December 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:	Explain whether all Conditional Fee Agreements are contentious business agreements and, if so, how that might affect a client's right to an Assessment of Costs under the Solicitors Act 1974.
Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	**Marks**
Required: Candidates should explain what a conditional fee agreement and contentious business agreement are, e.g: ***Contentious business is defined as:*** Business done, whether as a solicitor or advocate, in or for the purposes of proceedings begun before a court or before an arbitrator not being business which falls within the definition of non-contentious or common form probate business contained in section 128 of the Senior Courts Act 1981. ***Contentious business agreements:*** must be in writing (although they do not have to be signed) and it may provide that the solicitor be remunerated by a gross sum or by reference to an hourly rate, or by a salary or otherwise and whether at a higher or lower rate than that at which he would otherwise have been entitled to be remunerated. ***Credit reference to any relevant authority on what a contentious business agreement is, e.g:*** Section 87 of the Solicitors Act 1974 and Section 59 of the Solicitors Act 1974. ***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. They must comply with formalities in order to be enforceable, e.g they must be in writing and signed. ***Credit reference to any relevant authority on what a conditional fee agreement is, e.g:*** Section 58(1) of the Courts and Legal Services Act 1990, section 58(2) of the Courts and Legal Services Act 1990, section 58(3) of the Courts and Legal Services Act 1990 and section 58(4) of the Courts and Legal Services Act 1990.	Up to 5 marks
Candidates should explain whether all conditional fee agreements are contentious business agreements, e.g: ***Agreement:*** If both parties agree that the provisions of the Solicitors Act in relation to CBAs should not apply to their conditional fee agreement it has been held that there is no reason why they should not be able to	Up to 3 marks

reduce that to writing and for that agreement to be effective. Therefore, a CFA may not be a CBA, it is a matter of construction. ***Credit reference to any relevant authority on whether all CFAs are CBAs, e.g:*** Healys LLP v Partridge and Anor [2019], Acupay System LLC v Stephenson Harwood LLP [2021]	
Candidates should explain the impact on assessment under the Solicitors Act 1974, e.g: ***Enforcement of a CBA:*** An application must be made and the court is bound to consider whether a CBA is fair and reasonable, and if the court considers that it is, the court can proceed to enforce it. For example, a judgment may be made. ***Challenges:*** If the court considers a CBA to be unfair and unreasonable it may set the agreement aside. ***Assessment:*** The costs of a solicitor in any case where a CBA has been made shall not be subject to assessment. ***Challenges to rates and hours:*** In cases where a CBA provides for the remuneration of the solicitor to be by reference to an hourly rate then the court may enquire into the number of hours of work by the solicitor and whether the number of hours of work by him was excessive. Without overturning the CBA as unfair or unreasonable, the court would have no power to question hourly rates or, in a CFA, any success fee. ***Credit reference to any relevant authority on the impact on assessment, e.g:*** Section 60 of the Solicitors Act 1974, section 61(1) of the Solicitors Act 1974 and section 61(4B) of the Solicitors Act 1974.	Up to 4 marks

Question 2:	Explain the relationship between a client and their solicitor and set out when that relationship 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 entire contract, e.g:	Up to 2 marks

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. ***Entire contract:*** 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. ***Credit reference to any appropriate authority on retainers and entire contracts, e.g:*** J H Milner & Son v Percy Bilton Ltd [1966] and Underwood, Son v Piper Lewis [1894].	
Candidate should refer to when a solicitor may terminate a retainer, e.g: ***Good reason and reasonable notice:*** There is an implied term in a retainer that where a solicitor ceases to act for a client they must have good reason and provide reasonable notice. ***Good reason:*** Client's failure to make a payment on account of costs may amount to good reason. Although the amount sought must be reasonable otherwise it will be deemed to be wrongful termination. 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. A conflict of interest or professional embarrassment may amount to good reason. There may also be good reason if the clients instructions require the lawyer to act improperly. If the Solicitor is not confident the client is giving instructions freely they can cease to act. ***Credit reference to any appropriate authority on good reason, e.g:*** Indicative Behaviour 1.26 of the SRA Handbook (now superseded), Solicitors Act 1974 Section 65 (1)&(2), Wong v Vizards (a firm) [1997], Warmingtons v McMurray [1936], Hilton v Barker Booth & Eastwood [2005], Para 6.1 of the SRA Code of Conduct for Solicitors, RELs and RFLs, Re Jones [1896], Section 1 of the Legal Services Act 07 and Richard Buxton (Solicitors) v Huw Llewelyn Paul Mills-Owens & Law Society (intervener) (Second Appeal)[2010]. ***Reasonable notice:*** Will be case sensitive but should be judged objectively. ***Credit reference to any appropriate authority on reasonable notice, e.g:*** Gill v Heer Manak Solicitors [2018].	Up to 5 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: ***No entitlement to payment:*** If a solicitor wrongfully terminates the retainer he is not entitled to be paid. Where a solicitor terminates a retainer unreasonably he may not be entitled to payment even on a quantum meruit basis. Where reasonable notice has not been given there will be no entitlement to payment. Reasonable notice will be case sensitive. Where there is wrongful termination and no entitlement to payment it follows there will be no entitlement to costs. ***Credit reference to any appropriate authority on payment or consequence of wrongful termination, e.g:*** Re Romer & Haslam [1893], Wild v Simpson [1919], Gill v Heer Manak Solicitors [2018], Murray & Anor v Richard Slade and Company Ltd [2021].	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 may further refer to the form and content of a retainer e.g: ***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. Can be in writing, made orally, or implied by conduct. Leaving files at a solicitor's office may be sufficient to establish a retainer. Some agreements must follow specific formalities, such as a CFA which needs to be in writing or a contentious business agreement. ***Credit reference to any appropriate authority on payment or consequence of wrongful termination, e.g:*** Groom v Crocker [1939], Parrott v Etchells [1839], section 13 of the Supply of Goods and Services Act 1982, section 58(3) of the Courts and Legal Services Act 1990 and section 59 of the Solicitors Act 1974.	Up to 2 marks To pass a response must demonstrate an understanding of the nature and form of a retainer.

Question 3:	Describe the growth of third party funding in England and Wales and discuss whether there may be a need for better oversight of these type of funding arrangements.

Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	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	Up to 2 mark A pass must include the demonstration

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. ***Definitions:*** Champerty 'occurs when the person maintaining another stipulates for a share of the proceeds of the action or suit'. 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. ***Credit reference to any appropriate authority on defining champerty and maintenance, e.g:*** British Cash & Parcel Conveyors v Lamson. Store Service Co [1908] and Chitty 28 Ed Vol 1 17 – 054.	that the candidate understands what Third Party Funding is.
Credit a discussion on chronological developments (and the change in stance to such funding arrangements) e.g: ***Developments:*** Third Party funding was permitted in limited circumstances, for example matters arising out of insolvencies. Then came the availability of government funding for litigation which suggested a shift in attitude towards the use of funding from outside parties for litigation. In 1967 the legislative abolished the criminal offences and torts of champerty and maintenance. However, agreements may still be unenforceable on the grounds of public policy. Then, contingency fee agreements in the form of Conditional Fee Agreements were expressly permitted by statute. These agreements would have historically been deemed champertous. Today, given the current climate and changing attitudes to litigation funding, third party funding agreements are being held not offend public policy. They are also being used in wider types of litigation such as family (despite CFAs being prohibited in family). ***Credit reference to any appropriate authority on defining champerty, maintenance and the use of third party funding, e.g:*** Seear v Lawson (1880), the Legal Aid and Advice Act 1949, section 13 of the Criminal Law Act 1967, section 14 of the Criminal Law Act 1967, section 58 of the Courts and Legal Services Act 1990, section 45 of the Legal Aid Sentencing and Punishment of Offenders Act 2012, JEB Recoveries LLP v Linstock [2015] and Akhmedova v Akhmedov & Ors [2020].	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.
Credit a discussion on non party costs orders (and the change in stance to such funding arrangements) e.g: ***Jurisdiction:*** The Court has jurisdiction to award the costs of litigation to a non-party. Although historically the Court has been cautious in granting such an order there has more recently been a shift in stance. The was thought to be a cap on the liability of third party funders but this is not a principle that Courts are bound by and third party funders may be liable to the full extent of costs. Funders may be liable to full extent from date started funding.	Up to 4 marks

Credit reference to any appropriate authority on the making of third party costs orders against a third party funder, e.g: Section 51(1) of the Senior Courts Act 1981, CPR 46.2, Merchant bridge & Co Ltd & Another v Safron General Partner Ltd [2011], Arkin v Borchard Lines Ltd & Ors [2005], Davey v Money and Others [2019] and Chapel Gate Credit Opportunity Master Fund Ltd v Money & Ors [2020] ***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. Some funding agreements may mean the funder has high levels of control over the proceedings. The distinction between types of arrangements and 'pure funders' will be considered by the Court. Ultimately, the third party funder may be liable for costs on indemnity basis. ***Credit reference to any appropriate authority on the level of control and type of orders that may be made against a third party funder, e.g:*** Excalibur Ventures LLC v Texas Keystone Inc & Ors (Rev 2) [2014] and Laser Trust v CFL Finance Ltd [2021].	
Credit a discussion on whether there should be better oversight, e.g: ***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. This may restrict access to justice. There has been a 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. ***Association of Litigation Funders:*** Third party funding in England and Wales is self-regulated by the Association of Litigation Funders (ALF). The ALF is a private company limited by guarantee, owned and directed by its member firms. A voluntary code of conduct for litigation funders was first published in November 2011. It was developed by a Ministry of Justice working group on third party funding, which was set up in response to a recommendation by leading judge Lord Justice Jackson in his comprehensive review of civil litigation costs. ALF members which fail to meet the requirements of the code may be subject to a fine and/or termination of their membership. ***2017 Government has no plans to regulate:*** The UK government had no plans to formally regulate third party providers of litigation funding, as there are no "specific concerns" about the current voluntary framework.	Up to 3 marks To achieve a distinction, candidates will provide some commentary on the regulation and better oversight.

<table>
<tr><td>Question 4:</td><td colspan="2">Explain what a Conditional Fee Agreement is and identify the legal provisions which set out the requirements for these agreements to be enforceable.</td></tr>
<tr><td colspan="2">Total Marks Attainable

Fail = 0-7.4
Pass = 7.5+
Merit = 9+
Distinction = 10.5+</td><td>10</td></tr>
<tr><td colspan="2">Indicative Content</td><td>Marks</td></tr>
<tr><td colspan="2">Candidates must explain what a conditional fee agreement is, e.g:

Conditional Fee Agreements: Introduced by the Courts and Legal Services Act 1990. They are contingency agreements or 'no win no fee agreements' for advocacy and litigation services. Providing they satisfy all of the conditions applicable to it by virtue of the legislation shall not be unenforceable by reason only of its being a conditional fee agreement but any other conditional fee agreement shall be unenforceable.

Credit reference to any applicable authority explaining what a CFA is, e.g: Section 58(1) of the Courts and Legal Services Act 1990 and section 58(2) of the Courts and Legal Services Act 1990.</td><td>Up to 2 mark

A pass must include the demonstration that the candidate understands what a CFA is.</td></tr>
<tr><td colspan="2">Credit a discussion on the form and operation of a conditional fee agreement, e.g:

Form of CFAs: Must comply with formalities, e.g they must be in writing. 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. CFAs cannot relate to prohibited proceedings, which includes family and criminal proceedings. CFAs must comply with regulations made by the Lord Chancellor and even a technical breach may render an agreement unenforceable.

Credit reference to any applicable authority explaining the form and content of a CFA, e.g: Section 58(3)(a) of the Courts and Legal Services Act 1990, Section 58(3)(b) of the Courts and Legal Services Act 1990, Section 58(3)(c) of the Courts and Legal Services Act 1990, Section 58A of the Courts and Legal Services Act 1990, section 58(4) of the Courts and Legal Services Act 1990 and Wood v Chaleff [2002].

