February 2023: Marker Guidance: Unit 3

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

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

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

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

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

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

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

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

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

SECTION A (all compulsory – 40%)

Question 1:	Explain the circumstances when Conditional Fee Agreements will not amount to contentious business agreements.
Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	**Marks**
Required: Candidates should explain what a conditional fee agreement and contentious business agreement are, e.g: ***Contentious business is defined as:*** Business done, whether as a solicitor or advocate, in or for the purposes of proceedings begun before a court or before an arbitrator not being business which falls within the definition of non-contentious or common form probate business contained in section 128 of the Senior Courts Act 1981. ***Contentious business agreements:*** must be in writing (although they do not have to be signed) and it may provide that the solicitor be remunerated by a gross sum or by reference to an hourly rate, or by a salary or otherwise and whether at a higher or lower rate than that at which he would otherwise have been entitled to be remunerated. ***Credit reference to any relevant authority on what a contentious business agreement is, e.g:*** Section 87 of the Solicitors Act 1974 and Section 59 of the Solicitors Act 1974. ***Conditional Fee Agreements:*** introduced by Courts and Legal Services Act 1990, are contingency agreements or 'no win no fee agreements' for advocacy and litigation services. They must comply with formalities in order to be enforceable, e.g they must be in writing and signed. ***Credit reference to any relevant authority on what a conditional fee agreement is, e.g:*** Section 58(1) of the Courts and Legal Services Act 1990, section 58(2) of the Courts and Legal Services Act 1990, section 58(3) of the Courts and Legal Services Act 1990 and section 58(4) of the Courts and Legal Services Act 1990.	Up to 5 marks

Candidates should explain whether all conditional fee agreements are contentious business agreements, e.g: ***Agreement:*** If both parties agree that the provisions of the Solicitors Act in relation to CBAs should not apply to their conditional fee agreement it has been held that there is no reason why they should not be able to reduce that to writing and for that agreement to be effective. Therefore, a CFA may not be a CBA, it is a matter of construction. ***Credit reference to any relevant authority on whether all CFAs are CBAs, e.g:*** Healys LLP v Partridge and Anor [2019], Acupay System LLC v Stephenson Harwood LLP [2021]	Up to 3 marks
Candidates should explain the impact on assessment under the Solicitors Act 1974, e.g: ***Enforcement of a CBA:*** An application must be made and the court is bound to consider whether a CBA is fair and reasonable, and if the court considers that it is, the court can proceed to enforce it. For example, a judgment may be made. ***Challenges:*** If the court considers a CBA to be unfair and unreasonable it may set the agreement aside. ***Assessment:*** The costs of a solicitor in any case where a CBA has been made shall not be subject to assessment. ***Challenges to rates and hours:*** In cases where a CBA provides for the remuneration of the solicitor to be by reference to an hourly rate then the court may enquire into the number of hours of work by the solicitor and whether the number of hours of work by him was excessive. Without overturning the CBA as unfair or unreasonable, the court would have no power to question hourly rates or, in a CFA, any success fee. ***Credit reference to any relevant authority on the impact on assessment, e.g:*** Section 60 of the Solicitors Act 1974, section 61(1) of the Solicitors Act 1974 and section 61(4B) of the Solicitors Act 1974.	Up to 4 marks

Question 2:	Describe the rules governing the form and content of a retainer that must be complied with when a solicitor enters a contract with a client.	
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 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	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

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 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	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

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 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 3:	Discuss why Third Party Funding should not be an accepted method of funding mainstream litigation.	
Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+		10
Indicative Content		**Marks**
Candidates must explain what third party funding is, e.g:		Up to 2 mark

