

## September 2022: Marker Guidance: Unit 2

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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%)

<p><b>Question 1:</b></p>	<p>Explain the application that a claimant may make, outlining the relevant procedure, where they feel there is no compelling reason for their claim to proceed to a trial and the defendant has no real prospect of successfully defending the claim or issue.</p>
<p><b>Total Marks Attainable</b></p> <p>Fail = 0-4.9          Pass = 5+          Merit = 6+          Distinction = 7+</p>	<p>10</p>
<p><b>Indicative Content</b></p>	<p><b>Marks</b></p>
<p><b>Required: Candidate should set out the grounds for a summary judgment and the proceedings in which a summary judgment is available, e.g</b></p> <p><b>Grounds for summary judgment and proceedings in which a summary judgment is available:</b> CPR 24 sets out a procedure by which the court may decide a claim or a particular issue without a trial. The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if it considers that the claimant has no real prospect of succeeding on the claim or issue or the defendant has no real prospect of successfully defending the claim or issue; and there is no other compelling reason why the case or issue should be disposed of at a trial. The court may give summary judgment against a claimant in any type of proceedings. The court may give summary judgment against a defendant in any type of proceedings except proceedings for possession of residential premises (against a mortgagor; or a tenant or a person holding over after the end of his tenancy whose occupancy is protected within the meaning of the Rent Act 1977 or the Housing Act 1988) and proceedings for an admiralty claim in rem.</p> <p><b>Credit reference to any authority cited on grounds for summary judgment and proceedings in which a summary judgment is available, e.g:</b> CPR 24.1, CPR 24.2, CPR 24.3(1) and CPR 24.3(2).</p>	<p>Up to 2 marks</p> <p>A pass must refer to CPR 24 and set out what it means to apply for a summary judgment</p>
<p><b>Credit any relevant point to explain the procedure, e.g:</b></p> <p><b>Procedure applicable to summary judgments:</b> A claimant may not apply for summary judgment until the defendant against whom the application is made has filed an acknowledgement of service or a defence. This is unless the court gives permission; or a practice direction provides otherwise. Where a summary judgment hearing is fixed, the respondent (or the parties where the hearing is fixed of</p>	<p>Up to 5 marks</p> <p>A pass must refer to CPR 24 and set out what it means to apply for a summary</p>

<p>the court's own initiative) must be given at least 14 days' notice of the date fixed for the hearing and the issues which it is proposed that the court will decide at the hearing.</p> <p><b>Credit reference to any authority cited on the procedure applicable to summary judgments, e.g:</b> CPR 24.4(1) and CPR 24.4(3).</p> <p><b>Making an application:</b> Under CPR 23 an application notice means a document in which the applicant states his intention to seek a court order and respondent means the person against whom the order is sought and such other person as the court may direct. The general rule is that a copy of the application notice must be served on each respondent. An application may be made without serving a copy of the application notice if this is permitted by a rule a practice direction or a court order. An application notice must state what order the applicant is seeking and briefly, why the applicant is seeking the order. A copy of the application notice must be served as soon as practicable after it is filed and except where another time limit is specified in these Rules or a practice direction, must in any event be served at least 3 days before the court is to deal with the application. When a copy of an application notice is served it must be accompanied by a copy of any written evidence in support and a copy of any draft order which the applicant has attached to his application.</p> <p><b>Credit reference to any authority cited on the application, e.g:</b> CPR 23.1, CPR 23.4(1), CPR 23.4(2), CPR 23.6, CPR 23.7(1) and CPR 23.7(3).</p>	<p>judgment</p>
<p><b>Could also include a discussion on the evidence required for the purpose of a hearing and the power of the court, e.g:</b></p> <p><b>Evidence for the purposes of a summary judgment hearing:</b> If the respondent to an application for summary judgment wishes to rely on written evidence at the hearing, he must file the written evidence and serve copies on every other party to the application, at least 7 days before the summary judgment hearing. If the applicant wishes to rely on written evidence in reply, he must file the written evidence and serve a copy on the respondent, at least 3 days before the summary judgment hearing.</p> <p><b>Credit reference to any authority cited on the evidence for the purposes of a summary judgment hearing, e.g:</b> CPR24.5(1) and CPR24.5(2).</p> <p><b>Court's powers when it determines a summary judgment application:</b> When the court determines a summary judgment application it may give directions as to the filing and service of a defence and give further directions about the management of the case. When dealing with an application under CPR 24 it does not involve the court conducting a mini trial and the criteria that the</p>	<p>Up to 5 marks</p> <p>To achieve more than a pass a candidate must not simply cite the rules but should show a deeper understanding of the rules including an appreciation of the approach of the court will take to an application for a SJ</p>

<p>court needs to apply is not one of probability but is an absence of reality.</p> <p><b>Credit reference to any authority cited on the court's powers when it determines a summary judgment application, e.g:</b> CPR 24.6, Swain v Hillman [2001] and Three Rivers District Council v Bank of England (No. 3) [2001].</p>	
<p><b>Credit a discussion on the costs consequences of such an application, e.g:</b></p> <p><b>CPR 45.1 (1):</b> This section sets out the amounts which, unless the court orders otherwise, are to be allowed in respect of legal representatives' charges.</p> <p><b>CPR 45.1 (2) (a)(i):</b> This section applies where summary judgment is obtained.</p> <p><b>CPR 45.1 (3):</b> No sum in respect of legal representatives' charges will be allowed where the only claim is for a sum of money or goods not exceeding £25.</p> <p><b>CPR 45.1 (4):</b> Any appropriate court fee will be allowed in addition to the costs set out in this Section.</p> <p><b>CPR 45.1 (5):</b> The claim form may include a claim for fixed commencement costs.</p> <p><b>CPR 45.2:</b> Amount of fixed commencement costs in a claim for the recovery of money or goods</p> <p><b>CPR 45.2 (1):</b> The amount of fixed commencement costs in a claim will be calculated by reference to Table 1; and the amount claimed, or the value of the goods claimed if specified, in the claim form is to be used for determining the band in Table 1 that applies to the claim.</p> <p><b>CPR 45.2 (2):</b> The amounts shown in Table 4 are to be allowed in addition, if applicable. These are miscellaneous costs in respect of service.</p> <p><b>CPR 45.4:</b> Where the claimant has claimed fixed commencement costs under rule 45.2; and judgment is entered the amount to be included in the judgment for the claimant's legal representative's charges is the total of the fixed commencement costs; and the relevant amount shown in Table 2. For default judgment these will depend on whether the default was on an acknowledgment of service or default of a defence. These range between £22-£35.</p>	<p>Up to 2 marks</p>

<p><b>Question 2:</b></p>	<p>Explain whether a Costs Order may include provision requiring the payment of an amount in respect of all or part of an after the</p>
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	event Insurance premium.
<b>Total Marks Attainable</b>  Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
<b>Indicative Content</b>	<b>Marks</b>
<b>Required: Candidates must demonstrate knowledge of the legislative framework governing the recoverability of ATE premiums, e.g:</b>  <b><i>The legislative framework:</i></b> The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) renders that ATE premiums are no longer recoverable from the paying party. The Act introduced a new section 58C of the Courts and Legal Services Act 1990 which prevents recovery of any premium for an after the event insurance policy. A costs order made in favour of a party to proceedings who has taken out a costs insurance policy may not include provision requiring the payment of an amount in respect of all or part of the premium of the policy, unless permitted under the legislation. The legislation provides that the Lord Chancellor may make regulations in clinical negligence cases permitting for the recovery of ATE premiums in relations to medical experts reports.  <b><i>Credit reference to the citing of any supporting authority on the legislative framework, e.g:</i></b> Section 46(1) of the Legal Aid Sentencing and Punishment of Offenders Act 2012, section 58C(1) of the Courts and Legal Services Act 1990 and section 58C(2) of the Courts and Legal Services Act 1990.  <b><i>Further rules:</i></b> Insurance premiums are recoverable where the insurance is against the risk of incurring experts fees re liability and causation in clinical negligence proceedings, the part of the policy recoverable relates to the experts reports, and the damages claimed are valued at £1000.00 or more. There are no other rules or practice directions to give guidance on the assessment and recoverability of premiums and it was commented in the C of A decision that this ought to be looked at by the Rules Committee.  <b><i>Credit reference to the citing of any supporting authority on the further rules, e.g:</i></b> Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No 2) Regulations 2013 and Peterborough & Stamford Hospital NHS Trust v McMenemy [2017].	Up to 6 marks
<b>Credit any discussion on the court's discretion, e.g:</b>  <b><i>Court's discretion:</i></b> Court has discretion as to costs BUT emphasis on proportionality because of the standard basis of assessment. Where the	Up to 2 marks