Success Fees and ATE: When introduced success fees and ATE premiums were not recoverable between the parties. Subsequent legislation amended the Courts and Legal Services Act 1990 and allowed for the recoverability and the uptake of these funding arrangements increased. However, that position was reversed by legislation in 2013 and they are no longer recoverable. 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</td><td>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.</td></tr>
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matter that falls under the following exceptions 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. ***Credit reference to any applicable authority on success fees and ATE, e.g:*** section 27 of the Access to Justice Act 1999, section 29 of the Access to Justice Act 1999, section 44 of the Legal Aid, Sentencing & Punishment of Offenders Act 2012, section 46 of the Legal Aid, Sentencing & Punishment of Offenders Act 2012 and CPR 48.2(1)(a).	
Credit reference to any other circumstances that may impact the enforceability of a CFA, e.g: ***Retrospectivity:*** CFAs can be retrospective but not backdated. This principle also applies to success fees although where proceedings have been issued, a success fee will not be recoverable for the period until Notice of Funding has been given. The distinction between retrospectivity and an agreement being backdated is key, i.e it must contain a clause that details the agreement will have retrospective effect and should not just be dated with the date of entry but state that it relates to an earlier date. ***Credit reference to any applicable authority on retrospectivity, e.g:*** King v Telegraph Group Ltd [2005], Holmes v Alfred McAlpine Homes (Yorkshire) Ltd (2006), Forde v Birmingham City Council [2008] and JN Dairies Ltd v Johal Dairies Ltd & Anor [2011]. ***Assignment, novation and transferring:*** 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 change its name. There was a degree of uncertainty as to whether a CFA may be transferred. The latest authority sets out that it is possible to transfer a CFA. Even in cases where the judiciary may be divided on whether a novation or assignment has taken place it may still be possible for the first solicitor to be paid and additional liabilities to be recovered. This is because it has been held 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. 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. ***Credit reference to any applicable authority on assignment, novation and transferring, e.g:*** Jones v Spire Healthcare 2015, Budana v Leeds Teaching Hospitals [2016], Webb v Bromley [2016], Jones v Spire Healthcare [2016],	Up to 4 marks To achieve a distinction, candidates will provide some commentary on other issues concerning enforceability.

Budana v Leeds Teaching Hospitals NHS Trust [2017] and Roman v Axa Insurance [2019].	

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

Question 5:	You are instructed by Miss Theeba Ranjani, a Solicitor with a large SRA regulated firm. Miss Ranjani acted on behalf of the Defendant, Hailsham & Brownbridge University Hospitals NHS Trust in a clinical negligence claim brought by Jonathan Thomas. The claim arose in early 2015 from the treatment of a Cerebral Arteriovenous Malformation. The Defendant admitted liability and liability costs were settled. Quantum was settled on 4 June 2021 and the settlement was approved by the court on 7 August 2021. The Claimant commenced Detailed Assessment Proceedings in respect of quantum costs on 28 October 2021. The Bill of Costs comprises an old format paper bill for work undertaken until 6 April 2018 and a new format electronic bill covering costs thereafter. The Notice of Commencement of assessment of the bill of costs is dated 28 October 2021. You have been instructed to draft points of dispute and on review of the papers you have observed the following issues: 1. the bill is not properly certified because the signatory is not identifiable; 2. the paper bill fails to properly give the name and status for each fee earner and to identify the work done by each fee earner; and 3. the electronic bill does not provide the name and the grade of each fee earner. Miss Theeba Ranjani has asked that when you provide the points of dispute you also write a letter to her client providing advice on next steps in the Detailed Assessment Proceedings. Her experience is that her client has delayed in providing instructions so, she has asked that you include timescales within your advice and also highlight the potential consequences of not complying with those timescales.

	Prepare the body of a letter to the NHS Trust advising on the next steps in the Detailed Assessment Proceedings.

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, basis of assessment, 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.
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 that there are concerns with the certification and form of the bill of costs and candidates are likely to have explained the significance of these issues. 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.

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 CPR 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:*** CPR 44.6, CPR 47.1, CPR 47.6 (1), CPR 47.6 (2)	Up to 2 Marks

and CPR 47.7.	
Credit a discussion on an order for costs, e.g: ***Order:*** The court has discretion as to whether costs are payable by one party to another, the amount of those costs and when they are to be paid. If the court decides to make an order about costs then the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. However, the court may make a different order. ***Credit reference to the citation of any authority on making of an order for costs, e.g:*** CPR 44.2(1)(a), CPR 44.2(1)(b), CPR 44.2(1)(c), CPR 44.2(2)(a), CPR 44.2(2)(b), ***Basis of assessment:*** The CPR sets out the basis of assessment, standard or indemnity basis, but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount. 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 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. ***Credit reference to the citation of any authority on the basis of assessment, e.g:*** CPR 44.3(1), CPR 44.3(2) and CPR 44.3(3).	Up to 3 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	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

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 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. A bill of costs is not properly certified if the signatory's name is not identifiable. ***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], Bailey v IBC [1998] and Barking, Havering and Redbridge University Hospitals NHS Trust v AKC [2021].	
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].	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

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 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 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	Up to 5 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

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 SRA regulated firm, Faversham Law. Mr Faversham, the senior partner at the firm, is acting for Home Developers Ltd ("HD Ltd"), one of the UK's most successful housebuilders. Mr Faversham has asked you to advise the client on an application to vary a costs budget. Brown & Smith LLP ("B&S"), a legal practice, had acted for HD Ltd in relation to the development of some land in Diss, Norfolk. HD Ltd claim that B&S were professionally negligent in relation to the drafting of an Option Agreement and other advice relating to the development of that land. Additionally, B&S have issued a claim for unpaid fees against HD Ltd. The two claims will be heard together and are now being case managed together with combined costs budgets. HD Ltd value their claim in the region of £5m and B&S' fee claim is for a sum in excess of £200K.

