June 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:	Identify and discuss the formalities that must be complied with when an individual or organisation engages with a solicitor to provide legal services.
Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	**Marks**
Required: Candidates should identify the formalities that must be complied with when a solicitor provides legal services, e.g: ***The formalities:*** The relationship between a solicitor and their client is subject to general contract law, as well as various regulatory requirements. Solicitors should ensure at the outset that the scope and limits of the retainer are clear. This will help parties to the agreement understand what services are being requested and delivered, and the limitations of what has been agreed. ***SRA Standards and Regulations:*** Contain a number of codes and rules with provisions relevant to your relationship with the client.	Up to 3 marks A pass must refer to the formalities that must be complied with in order to have a retainer
Candidates should be credited for a discussion on the formalities in relation to retainers, e.g: ***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. The law implies that the contract of the solicitor upon a retainer in the action is an entire contract to conduct the action till the end. With entire contracts 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. ***Form of retainer:*** A contract requires agreement, the intention to create legal relations, and consideration. Can be in writing, made orally, or implied by conduct Can be in writing, made orally, or implied by conduct. For a valid contract or retainer the courts will look objectively to see if there is an agreement. ***Credit the use of any authority cited in relation to the form and content of a retainer e.g:*** J H Milner & Son v Percy Bilton Ltd [1966], Underwood, Son v Piper Lewis [1894], Adams v London Improved	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

Motor Coach Builders [1921], Groom v Crocker [1939], Abedi v Penningtons (a firm) [2000] and Parrott v Etchells [1839]. ***Specific Formalities:*** Some agreements must follow specific formalities, such as a CFA which must satisfy all of the conditions applicable to it to be enforceable. A CFA needs to be in writing, it must not relate to proceedings which cannot be the subject of an enforceable conditional fee agreement. It must comply with such requirements (if any) as may be prescribed by the Lord Chancellor. The wording of such an agreement is also important. ***Credit the use of any authority cited in relation to specific formalities of a retainer, e.g:*** Section 58(3) 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 58(4) of the Courts and Legal Services Act 1990, Hailey v Assurance Mutuelle Des Motards (unreported) March 2015 and Woods v Chaleff [2002]. ***Termination:*** For a solicitor to terminate a retainer there must be good cause and reasonable notice must be provided. Good cause may include the client's failure to make a payment on account of costs although this will only amount to good cause if the amount sought is reasonable. 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. Conflict of interest/Professional embarrassment may also amount to good cause, where there is suspected duress or undue influence and a Solicitor is not confident the client is giving instructions freely they can cease to act. 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. Reasonable notice will be case sensitive. Where reasonable notice has not been given there will be no entitlement to payment. ***Credit the use of any authority cited in relation to the right to terminate a retainer e.g:*** Section 65 (1)&(2) of the Solicitors Act 1974, Re Romer & Haslam [1893] 2 QB 286, Re Jones [1896], Wild v Simpson [1919] 2 KB 544, Warmingtons v McMurray [1936], Wong v Vizards (a firm) [1997], Hilton v Barker Booth & Eastwood [2005], Richard Buxton (Solicitors) v Huw Llewelyn Paul Mills-Owens & Law Society (intervener) (Second Appeal)[2010] and Gill v Heer Manak Solicitors [2018].	
Candidates should be credited for any discussion on the SRA standards and regulations, e.g: ***SRA Code of Conduct for Solicitors, RELs and RFLs:*** Solicitors should only act for clients on instructions from the client, or from someone properly authorised to provide instructions on their behalf. The	Up to 6 marks To achieve more than a pass, candidates must not simply cite

service provided should be competent and delivered in a timely manner. Solicitors should not act where there is a conflict of interest and must keep client's information confidential. Solicitors should also have a complaints procedure and notify client's as to how they may complain and how the complaint will be managed. Solicitors should ensure that clients receive the best possible information about how their matter will be priced and, both at the time of engagement and when appropriate as their matter progresses, about the likely overall cost and any additional costs that may be incurred. ***Credit the use of any authority cited in relation to the SRA Code of Conduct for Solicitors, RELs and RFLs, e.g:*** Rule 3.1 of the SRA Code of Conduct for Solicitors, RELs and RFLs, Rule 3.2 of the SRA Code of Conduct for Solicitors, RELs and RFLs, Rule 6.1 and 6.2 of the SRA Code of Conduct for Solicitors, RELs and RFLs, Rule 6.3 of the SRA Code of Conduct for Solicitors, RELs and RFLs, Rule 8 of the SRA Code of Conduct for Solicitors, RELs and RFLs and Rule 8.7 of the SRA Code of Conduct for Solicitors, RELs and RFLs. ***SRA Code of Conduct for Firms:*** Firms must have effective governance structures, arrangements, systems and controls in place to ensure that the firm and its managers and employees comply with all the SRA's regulatory arrangements, as well as with other regulatory and legislative requirements. Firms must keep and maintain records to demonstrate compliance with your obligations under the SRA's regulatory arrangements. Firms should only act for clients on instructions from the client, or from someone properly authorised to provide instructions on their behalf. The service provided should be competent and delivered in a timely manner. Firms should not act where there is a conflict of interest and must keep client's information confidential. ***Credit the use of any authority cited in relation to the SRA Code of Conduct for Firms, e.g:*** Rule 2.1 of the SRA Code of Conduct for Firms, Rule 2.2 of the SRA Code of Conduct for Firms, Rule 4.1 of the SRA Code of Conduct for Firms, Rule 4.2 of the SRA Code of Conduct for Firms, Rule 6.1 and 6.2 of the SRA Code of Conduct for Firms, Rule 6.3 of the SRA Code of Conduct for Firms and Rule 8 of the SRA Code of Conduct for Firms. ***SRA Transparency Rules:*** These rules require firms authorised by the SRA to provide certain information about the cost of various legal services offered by a firm, details of the firm's complaints handling procedure, and key regulatory information. ***SRA Accounts Rules:*** Set out the SRA requirements for when firms and sole practitioners authorised by the SRA receive or deal with money belonging to clients, including trust money or money held on behalf of third parties. The rules apply to authorised bodies, their	law but should show a greater depth to their knowledge base and apply the authority to the question posed

managers and employees. They only apply to licensed bodies in respect of activities regulated by the SRA in accordance with the terms of their licences.	