<p>amount of costs is to be assessed on the standard basis, the court will only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party. Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.</p> <p><b>Credit reference to any authority cited in relation the court's discretion as to costs, e.g:</b> Section 51 of the Senior Courts Act 1981, CPR 44.2, CPR 44.3(2), CPR 44.3 (3).</p>	
<p><b>Candidates should have developed their discussion on what challenges may be made to the such a premium, e.g:</b></p> <p><b>Challenges:</b> There have been a number of challenges to ATE premiums: Not all sum paid was premium, the premium is too high compared to others available on the market and the formula used leads to disproportionate premium. Identifying which part of the premium relates to experts' reports may be difficult.</p> <p><b>Credit reference to any authority cited in relation to challenges as to recoverability, e.g:</b> Emily Nokes v Heart of England Foundation NHS Trust [2015]</p> <p><b>Applicability of CPR:</b> Despite a period of uncertainty in relations to an ATE premium taken out after 1 April 2013, it is now clear that the new proportionality test applies to post-LASPO clinical negligence ATE premiums. The CPR is engaged when assessing recoverability of ATE premiums and they are subject to the scrutiny of the Court.</p> <p><b>Credit reference to any authority cited in relation to the applicability of the CPR, e.g:</b> BNM v MGN Ltd [2016], King v Basildon &amp; Thurrock Hospital NHS Trust [2016], Murrell v Cambridge University Hospital NHS Trust [2017] and Peterborough &amp; Stamford Hospital NHS Trust v McMenemy [2017].</p> <p><b>Proportionality:</b> Proportionality is a two-stage test and once reasonableness has been considered the Court should remove all unavoidable costs before making any deduction to reach a proportionate figure. Unavoidable costs may include ATE premiums. The Court require expert evidence if a premium is to be challenged.</p> <p><b>Credit reference to any authority cited in relation to the test of proportionality, e.g:</b> BNM v MGN Ltd [2017], May v Wavell Group [2016], May v Wavell Group [2017] and West and Demouilpied v Stockport NHS Foundation Trust [2020].</p>	<p>Up to 4 marks</p>

<b>Question 3:</b>	Outline what the Costs Lawyer Standards Board Code of Conduct means when it says that Costs Lawyers must comply with their duty to the court in the administration of justice.
<b>Total Marks Attainable</b>  Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
<b>Indicative Content</b>	<b>Marks</b>
<p><b>Required: Candidates must explain the legislative framework governing the regulation of authorised persons, e.g:</b></p> <p><b>The legislative framework governing the regulation of authorised persons:</b> Authorised persons are people who are authorised to carry out the relevant activity by a relevant approved regulator or a licensable body which, by virtue of such a licence, is authorised to carry on the relevant activity by a licensing authority in relation to the reserved legal activity. An approved regulator is a body which is designated as an approved regulator by Schedule 4 of the LSA 07. ACL is approved regulator, as an approved regulator under the LSA ACL regulate those undertaking reserved legal activities who are known as Costs Lawyers. However, there is a memorandum of understanding between ACL and the CLSB delegating the regulatory function to the CLSB.</p> <p><b>Credit reference to any authority cited in relation to the legislative framework governing the regulation of authorised persons, e.g:</b> Section 18 of the Legal Services Act 2007, Section 20 of the Legal Services Act 2007, Section 20(5) of the Legal Services Act 2007 and Schedule 4 of the Legal Services Act 2007.</p> <p><b>Undertaking reserved legal activities:</b> The reserved legal activities relevant to Costs Lawyers include: the exercise of rights of audience, the conduct of litigation and the administration of oaths. A person is entitled to carry on a reserved legal activity where that person is authorised in relation to the activity in question. If a person is not authorised, they may still be entitled to carry out a reserved legal activity if they are an “exempt person” in relation to the activity. Costs Lawyers must adhere to CLSB code of Conduct. Breach will result in disciplinary proceedings by CLSB. An individual who is not authorised by the CLSB, but who is a manager or employee of an authorised person, is also considered a regulated person under the LSA and must comply with all relevant regulatory arrangements.</p> <p><b>Credit reference to any authority cited in relation to undertaking reserved legal activities, e.g:</b> Section 12 and Sch 2 of the Legal</p>	Up to 5 marks  To pass candidates must demonstrate their understanding of the legislative framework governing the regulation of authorised persons

<p>Services Act 2007, Section 13(1) of the Legal Services Act 2007, Section 13(2)(a) of the Legal Services Act 2007, Section 13(2)(b) of the Legal Services Act 2007, Section 176(1) of the Legal Services Act 2007 and Section 176(2)(b) of the Legal Services Act 2007.</p>	
<p><b>Credit discussion of the costs lawyer's duty to the court, e.g:</b></p> <p><b>CLSB Code of Conduct Principle 2:</b> Costs Lawyers must comply with their duty to the court in the administration of justice. Costs Lawyers must at all times act within the law. Costs Lawyers must not knowingly or recklessly either mislead the court or allow the court to be misled. Costs Lawyers must comply with any court order which places an obligation on them and they must not be in contempt of court. Costs Lawyers must advise clients to comply with court orders made against them.</p> <p><b>Credit reference to any authority cited in relation to Principle 2 of the CLSB Code of Conduct, e.g:</b> CLSB Code of Conduct Principle 2, CLSB Code of Conduct Principle 2.1, CLSB Code of Conduct Principle 2.2, CLSB Code of Conduct Principle 2.3 and CLSB Code of Conduct Principle 2.4.</p> <p><b>CLSB Code of Conduct Principle 3:</b> Costs Lawyers must act in the best interests of their client. Costs Lawyers must act at all times to ensure the client's interest is paramount except where this conflicts with your duties to the court or where otherwise permitted by law. You must decline to act if it would not be in the client's best interests or if that client's interests conflict directly with your own or with those of another client.</p> <p><b>Credit reference to any authority cited in relation to Principle 3 of the CLSB Code of Conduct, e.g:</b> CLSB Code of Conduct Principle 3 and CLSB Code of Conduct Principle 3.1.</p> <p><b>Responsibility and authority on an assessment hearing:</b> The solicitors are responsible for the conduct of the detailed assessment proceedings and cannot avoid that responsibility merely by instructing a costs draftsman. Costs draftsmen can appear on behalf of the party only as a duly authorised representative of the solicitor who has instructed him to be there. Work undertaken by independent costs draftsmen could be treated as part of the instructing solicitor's profit costs such as to attract a success fee. The costs draftsman has the same authority as the solicitor would have had to consent to orders.</p> <p><b>Credit reference to any authority cited in relation to the responsibility and authority on an assessment hearing, e.g:</b> Crane v Canons Leisure Centre [2007], Ahmed v Powell [2003] and Waterson Hicks v Eliopoulos [1997].</p> <p><b>Negligence:</b> Initially, claimant's civil actions for negligence could</p>	<p>Up to 6 marks</p> <p>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</p>



not be sustained: a barrister's immunity was justified by public policy. This immunity extended to pre-trial work if and only if it is so intimately connected with the conduct of the case in court as to amount to a preliminary decision about it. However, it has subsequently been recognised that the advocate, like other professional men, undertaking a duty to his client to conduct his case, subject to the rules and ethics of his profession, should do so with proper skill and care.

**Credit reference to any authority cited in relation to negligence, e.g:** *Rondel v Worsley* [1967], *Saif Ali v Sydney Mitchell* [1978] and *Arthur J S Hall & Co v Simmons* [2007].

**Approach to advocacy:** The principle that an advocate is liable to his client for professional should not stifle the manner in which they conduct litigation and advise their clients. This might lead to defensive advocacy, where barristers would hedge their opinions with qualifications and be reluctant to give clients the advice which they require in their best interests. The courts have not yet developed a clear set of principles governing the terms in which an advocate's advice should be given. If a point is not properly arguable, it should not be argued. It is the duty of an advocate to draw the judge's attention to authorities that are in point, even if they are adverse to that advocate's case.

**Credit reference to any authority cited in relation to approach taken to advocacy, e.g:** *Moy v Pettmann Smith (A Firm) & Anor* [2005], *Buxton v Mills-Owens* [2010] and *Copeland v Smith* [2002].