	The parties were unable to agree the approach to disclosure. The claim came before Deputy Master Chucker on 15 August 2020 for a Costs and Case Management Conference. He gave case management directions, which included directions in respect of disclosure and cost budgeting. Your client's costs budget of £1.115m was approved, of which just over £800,000 was in respect of future costs. The CCMC Order was sealed on 23 September 2020. The trial was fixed for July 2021 with a time estimate of 6 days. The timetable has slipped. Disclosure has proved challenging, particularly for your client. On 30 March 2021, by consent, the date for disclosure was extended to 19 May 2021. It also became apparent that a trial date in July 2021 was not realistic and the trial was relisted in May 2022 with the same 6 day time estimate. There are still three outstanding disclosure issues remaining and it is now apparent that your client's costs budget may need amending. HD Ltd's costs budget, as agreed by the Deputy Master, was based on different disclosure assumptions to B&S' budget. Mr Faversham believes the budget will need to be increased to £1.5m because the case has turned out to be more complex than previously anticipated. Provide the body of a letter of advice setting out the steps that should be taken in the matter, particularly whether an application should be made to amend the budget and how any such application should be made.
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, what amounts to a significant development and the impact of a CMO on assessment. 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 whether there has been a significant development. There is also likely to be some discussion on significant developments not being just one change and that some developments will not be regarding as significant if they should

		have been foreseen at the point the budget was agreed/approved and the CMO was made. 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. may include a discussion on the fact there is no real authority on the difference or relationship between the two but that one is prospective and one retorspective). 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: ***Costs Management Order:*** 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. Once a CMO has been made, the court can control the recoverable costs. The court can record on the face of the order any comments on the incurred costs to be taken into account at detailed assessment. 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. ***Credit reference to any authority cited on CMOs, e.g:*** CPR 3.15(2), CPR 3.15(3), CPR 3.15(4), CPR 3.15(8). ***Estimated Costs and Incurred Costs at CMC:*** 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. When making a CMO it will be an error 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. Incurred costs will be subject to DA and the estimated costs will be subject to the test of proportionality. ***Credit reference to any authority cited on estimated costs and incurred costs, e.g:*** Redfern v Corby Borough Council [2014], CIP Properties Ltd v Galliford Try Infrastructure Ltd [2015], Yirenki v Ministry of Defence [2018] and Harrison v University Hospitals Coventry and Warwickshire NHS Trust [2017].	Up to 4 marks To pass candidates MUST include an explanation of what a CMO is and the impact where costs are assessed

Credit any explanation as to how to make an application to amend a budget, e.g: ***Applications to amend:*** Revising party must revise its budgeted costs upwards or downwards if significant developments in the litigation warrant such revisions. Revising party must revise its budgeted costs upwards or downwards if significant developments in the litigation warrant such revisions. Any budgets revised must be submitted promptly by the revising party to the other parties for agreement, and subsequently to the court. 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. 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. When making an application to amend incurred costs should not be amended on the last approved budget. ***Credit reference to how to make an application to amend, e.g:*** CPR 3.15A(1), CPR 3.15A(1), CPR 3.15A(2), CPR 3.15A(3), CPR 3.15A(4) and Sharp v Blank [2017]. ***Mistake and timing:*** The court takes a dim view of amending a budget due to a mistake once it is approved. An application to amend after judgment has been held to be a contradiction in terms. Parties should be prompt in making an application. 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. 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. ***Credit reference to any authority cited on mistake and timing, e.g:*** Murray & Anor v Neil Dowlman Architecture Ltd [2013], Elvanite Full Circle Ltd. v Amec Earth & Environmental (UK) Ltd. [2013], Persimmon Homes Ltd & Anor v Osborne Clark LLP [2021] and Simpson v MGN Ltd [2015]. ***Courts powers:*** 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. 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. ***Credit reference to authority cited on the courts powers, e.g:*** CPR 3.15A(5) and CPR 3.15A(6).	Up to 7 marks

Credit a discussion on what is meant by significant development, e.g: ***Meaning:*** There is no clear definition of what is meant by a significant development. A change in the value of the claim or a longer trial length has been held not to amount to a significant development in the case. Conduct may be a significant consideration for the court in arriving at their decision. '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. Not every development in litigation will amount to a significant development. ***Credit reference to authority on what is meant by a significant development, e.g:*** Churchill v Boot [2016], Thompson v NSL Ltd [2021] and Persimmon Homes Ltd & Anor v Osborne Clark LLP [2021] ***Disclosure:*** Claimants have been entitled to revise their trial budget because there had been a significant development in the litigation where 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. Disclosure that involved five times more documents than anticipated and expressly assumed in a claimant's budget has been held to be a significant development justifying its costs budget being updated. ***Credit reference to authority on disclosure amounting a significant development, e.g:*** Al-Najar v the Cumberland Hotel (London) Ltd [2018] and BDW Trading Ltd v Lantoom Ltd [2020]. ***Interim applications:*** Interim applications may be significant developments. 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. It should be noted that whilst the application itself may sit outside of the budgeted costs the consequential costs as a result of the application may mean the budget needs revising. ***Credit reference to interim applications, e.g:*** Sharp v Blank [2017] and CPR 3.17(4).	Up to 7 marks To achieve more than a pass candidates should demonstrate real awareness that persuading the court there has been a change in circumstance to justify amending the budget may be difficult
Credit discussion on assessment and good reason to depart, e.g: ***Assessment:*** 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. Where there is a CMO in place and costs are assessed on the standard basis 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. 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	Up to 4 marks To achieve more than a pass candidates should demonstrate real awareness that persuading the court to depart from a

another detailed assessment of estimated costs to be performed without 'good reason'. 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. ***Credit reference to any authority cited on the assessment of costs where there is a budget, e.g:*** CPR PD 44, 3.2, CPR 3.18, Harrison v University Hospitals Coventry and Warwickshire NHS Trust [2017] and Vertannes v United Lincolnshire Hospitals NHS Trust [2018]. ***Hourly rates:*** At one stage it was thought that, hourly rates were 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. However the present position is that a reduction in hourly rates for incurred costs does not appear to mean it follows that there should be a reduction on budgeted costs. ***Credit reference to any authority cited on hourly rates, e.g:*** Merrix v Heart of England NHS Trust [2017], RNB v London Borough of Newham [2017], Bains v Royal Wolverhampton NHS Trust [2017], Nash v Ministry of Defence [2018] and Jallow v Ministry of Defence [2018]. ***The indemnity principle:*** 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. ***Credit reference to any authority cited on the indemnity principle, e.g:*** Merrix v Heart of England NHS Trust [2017] and Barts Health NHS Trust v Hilrie Rose Salmon [2019]. ***Underspend:*** 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. ***Credit reference to any authority cited on underspend, e.g:*** Chapman v Norfolk and Norwich University Hospitals NHS Foundation Trust [2020] and Utting v City College Norwich [2020].	CMO will be difficult and case dependant depending on the evidence

Question 7:	You are a Costs Lawyer working in-house for a firm of solicitors in Birmingham. Miss Turner, a solicitor at the firm, has received instructions from Mrs Tabitha Hargreaves in respect of her daughter Eloise. Eloise was born on 2 November 2009. She joined her primary school, Little Hampton Primary, in 2014. In 2017 the school placed her on its Special Needs Register. In July 2020, Mrs Hargreaves asked the Local