Question 2:	Discuss how the law in relation to Solicitors' liens has evolved, if not changed considerably, over the past decade.
Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	**Marks**
Required: Candidates must explain what a lien is and the distinction between the types of lien, e.g: ***A lien is:*** A right to keep possession of property belonging to another person until a debt owed by that person is discharged. ***A solicitor with unpaid fees has a potential lien over the client's property in one of three ways:*** Common law lien, an equitable lien or a statutory lien under section 73 of the Solicitors Act 1974. ***Common law lien:*** Retaining – this is the right to hold property already in possession. it is a lien that can only exist where the party claiming the lien has property in their hands over which they can assert a claim, and in respect of which they have a right to keep. ***Equitable lien:*** Preserving – the equitable lien arises in cases where funds do not pass into the solicitor's hands and so the solicitor does not have the basic 'possession' required in order for a common law lien to arise. The court has an equitable jurisdiction to intervene to protect the solicitor's interests and to order that a payment is made to the solicitor direct. ***Section 73 of the Solicitors Act 1974:*** Solicitors have the right to apply to the court for a charge on any property recovered or preserved through their efforts.	Up to 3 marks To achieve a pass candidates must have explained the difference between the types of lien
Required: Candidates must explain what has changed, e.g: ***Changes:*** What amounts to property for the purpose of a common law lien, the type of contractual arrangements that can support an equitable lien and whether there needs to be proceedings or if ADR will suffice. ***Property for the purpose of a common law lien:*** The definition of property has been extended to cover money held on client account unless the money held is held for a specific purpose.	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

However, electronic data is not tangible property so no lien arises in respect of the same. ***The type of contractual arrangements that support an equitable lien:*** A conditional fee agreement places sufficient contractual liability on a client to pay a solicitors fees to give rise to the right for an equitable lien. ***Proceedings or ADR:*** There is a requirement that there must be proceedings in order to have the right to a preserving or statutory lien, however if a matter settles through ADR before the issue of proceedings then the right will arise. However, it has recently been held that where a firm helps a client write a letter of claim or complete an online form and the claim is paid directly to the client in response then the firm is not entitled to an interest in the compensation that equity would protect. This final point is currently being appealed.	the authority to the question posed
Candidates may explain in more detail what a retaining lien is and demonstrate knowledge of how it operates, e.g: ***A retaining (common law) lien:*** Is passive and possessory, there is no right to actively enforce the demand just a right to withhold possession. ***Credit should be given where reference is made to authority on the nature of retaining liens, e.g:*** Bozon v Bolland [1839] and Barrett v Gough Thomas [1951] ***Property:*** An example of the property they may have in their possession is the file of papers, solicitors are entitled to hold the papers until his fees are paid. This lien only extends to the client's own property, any paper belonging to a third party cannot be subject to such a lien. The property over which such a client is exercised must have come into the solicitor's possession through employment and the work done on behalf of the client. The property over which such a client can be exercised may include money held on client account unless the money held is held for a specific purpose. Electronic data is not tangible property so no lien arises in respect of the same. ***Credit should be given where reference is made to authority on retaining liens and the type of property, e.g:*** Sheffield v Eden [1878], Leo Abse and Cohen v Evan G Jones Builders Limited [1984], Loescher v Dean [1950], Withers v Rybeck [2011] and Withers v Langbar [2011] and Your Response v Datateam Business Media [2014].	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
Candidates may explain in more detail what a preserving lien is and demonstrate knowledge of how it operates, e.g:	Up to 3 marks

A preserving (or equitable) lien is: A right to ask the court to order that personal property recovered under a judgment obtained with the solicitor's assistance stand as security for his costs. ***Honest and fair dealing:*** An equitable or preserving lien exists because there should be honest and fair dealing, it is more in the nature of equitable relief to prevent the Solicitor from being deprived of his costs, rather than a lien. Authority sets out that a lien may exist to prevent defendants dealing directly with their lay opponents resulting in the opponent solicitors not being paid. ***Notice:*** If a paying party has notice of solicitor's interest and pays lay opponent direct may have to pay again. A party with notice of the solicitor's preserving lien is not under an obligation, following a settlement as to costs, to pay any settlement monies directly to the solicitor. However, he might be liable to the solicitor if both of the following apply he had knowledge of the existence of the lien and there is evidence of collusion with the solicitor's client to defeat the lien. ***Credit should be given where reference is made to authority on honest and fair dealings and notice of unpaid fees, e.g:*** Welsh v Hole [1779], Read v Dupper [1765], James Bibby Ltd v Woods and Howard [1949], and Khans Solicitors v Chifuntwe and SSHD [2012] ***Security or charge:*** The equitable lien operates by way of security or charge. A preserving lien can only be asserted in respect of the costs debt that relates to the property recovered. It does not attach to all forms of property but may offer wider protection than a retaining lien, in that it covers property not in the solicitor's possession and provides him with an equitable right to have the property transferred into his possession and to apply to the court for a charge. ***Credit should be given where reference is made to authority on security or charge, e.g:*** Barker v St Quinton [1844] and Euro Commercial Leasing v Cartwright & Lewis [1995]. ***To apply:*** A solicitor must have been instructed, there must be fees owed as a result of the instruction, the property over which they are claiming the lien must have been recovered or preserved and that must have been as a result of the proceedings. ***Proceedings:*** Historically it was thought there must be proceedings in order to have the right to a preserving lien, however, there does not need to be proceedings. For example, if the matter settled through ADR the solicitor would still have the right to make an application to the court. The rationale for this is that modern day litigation, and the existence of the protocols, encourages parties to settle before the need to litigate. However, very recently it has been decided that where a firm helps a client write a letter of claim	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