**Credit a discussion on the CLSB Practising Rules, e.g:**

**CLSB Practising Rules:** These Rules govern the practice of Costs Lawyers and the issue and revocation of practising certificates by the CLSB. No person shall be entitled to practise as a Costs Lawyer unless they have qualified as a Costs Lawyer in accordance with the Training Rules, they have a current Practising Certificate which has been issued in accordance with these Rules and which is not suspended and they comply with CPD requirements set out in the CPD Rules. An applicant or Costs Lawyer must disclose certain information when making an application for a Practising Certificate or throughout the lifetime of a Practising Certificate. This includes criminal convictions. A Practising Certificate may be revoked by the CLSB. Costs Lawyers must ensure that they have professional indemnity insurance.

**Credit reference to any authority cited in relation to the practising rules, e.g:** Rule 1 of the CLSB Practising Rules, Rule 4 of the CLSB Practising Rules, Rule 8 of the CLSB Practising Rules and Rule 10 of the CLSB Practising Rules.

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

<b>Question 4:</b>	Explain the provisions relating to Costs Lawyers handling client money found in the Costs Lawyer Code of Conduct and CLSB Practising Rules.
<b>Total Marks Attainable</b>  Fail = 0-7.4 Pass = 7.5+ Merit = 9+ Distinction = 10.5+	10
<b>Indicative Content</b>	<b>Marks</b>
<b>Required: A discussion on the CLSB rules, e.g:</b>  <i><b>Principle 3 of the CLSB Code of Conduct:</b></i> Generally is about acting in the best interests of the client. A costs lawyer must not accept client money save for disbursements and payment of your proper professional fees. There is no mention of the CLs handling client money in the CLSB Practising Rules.  <i><b>Credit reference to any authority cited on the principle, e.g:</b></i> Principle 3.6 of the Costs Lawyer Code of Conduct and CLSB Practising Rules.	Up to 3 marks
<b>Required: Students must include a discussion as to what client money is what proper professional fees are and what disbursements are, e.g:</b>  <i><b>No Definition:</b></i> There is no definition of client money within any rules set by the CLSB and therefore you must look to either CILEx or SRA rules for the definition. The SRA provide that "Client money" includes money held or received relating to regulated services delivered to a client and money held or received in respect of fees and any unpaid disbursements if held or received prior to delivery of a bill for the same. The CILEx account rules define client money as money beneficially owned by anyone other than the Authorised Entity.  <i><b>Credit reference to any authority cited on the definition of client money, e.g:</b></i> Rule 2.1(a) of the SRA Account Rules 2019, Rule 2.1(b) of the SRA Account Rules 2019, Rule 2.1(c) of the SRA Account Rules 2019, Rule 2.1(d) of the SRA Account Rules 2019 and the CILEx Account Rules.  <i><b>Proper professional fees:</b></i> Fees incurred on having complied with a client instruction, made up of payment for services provided; and disbursements paid on behalf of the client.  <i><b>Disbursements:</b></i> A disbursement is a sum that a Costs Lawyer spends on behalf of their client including the VAT element. Disbursements include, but are not limited to, court fees, counsel's fees, travel costs, postal costs (if exceptional sum e.g. courier), photocopying costs (if exceptional sum). Disbursements do not include hourly rates, telephone calls made or received, faxes made or received, or general office	Up to 6 marks

<p>overheads.</p> <p><b>Credit reference to any authority cited on professional fees and disbursements, e.g:</b> CLSB Guidance Note Handling Client Money (Principle 3.6)</p>	
<p><b>Credit discussion on whether the principle is relevant when a costs lawyer works for an SRA regulated firm, e.g</b></p> <p><b>Relevance:</b> The principles of the CLSB Code of Conduct are relevant to all authorised persons that are regulated by the CLSB. The CLSB are an approved regulator and must ensure they meet the 8 regulatory objectives set out in the Legal Services Act 2007. They do this by issuing rules, e.g the a code of conduct and practising rules.</p> <p><b>Credit reference to any authority cited on approved regulators and authorised persons, e.g:</b> Section 18 of the Legal Services Act 2007, Section 20 of the Legal Services Act 2007 and Section 1 of the Legal Services Act 2007</p> <p><b>Requesting payment in advance:</b> A costs lawyer can request payment in advance of their services when a Costs Lawyer is employed (PAYE) by, or is a partner in, a firm authorised and regulated under the Legal Services Act 2007 (LSA). For example, a firm of solicitors regulated by the Solicitors Regulation Authority (SRA), in which case prevailing SRA rules and regulations apply. A costs lawyer cannot request payment in advance of their services when a Costs Lawyer is working for a firm not authorised and regulated under the LSA or is a sole practitioner. Interim billing arrangements can be agreed with a client to reduce financial exposure on payment for services provided and reimbursement for disbursements.</p>	<p>Up to 3 marks</p>

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

<p><b>Question 5:</b></p>	<p>You work in the Litigation department of an SRA regulated firm, Bramble and Heckard LLP, in Manchester. You are contacted by a fee earner, Sarah Tyrell, who has requested help on the file of Charter Logistics Ltd.</p> <p>Charter Logistics Ltd are the defendants in proceedings. On 12 September 2022 you correctly filed an acknowledgment of service in their matter. You have since finished re-drafting the defence and counterclaim more quickly than you expected and today it is ready to be signed and served.</p> <p>Just before 5pm you received a call from Amanda Leyton at</p>
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Leyton and Tannard LLP. Amanda is representing the claimant in the case. Amanda informs you that she has today obtained judgment in default against your client on the basis that your client had failed to file a defence within 14 days of deemed service of the claim form.

Having discussed the situation with Sarah Tyrell you must now write to your client and, with reference to the relevant Civil Procedure Rules, explain whether Amanda Leyton correctly obtained judgment in default and what type of application you advise the defendant should now make. Your letter of advice should set out the grounds upon which any application should be made.

Write the body of a letter to Charter Logistics Ltd providing advice on Default Judgments.

<b>Total Marks Attainable</b>	20
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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: what a default judgment is, how a default judgment may be obtained, when permission may be needed to apply for a default judgment and the mandatory grounds for setting aside a default judgment. Candidates will demonstrate a good depth of knowledge of the subject (i.e. a good understanding of the procedure and impact of making an application) with good application and some analysis having regard to the facts, although candidates may demonstrate some areas of weakness.
Merit	12+	An answer which includes ALL the requirements for a Pass (as set out above) PLUS candidates will demonstrate a very good depth of knowledge of the subject (i.e. a very good understanding of the likely outcome in terms of costs) with very good application and some analysis having regard to the facts. Candidates are likely to observe that IN THIS SCENARIO it is likely the court will set aside the default judgment if it can be demonstrated the defendant complied with the CPR in relation to the response to the service of the claim. 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. 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+

<b>Indicative Content</b>	Marks
<p><b>Required: Candidate should explain what a Default Judgment is, how a Judgment may be obtained and upon what basis the Court may set aside a Default Judgment, e.g:</b></p> <p><b>A Default Judgment is:</b> A default judgment is judgment without trial where a defendant has failed to file an acknowledgment of service; or has failed</p>	Up to 5 Marks

<p>to file a defence.</p> <p><b>How a Judgment may be obtained:</b> Defendant does not respond after 14 days, or acknowledges service within 14 days, but does not file and serve a defence within 28 days, the claimant can apply for 'judgment by default'.</p> <p><b>The basis the Court may set aside a Default Judgment:</b> The mandatory grounds, upon which the court must set the judgment aside: D has filed an admission with request for time to pay, D had applied for summary judgment against the claimant, the claim was satisfied before judgment and D has complied with the rules.</p> <p><b>Credit reference to any authority cited on what a Default Judgment is, how a Judgment may be obtained and upon what basis the Court may set aside a Default Judgment, e.g:</b> CPR 12, CPR 12.1 and CPR 13.2.</p>	
<p><b>Credit a discussion on making an application for Default Judgment under Part 12 Civil Procedure Rules (CPR), e.g</b></p> <p><b>Making an application:</b> If a defendant fails to file an acknowledgment of service and does not within that period file a defence in accordance with Part 15 or serve or file an admission in accordance with Part 14, the claimant may obtain default judgment if Part 12 allows it. The claimant may obtain judgment in default of an acknowledgment of service only if at the date on which judgment is entered the defendant has not filed an acknowledgment of service or a defence to the claim (or any part of the claim); and the relevant time for doing so has expired. A default judgment is requested by completing and returning to the court Form N225 - Request for judgment and reply to admission. This form is also used in cases of admissions. Both on a request and on an application for default judgment the court must be satisfied that the particulars of claim have been served on the defendant (a certificate of service on the court file will be sufficient evidence), either the defendant has not filed an acknowledgment of service or has not filed a defence and that in either case the relevant period for doing so has expired, the defendant has not satisfied the claim, and the defendant has not returned an admission to the claimant or filed one with the court under rule.</p> <p><b>Credit reference to any authority cited on making an application, e.g:</b> CPR 10.2, CPR 12.3(1), CPR 6, Form N225 and CPR PD 12, para 4.1.</p> <p><b>When a DJ may not be obtained or when permission of the court may be needed:</b> A claimant may not obtain a default judgment on a claim for delivery of goods subject to an agreement regulated by the Consumer Credit Act 1974; where he uses the procedure set out in Part 8 (alternative procedure for claims); or in any other case where a practice direction provides that the claimant may not obtain default judgment. May only be obtained by a claimant with the permission of the court (for which an application under CPR Part 23 will be required) in the following cases: D was served outside the jurisdiction, D is a child or protected party, C seeks</p>	<p>Up to 7 Marks</p>