	Authority to make an assessment of Eloise's special educational needs. The Authority refused. Miss Turner is advising Mrs Hargreaves on her right of appeal to the First-tier Tribunal (Special Educational Needs and Disability). She has advised that the issue the Tribunal will have to decide is whether the Local Authority should arrange for an assessment to be made and that there are two requirements that must be met when the Local Authority or tribunal makes its decision. The requirements are that Eloise must have a learning difficulty and, secondly, that her learning difficulty must call for special educational provision. Miss Turner has also advised Mrs Hargreaves that the applicable procedural rules are the Health, Education and Social Care Chamber tribunal rules. However, Miss Turner wishes to provide some further advice to her client on the risk of an Adverse Costs Order being made in the case. It is upon this point that she has approached you for your input. Prepare the body of an email to Miss Turner setting out the rules in the lower tier tribunals in respect of costs and specifically when a Costs Order may be made.
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: This matter is a matter before a first tier tribunal Health, Education and Social Care Chamber, it is not one of the first tier tribunals that cannot make orders for costs, the framework of provisions in the Tribunals, Courts and Enforcement Act 2007 and the relevant rules specific to this tribunal - Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008. Candidates are also likely to have explored wasted costs orders. Candidates will demonstrate a good depth of knowledge of the subject with good application and some analysis having regard to the facts, although candidates 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 law on wasted costs in tribunals) with very good application and some analysis having regard to the facts. Candidates are likely to observe that, in this scenario, that, whilst the tribunal does have jurisdiction to make orders for costs, that they will only be made where conduct leads to the making of such an order. 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 when a costs order may be made 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.

Fail = 0-9.9 Pass = 10+ Merit = 12+ Distinction = 14+	
Indicative Content:	**Marks**
Required: Candidate should refer to legislative framework to describe the jurisdiction, e.g: ***Legislative framework:*** Tribunals governed by TCEA 2007, but each chamber is also governed by its own set of Procedure Rules. Costs shall be in the discretion of the tribunal and tribunals have full power to determine by whom and to what extent costs are to be paid. Costs orders can be made against a representative. The legislation defines wasted costs as any costs incurred by a party as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay. ***Credit reference to any authority cited on the legislative framework, e.g:*** Tribunals, Courts and Enforcement Act 2007, Section 29 (1) of the Tribunals, Courts and Enforcement Act 2007, Section 29 (2) of the Tribunals, Courts and Enforcement Act 2007, Section 29 (3) of the Tribunals, Courts and Enforcement Act 2007, Section 29(4) of the Tribunals Courts and Enforcement Act 2007, and Section 29(5) of the Tribunals Courts and Enforcement Act 2007. ***The First-tier Tribunal:*** Hears appeals from citizens against decisions made by Government departments or agencies although proceedings in the Property Chamber are on a party v party basis as are proceedings in the Employment Tribunal. There are seven chambers of the first tier tribunal. Social Entitlement Chamber; Health, Education and Social Care Chamber; Tax Chamber; General Regulatory Chamber; Immigration and Asylum Chamber; War Pensions and Armed Forces Compensation Chamber; and Property Chamber. ***The Upper Tribunal:*** Primarily, but not exclusively, reviews and decides appeals arising from the First–tier Tribunal. Like the High Court, it is a superior court of record as well having the existing specialist judges of the senior tribunals judiciary at its disposal it can also call on the services of High Court judges. ***Credit reference to any authority cited on the relevant rules, e.g:*** Tribunal Procedure (First Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008; Tribunal Procedure (First Tier Tribunal) (War Pensions and Armed Forces Compensation Chamber) Rules 2008; Tribunal Procedure (First Tier Tribunal) (Social Entitlement Chamber) Rules 2008.	Up to 6 marks

Candidate should refer to any of the specific tribunal rules and how that effects its jurisdiction to make costs orders, e.g: ***No Power to Award:*** The First Tier Tribunal Social Entitlement Chamber has no power to award costs. The First Tier Tribunal Social Entitlement Chamber has no power to award costs. Other first tier tribunals may make orders in respect of wasted costs and unreasonable conduct. ***Credit reference to any authority cited on the relevant rules, e.g:*** Rule 10 of the Tribunal Procedure (First Tier Tribunal) (Social Entitlement Chamber) Rules 2008 and Rule 10 of the Tribunal Procedure (First Tier Tribunal) (War Pensions and Armed Forces Compensation Chamber) Rules 2008. ***Jurisdiction of the first tier Health, Education and Social Care Chamber:*** The first tier Health, Education and Social Care Chamber may make orders for wasted costs or if the tribunal considers that a party has acted unreasonably in bringing, defending or conducting proceedings. The Tribunal may not make an order where a party has acted unreasonably in bringing, defending or conducting proceedings in mental health cases. The Tribunal may make an order in respect of costs on an application or on its own initiative. ***Credit reference to any authority cited on the relevant rules, e.g:*** Section 29(4) TCEA 2007, Rule 10(1) of the Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008, Rule 10(2) of the Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008.	Up to 4 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
Candidate may refer to the procedure for making a costs order in the Health, Education and Social Care Chamber, e.g: ***Applications:*** A person making an application for an order under this rule must send or deliver a written application to the Tribunal and to the person against whom it is proposed that the order be made and send or deliver a schedule of the costs claimed with the application. An application for an order may be made at any time during the proceedings but may not be made later than 14 days after the date on which the Tribunal sends the decision notice recording the decision which finally disposes of all issues in the proceedings. The Tribunal may not make an order against a person without first giving that person an opportunity to make representations and if the paying person is an individual, considering that person's financial means. ***Credit reference to any authority cited on making an application, e.g:*** Rule 10(4) of the Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008, Rule 10(5) of the Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 and Rule 10(6) of the Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008.	Up to 5 marks