Third party funding: Is an alternative method of litigation funding where a commercial funder with no connection to the proceedings will pay some or all of the costs of the case in return for a share of any sum of money awarded in damages if the case is won. ***Definitions:*** Champerty 'occurs when the person maintaining another stipulates for a share of the proceeds of the action or suit'. Maintenance is said to be the procurement, by direct or indirect financial assistance, of another person to institute, or carry on or defend the civil proceedings without lawful justification. ***Credit reference to any appropriate authority on defining champerty and maintenance, e.g:*** British Cash & Parcel Conveyors v Lamson. Store Service Co [1908] and Chitty 28 Ed Vol 1 17 – 054.	A pass must include the demonstration that the candidate understands what Third Party Funding is.
Credit a discussion on chronological developments (and the change in stance to such funding arrangements) e.g: ***Developments:*** Third Party funding was permitted in limited circumstances, for example matters arising out of insolvencies. Then came the availability of government funding for litigation which suggested a shift in attitude towards the use of funding from outside parties for litigation. In 1967 the legislative abolished the criminal offences and torts of champerty and maintenance. However, agreements may still be unenforceable on the grounds of public policy. Then, contingency fee agreements in the form of Conditional Fee Agreements were expressly permitted by statute. These agreements would have historically been deemed champertous. Today, given the current climate and changing attitudes to litigation funding, third party funding agreements are being held not offend public policy. They are also being used in wider types of litigation such as family (despite CFAs being prohibited in family). ***Credit reference to any appropriate authority on defining champerty, maintenance and the use of third party funding, e.g:*** Seear v Lawson (1880), the Legal Aid and Advice Act 1949, section 13 of the Criminal Law Act 1967, section 14 of the Criminal Law Act 1967, section 58 of the Courts and Legal Services Act 1990, section 45 of the Legal Aid Sentencing and Punishment of Offenders Act 2012, JEB Recoveries LLP v Linstock [2015] and Akhmedova v Akhmedov & Ors [2020].	Up to 3 marks To achieve more than a pass, candidates must not simply cite law but should show a greater depth to their knowledge base.
Credit a discussion on non party costs orders (and the change in stance to such funding arrangements) e.g: ***Jurisdiction:*** The Court has jurisdiction to award the costs of litigation to a non-party. Although historically the Court has been cautious in granting such an order there has more recently been a shift in stance. The was thought to be a cap on the liability of third party funders but this is not a principle that Courts are bound by and third party funders may be liable	Up to 4 marks

to the full extent of costs. Funders may be liable to full extent from date started funding. ***Credit reference to any appropriate authority on the making of third party costs orders against a third party funder, e.g:*** Section 51(1) of the Senior Courts Act 1981, CPR 46.2, Merchant bridge & Co Ltd & Another v Safron General Partner Ltd [2011], Arkin v Borchard Lines Ltd & Ors [2005], Davey v Money and Others [2019] and Chapel Gate Credit Opportunity Master Fund Ltd v Money & Ors [2020] ***Control and free decision making:*** Historically such funding arrangements have been unlawful because of the influence that a funder may have on the decisions of the litigator. Today, agreements tend to be structured so that the client retains full control over the way in which they conduct their action. However, even though third party funders are, in theory, unable to control proceedings, there is a concern that they may influence some of the decisions because they are ultimately funding all or part of the claim. Some funding agreements may mean the funder has high levels of control over the proceedings. The distinction between types of arrangements and 'pure funders' will be considered by the Court. Ultimately, the third party funder may be liable for costs on indemnity basis. ***Credit reference to any appropriate authority on the level of control and type of orders that may be made against a third party funder, e.g:*** Excalibur Ventures LLC v Texas Keystone Inc & Ors (Rev 2) [2014] and Laser Trust v CFL Finance Ltd [2021].	
Credit a discussion on whether there should be better oversight, e.g: ***Restrictions:*** Agreements based on champerty and maintenance still remain. Courts still have to decide on the facts of each litigation funding agreement whether the contract is unenforceable on the grounds of public policy. This may restrict access to justice. There has been a change in approach by both the legislative and judiciary but there has been no legislation around this type of funding meaning it only tends to get used in a commercial context. ***Association of Litigation Funders:*** Third party funding in England and Wales is self-regulated by the Association of Litigation Funders (ALF). The ALF is a private company limited by guarantee, owned and directed by its member firms. A voluntary code of conduct for litigation funders was first published in November 2011. It was developed by a Ministry of Justice working group on third party funding, which was set up in response to a recommendation by leading judge Lord Justice Jackson in his comprehensive review of civil litigation costs. ALF members which fail to meet the requirements of the code may be subject to a fine and/or termination of their membership.	Up to 3 marks To achieve a distinction, candidates will provide some commentary on the regulation and better oversight.