or complete an online form and the claim is paid directly to the client in response then the firm is not entitled to an interest in the compensation that equity would protect. This final point is currently being appealed. ***Credit should be given where reference is made to authority on an application and the issue of proceedings, e.g:*** Halvanon Insurance Co Ltd v Central Reinsurance [1988], Gavin Edmonson Solicitors Ltd v Haven Insurance Co Ltd [2018] and Bott and Co v Ryanair [2019].	
Candidates should explain what a statutory lien is and demonstrate knowledge of how it operates, e.g: ***Section 73 of the Solicitor Act 1974:*** This section replaces various earlier statutory provisions to the same effect going back least as far as the Attorneys and Solicitors Act 1860. It adds to the two common law remedies by giving a solicitor a right to apply for a charging order. The courts have stressed that the effect of the section is not to create any new right, but rather to give statutory aid to the existing common law liens. In other words, enabling them more cheaply and speedily to enforce a right they already possess. However, the section is expansive in at least one respect: it extends to a charge over real property, which the common law rights do not. ***To apply:*** Solicitor can apply to the court for a lien over property, the provisions are similar to that in Halvanon. The court may declare the solicitor is entitled to a charge on any property recovered or preserved through his instrumentality for his assessed costs in relation to that suit, matter or proceeding. A solicitor must also be able to make out a prima facie case that they will not be paid unless an order is made. The Court may also make such orders for the assessment of those costs and for raising money to pay or for paying them out of the property recovered or preserved as the court thinks fit. Costs belong to the client so any application under section 73 must be prompt. ***No absolute right:*** Section 73 does not confer an absolute right to a charging order. The court has a discretion and, like the equitable lien, it may be waived where a solicitor takes alternative security for his costs without expressly preserving those rights. ***Credit should be given where reference is made to authority on the statutory lien, e.g:*** Shaw v Neale (1858), Harrison v Harrison [1883], Re Born [1900], Re John Morris [1908] and Kahn Solicitors v Secretary of state [2013].	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

Question 3:	Explain why, since the abolition of the recovery of success fees, there has been debate regarding conditional fee agreements entered before 1 April 2013.
Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	**Marks**
Candidates should set out what a CFA is, what led to the abolition of the recoverability of success fees and why the 1 April 2013 is important, e.g ***Conditional fee agreements (CFAs):*** A CFA is an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances. A CFA provides for a success fee if it provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances. References to success fees, in relation to a CFA, are to the amount of the increase. ***Recoverability of Success Fees:*** When CFAs were introduced in 1990 additional liabilities were not recoverable *inter partes*. However, the relevant legislation was amended to allow for those to be recovered. This improved uptake of CFAs however that position was reversed by legislation which took effect on the 1 April 2013. ***Relevance of 1 April 2013:*** If a 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 a number of limited exceptions provided for in the transitional arrangements. ***Credit should be given where reference is made to authority on CFAs, success fees and the changes, e.g:*** Section 27 Access to Justice Act 1999, Section 29 Access to Justice Act 1999, Section 44 of the Legal Aid, Sentencing & Punishment of Offenders Act 2012, Section 46 of Legal Aid, Sentencing & Punishment of Offenders Act 2012.	Up to 3 Marks
Candidates should set out one or more areas of debate regarding conditional fee agreements entered before 1 April 2013, e.g: ***Circumstances when a CFA may need to be transferred:*** Much of the debate has been around where a CFA has needed to be transferred. There are a number of situations when a CFA may have needed to be transferred. A firm may have gone into administration, closed or closed a department. A solicitor may have	Up to 4 marks To achieve more than a pass, candidates must not simply cite law but should show a greater

moved firms and the client wanted to retain the same agreement. A firm may have been bought by another firm or have merged. A firm may change its name. ***Transfer from legal aid to CFA:*** Two events coincided at the beginning of 2013 which resulted in solicitors, acting for claimants whose claims were funded by legal aid, advising their clients to switch to CFA/after-the-event (ATE) funding. These were the reduction in scope for recovery of additional liabilities and the scope of public funding available under legal aid contracts changing. ***Uplift on damages:*** From 1 April 2013, there was a 10% increase in general damages for non-pecuniary loss (ie pain and suffering, loss of amenity, physical inconvenience and discomfort, social discredit or mental distress). This applies regardless of whether a claim is brought in contract or tort. The increase implemented a recommendation of Lord Justice Jackson, aimed at assisting claimants to meet the additional costs and risks arising from the abolition of the recoverability of additional liabilities.	depth to their knowledge base and apply the authority to the question posed
Candidates could have expanded on the debate on transferring a CFA, e.g: ***Key debate on transferring a CFA:*** 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 CFA gets transferred 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. Assignment should be distinguished from novation. ***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. (Two parties, in writing, by deed, same agreement, client not involved but can accept/reject, benefit and burden must pass). ***Definition of 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. (Tri party agreement, client involved, different agreement, only benefit passes). ***Credit should be given where reference is made to authority on the transfer of CFAs, e.g:*** Halsall v Brizell [1957], Jenkins v Young Brothers Transport [2006], Davies v Jones [2009], Budana v Leeds Teaching Hospitals [2016], Webb v Bromley [2016], Jones v Spire Healthcare	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

[2016], Budana v Leeds Teaching Hospitals NHS Trust [2017] and Roman v Axa Insurance [2019].	
Candidates could have set out areas of debate on changing from legal aid to a CFA, e.g: ***Case specific as to whether reasonable or unreasonable to switch:*** There are circumstances where it has been held to be reasonable to switch funding and cases where it has been held to be unreasonable. Some cases the 10% uplift had not been considered, or the client had not been advised of the same, and in some claimants had been given advice on funding that exaggerated the disadvantages of remaining with legal aid funding whilst not taking into account the disadvantages of entering into a CFA. ***Reasonableness of the decision:*** Where funding arrangements have changed what matters is the reasonableness of the decision to change funding which inevitably highlights the actual reasons for the change. If an alternative method of funding was entered into, which was not, on its face, more attractive or had more advantages than the previous method of funding, then consideration had to be given to the circumstances and reasons for such a switch in funding. The reasons should be contained within the advice provided to the claimant when the funding arrangement changed. ***Credit should be given where reference is made to authority on the the change of funding from legal aid to a CFA, e.g:*** Milton Keynes Foundation Trust v Hyde, Arianna Ramos v Oxford University Hospitals NHS Foundation Trust [2015], Oliver Davis v Wiltshire Primary Care Trust [2016], Hyde v Milton Keynes NHS Foundation Trust [2017], Surrey v Barnet and Chase Farm Hospitals NHS Trust [2018], AB v Mid Cheshire Hospitals NHS Foundation Trust, XDE v North Middlesex University Hospital NHS Trust [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 and apply the authority to the question posed
Candidates could have expanded on the debate on uplift, e.g: ***Application of the uplift:*** Initially the Court of Appeal announced that the increase would apply to all cases where judgment was given after 1 April 2013 but this meant that for defendants where CFAs were entered into before 1 April 2013 and judgment was given after that date they would still, potentially, be liable for the costs of the additional liabilities together with having to pay an additional 10% increase in general damages. This position was amended and the increase applies where judgment has been given after 1 April 2013, except where the claimant entered into a CFA before 1 April 2013 and therefore the success fee continues to be recoverable from the defendant.	Up to 1 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 should be given where reference is made to authority on the uplift, e.g: Simmons v Castle [2011] and Simmons v Castle [2012].	