Assessment: The amount of costs to be paid under an order may be ascertained by summary assessment by the Tribunal, agreement of a specified sum by the paying person and the person entitled to receive the costs ("the receiving person"); or assessment of the whole or a specified part of the costs incurred by the receiving person, if not agreed. Following an order for assessment under paragraph the paying person or the receiving person may apply to a county court for a detailed assessment of costs in accordance with the CPR 1998 on the standard basis or, if specified in the order, on the indemnity basis. ***Credit reference to any authority cited on the assessment of the costs, e.g:*** Rule 10(7) of the Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 and Rule 10(8) of the Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008.	
Candidate should refer to any specific authority on wasted costs orders, e.g: ***Principles on wasted costs orders:*** Wasted costs orders are discretionary. A mere mistake is not sufficient for a wasted costs order, there must be unreasonable, improper or negligent conduct. Wasted costs orders should not be used as a threat. The respondent must be alerted to the possibility of a wasted costs order, must be apprised of the case against him and must be given adequate time and opportunity to respond. A wasted costs order can never be made where the causal link between conduct and costs incurred does not exist. The Tribunal should exercise its power to make a wasted costs order of its own motion with restraint. Indemnity costs orders are no longer limited to cases where the court wishes to express disapproval of the way in which litigation has been conducted. Can be made even when the conduct could not properly be regarded as deserving of moral condemnation. The court must consider each case on its own facts. Conduct must be unreasonable to a high degree. 'Unreasonable' in this context does not mean merely wrong or misguided in hindsight. Whilst the pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, the pursuit of a hopeless claim (or a claim which the party pursuing it should have realised was hopeless) may well lead to an indemnity basis order. ***Credit reference to any authority cited on the principles behind making a wasted costs order, e.g:*** Harley v McDonald [2001], Ridehalgh v Horsefield [1994], Orchard v SE Electricity Board [1987], Cancino [2015], Awuah and Others [2017], Noorani v Calver [2009], Kiam v MGN Limited No2 [2002] and Wates Construction Limited v HGP Greentree Alchurch Evans Limited [2006].	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

Question 8:	You work in the Costs Department for an SRA regulated firm in Worcester, Tupper and Hart LLP. Mr Tupper, a partner at the firm, has recently been instructed by Mr Dorridge. Mr Dorridge resides at 124

	Alcester Road, Worcester WR7 4LR. Mr Tupper has approached you to write a letter to Mr Dorridge. On 29 September 2021, Mr Dorridge received a telephone call from his wife. She told him that she heard banging and looked out of the kitchen window to discover building works were being carried out next door at number 122 Alcester Road, a neighbouring property owned by Mr Tremor. Later that day, Mr Dorridge spoke with Mr Tupper. A site meeting was arranged for the following day and during the meeting it became apparent that substantial excavation works had been undertaken in the dining room of the property. The parties discussed the nature of the foundation of the shared wall between the properties. The foundation of that wall was sitting a common floor slab to both properties. A week later, on 6 October 2021, Mr Dorridge received a letter from the company providing architectural services to Mr Tremor. That letter explained that the work being undertaken would involve excavation within three metres of 124 Alcester Road. Mr Dorridge immediately made an application, without notice, for an Interim Injunction. An Order was made in Mr Dorridge's favour, and it was directed that a return date be listed for fourteen days after that hearing. The Order made on the return dates provided that the Injunction was to continue in force until 5 o'clock on 10 November 2021 and that any application by the Defendants to vary or discharge the Injunction was to be made by application notice to be served and filed by 4pm on 29 October 2021. The matter was to be listed for further consideration on 10 November 2021 at 10.30am and the costs of the hearing were reserved until 10 November 2021. Mr Tupper has discussed the matter with Mr Dorridge, who is of the view an Order should be made that the Defendant pay his costs upon the indemnity basis. Write the body of a letter to Mr Dorridge detailing how the costs of any injunction proceedings would ordinarily be dealt with and in what circumstances the Court may be persuaded to make an Order upon the indemnity basis.
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 the normal rule in costs and the three situations that need to be considered when offering advice on costs in relation to injunctions. The primary focus of the question may have been missed with candidates simply providing a general framework, although there will be evidence that the candidate has the knowledge that is fit for purpose. 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+	This band will deal with ALL the requirements and the focus of the response will be injunctions granted on the balance of convenience. 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 demonstrates an excellent depth of knowledge. Excellent application of the law to the arguments made and critical analysis of the same. All views expressed by candidates 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.

Indicative Content	**Marks**
Required (consideration as to the court's jurisdiction, e.g): ***Jurisdiction in relation to making injunctions:*** The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so. Guidelines to establish whether an applicant's case merited the granting of an interlocutory injunction are: whether there is a serious question to be tried, what would be the balance of convenience of each party should the order be granted (in other words, where does that balance lie?) and whether there are any special factors. ***Credit reference to any authority cited on the principles behind granting an injunction, e.g:*** Section 37(1) of the Senior Courts Act 1981 and American Cyanamid Co v Ethicom Ltd [1975] ***Jurisdiction in relation to costs:*** The court shall have full power to determine by whom and to what extent the costs are to be paid. The 'normal' rule that 'costs follow the event' applies therefore a claimant granted an interim injunction may understandably expect the court to order the defendant to pay the costs of the application. The court may however make any other order. Orders the court may/can make include reserving the costs of the application. ***Credit reference to any authority cited on the principles behind making a costs order in injunction proceedings, e.g:*** Section 51(3) of the Senior Courts	Up to 6 marks

