to justice. **Policy:** Change in approach by both the legislative and judiciary but there has been no legislation around this type of funding meaning it only tends to get used in a commercial context. **2017 Government has no plans to regulate:** The UK government has no plans to formally regulate third party providers of litigation funding, as there are no "specific concerns" about the current voluntary framework. **Association of Litigation Funders:** Established in 2011, they have a voluntary code of conduct. **Third party funding facilitates access to justice by:** Allowing claimants to pursue a claim where they may not have done so; enabling the risk of pursuing the claim to be shared; contributing to the success of the claim by increasing cash flow; being used in conjunction with other funding options, including a conditional fee agreement and/or after the event insurance; and allowing a company with multiple claims to finance more actions than their limited budget would otherwise allow. **Third party funding may further restrict access to justice because:** A successful claimant will have to pay a significant proportion of its recoveries (usually up to 50%) to the funder and this type of funding is not usually available for non-monetary claims.	

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

Question 5:	You are a Costs Lawyer for an SRA regulated firm, Templeman Law. The firm specialises in commercial litigation. You have been asked to work on the file of Rollinsons Financial Services Ltd ('Rollinsons') and prepare an advice on the outcome of a hearing. Rollinsons was a Defendant in proceedings brought by Mr Harper, who had sued the firm as being vicariously liable for alleged deceits and negligence of one of their employees, a Mr Villeroy. Mr Justice Blume found that none of the deceits in relation to the earlier schemes that Mr Villeroy had recommended to Mr Harper were made out, that claims of negligence in relation to both these schemes and the later scheme were statute barred, and that other claims in relation to the later scheme were barred because of his Findings of Fact on what was called the 'knowledge issue'. A hearing for the consequential matters took place on 13 September 2021. At that hearing, there was no dispute that the Claimant should pay the Defendant's costs of the proceedings on the indemnity basis, to be the subject of detailed assessment if not agreed. It is this hearing which you are required to advise upon. Prepare the body of a letter to Rollinsons advising on the consequence of the order made and the next steps.
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: commencement of assessment proceedings, assessment on an indemnity basis, next procedural steps and the assessment process. Candidates will demonstrate a good depth of knowledge of the subject (i.e. A good understanding of the framework for assessment of costs) with good application and some analysis having regard to the facts, although candidate may demonstrate some areas of weakness.
		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 framework for assessment) with very good application and some analysis having regard to the facts. Candidates are likely to observe that IN THIS SCENARIO we are

Merit	12+	told that costs will be assessed on the indemnity basis and they are likely to have explained the difference to an assessment on the standard basis. Candidates may discuss and critically analyse the process for assessment and the possibility for a negotiated settlement. 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 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 are likely to observe that in this scenario there may be discussion as to what precisely constitutes the costs 'of the proceedings'. Candidates will provide an excellent advice setting out the procedural steps and application of key concepts as part of the process (e.g. proportionality). 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: a discussion on the commencement of assessment proceedings, e.g: **Detailed/Provisional Assessment:** Takes place at conclusion of proceedings. Detailed assessment proceedings are commenced by the receiving party serving on the paying party notice of commencement in the relevant practice form; and a copy of the bill of costs. The receiving party must also serve a copy of the notice of commencement and the bill on any other relevant persons specified in Practice Direction 47. The period for commencing detailed assessment proceedings is within 3 months of the event that gives rise to entitlement. **Credit reference to the citation of any authority cited on commencement of assessment proceedings, e.g:** 44.6, CPR 47.1, CPR 47.6 (1), CPR 47.6 (2) and CPR 47.7.	Up to 2 Marks

Credit a discussion on the making of an order for costs, e.g: **CPR 44.2(1)** : The court has discretion as to (a) whether costs are payable by one party to another; (b) the amount of those costs; and (c) when they are to be paid. **CPR 44.2(2)** : If the court decides to make an order about costs (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but (b) the court may make a different order. **CPR 44.3(1)** : Sets out the basis of assessment, standard or indemity basus, but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount. **CPR 44.3(2)** : Where the amount of costs is to be assessed on the standard basis, the court will… (a) 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 (b) 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. **CPR 44.4** : Lists the factors to be taken into account in deciding the amount of costs (including the 'pillars' – conduct, efforts made to resolve the dispute etc)	Up to 4 Marks

Credit a discussion regarding the bill of costs and the right to recover costs e.g: **The electronic bill:** In October and November 2017 CPR 47 and the Part 47 Practice Direction were amended to provide that in all CPR Part 7 multitrack claims (except where the proceedings are subject to fixed costs or scale costs, the receiving party is a litigant in person or the court has otherwise ordered) bills of costs for costs recoverable between the parties must, for all work undertaken after 6 April 2018, be presented in electronic spreadsheet format, capable of producing essential summaries and performing essential functions compatible with Precedent S, annexed to the Part 47 Practice Direction. **Essential Information:** A bill should start with the full title of the proceedings, the name of the party whose bill it is and a description of the order for costs or other document giving the right to detailed assessment. The title page should include prescribed information as to VAT. The bill should then give some background information about the case. Then the bill should incorporate a statement of the status of the fee earners in respect of whom profit costs are claimed, the rates claimed for each such person and a brief explanation of any agreement or arrangement between the receiving party and his legal representatives which affects the costs claimed in the bill. It is then convenient to divide the paper into several columns headed as follows: item number, date and description of work done, VAT, disbursements, profit costs. Sometimes it is necessary or convenient to divide the bill containing the actual items of costs into separate parts, numbered consecutively. In each part of a bill all the items claimed must be consecutively numbered and must be divided under such of the heads of costs as may be appropriate. The final part of the bill of costs should contain such of the prescribed certificates as are appropriate to the case and then the signature of the receiving party or his legal representative. **Credit reference to the citation of any authority cited on the form and content of a bill of costs, e.g:** CPR 47 PD para 13.3, CPR 47 PD para 5.7, CPR 47 PD para 5.8, CPR 47 PD para 5.9, CPR 47 PD para 5.10, CPR 47 PD para 5.11, CPR 47 PD para 5.12-22 **The indemnity principle and retainer:** The indemnity principle	Up to 7 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