<p>costs (other than fixed costs), Tort claims between spouses or civil partners and C wants delivery of goods, not simply damages.</p> <p><b>Credit reference to any authority cited on when a DJ may not be obtained or when permission of the court may be needed, e.g:</b> CPR 12.2 and CPR 12.10.</p>	
<p><b>Credit a discussion on setting aside a default judgment, e.g:</b></p> <p><b>Setting aside a DJ:</b> The mandatory grounds, upon which the court must set the judgment aside: D has filed an admission with request for time to pay, D had applied for summary judgment against the claimant, the claim was satisfied before judgment and D has complied with the rules. In any other case, the court may set aside or vary a judgment entered under Part 12 if the defendant has a real prospect of successfully defending the claim or it appears to the court that there is some other good reason why the judgment should be set aside or varied or the defendant should be allowed to defend the claim.</p> <p><b>Credit reference to any authority cited on setting aside a DJ, e.g:</b> CPR 13.2 and CPR 13.3.</p> <p><b>Promptness:</b> A lack of promptness is a factor for the court to consider when deciding whether to set aside a default judgment. However a lack of promptness (and even a positive decision not to act promptly) does not prevent the court setting a judgment aside if the defendant can show a real prospect of successfully defending the claim.</p> <p><b>Credit reference to any authority cited on promptness in making an application, e.g:</b> Page v Champion Financial Ltd [2014], Gentry v Miller [2016] and Stanley v London Borough Tower Hamlets [2020].</p> <p><b>The Denton Principles:</b> There is a degree of uncertainty about whether or not an application to have a default judgment set aside should be dealt with under the principles from Denton in relation to applications for relief from sanctions. Those principles say that when an application is made for relief from sanctions under CPR 3.9(1) a three stage approach should be taken. Firstly, the court should identify and assess the seriousness or significance of the breach. Secondly, the court should consider why the default occurred and thirdly all of the circumstances of the case should be evaluated.</p> <p><b>Credit reference to any authority cited on applications for relief from sanctions, e.g:</b> Core-Export Spa v Yang Ming Marine Transportation Corp [2020], Denton v White [2014], Ince Gordon Dadds LLP v Mellitah Oil &amp; Gas BV [2022] and C v D [2022].</p>	<p>Up to 8 marks</p>
<p><b>Credit a discussion on the costs consequences of such an application, e.g:</b></p> <p><b>Legal representatives' charges:</b> No sum in respect of legal representatives' charges will be allowed where the only claim is for a sum of money or goods not exceeding £25. Any appropriate court fee will be allowed in</p>	<p>Up to 4 marks</p>

addition to the costs set out.

**Credit reference to any authority cited on legal representatives' charges,**  
**e.g:** CPR 45.1(1), CPR 45.1 (2) (a)(i), CPR 45.1 (3) and CPR 45.1 (4).

**Fixed commencement costs:** The claim form may include a claim for fixed commencement costs. The amount of fixed commencement costs in a claim will be calculated by reference to Table 1; and the amount claimed, or the value of the goods claimed if specified, in the claim form is to be used for determining the band in Table 1 that applies to the claim. The amounts shown in Table 4 are to be allowed in addition, if applicable. These are miscellaneous costs in respect of service. Where the claimant has claimed fixed commencement costs and judgment is entered the amount to be included in the judgment for the claimant's legal representative's charges is the total of the fixed commencement costs and the relevant amount shown in Table 2. For default judgment these will depend on whether the default was on an acknowledgment of service or default of a defence. These range between £22-£35.

**Credit reference to any authority cited on fixed commencement costs,**  
**e.g:** CPR 45.1 (5), CPR 45.2, CPR 45.2 (1), CPR 45.2 (2) and CPR 45.4.

**Question 6:**

You work in the Costs department of Barnetts an SRA regulated firm that specialises in clinical negligence and catastrophic injury claims. Your colleague, Helen Elmshaw, has requested your help on the file of Bohdan Shevchenko.

Bohdan Shevchenko had an accident at work in December last year. Mr Shevchenko was a general labourer at Bicester Building Centre. His accident happened when he was lifting some heavy steel castings and, as a result, suffered an injury to his back. The injury was quite serious and has prevented him from returning to work because he is unable to cope with the heavy manual work which was the majority of his role.

Mr Shevchenko has been examined by Bicester Building Centre's doctor and his employment has been terminated because he is unable to return to his former duties. The defendant accepts that it is liable for the accident but has disputed the extent of the injuries that were caused by it. Their doctor has indicated that Mr Shevchenko had pre-existing degenerative problems with his back. In contrast, Mr Shevchenko's doctor believes that all the current symptoms are attributable to the accident and that he will be left with some permanent ongoing symptoms.

Your firm have valued Mr Shevchenko's general damages at around £30,000. He is suffering a continuing loss of earnings of

approximately £300 a week and this has been the case since the beginning of March.

Mr Shevchenko is nervous of the financial consequences of bringing this claim. His wife has been on maternity leave, so they don't have lot of money. However, the firm are proposing to act for him on a conditional fee agreement and Helen Elmshaw has asked you to prepare some advice for him on when a claimant is entitled to the protection of QOCS.

Write the body of a letter to Mr Shevchenko advising when a claimant is entitled to the protection of QOCS and in what situation that protection may be lost.

**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: an explanation as to how QOCs operates, which cases the rules apply to, when an order can be enforced without the courts permission, to what extent an order can be enforced and when an order can be enforced only with the court's permission. Candidates will demonstrate a good depth of knowledge of the subject (i.e. a good understanding of the legislative framework around) with good application and some analysis having regard to the facts, although candidates may demonstrate some areas of weakness.
Merit	12+	An answer which addresses ALL of the following points required for a pass AND most of the following points: the impact where a claim has been struck out, the impact where there has been a finding of fundamental dishonesty, the impact where the claim involves an element for another person and mixed claims. Candidates will demonstrate a very good depth of knowledge of the subject (i.e. a good understanding of the legislative framework) with good application and some analysis having regard to the facts, although candidates may demonstrate some areas of weakness.
Distinction	14+	An answer which includes ALL the requirements for a pass and merit (as set out above) PLUS the candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. All views expressed by candidates should be supported by relevant authority and/or case law. Work should be written to an exceptionally high standard taking into consideration that it is written in exam conditions.