2017 Government has no plans to regulate: The UK government had no plans to formally regulate third party providers of litigation funding, as there are no "specific concerns" about the current voluntary framework.	

Question 4:	Describe what a Conditional Fee Agreement is and explain the form, content and way that such an agreement works.
Total Marks Attainable Fail = 0-7.4 Pass = 7.5+ Merit = 9+ Distinction = 10.5+	10
Indicative Content	**Marks**
Candidates must explain what a conditional fee agreement is, e.g: ***Conditional Fee Agreements:*** Introduced by the Courts and Legal Services Act 1990. They are contingency agreements or 'no win no fee agreements' for advocacy and litigation services. Providing they satisfy all of the conditions applicable to it by virtue of the legislation shall not be unenforceable by reason only of its being a conditional fee agreement but any other conditional fee agreement shall be unenforceable. ***Credit reference to any applicable authority explaining what a CFA is, e.g:*** Section 58(1) of the Courts and Legal Services Act 1990 and section 58(2) of the Courts and Legal Services Act 1990.	Up to 2 mark A pass must include the demonstration that the candidate understands what a CFA is.
Credit a discussion on the form and operation of a conditional fee agreement, e.g: ***Form of CFAs:*** Must comply with formalities, e.g they must be in writing. If a CFA includes the provision for a success fee they must be stated and must not exceed the amount set by the Lord Chancellor. CFAs cannot relate to prohibited proceedings, which includes family and criminal proceedings. CFAs must comply with regulations made by the Lord Chancellor and even a technical breach may render an agreement unenforceable. ***Credit reference to any applicable authority explaining the form and content of a CFA, e.g:*** Section 58(3)(a) of the Courts and Legal Services Act 1990, Section 58(3)(b) of the Courts and Legal Services Act 1990, Section 58(3)(c) of the Courts and Legal Services Act 1990, Section 58A of the Courts and Legal Services Act 1990, section 58(4) of the Courts and Legal Services Act 1990 and Wood v Chaleff [2002]. ***Success Fees and ATE:*** When introduced success fees and ATE premiums were not recoverable between the parties. Subsequent legislation amended the Courts and Legal Services Act 1990 and allowed for the recoverability and the uptake of these funding arrangements increased.	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.