Question 4:	Explain how the relaxation of common law rules has led to the growth of the litigation funding market in England and Wales.
Total Marks Attainable Fail = 0-7.4 Pass = 7.5+ Merit = 9+ Distinction = 10.5+	10
Indicative Content	**Marks**
Candidates should set out what is meant by litigation funding, e.g: ***The main funding options available today for litigation are:*** Conditional fee agreements (CFAs), damages-based agreements (DBAs), after the event (ATE) insurance and third-party funding. ***Litigation funding:*** May also refer to, or can be another name for, third party funding. ***Conditional fee agreements (CFAs):*** A CFA is an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances. A CFA provides for a success fee if it provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances. References to a success fee, in relation to a CFA, are to the amount of the increase. ***Damages-based agreements (DBAs):*** A DBA is an agreement between a person providing advocacy services, litigation services or claims management services and the recipient of those services which provides that the recipient is to make a payment to the person providing the services if the recipient obtains a specified financial benefit in connection with the matter in relation to which the services are provided. A DBA will also provide that the amount of that payment is to be determined by reference to the amount of the financial benefit obtained. ***After the event (ATE) insurance:*** Is a type of commercially available insurance policy which provides coverage for legal costs, subject to an agreed limit of indemnity. It can be used as a tool by which a party to litigation or arbitration may limit its liability for the opposing party's legal costs in the event that it is unsuccessful in its case. ***Third-party funding:*** Third party funding is an alternative method of litigation funding where a commercial funder provides the financial	Up 3 marks To achieve a pass candidates should apply their knowledge to the question set and identify what is meant by litigation funding.

resources to enable litigation or arbitration cases to proceed. The litigant obtains all or part of the financing to cover its legal costs from a private commercial litigation funder, who has no direct interest in the proceedings. In return, if the case is won, the funder receives an agreed share of the proceeds of the claim. If the case is unsuccessful, the funder loses its money and nothing is owed by the litigant.	
Candidates should be credited for a discussion on how arrangements where a lawyer or third party may have a direct financial interest in the outcome of proceedings were prohibited, e.g: ***Control and free decision making:*** Historically funding arrangements where a lawyer or third party may have a direct financial interest in the outcome of proceedings were prohibited because of the influence that a funder, or lawyer, 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 the action is conducted. ***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. ***Champerty:*** Occurs when the person maintaining another stipulates for a share of the proceeds of the action or suit. May be described as aggravated maintenance. ***Credit should be given where reference is made to authority on champerty and maintenance, e.g:*** Chitty 28 Ed Vol 1 17 – 054, British Cash & Parcel Conveyors v Lamson. Store Service Co [1908], *Re Trepca Mines* (No 2) [1963] and Wallis v Duke of Portland [1797].	Up to 4 marks To achieve a pass candidates need to explore why and how the litigation funding market was restricted.
Credit should be given for a discussion on the change of attitude towards funding and how new types of funding have been introduced or emerged, e.g: ***The criminal offences and torts of champerty and maintenance were abolished:*** However, Agreements may still be unenforceable on the grounds of public policy. Therefore, outside of statutory provisions, the common law continues to apply. Today, to amount to maintenance or champerty, a funding agreement must disclose an element of impropriety, such as wanton or officious meddling, disproportionate control or profit, or a clear tendency to corrupt justice (e.g. there is a temptation to inflame damages). ***Credit should be given where reference is made to authority on the abolition of champerty and maintenance, e.g*** Section 13 of the Criminal Law Act 1967, Section 14 of the Criminal Law Act 1967	Up to 6 Marks The question requires candidates to consider the common law developments. 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

New funding arrangements have been introduced: In the 40s government funding became available for litigation which suggested a shift in attitude towards the use of funding from outside parties for litigation. In the 1990s CFAs were expressly permitted by statute, these agreements would have historically been deemed champertous. At the same time availability of government funding was restricted. Uptake of use of CFAs was lower than expected which resulted in additional liabilities becoming recoverable inter partes. This position was then reversed as the CFA became the most normal way of funding personal injury and clinical negligence matters. At the same time DBAs, a new form of contingency fee agreement was permitted by statute. Uptake of DBAs has been slow. ***Credit should be given where reference is made to authority on the change of arrangements that became available for funding litigation, e.g*** The Legal Aid and Advice Act 1949, Section 58 of the Courts and Legal Services Act 1990, Sections 27 and 29 of the Access to Justice Act 1999, Sections 44 and 46 of the Legal Aid Sentencing and Punishment of Offenders Act 2012, Section 45 of the Legal Aid Sentencing and Punishment of Offenders Act 2012, The Damages–Based Agreements Regulations 2013 and Zuberi v Lexlaw Limited [2021]. ***The change of attitude to Third Party Funding:*** Third Party funding has been permitted in limited situations since as early as the 19th Century, e.g in matters arising out of insolvencies. Over time it was also accepted that this type of funding could be used to fund experts providing the party remained in control of the litigation. As the courts started to give tacit approval to this type of funding more generally, a cap on the liability of third-party funders was introduced. This limited the costs liability of funders to the amount they had provided by way of funding. ***Credit should be given where reference is made to authority on the change of approach towards Third Party Funding, e.g:*** Seear v Lawson (1880), Factortame 2002, Akin v Borchard Lines Ltd & Ors [2005], Merchant bridge & Co Ltd & Another v Safron General Partner 1 Ltd [2011] and Excalibur Ventures LLC v Texas Keystone Inc & Ors (Rev 2) [2014]. ***The current attitude towards Third Party Funding:*** In more recent times the courts have found the climate and changing attitudes to litigation funding means these funding agreements may not offend public policy. It has also since been decided that third party funders could be liable to the full extent of the claimant's costs and that the cap on liability is not a point of principle that has to be followed. There has recently been a clear indication that the ban on CFAs in other matters, such as family, should not be read across	authority to the question posed.