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

**Indicative Content:**

**Marks**

**Required: Candidates are required to explore what QOCS is:**

Up to 2 marks

**QOCS and the court's discretion:** QOCS limits the circumstances in which such costs orders can be enforced and provides for circumstances where they can be enforced with or without court



<p>permission. The Court retains discretion as to costs and QOCS does not impact this. The normal rule that the losing party to litigation is ordered to pay the winning party's costs is not displaced by QOCS. Where costs are ordered against a claimant, this may be on a standard or indemnity basis and may be subject to a summary or detailed assessment.</p> <p><b>Credit reference to any authority cited on QOCS and the court's discretion, e.g:</b> CPR 44.2(1), CPR 44.2(2)(a) and CPR PD 44, para 12.7.</p>	
<p><b>Credit reference to any relevant point to describe where QOCS does/doesn't apply, e.g:</b></p> <p><b>QOCS applies:</b> QOCS applies to personal injury and fatal accidents claims both under the Fatal Accidents Act 1976 and under section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934. QOCS will not apply to applications for pre-action disclosure. QOCs will not apply where the claimant had entered into a 'pre-commencement funding arrangement'. A pre-commencement funding arrangement is essentially a CFA entered into before 1 April 2013.</p> <p><b>Credit reference to any authority cited in relation to when QOCS applies, e.g:</b> CPR 44.13, CPR 44.17, CPR 48, <i>Wagenaar v Weekend Travel Ltd (trading as Ski Weekend) &amp; Serradj</i> [2014], <i>Catalano v Espley-Tyas Development Group</i> [2017], <i>Price v Egbert Taylor &amp; Co.</i> [2016] and <i>Landau v Big Bus Co Ltd</i> [2014].</p>	Up to 3 marks
<p><b>Credit reference to any relevant point to describe the enforcement of costs orders, under CPR 44.14, where QOCS applies, e.g:</b></p> <p><b>Enforcement up to the extent of damages without the court's permission:</b> Orders can be enforced to the extent that the amount of the costs does not exceed the damages awarded to the claimant. The court's permission is not required. This covers a situation where a claimant fails to beat a defendant's Part 36 offer. May only be enforced after the proceedings have been concluded and the costs have been assessed or agreed.</p> <p><b>Credit reference to any authority cited in relation to enforcement up to the extent of damages without the court's permission, e.g:</b> CPR 44.14(1), CPR 36 and CPR 44.14 (2).</p>	Up to 4 marks
<p><b>Credit any relevant point made in relation to enforcing an order when a claim has been struck out, e.g:</b></p> <p><b>Struck out:</b> Orders can be enforced where proceedings are struck out because there were no reasonable grounds for bringing the proceedings, there is an abuse of process or the conduct of the claimant (or a person acting on his behalf with his knowledge) is likely to obstruct the just disposal of the proceedings. There have been cases where a claimant may have discontinued and the defendant has applied to have the discontinuance set aside however the court have made clear that the claimant has the right to discontinue. It has also</p>	Up to 4 marks

<p>been highlighted that there is a potential lacuna in the rules because where a defendant is outside of the jurisdiction the court do not have the power to strike out a claim but must set it aside, in these circumstances the defendant would be unable to enforce their costs against the claimant.</p> <p><b>Credit reference to any authority cited in relation to enforcement when a claim has been struck out, e.g:</b> CPR 44.15, Wall v British Canoe Union [2015], Brahilka v Allianz Insurance, Reckitt Benckiser (UK) Ltd v Home Pairfum Ltd [2004], Kite v Phoenix Pub Group [2015] and Shaw v Medtronic Corevalve LLC and others [2017].</p>	
<p><b>Credit any relevant point made in relation to enforcing an order where there is a finding of fundamental dishonesty, e.g:</b></p> <p><b>Fundamental dishonesty:</b> Costs orders against claimants can be enforced to their full extent only with court permission where the claim is found, on the balance of probabilities, to be fundamentally dishonest. The orders against claimants can be enforced to their full extent only with court permission. An exaggeration of symptoms may be fundamental dishonesty but it isn't always the case and will be fact dependant. Fundamental dishonesty is a two stage test, firstly is there dishonesty and secondly is it fundamental to the claim. It is not necessary for the defendant to raise fundamental dishonesty in their defence.</p> <p><b>Credit reference to any authority cited on enforcement where there is a finding of fundamental dishonesty, e.g:</b> CPR 44.16(1), CPR 44.16(3), Menary v Darnton [2016], Gosling v Hailo and Screwfix Direct [2014], Zurich Insurance v Bain [2015], Wagett v Witold [2015] and Howlett v Davies [2017].</p>	Up to 4 marks
<p><b>Credit any relevant point made in relation to enforcing an order where the claim may include an element for another or is a mixed claim, e.g:</b></p> <p><b>Involving another person:</b> Where the proceedings include a claim which is made for the financial benefit of a person other than the claimant or a dependant within the meaning of section 1(3) of the Fatal Accidents Act 1976 (other than a claim in respect of the gratuitous provision of care, earnings paid by an employer or medical expenses) the orders against claimants can be enforced to their full extent only with court permission.</p> <p><b>Mixed claims:</b> Costs orders against claimants can be enforced to their full extent providing the court has given permission where the claim includes a claim for financial benefit unrelated to personal injury either for the claimant or for another party. This part therefore gives the court the power to deny a claimant QOCS protection in a claim, for example, which is primarily a property damage claim but which includes a personal injury claim. Examples of such claims are subrogated claims and claims for credit hire. In mixed claims cases the starting point will be</p>	Up to 5 marks

<p>that claimants have QOCs protection but that is only the starting point.</p> <p><b>Credit reference to any authority cited on where a claim may include an element for another or is a mixed claim, e.g:</b> CPR 44.16(2)(a), CPR 44.16(2)(b), CPR 44.16(3), CPR PD 44, para 12.2, Howlett and Howlett v Davies and Ageas [2017], Jeffreys v Commissioner of Police for the Metropolis [2017] and Brown v Commissioner of Police of the Metropolis &amp; Anor [2019].</p>	
<p><b>Credit any relevant point to describe set-off of costs orders, e.g:</b></p> <p><b>Set off:</b> Where a party entitled to costs is also liable to pay costs, the court may assess the costs which that party is liable to pay and either set off the amount assessed against the amount the party is entitled to be paid and direct that party to pay any balance; or delay the issue of a certificate for the costs to which the party is entitled until the party has paid the amount which that party is liable to pay. The defendant is unable to set off costs against the claimants costs but may against the claimant's damages where those damages were awarded in an order.</p> <p><b>Credit reference to any authority cited on set off, e.g:</b> CPR 44.12(1), Howe v Motor Insurers' Bureau [2017], Faulkner v Secretary of State for Energy and Industrial Strategy [2020], Ho v Adelekun (no.2) [2020] and Jeffrey Cartwright v Venduct Engineering Limited [2018] and Ho v Adelekun [2021].</p>	<p>Up to 1 mark</p>

<p><b>Question 7:</b></p>	<p>You are a Costs Lawyer working in-house for a firm of solicitors in Blackpool, Lavigne Legal LLP. You are instructed by the defendant in proceedings, Walker Hampsons.</p> <p>The claimant, Mr Mark Craven, brought a claim against Walker Hampsons for noise induced hearing loss. Part 18 requests were made on behalf of your client. Two issues on which clarification were sought were whether Mr Craven had been a director of Walker Hampsons and whether he had been provided with hearing protection.</p> <p>In his part 18 response Mr Craven had falsely stated that he had not been a director of Walker Hampsons at the material time. Mr Craven has since said he did not sign the response but his legal representatives, Turner and Morgan, said he did. Mr Craven also put forward a confused and contradictory position over whether he had been provided with ear protection. When the case came on for trial Mr Craven discontinued his claim in entirety.</p> <p>Your firm have now been instructed to make an application for a wasted costs order. Your client believes that the court should be asked to make a wasted costs order against the Solicitor that</p>
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	<p>represented Mr Craven.</p> <p>Prepare the body of an advice to Walker Hampsons setting out what a wasted costs order is, how an application for a wasted costs order should be made and when the court can make a wasted costs order against a legal representative.</p>	
<b>Total Marks Attainable</b>		20
Fail = 0-9.9 Pass = 10+ Merit = 12+ Distinction = 14+		
Fail	up to 9.9	An answer which deals with the basic requirements of the question, but in dealing with those requirements only does so superficially and does not address, as a minimum, all the criteria expected of a pass grade (set out in full below). The answer will only demonstrate an awareness of some of the more obvious issues. The answer will be weak in its presentation of points and its application of the law to the facts.
Pass	10+	An answer which addresses MOST of the following points: An outline of the court's discretion as to costs, the factors the court may consider when making a costs order, what a wasted costs order is, when a wasted costs order would be made and the court's approach to making a wasted costs order. Candidates should identify the relevant issues in the case and deal with the circumstances in their advice.
Merit	12+	An answer which includes ALL the requirements for a Pass (as set out above) PLUS candidates will demonstrate a very good depth of knowledge of the subject (i.e. a very good understanding of the personal liability of a costs lawyer) with very good application and some analysis having regard to the facts. Most views expressed by candidates should be supported by relevant authority and/or case law.
Distinction	14+	An answer which includes ALL the requirements for a Pass (as set out above) PLUS candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. Work should be written to an exceptionally high standard with few, if any, grammatical errors or spelling mistakes etc.
<b>Indicative Content</b>		<b>Marks</b>
<p><b>Required: Candidates must explain the court's discretion as to costs, e.g:</b></p> <p><b>Discretion of the court:</b> Costs payable by one party to another are the discretion of the court. Court may consider a number of factors when determining what type of order to make. Court can consider conduct when making an order for costs.</p> <p><b>Credit reference to any relevant authority cited on the discretion of the court, e.g:</b> Section 51 of the Senior Courts Act 1981, CPR 44.2, CPR 44.2(4) and CPR 44.2(5).</p>		<p>Up to 2 Marks</p> <p>An explanation should be given as to what is meant by the court's discretion</p>
<p><b>Credit a discussion on wasted costs orders, e.g:</b></p> <p><b>Wasted costs:</b> The court shall have full power to determine by whom and to what extent the costs are to be paid. The court may disallow or order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may</p>		Up to 10 marks

be determined in accordance with rules of court. Where the court orders a legal representative to pay wasted costs it must inform an approved regulator or the Director of Legal Aid Casework as it considers appropriate.