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. This does not appear to be a situation where the indemnity principle will not apply. Signature on the bill is sufficient to show that the indemnity principle has not been breached. However, if a genuine issue is raised by the paying party then the court is likely to consider this. ***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).	
Discussion on next procedural steps e.g: **Points of dispute:** The paying party and any other party to the detailed assessment proceedings may dispute any item in the bill of costs by serving points of dispute. The period for serving points of dispute is 21 days after the date of service of the notice of commencement. Only items specified in the points of dispute may be raised at the hearing, unless the court gives permission. The RP may file a request for a DCC if the 21 days (or relevant period) has expired and the RP has not been served with any POD. **Credit reference to any authority cited on points of dispute, e.g:** CPR 47.9 (1), CPR 47.9 (2), CPR 47.14 (6), CPR 47.9 (4), Edinburgh v Fieldfisher LLP [2020] and Ainsworth v Stewarts Law LLP [2020]. **Default Costs Certificates:** The RP may file a request for a DCC if the 21 days (or relevant period) has expired and the RP has not been served with any POD. Application for requesting a DCC is on Form N254. Will include an order to pay costs to which the DCC relates. Sum payable is set out in PD (£80 fixed costs plus court fee). **Credit reference to any authority cited on default costs certificates, e.g:** CPR 47.9 (4), CPR 47.11(1), CPR 47.11(2), CPR	Up to 9 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

47.11(3), CPR PD 47 para 10.7, Masten v London Britannia Hotel Ltd [2020], National Bank of Kazakhstan & Another v The Bank of New York Mellon & Ors [2021], Gregor Fisken Ltd v Carl [2021], Serbian Orthodox Church – Serbian Patriarchy v Kesar & Co [2021] **Replies:** Where any party to the detailed assessment proceedings serves POD, the RP may serve a reply on the other parties to the assessment proceedings. RP may do so within 21 days after being served with the POD to which the reply relates. Replies must be limited to points of principle and concessions only, must not contain general denials, specific denials or standard form responses. When practicable replies must be set in the form of Precedent G. **Credit reference to any authority cited on replies, e.g:** CPR 47.13 (1), CPR 47.13(2), CPR PD 44, 12.1 and CPR PD 47, 12.2. **Request for a Hearing:** RP must file request for DA Hearing within 3 months of expiry of period for commencing DA proceedings. N258 needs to be filed plus NOC, Bill, Order/Judgment/Doc giving right to DA, Precedent G PODS and Replies, Any other orders, Fee notes and written evidence of disbursements (over £500). Statement signed by legal representative and estimate of the length of time the DA hearing will take. Court fee will also need to be paid. **Credit reference to any authority cited on requesting a hearing, e.g:** CPR 47.14, CPR PD 47 para 13.1, CPR PD 47 para 13.2 and CPR PD 47 para 5.2	
Discussion on the assessment e.g: **Basis of Assessment and reasonableness:** 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). 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. Where the amount of costs is to be assessed on the indemnity	Up to 7 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

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. Whatever basis: Reasonableness would always be considered. **Credit reference to any authority cited on basis of assessment and reasonableness, e.g:** Section 51 of the Senior Courts Act 1981, CPR 44.2, CPR 44.3(2) and CPR 44.3(3) **Application of Proportionality:** There has been uncertainty as to how the new test or proportionality should apply. However the Court of Appeal has now provided a degree of certainty. It 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. **Credit reference to any authority cited on the application of proportionality, e.g:** BNM v MGN Ltd [2017], May v Wavell Group [2016], May v Wavell Group [2017], West and Demouilpied v Stockport NHS Foundation Trust [2020]. **Assessment and good reason:** Where there is no CMO in place and the costs exceed the budget by 20% or more the receiving party must serve a statement of reasons with the bill. CPR 3.18 is not ambiguous. Estimated costs agreed and subject to a Cost Management Order have already, in theory, been through a detailed assessment. It would be going against the intent of the rule to require another detailed assessment of estimated costs to be performed without 'good reason'. **Credit reference to any authority cited on assessment and good reason, e.g:** CPR 3.18, CPR PD 44, 3.2, Vertannes v United Lincolnshire Hospitals NHS Trust [2018] and Harrison v University Hospitals Coventry and Warwickshire NHS Trust [2017]	

Question 6:	You are a Costs Lawyer at an independent costs firm, Express Cost Services. You are based in Liverpool but undertake work all over the country. You have received instructions from Forest and Hunter LLP who are acting on behalf of the Defendant in clinical negligence proceedings. The Claimant has been successful in her claim for damages and the

	Defendant is therefore responsible for her costs. Forest and Hunter LLP believe that there is good reason to depart from the budgeted costs in two phases, the experts phase and ADR/Settlement phase. It is on this point that you have been asked to provide advice. The Cost Management Order was made by DJ Mansfield and it does not record the assumptions applied by her. She reduced the experts phase by £22,000 from the figure claimed by the Claimant in her precedent H and you are content, from the attendance note on the file, that DJ Mansfield properly directed herself in assessing what figure fell within the range of reasonable and proportionate costs for each particular phase. Having considered the Bill of Costs and Defendant's file of papers, you are of the view that the figures for the two phases are higher than might have been expected for the stage that the parties had reached within each phase. You are required to write the body of an email to Forest and Hunter LLP setting out what the Court will consider when determining whether there is a good reason to depart and whether early settlement means there should be a reduction of the figures set out in the budget.
Total Marks Attainable	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, for example simply outlining the rules in relation to budgets and CMOs. The answer may not indicate any real understanding that costs management is in place in order to ensure cases are managed proportionately. 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 the candidate fully understands how the CPR operates and any view expressed will be unsupported by evidence or authority.
Pass	10+	An answer which addresses MOST of the following points: When a CMO will be made, in what circumstances a budget can be amended, the impact of a CMO on assessment and what amounts to a good reason to depart. Candidates will demonstrate a good depth of knowledge of the subject with good application and some analysis, although the candidate may demonstrate some areas of weakness.
Merit	12+	An answer which addresses ALL of the points required for a pass (as set out above) PLUS there will be evidence that the candidate has a very good understanding of the law in some depth but this may be expressed poorly or may be weak in places and strong in others. The candidate is likely to have discussed the importance of assumptions in demonstrating to the court that there is 'good reason' to depart. There is likely to be some discussion on the potential impact of early settlement and the decision in *Chapman*, which is most relevant to that