However, that position was reversed by legislation in 2013 and they are no longer recoverable. If the CFA is dated after 1 April 2013 then the success fee will not be recoverable from the losing party unless it relates to a matter that falls under the following exceptions publication and privacy proceedings and mesothelioma cases. If the CFA is pre 1 April 2013 then the success fee can be recovered from the client if the 'win' under the terms of the CFA is triggered. ***Credit reference to any applicable authority on success fees and ATE, e.g:*** section 27 of the Access to Justice Act 1999, section 29 of the Access to Justice Act 1999, section 44 of the Legal Aid, Sentencing & Punishment of Offenders Act 2012, section 46 of the Legal Aid, Sentencing & Punishment of Offenders Act 2012 and CPR 48.2(1)(a).	
Credit reference to any other circumstances that may impact the enforceability of a CFA, e.g: ***Retrospectivity:*** CFAs can be retrospective but not backdated. This principle also applies to success fees although where proceedings have been issued, a success fee will not be recoverable for the period until Notice of Funding has been given. The distinction between retrospectivity and an agreement being backdated is key, i.e it must contain a clause that details the agreement will have retrospective effect and should not just be dated with the date of entry but state that it relates to an earlier date. ***Credit reference to any applicable authority on retrospectivity, e.g:*** King v Telegraph Group Ltd [2005], Holmes v Alfred McAlpine Homes (Yorkshire) Ltd (2006), Forde v Birmingham City Council [2008] and JN Dairies Ltd v Johal Dairies Ltd & Anor [2011]. ***Assignment, novation and transferring:*** There are a number of situations when a CFA may need to be transferred. A firm may go into administration, close or close a department. A solicitor may move firms and client wants to retain the same agreement. A firm may be bought by another firm or merges. A firm may change its name. There was a degree of uncertainty as to whether a CFA may be transferred. The latest authority sets out that it is possible to transfer a CFA. Even in cases where the judiciary may be divided on whether a novation or assignment has taken place it may still be possible for the first solicitor to be paid and additional liabilities to be recovered. This is because it has been held that the intention of parliament, when they legislated and LASPO was passed, would not have been that the first solicitor could not be paid or that the additional liabilities would not be recovered where a CFA was transferred. It will be a question of evidence and each individual case must be considered based on the individual circumstances surrounding the purported transfer. Where there has been a termination the first solicitor will not be entitled to payment and the pre LASPO benefits, i.e recoverability of additional liabilities, will not be transferable.	Up to 4 marks To achieve a distinction, candidates will provide some commentary on other issues concerning enforceability.

Credit reference to any applicable authority on assignment, novation and transferring, e.g: Jones v Spire Healthcare 2015, Budana v Leeds Teaching Hospitals [2016], Webb v Bromley [2016], Jones v Spire Healthcare [2016], Budana v Leeds Teaching Hospitals NHS Trust [2017] and Roman v Axa Insurance [2019].	

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

Question 5:	You work at Anjani and Moore LLP, an SRA regulated firm in Maidstone. An Assistant Solicitor at the firm, Miss Grey, has approached you for your help on one of her cases. Her client is Mr Donald Spare and he is the Claimant in proceedings. The Defendant is Bradbury NHS Trust. Mr Spare suffered complications with his heart whilst undergoing treatment for a bowel disorder. The heart complications were a result of negligent treatment in one of the hospitals for which Bradbury NHS Trust is responsible. The matter was settled on 16 September 2022. The parties agreed the terms of a consent order which was approved by the court on 7 November 2022. The order provided that the Defendant would pay Mr Spare £20,000 together with his costs on the standard basis, to be assessed if not agreed. Miss Grey has asked you to commence detailed assessment proceedings. She has also asked you to draft a letter to her client providing advice on detailed assessment proceedings. Prepare the body of a letter to Mr Donald Spare advising on detailed assessment proceedings and setting out the steps you will take.
Total Marks Attainable	**20**

Fail	Up to 9.9	This mark should be awarded to candidates whose papers fail to address any of the requirements of the question, or only touch on some of the more obvious points without dealing with them or addressing them adequately.
		An answer which addresses MOST of the following points: commencement of assessment proceedings, basis of assessment, next procedural steps and the assessment process. Candidates will demonstrate a good depth of knowledge of the subject (i.e. A good understanding of the framework for assessment of costs) with good application and some analysis having regard to the facts, although candidate may demonstrate some areas of

Pass	10+	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 may discuss and critically analyse the process for assessment and the possibility for a negotiated settlement. Most views expressed by candidates should be supported by relevant authority and/or case law.
Distinction	14+	An answer which includes ALL the requirements for a Pass and Merit (as set out above) PLUS the candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. Candidates are likely to observe that in this scenario there may be discussion as to what precisely constitutes the costs 'of the proceedings'. Candidates will provide an excellent advice setting out the procedural steps and application of key concepts as part of the process (e.g. proportionality). All views expressed by candidates should be supported by relevant authority and/or case law. Work should be written to an exceptionally high standard taking into consideration that it is written in exam conditions.