Act 1981, CPR 44.2(1), CPR 44.2(2)(a), CPR 44.2(2)(b), CPR 44.2(6) and CPR PD 44, 4.2.	
Credit a discussion on how costs or interim applications will usually be dealt with e.g: ***Summary Assessment:*** Where the court orders costs at the end of an interim injunction hearing which has lasted one day or less, it can summarily assess the costs of the application at the end of that hearing. It is the duty of the parties and their legal representatives to assist the judge in making a summary assessment of costs. Each party who intends to claim costs must prepare and file either a statement of costs (N260) or a schedule: not less than 2 days for fast track trial or not less than 24 hours before other hearings. Disproportionate and unreasonable costs will be disallowed. ***Credit reference to any authority cited on summary assessment in injunction proceedings, e.g:*** CPR PD 44, 9.2, CPR PD 44, 9.5, N260A, CPR PD 44, 9.10 and CPR 44.3(1)–CPR 44.3(3) ***Impact of an Order:*** A final order might award a party costs which, upon fuller consideration at trial, he would not have been given. A failure to make a final order might have the practical effect of depriving a party of some or all of the costs, which in fairness he ought to have recovered. The possibility that there might be no further trial should be kept in mind. It might be unfair to order payment by a party whom might, as a result of trial, become entitled to set off an award for costs in his favour, such as where an order for immediate payment might hamper the party's conduct of the action or destroy his business or because the opposing party might not have the means to repay if there should be a subsequent order against it. ***Credit reference to any authority cited on the impact of an order, e.g:*** Kickers International SA v Paul Kettle Agencies Ltd [1990], Picnic at Ascot v Derigs (unreported) [2001] and Hospital Metalcraft Ltd v Optimus British Hospital Metalcraft Ltd [2015]. ***Three situations that should be considered:*** Interim injunction application granted on (or agreed by consent on the basis of) the balance of convenience. A defendant that successfully resists an injunction application. An injunction on a quia timet basis.	Up to 8 marks To achieve more than a pass the candidate must not simply cite the law but demonstrate an understanding of how the rules operate
Credit discussion on Interim injunction applications granted on (or agreed by consent on the basis of) the balance of convenience, e.g: ***Balance of Convenience:*** When granting an injunction on the balance of convenience the court will weight up the inconvenience/loss to each party. The Court of Appeal has held that the costs of an interim injunction application granted on (or agreed by consent on the basis of) the balance of convenience should usually be reserved until trial of the substantive issue because, in such a situation, there is no successful or unsuccessful party at that stage for the purposes of CPR 44.2(2). However it will depend on whether the application can be classed as free standing – in which case the	Up to 3 marks

usual rule should apply unless there is another reason for the court to depart from that rule. Additionally, where the balance of convenience was significantly against the claimant it may be possible to deal with costs at the time of the application. ***Credit reference to any authority cited on the courts approach in balance of convenience cases, e.g:*** Desquenne et Giral UK Ltd v Richardson [1999], Interflora v Marks & Spencer PLC [2014] and Koza Ltd v Koza Altin Isletmeleri AS [2020].	
Credit should be given to a discussion on when a defendant successfully resists an injunction application e.g: ***A defendant that has successfully resisted an injunction:*** May expect the court to order that his costs of the application be paid by the claimant. For costs not to follow the event, the applicant would need to justify coming to court and it can do that by showing that there was a 'sufficiently strong probability that an injunction would be required to prevent the harm to the claimant to justify bringing the proceedings'. Were an interim injunction is not granted because damages would be a sufficient remedy then costs should be decided at the time and should not be reserved. ***Credit reference to any authority cited on the courts approach where a defendant successfully resists an injunction application, e.g:*** Merck Sharp Dohme Corp v Teva Pharma BV [2013] and Neurim Pharmaceuticals (1991) Ltd and another v Generics UK Ltd and another [2020].	Up to 3 marks
Credit should be given to a discussion on an injunction on a *quia timet* basis, e.g: ***Quia timet ("because he fears"):*** Is an injunction to restrain wrongful acts which are threatened or imminent but have not yet commenced. The position needs to be considered in light of the fact that by the time of trial it may be clear that there was no threat by the respondent to violate the applicant's legal right, but the applicant says there was a threat when it started proceedings.	Up to 2 marks

Question 9:	You work as a Costs Lawyer for Brown and Taylor Solicitors, who are based in the West Midlands. One of the solicitors at the firm, Mr Avery, has contacted you about a query he has in relation to a contentious probate matter. Mr Avery's client, Brian Simpson, is the executer and a beneficiary of Miss Hillary Minter's Will. Miss Hillary Minter was Mr Simpson's neighbour. Miss Minter had a Will which left her entire estate to be divided equally between her two nephews, Tom and Joey. However, she decided she wanted to change her Will and requested Mr Simpson help her arrange it. So, Mr Simpson made the appointment for her and also drove her to the solicitor's office for the appointment. The new Will was not executed at the solicitor's office but was executed elsewhere. The new Will left her house, the main asset in the estate, in its entirety to Mr Simpson. Miss Minter died on the 19 April 2021. Her nephews are challenging the validity of the Will. Tom thinks that Mr Simpson pressurised and coerced Miss Minter. He believes Mr Simpson's officious manner and his aunt's vulnerability meant that the later Will is not valid. Joey's position is slightly different, he has not advanced a positive claim that the Will is invalid, but wants the Will to be proved in solemn form. As part of the advice to Mr Simpson, Mr Avery would like to include some information on the way costs may be dealt with in contentious probate matters. Mr Avery has therefore approached you for your help. Write the body of a memo to Mr Avery setting out the rules on costs in contentious probate matters, with specific consideration of the general rule under the CPR.
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 general rule and its applicability in contentious probate matters, the three exceptions to the general rule in contentious probate and the propositions in Kostic. Credit will be given to any reasonably written answer and any reasonable conclusion. 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 are likely to have recognised that in this scenario there is a personal representative who may obtain costs from the estate unless paid by another party, the case involves the exception within the CPR where no positive case has been advanced and the final party may have been the cause of the litigation which may trigger an exception in spiers. 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 (discussion of the application of the CPR in contentious probate cases) e.g : ***The general rule:*** The general rule that costs follow the event applies to costs in non-contentious probate, contentious probate and Inheritance (Provision for Family and Dependents) Act 1975 claims. Following this rule, the costs of contentious probate proceedings should be paid by one or more of the parties rather than by the estate. The court does retain the power to 'make a different order' in contentious probate matters. The relevant factors the court should consider when making an order for costs includes conduct. The CPR sets out what conduct means and this includes any relevant pre-action protocol. Whilst not a pre-action protocol, the Association of Contentious Trust and Probate Specialists' (ACTAPS) Code is explicitly referred to within this part of the CPR. ***Credit reference to any authority cited on the general rule in contentious probate claims, e.g:*** CPR 44.2(2)(a), CPR 44.2(2)(b), CPR 44.2(4), CPR 44.2(5) and CPR 44.2(5)(a). ***Applicability of other parts of the CPR:*** The rules on discontinuance do not apply in contentious probate matters. CPR 36 applies in contentious probate matters. Offers must be valid Part 36 offers, i.e consistent with the wording of Part 36 in order that the more advantageous consequences of Part 36 apply. ***Credit reference to any authority cited on the applicability of other parts of the CPR, e.g:*** CPR 57.11(1), CPR 38, CPR 36 and James v James and Ors [2018]	Up to 4 marks
Required (discussion of the three exceptions to the 'normal' rule that 'costs follow the event) e.g: ***There are three exceptions to the general rule:*** There are three exceptions to the general rule that costs follow the event, the first of three exceptions is found within the CPR and this states that when costs should not follow the event in probate. This is the procedure for requiring a will to be proved without advancing a positive case. The normal rules as to costs contained in the CPR should also be followed in probate actions save only that the judge should also take account of the guidance in the Spiers case, where an alternative costs order might be made. The second and third exceptions are therefore found in the common law. These provide that where a testator had been the cause of the litigation, costs should come out of the estate and where the circumstances led reasonably to an investigation of the matter, costs should be borne by both sides.	Up to 4 marks