		aspect of the scenario. The candidate should show very good, appropriate references to the relevant law and authority. Work should be written to a very high standard with few, if any, grammatical errors or spelling mistakes etc.	
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 the candidate should be supported by relevant authority and/or case law throughout. The candidate may make the link between 'good reason' and 'significant development' (i.e. if amending a budget at an earlier stage in the process). The candidate should be able to show critical assessment and capacity for independent thought on the topic. Work should be written to an exceptionally high standard with few, if any, grammatical errors or spelling mistakes etc. taking into account it has been written under exam conditions.	

Indicative Content	**Marks**
Required: Explanation as to what is meant by a Costs Management Order, e.g: ***CPR 3.15(2):*** Where a costs budget has been filed, the court will make a costs management order unless it considers the matter can be conducted justly and proportionately without a costs management order. A costs management order will record the extent the incurred costs were agreed; the extent budgeted costs were agreed; and the approval of budgeted costs once revised. ***CPR 3.15(3):*** Once a CMO has been made, the court can control the recoverable costs. ***CPR 3.15(4):*** The court can record on the face of the order any comments on the incurred costs to be taken into account at detailed assessment. ***CPR 3.15(8):*** The CMO concerns only the phase totals; it is not the role of the judge to fix or approve hourly rates; and any detail within the budget is for reference purposes only. ***Redfern v Corby Borough Council [2014]:*** The court may, in determining the amount of a given phase to which approval is given, take into account the costs incurred to date by setting a figure which impliedly criticises those costs as being excessive and leaving very little for prospective costs. ***CIP Properties Ltd v Galliford Try Infrastructure Ltd [2015]:*** The court may achieve a similar result by approving budget figures in a way which sets a benchmark figure in relation to anticipated recoverable incurred costs so that, if the party recovers more than that figure in relation to incurred costs, the amount for future costs is reduced pound for pound. ***Harrison v University Hospitals Coventry and Warwickshire NHS Trust [2017]:*** Incurred costs will be subject to DA and the estimated costs	Up to 6 marks To pass candidates MUST include an explanation of what a CMO is and the impact where costs are assessed

will be subject to the test of proportionality. ***Yirenki v Ministry of Defence [2018]:*** A master conducting a cost budgeting exercise had erred in principle in approving specific hours and disbursements rather than total figures for each phase of the proceedings and in expressly reserving matters, such as hourly rates, to be disputed at a detailed assessment.	
Credit any explanation as to applicability of costs budgets, how to make an application to amend a budget and the test for departing from a CMO on detailed assessment, e.g: ***CPR 3.12 (1):*** Applies to all Part 7 Multi Track with four exceptions. ***CPR 3.12 (2):*** Purpose of costs management is the court should manage both the steps to be taken and the costs to be incurred by the parties to any proceedings so as to further the overriding objective. ***CPR 3 PD 3E, para 2:*** Even where parties do not have to file budgets the court has discretion to order them to do so. ***CPR 3.15A(1):*** Revising party must revise its budgeted costs upwards or downwards if significant developments in the litigation warrant such revisions. ***CPR 3.18:*** When costs are assessed on the standard basis where there is a costs management order consideration must be given to the last approved or agreed costs budget of the receiving party and there cannot be any departure from this unless there is good reason. Additionally, any comments made on incurred costs can be considered.	Up to 4 marks
Credit discussion on assessment and good reason to depart, e.g: ***CPR PD 44, 3.2:*** Where there is no CMO in place and the costs exceed the budget by 20% or more the receiving party must serve a statement of reasons with the bill. ***Harrison v University Hospitals Coventry and Warwickshire NHS Trust [2017]:*** CPR 3.18 is not ambiguous. Estimated costs agreed and subject to a Cost Management Order have already, in theory, been through a detailed assessment. It would be going against the intent of the rule to require another detailed assessment of estimated costs to be performed without 'good reason'. ***Merrix v Heart of England NHS Trust [2017]:*** Carr J did not define what a 'good reason' to depart from the budget would be. BUT if the party had spent less than the budgeted sum, complying with the indemnity principle would be a good reason. She also commented that, when considering hourly rates, changing the	Up to 8 marks To achieve more than a pass candidates should demonstrate real awareness that persuading the court to depart from a CMO will be difficult and case dependant depending on the evidence

rates might be a good reason to award a different sum for certain phases. ***Vertannes v United Lincolnshire Hospitals NHS Trust [2018]:*** Receiving party was ordered to re draw a bill of costs. A CMO cannot be deemed superseded. Even where there is, on the face of it, a good reason to depart this isn't a good reason to depart from the CMO generally. ***RNB v London Borough of Newham [2017]:*** Hourly rates have also been deemed a good reason to depart because they are a mandatory component in Precedent H which cannot be subjected to the rigours of detailed assessment at the CCMC. ***Bains v Royal Wolverhampton NHS Trust [2017]:*** High Court decision held the opposite that a reduction of hourly rates for incurred costs was not a good reason to depart from the CMO. ***Nash v Ministry of Defence [2018]:*** A reduction in hourly rates for incurred costs does not appear to mean it follows that there should be a reduction on budgeted costs. ***Jallow v Ministry of Defence [2018]:*** SCCO decision. Followed Bains and Nash, a reduction of hourly rates for incurred costs did not mean the same rates should be applied to budgeted costs. ***Barts Health NHS Trust v Hilrie Rose Salmon [2019]:*** The indemnity principle is a good reason to depart. Once you have established a good reason for a phase you are free to challenge any other sums within that phase without identifying further good reason. ***Maurice Hutson & Ors v Tata Steel UK Ltd [2020]:*** High Court rejected the argument that a longer-than-expected procedural timetable in a large group action was good reason to revise the claimants' budget upwards. ***Chapman v Norfolk and Norwich University Hospitals NHS Foundation Trust [2020]:*** Not spending the totality of the budgeted figure for a phase because of settlement is not in itself a good reason to depart. There would need to be very clear evidence of obvious overspending in a particular phase before the court could even begin to entertain arguments that there was a good reason to depart from the budgeted phase figure if the amount spent comes within the budget. ***Utting v City College Norwich [2020]:*** Underspending on a budget phase is not in itself a good reason to depart from the budget, a costs judge has ruled in the latest lower court ruling on the issue.	
Credit a more detailed explanation of applications to amend a	Up to 6 marks