to third-party litigation funding and that these agreements may be permitted for use in family proceedings. ***Credit should be given where reference is made to authority on the current approach towards Third Party Funding, e.g:*** JEB Recoveries LLP v Linstock [2015], Davey v Money [2019], Chapel Gate Credit Opportunity Master Fund Ltd v Money & Ors [2020], *Akhmedova v Akhmedov & Ors* [2020] and Nosworthy v Royal Bournemouth & Christchurch Hospitals NHS Foundation Trust [2020]. ***Association of Litigation Funders:*** Established in 2011, they have a voluntary code of conduct.	
Credit a discussion on any other point that may have affected the litigation funding market, e.g: ***Success fees and premiums have now ceased to be recoverable:*** So litigation funding by a third party may be a more attractive option in some cases. ***Access to Justice:*** Alternative funding arrangements will provide claimants with the resources to be represented by highly experienced solicitors and counsel. There are limits on the availability of third party funding with a minimum size of claim, most litigation funders will fund is approximately £350,000. There needs to be sufficient damages available to make the time and effort invested worth it. ***Some uncertainty:*** Restrictions on champerty and maintenance still remain. Courts decide on the facts of each litigation funding agreement whether the contract is unenforceable on the grounds of public policy. Piecemeal development. However, there is now an industry wide initiative to develop model funding documentation, launched by the London office of US law firm Brown Rudnick.	Up to 2 Marks To achieve more than a pass, candidates must not simply cite law but should show a greater depth to their knowledge base and apply the authority to the question posed

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

Question 5:	You work as an in-house Costs Lawyer for an SRA regulated firm, Butlers Law, located in Bristol. The firm specialises in clinical negligence, private client and commercial litigation. You have been asked to work on the file of Mrs Tremors. Mrs Tremors had undergone a caesarean section at a hospital operated by the Defendant, North Bristol NHS Trust, in March 2017. Complications arose. In due course Mrs Tremors instructed your firm and issued proceedings against the

	Defendant. At all stages the claim for damages was expressly limited in value to £50,000. Liability was disputed. There was a Costs Management Conference before HHJ Thompson on 19 September 2019. Amongst other things the parties were, by the Judge's Order, given permission to rely upon their updated costs budgets as presented and modified at the hearing. The total, including both incurred costs and estimated future costs, being put forward on behalf of Mrs Tremors for time costs and disbursements came to £167,000. The Judge recorded no comment on the figure relating to incurred costs, which amounted to some £108,000 of the £167,000. No appeal was sought to be made against the Judge's Order. Shortly before the trial fixed for October 2020 the case was settled. The Defendant agreed to pay the Respondent £20,000, together with costs on the standard basis. You have now prepared a bill of costs of £147,000 and are about to commence detailed assessment proceedings. You require approval of the bill from Mrs Tremors and provide advice on the next steps in the detailed assessment proceedings and what she can expect to happen up to, and including, the Detailed Assessment Hearing. Prepare the body of a letter to Mrs Tremors enclosing the bill of costs and setting out the next steps in 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: contents of a bill of costs, details as to how detailed assessment is commenced, next procedural steps (PODs, Replies and negotiations) and the request for the hearing. Candidates will demonstrate a good depth of knowledge of the subject with good application and some analysis having regard to the facts, although the 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. Candidates may discuss authority for assessment and may also refer to provisional assessment although they may also make the observation that they do not know what the total costs included in the bill are. Most views expressed by the candidate should be supported by relevant authority.

Distinction	14+	An answer which includes ALL the requirements for a pass and merit (as set out above) PLUS the candidate's answer should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant authority in respect of the procedure. The candidate will provide an excellent body of an email setting out the procedure in detail with excellent reference to relevant authority. Work should be written to an exceptionally high standard considering the response will have been drafted in examination 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 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	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

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 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.	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

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 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	the authority to the question posed
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	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

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 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]	the authority to the question posed

Question 6:	You are a Costs Lawyer at a busy SRA regulated firm, Dominos and Denton LLP, in Canterbury. You have been working on the file of Debbie Maryland. The fee earner with conduct of the matter is Amrit Singh. Debbie Maryland is the Claimant in a personal injury matter. Her claim was issued in the County Court, valued at approximately £120,000. You drafted the budget on the matter, which was filed and served in accordance with the deadline under the Civil Procedure Rules. After service and filing of the budget, Amrit received medical expert evidence in the case. Initially the case appeared to concern a probable mild traumatic brain injury, but the evidence now shows that Debbie had a neuropsychiatric condition, which

	caused her to become seriously disabled needing assistance from the State in her day to day care. This meant that the value of the claim would need to be increased to somewhere in the region of £2.5m. The evidence was received less than a month after the budget had been filed and just before the budgeting hearing. A revised schedule of loss was pleaded, but it was not feasible to seek to revise the budget at the hearing because the impact of the new medical evidence, other than on value, was not clear at that time. At the hearing directions were made, budgets approved, and the case transferred to the High Court. You have now been asked for your advice on the matter. Amrit has instructed that the case has turned out to be more complex than previously anticipated. In the original budget assumptions, you had indicated much of the disclosure had already taken place. The assumptions state that 5 lever arch files had been disclosed. You budgeted future costs on the assumption there would be follow up disclosure requests and had also assumed that there was likely to be a 4 day trial in the County Court and that 8 files would be needed at trial. Disclosure has now grown to 10 files and it is expected that there will be a further 10. Amrit wishes to know whether an application should be made to amend the budget, or if the matter is best left to be dealt with when costs are assessed. You are required to write the body of an email to Amrit setting out the steps that should be taken in the matter, particularly whether an application should be made to amend the budget, or if it is a matter best left to assessment.
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, how the court may approach making a CMO, what needs to be done in order to make an application to amend a budget after a CMO has been made, what amounts to a significant development when making an application to amend a budget, 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 what is a significant development is and that the current authority mainly concerns downward departures on budgeted costs at assessment. There is likely to be some discussion on the new procedure and therefore the uncertainty as to steps that need to be taken. 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 applications to amend and the conflict between agreed/approved budgets. 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.