Credit reference to any authority cited on the exceptions, e.g: CPR 57.7(5), Re Good, deceased; Carapeto v Good and Others [2002] and Spiers v English [1907].	
Credit any relevant point in relation to a discussion of the exception in CPR 57.7.5 e.g: ***The exception in CPR 57.7.5:*** A defendant may give notice in his defence that he does not raise any positive case but insists on the will being proved in solemn form and will cross-examine the witnesses who attested the will. If a defendant gives such a notice, the court will not make an order for costs against him unless it considers that there was no reasonable ground for opposing the will. Where a positive case is advanced the defendant may not be afforded costs protection and an order may be made against them where they are either unsuccessful or discontinue their claim. ***Credit reference to any authority cited on the exception in CPR 57.7.5, e.g:*** CPR 57.7(5)(a), CPR 57.7(5)(b) and Wharton v Bancroft [2012].	Up to 2 marks
Credit any relevant point in relation to a discussion of the first exception in Spiers v English e.g: ***Exception 1:*** Where the testator himself has, or the residuary beneficiaries have, been the cause of the litigation in these cases costs should come out of the estate. The basis of all rules on this subject should rest upon the degree of blame to be imputed to the respective parties. Here, blame is being used in a causal rather than a moral sense. It may be possible for the testator's incapacity to trigger the exception just as readily as his failure to make a clear will. This exception does not apply to a testator who gives beneficiaries a false impression of what is going to be in his will. One unfortunate consequence of the first exception laid down in *Spiers v English* is in many circumstances to require a beneficiary who succeeds in proving the will to pay the costs of the losing challengers: where, for example, there is no residue. ***Credit reference to any authority cited on the first exception in Spiers v English, e.g:*** Mitchell v Gard (1863), Kostic v Sir Malcolm Chaplin and Mr Martin Saunders (chairman and secretary of the Conservative Party Association) & HM Attorney-General [2007], Re Cutcliffe's Estate [1959] and Wharton v Bancroft [2012].	Up to 4 marks

Credit any relevant point in relation to a discussion of the second exception in Spiers v English e.g: ***Exception 2:*** Where neither the testator nor the residuary beneficiaries are to blame for the litigation, but circumstances lead reasonably to an investigation of the matter: parties should bear their own costs**.** If, having taken all proper steps to inform themselves as to the facts of the case, the challengers nevertheless *bona fide* believe in the existence of a state of things which, if it did exist, would justify litigation, then, although no blame should attach to the testator or to the executors and persons interested in the residue, each party must bear his own costs. ***Credit reference to any authority cited on the second exception in Spiers v English, e.g:*** Mitchell Davies v Gregory (1873)	Up to 4 marks
Credit a discussion of the 4 propositions in *Kostic* e.g: ***Kostic:*** Mr Justice Henderson held that the two recognised exceptions from *Spiers* were guidelines not straitjackets. He went on and held that a number of propositions as to the meaning of the exceptions could be derived from authorities decided before *Spiers*. ***Proposition 1:*** In order for the first exception to apply, the touchstone was whether it was the testator's own conduct or the conduct of those interested in the residue that caused the litigation which had led to his Will being surrounded with confusion or uncertainty in law or fact. If it was the testator's own conduct it should not matter whether the problem related to the state in which the deceased left his testamentary papers, for example, where a will could not be found, or to the capacity of the deceased to make a will. ***Proposition 2:*** Moral blameworthiness was not the criterion for the application of the first exception. ***Proposition 3:*** There was no correlation between eccentricity and testamentary incapacity. ***Proposition 4:*** The second exception applied, and each party would bear their own costs, where neither the testator nor the persons interested in the residue had been to blame, but where the opponents of the will had been led reasonably to the bona fide belief that there were good grounds for impeaching the Will. The trend of more recent authorities was to encourage a very careful scrutiny of any case in which the first exception was said to apply and to narrow, rather than extend, the circumstances in which it would be held to be engaged. Further, each side should bear its own costs in an intermediate period of the proceedings up to the date on which expert reports were exchanged; whereafter costs should follow the event.	Up to 2 marks

Credit reference to any authority cited on the second exception in Kostic, e.g: Kostic v Sir Malcolm Chaplin and Mr Martin Saunders (chairman and secretary of the Conservative Party Association) & HM Attorney-General [2007], Mitchell v Gard [1863], Davies v Gregory [1873], Boughton v Knight [1873].	
Any other relevant point to describe costs in contentious probate (credit any case law/points of law correctly cited and applied) e.g: ***Personal representatives:*** Where a personal representative has incurred costs on behalf of the estate and no other party has been ordered to pay them then they are entitled to recover them from the Estate on the indemnity basis. Personal representatives may have a prima facie right to recover costs from the estate but this may be deprived of them by Order of the Court. ***Credit reference to any authority cited on the costs of personal representatives, e.g:*** CPR 46.3, CPR 46.3(2), CPR 46.3(3) and Re Coles Estate [1962]. ***Unsuccessful challenge*****:** There have been cases where an unsuccessful challenge to the Will meant costs followed the event. However, the court have considered whether executors should have their costs out of the estate unless they had acted unreasonably. The court has been reluctant to do anything to create the idea that unsuccessful litigants might get their costs out of the estate. ***Credit reference to any authority cited unsuccessful challenges, e.g:*** McCabe v MaCabe [2015] and Re Plant deceased [1926]. ***Conduct:*** Conduct in its broadest sense is a factor in some of the principles behind costs awards in probate claims. On a "half-win" basis the court may decide that the proper starting position is that the parties should each pay half of the others' costs however other factors may lead the court to depart from this approach. ***Credit reference to any authority cited on conduct, e.g*** Burgess v Penny [2019]	Up to 2 marks