budget and what is meant by significant development, e.g: ***CPR 3.15A(1):*** Revising party must revise its budgeted costs upwards or downwards if significant developments in the litigation warrant such revisions. ***CPR 3.15A(2):*** Any budgets revised must be submitted promptly by the revising party to the other parties for agreement, and subsequently to the court. ***CPR 3.15A(3):*** The revising party must serve particulars of the variation proposed on every other party, using the form prescribed by Practice Direction 3E, confine the particulars to the additional costs occasioned by the significant development; and certify, in the form prescribed by Practice Direction 3E, that the additional costs are not included in any previous budgeted costs or variation. ***CPR 3.15A(4):*** The revising party must submit the particulars of variation promptly to the court, together with the last approved or agreed budget, and with an explanation of the points of difference if they have not been agreed. ***CPR 3.15A(5):*** The court may approve, vary or disallow the proposed variations, having regard to any significant developments which have occurred since the date when the previous budget was approved or agreed, or may list a further costs management hearing. ***CPR 3.15A(6):*** Where the court makes an order for variation, it may vary the budget for costs related to that variation which have been incurred prior to the order for variation but after the costs management order. ***Murray & Anor v Neil Dowlman Architecture Ltd [2013]:*** The court takes a dim view of amending a budget due to a mistake once it is approved. ***Elvanite Full Circle Ltd. v Amec Earth & Environmental (UK) Ltd. [2013]:*** On assessment Coulson J refused to amend the budget. Costs were £531,946 and the budget was £268,488. Application to amend after judgment is a contradiction in terms. Any application to vary should be made immediately if it becomes apparent that the original budget costs have been exceeded by more than a minimal amount. ***Simpson v MGN Ltd [2015]:*** There will be sanctions for not making an application albeit that the judge will not want to impose a disproportionate and unjust sanction to ensure compliance with the overriding objective. ***Churchill v Boot [2016]:*** A change in the value of the claim or a	

longer trial length did not amount to a significant development in the case. In this case conduct was a significant consideration for the court in arriving at their decision. ***Sharp v Blank [2017]:*** Interim applications may be significant development. When making an application to amend incurred costs should not be amended on the last approved budget. ***CPR 3.17(4):*** If interim applications are made which, reasonably, were not included in a budget, then the costs of such interim applications shall be treated as additional to the approved budgets. ***Al-Najar v the Cumberland Hotel (London) Ltd [2018]:*** The claimants were entitled to revise their trial budget because there had been a significant development in the litigation. Disclosure was of a scale and complexity that was much larger than had actually been budgeted for, which was not envisaged and which could not have been reasonably envisaged. ***BDW Trading Ltd v Lantoom Ltd [2020]:*** Disclosure that involved five times more documents than anticipated and expressly assumed in a claimant's budget was a significant development justifying its costs budget being updated. ***Thompson v NSL Ltd* [2021]:** 'Significant development' requiring budget revision need not be a specific event but can be a "collection of factors" which mean that the nature of the claim has changed. ***Persimmon Homes Ltd & Anor v Osborne Clark LLP [2021]:*** Be prompt in making an application. Not every development in litigation will amount to a significant development.	

Question 7:	You are a Costs Lawyer at a small SRA regulated firm, Lyons and Haversham LLP, in Maidstone. You have been working on the file of Aiguo Liu. The fee earner with conduct of the matter is Ronald Buch and he is writing a preliminary advice to Mr Liu. He would like to include some information on costs and has asked for your assistance with that part of the letter. The file concerns a dispute between the Aiguo Liu, Thomas Saffron and Leonard Dahl, which arises out of their practice together as accountants in an accountancy partnership. The partnership has existed for around 12 years. The dispute concerns the circumstances of Mr Dahl's departure from the partnership. In summary, Mr Liu and Mr Saffron are claiming a sum in excess of

	£500,000 as damages, which are said to arise from misrepresentations made by Mr Dahl as to the state of his health and his intention to work following retirement from the partnership. Mr Liu and Mr Saffron contend that Mr Dahl requested retirement on the grounds of ill-health and said that he would not work again, save in a consultancy capacity for the partnership. Mr Dahl has stated that it was always his intention to set up business by himself, or he was at least contemplating that possibility. The Partnership Deed contains an arbitration clause providing for disputes to be determined by an arbitrator appointed by the President of the Institute of Chartered Accountants for England and Wales. The clause provides that the Arbitration Act 1996 is to apply and that the decision of the arbitrator would be final and binding. Prepare the body of an advice to Aiguo Liu. The advice must set out how the provisions of the Arbitration Act 1996 govern the assessment of costs, when a matter may be referred to the Court and the rules on enforcement in an arbitration matter.
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: Costs should be determined by agreement or by the arbitrator, assessment as arbitrator 'sees fit', 3 categories of costs, matter may be referred to the court where costs of the arbitrator cannot be agreed, enforcement would be through the usual methods under the CPR. Candidates will demonstrate a good depth of knowledge of the subject (i.e. a good understanding of the framework for assessment of costs and the relationship between arbitration proceedings and the courts) with good application and some analysis having regard to the facts, although candidate may demonstrate some areas of weakness.
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 framework for assessment) with very good application and some analysis having regard to the facts. Candidates are likely to observe that IN THIS SCENARIO we are told there are three main points that need addressing (assessment, court and enforcement) and candidates will demonstrate a sound knowledge base as to how the particular sections of the Arbitration Act relate to those points. Candidates may discuss and critically analyse why, for example, the assessment of costs by the court is very unlikely i.e that the starting point will be the parties agreement followed by the potential assessment by the arbitrator. 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 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 the right to refer the matter to the court and the difficulties faced with enforcing 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.