**Credit reference to any relevant authority cited on wasted costs,**

**e.g:** Section 51(3) of the Senior Courts Act 1981, Section 51(6) of the Senior Courts Act 1981 and Section 51(7A) of the Senior Courts Act 1981

**Two stages:** As a general rule the court will consider whether to make a wasted costs order in two stages at the first stage the court must be satisfied that it has before it evidence or other material which, if unanswered, would be likely to lead to a wasted costs order being made and the wasted costs proceedings are justified notwithstanding the likely costs involved. At the second stage, the court will consider, after giving the legal representative an opportunity to make representations in writing or at a hearing, whether it is appropriate to make a wasted costs order in accordance with paragraph 5.5 above.

**Credit reference to any authority cited on the two stage**

**approach, e.g:** CPR PD 46 para 5.7(a) and CPR PD 46 para 5.7(b).

**Making the Order:** The court will give the legal representative a reasonable opportunity to make written submissions or, if the legal representative prefers, to attend a hearing before it makes such an order. When the court makes a wasted costs order, it will specify the amount to be disallowed or paid or direct a costs judge or a district judge to decide the amount of costs to be disallowed or paid.

**Credit reference to any relevant authority cited on making an**

**order, e.g:** CPR 46.8(1), CPR 46.8(2), CPR 46.8(3)(a) and CPR 46.8(3)(b).

**Guidance from the common law:** The Court should only make a Wasted Costs Order where the legal representative has acted improperly, negligently or unreasonably - a mistake is not enough. Wasted Costs Orders are discretionary and should be reserved for unjustifiable conduct. Wasted Costs Orders should not be used as a threat to intimidate the other party. Wasted Costs Orders should not be motivated by a resentment or inability to obtain an effective costs order against an impecunious litigant. Wasted costs were neither a punitive nor a regulatory jurisdiction, but rather a compensatory one.

**Credit reference to any case authority cited, e.g:** Ridehalgh v Horsefield (1994), Orchard v SE Electricity Board (1987), Harley v McDonald (2001), Kiam v MGN Limited No2 [2002], Wates Construction Limited v HGP Greentree Alchurch Evans Limited

<p>[2006], Cancino [2015], Noorani v Calver [2009], Awuah and Others [2017].</p>	
<p><b>Credit a discussion on applications for wasted costs orders, e.g:</b></p> <p><b>Application or court's own initiative:</b> The court may make a wasted costs order against a legal representative on its own initiative. A party may apply for a wasted costs order by filing an application notice in accordance with Part 23, or by making an application orally in the course of any hearing.</p> <p><b>Credit reference to an application or court's own initiative, e.g:</b> CPR PD 46 para 5.3 and CPR PD 46 para 5.4</p> <p><b>Making an application:</b> A party may apply for a wasted costs order by filing an application notice in accordance with Part 23 or by making an application orally in the course of any hearing. Under CPR 23 an application notice means a document in which the applicant states his intention to seek a court order and respondent means the person against whom the order is sought and such other person as the court may direct. The general rule is that a copy of the application notice must be served on each respondent. An application may be made without serving a copy of the application notice if this is permitted by a rule a practice direction or a court order. An application notice must state what order the applicant is seeking and briefly, why the applicant is seeking the order. A copy of the application notice must be served as soon as practicable after it is filed and except where another time limit is specified in these Rules or a practice direction, must in any event be served at least 3 days before the court is to deal with the application. When a copy of an application notice is served it must be accompanied by a copy of any written evidence in support and a copy of any draft order which the applicant has attached to his application. Wasted costs applications should be left until the end of the trial. Applications are usually raised by the aggrieved party but can be made by the court of its own initiative.</p> <p><b>Credit reference to any authority cited on making an application, e.g:</b> CPR PD 46 para 5.4, CPR 23, CPR 23.1, CPR 23.4(1), CPR 23.4(2), CPR 23.6, CPR 23.7(1) and CPR 23.7(3).</p>	<p>Up to 8 Marks</p>
<p><b>Credit a discussion on the indemnity principle, e.g:</b></p> <p><b>The indemnity principle and retainer:</b> 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</p>	<p>Up to 5 Marks</p> <p>To achieve a distinction candidates should demonstrate a sound ability to apply the law to</p>

<p>partes. The indemnity principle does not apply in certain circumstances e.g. legal aid.</p> <p><b>Credit reference to the citation of any authority cited on the retainers and the indemnity principle, e.g:</b> JH Milner v Percy Bilton [1966], Scott v Hull and East Yorkshire Hospitals NHS Trust [2014] and Bailey v IBC (1998).</p>	<p>the facts of the scenarios presented.</p>
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<p><b>Question 8:</b></p>	<p>You are a Costs Lawyer and work in the Costs department for an SRA regulated firm, Timpson and Tweddle LLP based in Doncaster. The Costs department are instructed internally by fee earners throughout the firm but also receive external instructions predominantly from receiving parties.</p> <p>You have been approached by Jonathan Grey who is the firms Compliance Officer for Legal Practice. It is Jonathan's responsibility to ensure that all risks at the firm are identified, managed and monitored. Jonathan is currently updating the firm's risk register and is asking for your input. He wishes for you to prepare some notes on the potential risks the firm faces as a result of the external instructions your department receive.</p> <p>You have agreed to draft a paper setting out the work you do, the status of that work and the potential risks that the firm face as a result of your department undertaking that work.</p> <p>Prepare the body of an advice as requested by the firms Compliance Officer for Legal Practice.</p>
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<p><b>Total Marks Attainable</b></p> <p>Fail = 0-9.9  Pass = 10+  Merit = 12+  Distinction = 14+</p>	<p>20</p>
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<p>Fail</p>	<p>up to 9.9</p>	<p>An answer which deals with the basic requirements of the question, but in dealing with those requirements only does so superficially and does not address, as a minimum, all the criteria expected of a pass grade (set out in full below). The answer will only demonstrate an awareness of some of the more obvious issues. The answer will be weak in its presentation of points and its application of the law to the facts.</p>
<p>Pass</p>	<p>10+</p>	<p>An answer which addresses MOST of the following points: an outline of how the legal profession is regulated, an outline of the relevant professional conduct rules which govern a costs lawyer, an outline of the relationship between a solicitor and the instruction of a costs professional, the duty to the court of advocates and the potential consequence of misleading the court and liability.</p>