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

Indicative Content:	**Marks**
Required: An 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: ***Applicability of budgets:*** Rules on costs management apply to all Part 7 Multi Track with four exceptions. 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. Even where parties do not have to file budgets the court has discretion to order them to do so. ***Credit reference to any authority cited on the applicability of budgets and costs management, e.g:*** CPR 3.12 (1), CPR 3.12 (2) and CPR 3 PD 3E, para 2. ***Application to amend:*** Revising party must revise its budgeted costs upwards or downwards if significant developments in the litigation warrant such revisions.	Up to 2 marks

Credit reference to any authority cited on applications to amend, e.g: CPR 3.15A(1). ***Departing from a budget at assessment:*** 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. ***Credit reference to the test from departing from a budget at assessment, e.g:*** CPR 3.18	
Credit a discussion on what is meant by a Costs Management Order, e.g: ***A CMO is:*** 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. ***Credit reference to any authority cited on what a CMO is, e.g:*** CPR 3.15(2) and CPR 3.15(3) ***Court approach to making a CMO:*** 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. 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. 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 the court's approach to making a CMO, e.g:*** CPR 3.15(4), CPR 3.15(8), Redfern v Corby Borough Council [2014], CIP Properties Ltd v Galliford Try Infrastructure Ltd [2015], Harrison v University Hospitals Coventry and Warwickshire NHS Trust [2017] and Yirenki v Ministry of Defence [2018].	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
Credit a more detailed explanation of applications to amend a budget and what is meant by significant development, e.g: ***Application to revise budget:*** The revising party must revise its budgeted costs upwards or downwards if significant developments	Up to 10 marks To achieve more than a pass, candidates must

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. Parties should be prompt in making an application. When making an application to amend incurred costs should not be amended on the last approved budget. ***Credit any relevant authority cited on applications to revise budgets, e.g:*** CPR 3.15A(1), CPR 3.15A(2), CPR 3.15A(3), CPR 3.15A(4), Sharp v Blank [2017], Elvanite Full Circle Ltd. v Amec Earth & Environmental (UK) Ltd. [2013] and Persimmon Homes Ltd & Anor v Osborne Clark LLP [2021]. ***Court's powers and approach:*** 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. 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 any relevant authority cited on the court's powers and approach, e.g:*** CPR 3.15A(5), CPR 3.15A(6) and Simpson v MGN Ltd [2015] ***A significant development:*** A '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. Interim applications may be significant development but 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. A change in the value of the claim or a longer trial length may not amount to a significant development. Disclosure involving	not simply cite law but should show a greater depth to their knowledge base and apply the authority to the question posed

more documents than anticipated and expressly assumed in a claimant's budget may be a significant development. ***Credit any relevant authority cited on what is meant by a significant development, e.g:*** Murray & Anor v Neil Dowlman Architecture Ltd [2013], Churchill v Boot [2016], Sharp v Blank [2017], CPR 3.17(4) and Al-Najar v the Cumberland Hotel (London) Ltd [2018], BDW Trading Ltd v Lantoom Ltd [2020], Thompson v NSL Ltd [2021] and Persimmon Homes Ltd & Anor v Osborne Clark LLP [2021].	
Credit discussion on assessment and good reason to depart, e.g: ***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 PD 44, 3.2, Vertannes v United Lincolnshire Hospitals NHS Trust [2018] and Harrison v University Hospitals Coventry and Warwickshire NHS Trust [2017] ***Hourly Rates and the Indemnity principle:*** There is no clear definition of good reason. Hourly rates have 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. However subsequently it has been held that a reduction of hourly rates for incurred costs does not mean the same rates should be applied to budgeted costs. 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. A longer-than-expected procedural timetable in a large group action was held to be a good reason to revise the claimants' budget. ***Credit reference to any authority cited on hourly rates and the indemnity principle, 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], Jallow v Ministry of Defence [2018], Barts Health NHS Trust v Hilrie Rose Salmon [2019] and Maurice Hutson & Ors v Tata Steel UK Ltd [2020]. ***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	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

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]	

Question 7:	As a self-employed Costs Lawyer, you take instructions from various firms across the country. You have been instructed by an SRA regulated firm, Hampton and Hill LLP, in Dulwich. The firm act for Trebor, a firm beneficially owned by Mr Tomlinson. They wish for you to provide advice on how the provisions of the Arbitration Act 1996 govern the assessment of costs. Mr Tomlinson founded an oil production and exploration company, OILP, which was incorporated in Jersey. It was listed on the London Stock Exchange. In 2019, TSTP acquired 80% of the share capital of OILP and took the company private. The other 20% remained owned by Trebor. On 31 January 2020, Trebor agreed to sell its remaining 20% interest in OILP to TSTP for the sum of £50m. The first two instalments were paid by TSTP. However, shortly before the final instalment became due on 20 December 2020, Homers LLP, on behalf of OILP, wrote to Trebor asserting claims against Mr Tomlinson and setting out OILP's intention to withhold payment of the outstanding amount payable. Much correspondence passed between the parties. Eventually an agreement was entered into whereby the disputed payment would be held by a third party whilst the parties attempt to resolve the dispute. The agreement reached contains an arbitration clause that reads: *"Any dispute or difference (whether contractual or non-contractual) arising out of or in connection with this letter (including any question regarding its existence, validity, interpretation performance or termination) shall be referred to and finally settled by arbitration in accordance with the Arbitration Act 1996."* Prepare the body of an advice to Trebor. 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	Up to 2 marks