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

Indicative Content:	**Marks**
Required: A discussion on what is meant by costs under the legislation, e.g: ***Costs in arbitration proceedings:*** Costs in arbitration proceedings fall into three categories - the arbitrator's fees and expenses, the fees and expenses of any arbitral institution concerned and the legal or other costs of the parties. Costs will also include the costs of or incidental to any proceedings when determining the amount of the recoverable costs of the arbitration which may include premiums charged by third party funders. ***Credit reference to any authority cited on costs in arbitration proceedings, e.g:*** Section 59(1) of the Arbitration Act 1996, Section 59(2) of the Arbitration Act 1996 and Essar Oilfields Services Limited v Norscot Rig Management PVT Limited [2016].	Up to 2 marks
Credit any points advanced on agreements, e.g: ***Agreement:*** Parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest. The tribunal may make an award allocating the costs of the arbitration as between the parties, subject to any agreement of the parties. An agreement can only extends to such costs as are recoverable, unless the parties decide otherwise. An agreement to pay costs in any event, for a party to pay the whole or part of the arbitration, can only be valid in the arbitration if made after the dispute arose. Prohibiting such agreements may be aimed at protecting a weaker party from having such an onerous obligation imposed upon them where there is some inequality of bargaining power. ***Credit reference to any authority cited on costs in arbitration proceedings, e.g:*** Section 1 of the Arbitration Act 1996, Section 60 of the Arbitration Act 1996, Section 61 of the Arbitration Act 1996	Up to 3 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

and Section 62 of the Arbitration Act 1996.	
Credit any points advanced on the arbitrator's assessment of costs, e.g: ***Arbitrator's assessment of costs:*** The arbitrator can allocate the costs of the arbitration between the parties. For any award of costs, unless the parties have agreed otherwise, the arbitrator shall award costs on the general principle that costs should follow the event. The arbitrator must assess costs as he 'sees fit'. Where costs are determined by the arbitrator, they are assessed on the standard basis as it was defined before the introduction of the CPR, unless the arbitrator or the court orders otherwise. However, the CPR state that where an arbitrator determines the costs of proceedings that CPR 44-47 should apply. ***Credit reference to any authority cited on the Arbitrator's assessment of costs, e.g:*** Section 61(1) of the Arbitration Act 1996, Section 61(2) of the Arbitration Act 1996, Section 63(3) of the Arbitration Act 1996, Sections 63(4) of the Arbitration Act 1996, Sections 63 (5) of the Arbitration Act 1996, CPR 44.1(2) and CPR 44-47. ***Recoverable fees and expenses of arbitrators:*** Unless otherwise agreed by the parties, the recoverable costs of the arbitration shall include in respect of the fees and expenses of the arbitrators only such reasonable fees and expenses as are appropriate in the circumstances. If there is any question as to what reasonable fees and expenses are appropriate in the circumstances an application may be made to the court by either party for the court to determine the matter, or order that it be determined by such means and upon such terms as the court may specify. ***Credit reference to any authority cited on the recoverable fees and expenses of arbitrators, e.g:*** Section 64(1) of the Arbitration Act 1996 and Section 64(2) of the Arbitration Act 1996. ***Power to limit costs:*** The arbitrator, unless the parties have agreed otherwise, may limit the recoverable costs of the arbitration, or of any part of the arbitral proceedings, to a specified amount. This can be done at any stage, but it must be done sufficiently in advance of the incurring of costs to which it relates, or the taking of any steps in the proceedings which may be affected by it, for the limit to be taken into account. ***Credit reference to any authority cited on the Arbitrator's power to limit costs, e.g:*** Section 65(1) of the Arbitration Act 1996 and Section 65(2) of the Arbitration Act 1996.	Up to 8 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
Credit any points advanced on the when the matter may go to	Up to 6 marks

court, e.g: ***Applications to the court to determine costs:*** If costs are not determined by agreement or by the arbitrator, the parties can apply to the court (the application should be on-notice) and the court may then determine the recoverable costs. If a party applies to the court to consider the fees, the court may make any adjustments it sees fit. ***Credit reference to any authority cited on applications to the court to determine costs, e.g:*** Section 63(4) of the Arbitration Act 1996, Section 63(1) of the Arbitration Act 1996, Section 64(2) of the Arbitration Act 1996 and Section 28(2) of the Arbitration Act 1996. ***Challenging and award:*** A party to arbitral proceedings may apply to the court challenging any award of the arbitral tribunal as to its substantive jurisdiction; or for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction. A party to arbitral proceedings may apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. Unless otherwise agreed by the parties, a party to arbitral proceedings may appeal to the court on a question of law arising out of an award made in the proceedings. ***Credit reference to any authority cited on challenging an award, e.g:*** Section 67 of the Arbitration Act 1996, Section 68 of the Arbitration Act 1996 and Section 69 of the Arbitration Act 1996. ***Appeal:*** An application or appeal may not be brought if the applicant or appellant has not first exhausted any available arbitral process of appeal or review and any available recourse under the Act. ***Credit reference to any authority cited on challenging an appeal, e.g:*** Section 57 of the Arbitration Act 1996 and Section 70(2) of the Arbitration Act 1996.	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
Credit any relevant points cited on the enforcement of an Award, e.g: ***Leave and Enforcement:*** An award is effectively a final order and can therefore be enforced with the leave of the court if a party fails to comply with it. Where the court gives leave, judgment can be entered in the terms of the award except where the person against whom the order is sought can show that the arbitrator lacked jurisdiction to make the award. If the court finds that the award is not legally valid, it may refuse leave. The CPR sets out the procedure to enforce an award - the application should include the costs to be included in the order giving permission and, if	Up to 4 marks

judgment is to be obtained, for the costs of any judgment to be entered. ***Credit reference to any authority cited on enforcement, e.g:*** Section 66(1) of the Arbitration Act 1996, Section 66(2) of the Arbitration Act 1996, Section 66(3) of the Arbitration Act 1996, CPR 62.18, Re Stone and Hastie Arb. [1903] and Middlemiss & Gould v Hartlepool Corp [1972].	