Merit	12+	An answer which includes ALL the requirements for a Pass (as set out above) PLUS candidates will demonstrate a very good depth of knowledge of the subject (i.e. a very good understanding of the personal liability of a legal representative, including costs lawyers) with very good application and some analysis having regard to the facts. Most views expressed by candidates should be supported by relevant authority and/or case law.
Distinction	14+	An answer which includes ALL the requirements for a Pass (as set out above) PLUS candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. Work should be written to an exceptionally high standard with few, if any, grammatical errors or spelling mistakes etc.
Indicative Content		Marks
<p><b>Required: Candidates must explain the legislative framework governing the regulation of lawyers and reserved legal activities with specific reference to costs lawyers, e.g:</b></p> <p><b>Regulation of lawyers:</b> An authorised persons is a person, or company, who is authorised to undertake reserved legal activities by an approved regulator. An approved regulator is a body which is designated as an approved regulator by Schedule 4 of the LSA 07. ACL is the approved regulator of Costs Lawyers. A Memorandum of Understanding between ACL and the CLSB delegates the regulatory function to the CLSB. This is similar to the relationship between the SRA and Law Society, the SRA regulate solicitors and SRA regulated firms. Reserved legal activities include the exercise of rights of audience, the conduct of litigation and the administration of oaths.</p> <p><b>Credit reference to any authority cited on the regulation of lawyers, e.g:</b> Section 18 of the Legal Services Act 2007, Section 20 of the Legal Services Act 2007, Section 20(5) of the Legal Services Act 2007, Schedule 4 of the Legal Services Act 2007, Section 12 of the Legal Services Act 2007, Sch 2 of the Legal Services Act 2007.</p> <p><b>Reserved legal activities:</b> Any question of entitlement to undertake reserved legal activities is determined solely in accordance with the LSA 07. A person is entitled to carry on a reserved legal activity where that person is authorised in relation to the activity in question. If a person is not authorised, they may still be entitled to carry out a reserved legal activity if they are an "exempt person" in relation to the activity. Costs Lawyers must adhere to CLSB code of Conduct. Breach will result in disciplinary proceedings by CLSB. An individual who is not authorised by the CLSB, but who is a manager or employee of an authorised person, is also considered a regulated person under the LSA and must comply with all relevant regulatory arrangements.</p> <p><b>Credit reference to any authority cited on undertaking reserved legal activities, e.g:</b> Section 13(1) of the Legal Services Act 2007, Section 13(2)(a) of the Legal Services Act 2007, Section 13(2)(b) of the Legal Services Act 2007, Section 176(1) of the LSA 2007, Section 176(2)(b) of the LSA 2007.</p>		Up to 8 marks
<p><b>Credit discussion on the responsibility of costs professionals when acting as agents, e.g:</b></p> <p><b>Costs Professionals as agents:</b> The solicitors with conduct of the case are responsible for the conduct of the detailed assessment proceedings</p>		Up to 4 Marks



<p>and cannot avoid that responsibility merely by instructing a costs draftsman. Costs professionals can undertake the work and appear on behalf of the party as a duly authorised representative of the solicitor who has instructed him to be there. Work undertaken by independent costs professionals could be treated as part of the instructing solicitor's profit costs such as to attract a success fee.</p> <p><b>Credit reference to any authority cited on instructing a non regulated costs professional, e.g:</b> Legal Services Act 2007, Sch 3, Ahmed v Powell [2003], Crane v Canons Leisure Centre [2007], Waterson Hicks v Eliopoulos [1997].</p>	
<p><b>Credit discussion of the role of the costs lawyer as an advocate and their duty to the court, e.g:</b></p> <p><b>Costs Lawyer's duty to the court:</b> A regulated costs lawyer must comply with your duty to the court in the administration of justice. Costs Lawyers must at all times act within the law and must not knowingly or recklessly either mislead the court or allow the court to be misled. Costs Lawyers must comply with any court order which places an obligation on them and they must not be in contempt of court. Costs Lawyers must advise clients to comply with court orders made against them. Costs Lawyers must act in the best interests of your client. They must act at all times to ensure the client's interest is paramount except where this conflicts with your duties to the court or where otherwise permitted by law. You must decline to act if it would not be in the client's best interests or if that client's interests conflict directly with your own or with those of another client.</p> <p><b>Credit reference to any authority cited on the Costs Lawyer's duty to the court, e.g:</b> CLSB Code of Conduct Principle 2, CLSB Code of Conduct Principle 2.1, CLSB Code of Conduct Principle 2.2, CLSB Code of Conduct Principle 2.3, CLSB Code of Conduct Principle 2.4, CLSB Code of Conduct Principle 3 and CLSB Code of Conduct Principle 3.1.</p> <p><b>Advocate's duty to the court:</b> It is the duty of an advocate to draw the judge's attention to authorities that are in point, even if they are adverse to that advocate's case. If a point is not properly arguable, it should not be argued.</p> <p><b>Credit reference to any authority cited on the advocates's duty to the court, e.g:</b> Copeland v Smith [2002] and Buxton v Mills-Owens [2010].</p>	<p>Up to 4 Marks</p>
<p><b>Credit potential risk of liability for negligence, e.g:</b></p> <p><b>Negligence:</b> The fact is that a lawyer, like other professional men, should undertake their duty to their client to conduct his case, subject to the rules and ethics of his profession, with proper skill and care. Costs lawyers, as legal advisors and advocates, will be liable to his client for professional negligence. However, this should not stifle the manner in which they conduct litigation and advise their clients.</p> <p><b>Credit reference to any relevant authority cited on negligence, e.g:</b> Rondel v Worsley [1967], Arthur J S Hall &amp; Co v Simmons [2007] and Moy v Pettmann Smith (A Firm) &amp; Anor [2005].</p>	<p>Up to 4 Marks</p> <p>To achieve a distinction candidates should demonstrate a sound ability to apply the law to the facts of the</p>

	scenarios presented.
<p><b>Credit discussion on potential risk of liability wasted costs orders, e.g:</b></p> <p><b>Wasted costs:</b> The court shall have full power to determine by whom and to what extent the costs are to be paid. The court may disallow or order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with rules of court. Where the court orders a legal representative to pay wasted costs it must inform an approved regulator or the Director of Legal Aid Casework as it considers appropriate.</p> <p><b>Credit reference to any relevant authority cited on wasted costs, e.g:</b> Section 51(3) of the Senior Courts Act 1981, Section 51(6) of the Senior Courts Act 1981 and Section 51(7A) of the Senior Courts Act 1981.</p> <p><b>Making the Order:</b> The court will give the legal representative a reasonable opportunity to make written submissions or, if the legal representative prefers, to attend a hearing before it makes such an order. When the court makes a wasted costs order, it will specify the amount to be disallowed or paid or direct a costs judge or a district judge to decide the amount of costs to be disallowed or paid.</p> <p><b>Credit reference to any relevant authority cited on making an order, e.g:</b> CPR 46.8(1), CPR 46.8(2), CPR 46.8(3)(a) and CPR 46.8(3)(b).</p>	<p>Up to 4 Marks</p> <p>To achieve a distinction candidates should demonstrate a sound ability to apply the law to the facts of the scenarios presented.</p>

<p><b>Question 9:</b></p>	<p>You are a Costs Lawyer and head the Costs and Accounts department at Turner and Battersby LLP, a large high street firm in Durham. You work alongside Martha Haslet, who is the firm's Compliance Officer for Finance and Administration.</p> <p>Martha has asked you to assist with the drafting of some training materials on money laundering. She has explained that the purpose of the materials is to highlight the importance of the firm ensuring that they make fully informed and risk-based decisions on new clients and new types of business from both new and existing clients. Martha wishes for you to include an explanation of why the practice needs customer due diligence procedures in place to identify clients and the potential steps that should be taken if a client refuses to answer questions or give information about themselves.</p> <p>Martha has also asked you to ensure that the materials explain why the firm must be able to show a reasonable connection between the underlying legal transaction for which they have been instructed to advise on with any funds the firm are asked to hold, or payments the firm are asked to make. The guidance must emphasise that a client account should not be used as a</p>
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	<p>banking facility for funds unrelated to any underlying transaction that the fee earner is carrying out.</p> <p>Prepare a summary that you will form the basis of the training materials on the aspects detailed above.</p>	
<b>Total Marks Attainable</b>		20
Fail	up to 9.9	An answer which deals with the basic requirements of the question, but in dealing with those requirements only does so superficially and does not address, as a minimum, all the criteria expected of a pass grade (set out in full below). The answer will only demonstrate an awareness of some of the more obvious issues. The answer will be weak in its presentation of points and its application of the law to the facts. There will be little evidence that candidates have any understanding of the regulatory framework governing client accounts and money laundering.
Pass	10+	An answer which addresses MOST of the following points: Use of Client account as a banking facility, insolvency matters, a definition of money laundering, an explanation of what money laundering is, identification of the relevant legislation/regulations, an outline of the due diligence requirements and the principle offences. Some key authority should be included, but this may not be specifically applied or only superficially.
Merit	12+	An answer which includes ALL the requirements for a Pass (as set out above) PLUS candidates will demonstrate a very good depth of knowledge of the subject (i.e. a very good understanding of the operation of the money laundering regulations) with very good application to the scenario, i.e recognition that the firm must be SRA regulated and/or an explanation of the relevant governance that a firm must have in place. There will be some analysis having regard to the facts. Most views expressed by candidates should be supported by relevant authority and/or case law.
Distinction	14+	An answer which includes ALL the requirements for a Pass (as set out above) PLUS the candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. All views expressed by candidates should be supported by relevant authority and/or case law throughout. Candidates should be able to show critical assessment and capacity for independent thought on the topics. Work should be written to an exceptionally high standard with few, if any, grammatical errors or spelling mistakes etc.
<p>Fail = 0-9.9  Pass = 10+  Merit = 12+  Distinction = 14+</p>		
<b>Indicative Content</b>		<b>Marks</b>
<p><b>Required: Candidates must identify why it is important to ensure they make informed risk based decisions and have identified risks associated with the use of client accounts, e.g:</b></p> <p><b>Systems and controls:</b> Firms must take appropriate steps to identify and assess the risks of the use of client accounts. They must also keep records of any identified risks. Firms must establish and maintain policies, controls and procedures to mitigate and manage effectively the risks identified in any risk assessment undertaken. They must review any such policies and maintain records of them.</p>		<p>Up to 5 marks</p> <p>To achieve a pass, an explanation should be given as to what risks a firm will be</p>