59(2) of the Arbitration Act 1996 and Essar Oilfields Services Limited v Norscot Rig Management PVT Limited [2016].	
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 and Section 62 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
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	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

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.	
Credit any points advanced on the when the matter may go to 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	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

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.	
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 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].	Up to 4 marks

Question 8:	You work as a costs lawyer for Brown and Taylor Solicitors, who are based in the West Midlands. Mrs Brown is a family lawyer at the firm who specialises in divorce, property and finance. She is a Collaborative Lawyer and one of the few Family Solicitor/Mediators in the West Midlands. Mrs Brown has approached you for assistance in relation to one of her clients, Mrs Betty Sumpter. In 2020, after 27 years, Mr and Mrs Sumpter's marriage came to an end. The impact of COVID-19 brought underlying relationship difficulties to a head. The couple have two children, Jenny Sumpter (d.o.b 10/07/1995) and Harry Sumpter (d.o.b 26/11/1997). At the time of separation the matrimonial assets were valued at £572,000. The matrimonial home was valued at £450,000. There is no mortgage on the property. Mr Sumpter has a good pension with a cash equivalent value of £122,000. Mr Sumpter is in full time employment earning £72,000 gross per annum and Mrs Sumpter works part time earning £12,000 gross per annum.

	The Financial Dispute Resolution (FDR) hearing took place and the District Judge made it clear that she believed the parties should not be in court and she did not want to see the matter proceed to a Final Hearing. She believed the parties could reach a settlement and she indicated that an appropriate settlement in the case would be somewhere in the region of a 55-60% share of the matrimonial assets to Mrs Sumpter. Costs in the matter are escalating. At the FDR the Form H for each party showed combined legal expenses of £9,500, which were estimated to increase by £15,000 if the matter proceeded to a Final Hearing. Mrs Sumpter desperately wants to reach an agreement, but Mr Sumpter is refusing to engage in meaningful negotiations. Mrs Sumpter is really concerned about the costs in the matter and Mrs Brown has approached you to advise on the same. You are required to write the body of an email to Mrs Sumpter 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 Fail = 0-9.9 Pass = 10+ Merit = 12+ Distinction = 14+	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 and a discussion on how costs in family cases are usually dealt with, e.g): ***No single source provides an all-encompassing definition of family proceedings:*** 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. ***Credit reference to any authority on the diverse nature of family proceedings, e.g:*** Section 58A of the Courts and Legal Services Act 1990 and the Courts Act 2003. ***FPR or CPR:*** In some family cases the CPR will apply rather than the FPR 2010. The FPR apply to family proceedings in the High Court and the Family Court. Family proceedings are defined with reference to section 75(3) of the Courts Act 2003, i.e as those in the Family Court and proceedings in the Family Division of the High Court where they cannot be heard by another division. ***Credit reference to any authority cited on how costs in family cases are usually dealt with, e.g:*** Rule 2.1 of the Family Procedure Rules 2010, Rule 2.3 of the Family Procedure Rules 2010, Section 75(3) of the Courts Act 2003, and Rule 28 and the Practice Direction 28A of the Family Procedure Rules 2010	Up to 6 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 how the costs in this type of case should be dealt with, i.e the No Order regime, e.g: ***The 'no order regime':*** Prevails in all financial remedy proceedings. This regime means there is unlikely to be any costs shifting. Financial remedy proceedings and proceedings in connection with a financial remedy, requiring a financial order. 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 orders. The CPR apply with	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

some modifications. The court does not have discretion as to costs, the factors that the court should consider when making an order do not apply and nor does the definition of conduct within the CPR. ***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. ***Credit reference to any authority on the No Order regime, e.g:*** Rule 28.3(1) of the Family Procedure Rules 2010, Rule 28.3(2) of the Family Procedure Rules 2010, Rule 28.3(4)(b) of the Family Procedure Rules 2010, Rule 28.3(5) of the Family Procedure Rules 2010, CPR 44.2 (1), CPR 44.2 (4) and CPR 44.2 (5).	the facts of the question
Credit discussion on what rules the Court should consider when making a costs order in this case, e.g: ***When the court may make an order in financial remedy proceedings:*** The court may make an order if it is considered appropriate on the grounds of conduct. 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. Conduct is defined so as to include any open offer to settle made by a party, whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue, any other aspect of a party's conduct in relation to proceedings which the court considers relevant and the financial effect on the parties of any costs order. ***Credit reference to any authority on when the court may make an order in financial remedy proceedings, e.g:*** Rule 28.3(6) of the Family Procedure Rules 2010, Rule 28.3(7)(a) of the Family Procedure Rules 2010, Rule 28.3(7)(b) of the Family Procedure Rules 2010, Rule 28.3(7)(c) of the Family Procedure Rules 2010, Rule 28.3(7)(d) of the Family Procedure Rules 2010, Rule 28.3(7)(e) of the Family Procedure Rules 2010, Rule 28.3(7)(f) of the Family Procedure Rules 2010 and AB v CD [2016]. ***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. However they may be made and stand as a stark warning in relation to conduct in financial remedy proceedings. ***Credit reference to any authority on indemnity costs, e.g.:*** H v Dent (Re an Application for Committal (No. 2: Costs)) [2015] and MB v EB [2019].	Up to 5 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
Credit discussion on the clean sheet regime, e.g: ***Clean sheet regime:*** This follows the FPR costs rules. This regime applies in all cases heard in the Family Court other than financial remedy	Up to 5 marks