Question 8:	You work as a Costs Lawyer for Tarrant and Marshall Solicitors, who are based in Maidstone. Mr Tarrant is a family lawyer at the firm, who specialises in divorce, property and finance. He has approached you and asked you to write to one of his clients, Mr Tom Little. Tom met his wife, Cheryl, in England in 1999. They married in 2000. At the time, Cheryl was a businesswoman and Tom was an art student. Cheryl came from a very wealthy family. In 2006 Tom asked Cheryl for a divorce, but Cheryl refused. Between 2006 and 2019 the parties remained married and living together. Tom issued divorce and financial proceedings in June 2020 and November 2020 respectively. In December 2020, Cheryl offered £300,000, which would cover Tom's then outstanding legal costs of £155,000 and give him capital of £145,000. Your firm were unable to obtain Tom's instructions, so did not respond to this offer. In May 2021 Cheryl increased her offer to £336,000, which would cover £236,000 towards his costs and £100,000 on top. In August 2021, four weeks before the Final Hearing, Tom sent Cheryl a counter-offer requesting the transfer of Cheryl's flat worth £400,000 and a lump sum of £527,000. The Final Hearing is next week. Mr Tarrant believes that this case should have been relatively easy to settle and that there is a risk that the Court may find that the reason it has not was because of the way Tom had chosen to run his case. Mr Tarrant thinks that although Cheryl's first offer was light, had there been a sensible (or any) response to her offer, there would have been a quick resolution of this case. Mr Tarrant is concerned that Tom may be at risk of an Adverse Costs Order being made. You are required to write the body of a letter to Tom Little setting out how costs in family cases are usually dealt with, how the costs in this type of case should be dealt with and what rules the Court should consider when making a Costs Order.

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. An answer which makes little or no sense OR is so poorly written as to lack coherence OR the answer will only demonstrate an awareness of some of the more obvious issues and is likely to be poorly written.
Pass	10+	An answer which includes MOST of the requirements, namely: An explanation of what family proceedings are, explanations of the three costs regimes in family proceedings and an explanation as to the rules on assessment under the CPR. The answers will be written to a reasonable standard, but may contain some grammatical errors or spelling mistakes etc. Appropriate authority will be used throughout although some points advanced may not be supported.
Merit	12+	For a mark in this band, the answer will deal with ALL of the requirements required for a pass however, candidates will have produced responses that have more depth and more application and analysis, as appropriate. Candidates will have identified the no order regime would be applicable in this scenario and if the court were minded to make an order in the client's favour then the starting point would be the conduct of the parties, as defined by the FPR. Candidates will have produced responses which are written to a high standard with few, if any, grammatical errors or spelling mistakes etc.
Distinction	14+	An answer which includes ALL of the requirements for a pass (as set out above) PLUS demonstrates an excellent depth of knowledge. Excellent application of the law to the arguments made and critical analysis of the same. It is likely that an observation would have been made that in this scenario there was an attempt to settle this matter by the making of an offer. All views expressed by the candidate should be supported by relevant authority and/or case law. Work which is written to an exceptionally high standard with few, if any, grammatical errors or spelling mistakes etc. taking into account it has been written under exam conditions.

Indicative Content	**Marks**
Required (consideration as to what is meant by a family case e.g): ***Family cases may include (for example):*** Marriage and civil partnership; Matrimonial and partnership finance; The care of children either by their parents or by the state; Domestic abuse; The way in which a family home is occupied; Child abduction; Egg and sperm donors; and Gender recognition. ***No single source provides an all-encompassing definition of family proceedings:*** Section 58A of the Courts and Legal Services Act 1990 and the Courts Act 2003.	Up to 2 marks
Credit a discussion on how costs in family cases are usually dealt with, e.g ***FPR or CPR:*** In some family cases the CPR (CPR 44-48) will apply	Up to 4 marks To achieve more than a

rather than the FPR 2010. ***Family Procedure Rules 2010:*** Apply to family proceedings and use the definition found within Section 75(3) Courts Act 2003. ***Rule 2.1 of the Family Procedure Rules 2010:*** Rules apply to family proceedings in the High Court and the Family Court. ***Rule 2.3 of the Family Procedure Rules 2010:*** Family proceedings are defined with reference to section 75(3) of the Courts Act 2003. ***Section 75(3) of the Courts Act 2003:*** Defines family proceedings as those in the Family Court and proceedings in the Family Division of the High Court where they cannot be heard by another division. ***Rule 28 and the Practice Direction 28A of the Family Procedure Rules 2010:*** Contain the costs provisions.	pass the candidate must not simply cite the law but demonstrate an understanding of how the rules operate
Credit a discussion as to what the costs regimes are in family proceedings, e.g: ***The three costs regimes in family proceedings:*** Clean sheet, No Order and Costs follow the event. ***The 'clean sheet' regime:*** Follows the FPR costs rules. This regime applies in all cases heard in the Family Court other than financial remedy proceedings. It also applies to those proceedings heard in the Family Division of the High Court which can only be allocated to the Family Division. This regime means there is unlikely to be any costs shifting. ***The 'no order regime':*** Prevails in all financial remedy proceedings. This regime means there is unlikely to be any costs shifting. ***The 'costs follow the event' regime***: From the CPR, generally requires the unsuccessful party to pay the costs of the successful party. This is the costs regime applicable to the Family Division of the High Court when dealing with proceedings under statutes which can be allocated to other divisions of the High Court.	Up to 3 marks
Credit discussion on how the costs in this type of case should be dealt with, i.e the No Order regime, e.g: ***Financial remedy proceedings and proceedings in connection with a financial remedy:*** The general rule is that there shall be no order as to costs in financial remedy proceedings. This regime applies to the substantive final hearing of an application for an order in financial remedy proceedings and to interim variation	Up to 3 marks To achieve more than a pass there must be strong evidence that the candidate is able to apply the authority