<p><b>Use of account as a banking facility:</b> Firms should only receive funds into a client account in relation to an underlying transaction that they are advising on.</p> <p><b>Risk of Insolvency:</b> Funds should not be paid into, or transferred out, of Client Account, to avoid responsibilities imposed by insolvency legislation or to perpetuate suspected financial crime or tax fraud.</p> <p><b>Money Laundering:</b> Money laundering is "the process by which criminal proceeds are sanitised to disguise their illicit origins". Criminals often target client accounts to lend credibility to fraudulent schemes or to launder the proceeds of their criminal activity. You must not allow money to move through client account unless it is in connection with a genuine transaction about which you are providing legal services.</p> <p><b>Potential Offences:</b> A person will be liable of an offence if he conceals, disguise, converts, transfers or removes criminal property.</p>	faced with
<p><b>Candidates should be credited for expanding on the use of account as a banking facility, e.g:</b></p> <p><b>Use of account as a banking facility:</b> Since the Solicitors' Account Rules 2011 the SRA have expressly prohibited the use of a client account as a banking facility. It is not a proper use of a solicitor's client account to allow it to be used by client as a bare banking facility. The proper use of a solicitor's client account is to hold money and disburse it as required in connection with a client matter of which the solicitor has conduct on behalf of that client. Solicitors are not regulated as a bank to provide such facilities. The relevant movement of funds on the client account must be in respect of, not just an underlying transaction, but an underlying transaction which is part of the accepted professional services of solicitors.</p> <p><b>Credit refence to any authority cited on money laundering and the applicability of the legislative framework, e.g:</b> <i>SRA v Quartey and Esuruoso</i> (Case No. 11350-2015), <i>Wood and Burdett</i> (Case No. 8669/2002), <i>Fuglers LLP v SRA</i> [2014], <i>Patel v SRA</i> [2012] and Rule 3.3 of the SRA Accounts Rules 2019.</p>	Up to 3 marks
<p><b>Candidates should be credited for expanding on the risk of insolvency, e.g:</b></p> <p><b>Insolvency Matters:</b> There are risks inherent in a solicitor permitting a client to use its account when there is an insolvency situation. Historically, solicitors may have allowed their client account to be used as a bank account where client's own banking facilities had been withdrawn upon the presentation by HMRC of a winding up petition. Solicitors may have then decided which creditors should be paid. Using the client account in this way allows the client to have a banking facility when their normal bank may have withdrawn such facilities and there is a risk that one creditor will be improperly favoured over another.</p> <p><b>Credit refence to any authority cited on insolvency matters, e.g:</b> <i>Fuglers LLP v SRA</i> [2014].</p>	Up to 2 marks
<p><b>Candidates should be credited for expanding on the risk of money</b></p>	Up to 8 marks

**laundering:, e.g:**

**Money Laundering:** The SRA require individuals and firms respectively to make sure they keep up to date with, and remain aware of, their responsibilities under any new legislation as and when it is introduced. This includes the Money Laundering, Terrorist Financing and Transfer of Funds. These regulations apply to certain categories of persons acting in the course of business carried on in the UK. These regulations apply to independent legal professionals participating in certain financial or real property transactions.

**Credit reference to any authority cited on money laundering and the applicability of the legislative framework, e.g:** Legal Guidance, Proceeds Of Crime Act 2002 Part 7 - Money Laundering Offences, Paragraph 7.1 of the SRA Code of Conduct for Solicitors, RELs and RFLs, and paragraph 3.1 of the SRA Code of Conduct for Firms, Regulation 8 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 and Regulation 12(1) of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.

**Due diligence:** Firms must apply customer due diligence measures if they establish a business relationship; carry out an occasional transaction that amounts to a transfer of funds exceeding 1,000 euros; suspects money laundering or terrorist financing; or doubts the veracity or adequacy of documents or information previously obtained for the purposes of identification or verification. A firm must identify the customer unless the identity of that customer, verify the customer's identity and assess the purpose and intended nature of the business relationship or occasional transaction. Firms may rely on another person (another regulated individual) who is subject to the MLR or equivalent to carry out CDD, but they remain liable for any failings. To rely on a third party, firms must enter into a written agreement with the third party under which they agree to provide copies of any identification and verification data on the customer or its beneficial owner within two working days, and to keep records in accordance with MLRs.

**Credit reference to any authority cited on due diligence, e.g:** Regulation 27 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, Regulation 28 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 and Regulation 39 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.

**Enhanced due diligence:** Under the regulations, enhanced due diligence measures must include, as a minimum, examining the background and purpose of the transaction and increasing the monitoring of the business relationship. The regulations set out a list of circumstances in which enhanced due diligence measures must be applied, which includes any transaction or business relationship involving a person established in a 'high risk third country', any transaction or business relationship involving a 'politically-exposed person', or a family member or known associate of a politically-exposed person and any other situation that presents a higher risk of

<p>money laundering or terrorist financing.</p> <p><b>Credit refence to any authority cited on enhanced due diligence, e.g:</b> Regulation 33 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 and Regulation 33(1) of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.</p> <p><b>Simplified due diligence:</b> Simplified due diligence is permitted where a firm determines, after individual risk assessment of the client, that the business relationship or transaction presents a low risk of money laundering or terrorist financing, taking into account their risk assessment.</p> <p><b>Credit refence to any authority cited on simplified due diligence, e.g:</b> Regulation 37 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.</p>	
<p><b>Candidates should be credited for expanding on the potential offences:, e.g:</b></p> <p><b>Offences:</b> Concealing or disguising criminal property includes concealing or disguising its nature, source, location, disposition, movement or ownership or any rights with respect to it. A person commits an offence if he enters into, or becomes concerned in, an arrangement which he knows or suspects facilitates the acquisition, retention, use or control of criminal property by or on behalf of another person. If a person acquires, uses or possesses property for which he has not given adequate consideration, he may be liable of an offence. It is an offence of participating in an organised crime group into English law. It has the potential to seriously widen the scope of criminal liability for lawyers and other professionals working in the non-regulated sector. It is an offence to be involved in fundraising if you have knowledge or reasonable cause to suspect that the money or other property raised might be used for terrorist purposes. It is an offence to use or possess money or other property for terrorist purposes, including when you have reasonable cause to suspect the money or property might be used for these purposes. It is an offence to enter into or become concerned in an arrangement facilitating the retention or control of terrorist property by, or on behalf of, another person (unless you did not know, and had no reasonable cause to suspect, that the arrangement related to terrorist property).</p> <p><b>Who may investigate and prosecute offences:</b> Money laundering offences are principally investigated by the police, the National Crime Agency (NCA) or HM Revenue &amp; Customs (HMRC), or, if the offence has been committed by an entity in the City of London, the Financial Investigations Unit of the City of London Police. The Crown Prosecution Service usually conducts criminal proceedings. The Serious Fraud Office investigates and prosecutes matters involving serious or complex fraud or corruption. Where the allegations are linked to financial firms, the matter may be investigated or prosecuted by the Financial Conduct Authority (FCA).</p> <p><b>Credit refence to any authority cited on the offences, e.g:</b> Section 327 of the Proceeds of Crime Act 2002, Section 328 of the Proceeds of Crime Act 2002, Section 329 of the Proceeds of Crime Act 2002,</p>	Up to 6 marks

Section 45 of the Serious Crime Act 2015, Section 15 of the Terrorism Act 2002, Section 16 of the Terrorism Act 2002 and Section 18 of the Terrorism Act 2002.	
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