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 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). The court may make such order as it considers just. The Costs provisions in the CPR will apply with some modification, for example; this rule disapplies the general rule and basis of assessment. The court's discretion, the factors to take into account when making an order and the definition of conduct are not excluded and therefore do apply. If the court decide to make an order where there is costs shifting then the starting point should be costs follow the event. ***Credit reference to any relevant authority on the clean sheet regime, e.g.:*** Rule 28.1 of the Family Procedure Rules 2010, Rule 28.2 of the Family Procedure Rules 2010, CPR 44.2(2), CPR 44.2(1), CPR 44.2(4), CPR 44.2(5) and Solomon v Solomon (2013).	
Credit discussion on the costs follow the event regime, e.g: ***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, for example in TOLATA 1996 claims. ***Credit reference to any relevant authority on costs assessment, e.g.:*** CPR 44-48.	Up to 3 marks
Any relevant point to describe costs assessment in family proceedings, e.g: ***Costs assessment in family proceedings:*** Where they are costs that do not involve legal aid they are assessed in accordance with the CPR. The CPR apply to all between the parties costs assessments. 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 whether they were reasonably incurred or reasonable and proportionate in amount in favour of the paying party. 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. The Court may reduce a claim for costs in a family case because the sum spent is disproportionate to the legal issue raised. ***Credit reference to any relevant authority on costs assessment, e.g.:*** CPR 44.3(1)(a), CPR 44.3(2), CPR 44.3(1)(b), CPR 44.3(3), J v J [2014], Seagrove v Sullivan [2014], Joy v Joy-Morancho & Ors (No 3) [2015] and K v K [2016].	Up to 2 marks

Question 9:	As an independent Costs Lawyer you are instructed by a number of firms on a variety of matters. However, the bulk of your work is costing Court of Protection files. One of the solicitors who regularly instructs you, Mr Terry from Terry and Walsh LLP, has contacted you about a query he has in relation to a contentious probate matter. Whilst this is not work you routinely do, you have extensive experience in this type of dispute. Mr Terry's client, Jeremy Henderson, is the executer and a beneficiary of his elderly neighbour's Will. Mr Henderson made the appointment for his neighbour, Mr Henry Cartwright, to make the Will and he also drove Mr Cartwright to the solicitor's office for the appointment. The Will replaced an earlier Will and was not executed at the solicitor's office, but was executed elsewhere. Mr Cartwright's original Will left his entire estate to be divided equally between his two daughters, Tamsin and Jenny. The later Will left his house, the main asset in the estate, in its entirety to Mr Henderson. Mr Cartwright died on the 26 March 2020. His daughters are challenging the validity of the Will. Tamsin thinks that Mr Henderson pressurised and coerced Mr Cartwright. She believes that Mr Henderson's forceful personality, together with her father's vulnerability and his dependence on Mr Henderson meant that the later Will is not valid. Jenny's position is slightly different, she 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 Henderson, Mr Terry would like to include some information on the way costs may be dealt with in contentious probate matters. Mr Terry has therefore approached you for your help. Write the body of a memo to Mr Terry 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.

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

Indicative Content	**Marks**
Required: discussion of the application of the CPR in contentious probate cases and the three exceptions to the general, e.g: **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, applying relevant factors the court should consider when making an order for costs (includes conduct) set out in the CPR. The definition of conduct within the CPR includes any relevant pre-action protocol. Whilst not a pre-action protocol, the Association of Contentious Trust and Probate Specialists'	Up to 4 marks To achieve more than a pass the candidate must not simply cite the law but demonstrate an understanding of how the rules operate

(ACTAPS) Code is explicitly referred to within the CPR. The rules on discontinuance under the CPR do not apply but CPR 36 does. **Credit reference to any applicable authority on the general rule, e.g.:** CPR 44.2(2)(a), CPR 44.2(2)(b), CPR 44.2(4), CPR 44.2(5), CPR 44.2(5)(a), CPR 38, CPR 57.11(1) and James v James and Ors [2018]. ***Three exceptions to the applicability of the general rule:*** The first of three exceptions to when costs should not follow the event in probate is found in the CPR. This is the procedure for requiring a will to be proved without advancing a positive case. Exception 2 and 3 are found in the common law. The first is where a testator had been the cause of the litigation so costs should come out of the estate; and the second is where the circumstances led reasonably to an investigation of the matter and costs should be borne by both sides. 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. **Credit reference to any applicable authority on where the exceptions are found, e.g.:** CPR 57.7(5), Spiers v English [1907], Re Good, deceased and Carapeto v Good and Others [2002] EWHC 640.	
Credit any relevant point in relation to a discussion of the exception in CPR 57.7(5), e.g: ***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. So, 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 applicable authority 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 3 marks
Credit any relevant point in relation to a discussion of the exceptions 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. 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	Up to 8 marks To achieve more than a pass there must be strong evidence that the candidate is able to apply the authority

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 applicable authority on the exceptions in Spiers v English, e.g.:** Re Cutcliffe's Estate [1959] and Wharton v Bancroft [2012] ***Blame and Conduct:*** The 'basis of all rule on this subject should rest upon the degree of blame to be imputed to the respective parties'. Blame is 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. 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 consider that the proper starting position was that each pay half of the others' costs however other factors may lead the court to depart from this approach. **Credit reference to any applicable authority on blame and conduct, 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] and Burgess v Penny [2019]. ***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. There must be a bona fide belief in the existence of a state of things which, if it did exist, would justify litigation. There is no correlation between eccentricity and testamentary incapacity. **Credit reference to any applicable authority on the second exception, e.g.:** Davies v Gregory (1873) and Boughton v Knight [1873].	to the facts of the question
A discussion of the 4 propositions 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] EWHC 2909 (Ch):*** Mr Justice Henderson held that the two recognised exceptions from Spiers were guidelines not straitjackets. He went on and made a number of propositions as to the meaning of the exceptions based on previous authority. ***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	Up to 4 marks

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; where after costs should follow the event.	
Credit a discussion on where a personal representative has incurred costs on behalf of the estate, e.g: ***The general rule:*** The general rule is that that person is entitled to be paid the costs of those proceedings, insofar as they are not recovered from or paid by any other person, out of the relevant trust fund or estate. CPR 44.5 (amount of costs where costs are payable under a contract) does not apply. **Credit reference to any applicable authority on the general rule where a personal representative has incurred costs on behalf of the estate, e.g.:** CPR 46.3(1)(a), CPR 46.3(1)(b), CPR 46.3(2), Re Coles Estate [1962] and McCabe v MaCabe [2015]. ***Basis:*** Where that person is entitled to be paid any of those costs out of the fund or estate, those costs will be assessed on the indemnity basis. **Credit reference to any applicable authority on the basis of assessment where a personal representative has incurred costs on behalf of the estate, e.g.:** CPR 46.3(3)	