orders. ***Proceedings in connection with a financial remedy:*** Such proceedings include: Interim orders; Interim hearings; Final orders to set aside an application; Determination of a beneficial share in property; and Disposing of the application other than by final financial order. ***Rule 28.3(1) of the Family Procedure Rules 2010:*** Rule 28.3 applies to financial remedy proceedings. ***Rule 28.3(2) of the Family Procedure Rules 2010:*** The CPR apply with some modifications. The court does not have discretion as to costs (CPR 44.2 (1)), the factors that the court should consider when making an order do not apply (CPR 44.2 (4)) and nor does the definition of conduct within the CPR (CPR 44.2 (5)). ***Rule 28.3(4)(b) of the Family Procedure Rules 2010:*** Defines financial remedy proceedings as proceedings requiring a financial order. ***Rule 28.3(5) of the Family Procedure Rules 2010:*** The general rule is that the court will not make an order for costs against the unsuccessful party.	to the facts of the question
Credit discussion on what rules the Court should consider when making a costs order in this case, e.g: ***Rule 28.3(6) of the Family Procedure Rules 2010:*** The court may make an order if it is considered appropriate on the grounds of conduct. ***Rule 28.3(7)(a) of the Family Procedure Rules 2010:*** Conduct is defined so as to include any failure by a party to comply with these rules, any order of the court or any practice direction which the court considers relevant. ***Rule 28.3(7)(b) of the Family Procedure Rules 2010:*** Conduct is defined so as to include any open offer to settle made by a party. ***Rule 28.3(7)(c) of the Family Procedure Rules 2010:*** Conduct is defined so as to include whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue. ***Rule 28.3(7)(d) of the Family Procedure Rules 2010:*** Conduct is defined so as to include the manner in which a party has pursued or responded to the application or a particular allegation or issue. ***Rule 28.3(7)(e) of the Family Procedure Rules 2010:*** Conduct is	Up to 4 marks To achieve more than a pass there must be strong evidence that the candidate is able to apply the authority to the facts of the question

defined so as to include any other aspect of a party's conduct in relation to proceedings which the court considers relevant. ***Rule 28.3(7)(f) of the Family Procedure Rules 2010:*** Conduct is defined so as to include the financial effect on the parties of any costs order. ***Indemnity costs are unusual in family proceedings:*** Unless the conduct of a litigant is considered in some material respect(s) to be unreasonable or a disproportionate use of the court's time and resources. (*H v Dent (Re an Application for Committal (No. 2: Costs))* [2015]).	
Credit discussion on the clean sheet regime, e.g: ***Clean sheet regime:*** This regime provides that the starting point is that there will be no costs shifting, parties bear their own costs, examples include Children Act 1989 proceedings (both public and private). ***Rule 28.1 of the Family Procedure Rules 2010:*** The court may make such order as it considers just. ***Rule 28.2 of the Family Procedure Rules 2010:*** The Costs provisions in the CPR will apply with some modification, for example; this rule disapplies the general rule (CPR 44.2(2)) and basis of assessment. The court's discretion (CPR 44.2(1)), the factors to take into account when making an order (CPR 44.2(4)) and the definition of conduct (CPR 44.2(5)) are not excluded and therefore do apply. ***Solomon v Solomon (2013):*** If the court decide to make an order where there is costs shifting then the starting point should be costs follow the event.	Up to 4 marks
Credit discussion on the costs follow the event regime, e.g: ***Costs follow the event regime:*** Costs shifting, the general rule is likely to apply, for example in TOLATA 1996 claims. ***CPR 44-48:*** Apply as usual.	Up to 2 marks
Any relevant point to describe costs assessment in family proceedings e.g: ***Costs assessment in family proceedings:*** Where they do not involve legal aid they are assessed in accordance with the CPR. The CPR apply to all between the parties costs assessments. ***CPR 44.3(1)(a) and CPR 44.3(2):*** On an assessment on the standard basis the court will only allow costs that are proportionate to the matters in issue and resolve any doubt as to	Up to 2 marks

whether they were reasonably incurred or reasonable and proportionate in amount in favour of the paying party. ***CPR 44.3(1)(b) and CPR 44.3(3):*** Where costs are assessed on an indemnity basis the amount recoverable under an indemnity costs order may be significantly higher as the court will consider any doubt as to whether costs are reasonably incurred or reasonable in amount in favour of the receiving party.	

Question 9:	You work for a costs firm, Civlo Ltd, located in Buckingham. You have received instructions from Mr Leon, a partner at Leon and Dennis LLP, in relation to his client Aaban Afridi. An application for judicial review has been brought by Mr Afridi challenging the decision of Buckingham Town Council to revise market pitch fees at the market held in Buckingham town centre. The essence of the Mr Afridi's case is that the decision is unlawful because a fair process of consultation did not take place. The Defendant submits that, in essence, there was no duty to consult over the changes in the fees before they were determined. Secondly, the duty was adequately discharged and, thirdly, if the duty was not adequately discharged, the Court should not grant relief in any event. Mr Afridi is a local resident, not a market trader, raising an issue of local importance. He has some serious medical conditions, which make him heavily reliant on the Market. It is of great importance both to him and to others in the community. Mr Afridi is in receipt of Employment and Support Allowance benefits Mr Leon is of the view that this may be a case where it is appropriate to apply for a Costs Capping Order and it is this aspect upon which he is seeking your assistance. He has asked that you provide an advice in relation to Costs Capping Orders in judicial review cases. Write the body of an email to Mr Leon setting out the statutory tests for Costs Capping Orders in judicial review cases.
Total Marks Attainable	20

Fail	up to 9.9	This mark should be awarded where candidates: Fail to advise on the framework of the rules governing the granting of a costs capping order. Fail to adhere to the instructions provided in the question completely or in a substantial part of the answer. An answer which makes little or no sense or is so poorly written as to lack coherence.
Pass	10+	Candidates may have considered MOST of the following: the definition of public interest proceedings, the factors the court will consider when determining if proceedings are public interest proceedings and how an application for a costs capping order will be made. Credit will be given to any reasonably written answer and any reasonable conclusion that, providing it can be demonstrated the proceedings are public interest proceedings and the financial resources of the parties suggest there should be an order that an order will be made. Candidates

		should use appropriate references to the relevant law and authority throughout but not all points advanced may be appropriately supported.
Merit	12+	An answer which includes ALL of the requirements for a pass (as set out above) PLUS Candidates will have produced responses that have more depth and with more application to the facts provided. There will also be a demonstration that the candidate is able to analyse, as appropriate. Candidates will have produced responses which are written to a high standard with few, if any, grammatical errors or spelling mistakes etc. taking into account it is written under exam conditions.
Distinction	14+	An answer which includes ALL of 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. Candidates should have a clear and reasoned view as to the rules on costs capping orders. The advice should be very well structured. Work should be written to an exceptionally high standard with few, if any, grammatical errors or spelling mistakes etc. taking into account it has been written under exam conditions.

Indicative Content	**Marks**
Required: Candidates MUST identify the framework of rules governing costs capping orders e.g: **Sections 88-90 of the Criminal Justice and Courts Act 2015**:Rules on 'Costs-Capping' which replaced the common law rules on protective costs order in Judicial Review proceedings. **Section 88(2) of the Criminal Justice and Courts Act 2015**: Defines a "costs capping order": as an order limiting or removing the liability of a party to judicial review proceedings to pay another party's costs in connection withany stage of the proceedings. **Section 88(6) of the Criminal Justice and Courts Act 2015**:The court may make a costs capping order only if it is satisfied that the proceedings are public interest proceedings and that, in the absence of the order, the applicant for judicial review would withdraw the application for judicial review or cease to participate in the proceedings, and it would be reasonable for the applicant for judicialreview to do so.	Up to 4 marks

Credit a discussion on what amounts to public interest proceedings, e.g: **Section 88(7) of the Criminal Justice and Courts Act 2015:** proceedings are "public interest proceedings" only if a subject of the proceedings is of general public importance,the public interest requires the issue to be resolved, and theproceedings are likely to provide an appropriate means of resolving it. **Section 88(8) of the Criminal Justice and Courts Act 2015:** the court must have regard when determining whether proceedings are public interest proceedings include the number of people likely to be directly affected if relief is granted to the applicant for judicial review, how significantthe effect on those people is likely to be, and whether the proceedings involve consideration of a point of law of general public importance. **Eweida v British Airways [2009]:** A PCO cannot be made inprivate litigation. **R (on the application of Hawking) v Secretary of State for Health and Social Care [2018]:** Judicial review proceedings challenging a decision made by a government department regarding the National Health Service was in the public interest and the claimants who had crowdfunded to fund the case met the statutory criteria for a cost capping order. **Maugham QC v Uber London Ltd [2019]:** Claim by a barrister against Uber for the provision of a VAT invoice. The claim was one between two private persons. Uber was a defendant in its capacity as a potential taxpayer and it carried out no public functions. Not appropriate for the court to make a PCO.	Up to 5 marks
Credit a discussion on how the court may decide to make an order and the content of an order, e.g: **Davey v Aylesbury Vale District Council [2007]:** The normal'loser pays' rule, found in CPR 44.2(2)(a) does not apply 'automatically' in judicial review cases because there is not sufficient justification in public law' for the same rule to be followed. **Booth v Bradford Metropolitan District Council [2000]:** Musttake into account all of the circumstances of a case and thatcosts do not necessarily follow the event unless it could beshown that the authority acted in bad faith or unreasonably.	Up to 10 marks Candidates that achieve more than a pass **MUST** show evidence of their ability to apply the legal framework to the facts of the question

R (Corner House Research) v Sec of State for Trade and Industry [2005]: PCOs should only be made in exceptional circumstances, Essential principles for the making of a PCOinclude that the issues raised are of general public importance; the public interest requires that those issues should be resolved and the applicant has no private interestin the outcome of the case.

Morgan v Hinton Organics [2009]: Expanded upon the principles, it was said there should be a flexible approach toPCOs' was to be encouraged, especially the requirement of 'no private interest'.

Section 89(1) of the Criminal Justice and Courts Act 2015: The matters to which the court must have regard when considering whether to make a costs capping order in connection with judicial review proceedings, and what theterms of such an order should be, include:

- The financial resources of the parties.
- The extent to which the applicant for the order islikely to benefit.
- The extent to which any person who has providedfinancial support may benefit.
- Whether legal representatives for the applicant forthe order are acting free of charge.
- Whether the applicant for the order is an appropriate person to represent the interests of other persons or the public interest generally.

Section 89(2) of the Criminal Justice and Courts Act 2015: A costs capping order that limits or removes the liability of theapplicant for judicial review to pay the costs of another party to the proceedings if relief is not granted to the applicant for judicial review must also limit or remove the liability of the other party to pay the applicant's costs if it is.

R (On the application of Hannah Beety & Ors) (Claimant) v Nursing & Midwifery Council (Defendant) & Independent Midwives UK [2017]: The court capped the claimant's liability for costs at £25,000 and the defendant's at £65,000.

Credit a discussion on the procedural steps for making suchan application, e.g: **CPR 46.17(1)(a):** An application for a judicial review costscapping order must be made on notice. **CPR 23.3(2)(b):** States an application without notice may be made where a rule or PD allows it. **CPR PD 46, 10.2:** An application should be made on the claimform (and there will be instances when a claim may be issued without notice). **CPR 46.17(1)(b):** Applications must be supported by evidence setting out why a judicial review costs capping	Up to 5 marks