Indicative Content	**Marks**
Required: A discussion on the commencement of assessment proceedings, e.g: ***Detailed/Provisional Assessment:*** Takes place at conclusion of proceedings. Detailed assessment proceedings are commenced by the receiving party serving on the paying party notice of commencement in the relevant practice form; and a copy of the bill of costs. The receiving party must also serve a copy of the notice of commencement and the bill on any other relevant persons specified in CPR Practice Direction 47. The period for commencing detailed assessment proceedings is within 3 months of the event that gives rise to entitlement. ***Credit reference to the citation of any authority cited on commencement of assessment proceedings, e.g:*** CPR 44.6, CPR 47.1, CPR 47.6 (1), CPR 47.6 (2) and CPR 47.7.	Up to 2 Marks
Credit a discussion on an order for costs, e.g: ***Order:*** The court has discretion as to whether costs are payable by one party to another, the amount of those costs and when they are to be paid. If the court decides to make an order about costs then the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. However, the court may make a different order.	Up to 3 Marks

Credit reference to the citation of any authority on making of an order for costs, e.g: CPR 44.2(1)(a), CPR 44.2(1)(b), CPR 44.2(1)(c), CPR 44.2(2)(a), CPR 44.2(2)(b), ***Basis of assessment:*** The CPR sets out the basis of assessment, standard or indemnity basis, but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount. Where the amount of costs is to be assessed on the standard basis, the court will only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred and resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party. Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party. ***Credit reference to the citation of any authority on the basis of assessment, e.g:*** CPR 44.3(1), CPR 44.3(2) and CPR 44.3(3).	
Credit a discussion regarding the bill of costs and the right to recover costs e.g: ***The electronic bill:*** In October and November 2017 CPR 47 and the Part 47 Practice Direction were amended to provide that in all CPR Part 7 multitrack claims (except where the proceedings are subject to fixed costs or scale costs, the receiving party is a litigant in person or the court has otherwise ordered) bills of costs for costs recoverable between the parties must, for all work undertaken after 6 April 2018, be presented in electronic spreadsheet format, capable of producing essential summaries and performing essential functions compatible with Precedent S, annexed to the Part 47 Practice Direction. ***Essential Information:*** A bill should start with the full title of the proceedings, the name of the party whose bill it is and a description of the order for costs or other document giving the right to detailed assessment. The title page should include prescribed information as to VAT. The bill should then give some background information about the case. Then the bill should incorporate a statement of the status of the fee earners in respect of whom profit costs are claimed, the rates claimed for each such person and a brief explanation of any agreement or arrangement between the receiving party and his legal representatives which affects the costs	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

claimed in the bill. It is then convenient to divide the paper into several columns headed as follows: item number, date and description of work done, VAT, disbursements, profit costs. Sometimes it is necessary or convenient to divide the bill containing the actual items of costs into separate parts, numbered consecutively. In each part of a bill all the items claimed must be consecutively numbered and must be divided under such of the heads of costs as may be appropriate. The final part of the bill of costs should contain such of the prescribed certificates as are appropriate to the case and then the signature of the receiving party or his legal representative. **Credit reference to the citation of any authority cited on the form and content of a bill of costs, e.g:** CPR 47 PD para 13.3, CPR 47 PD para 5.7, CPR 47 PD para 5.8, CPR 47 PD para 5.9, CPR 47 PD para 5.10, CPR 47 PD para 5.11, CPR 47 PD para 5.12-22 ***The indemnity principle and retainer:*** The indemnity principle simply provides that the receiving party cannot recover more costs from the paying party than he himself would be liable to pay his own solicitors. The retainer is fundamental to the right to recover costs. Where there is no retainer there is no entitlement to charge, there is no business relationship. A retainer must be enforceable in order to charge the client and recover costs inter partes. The indemnity principle does not apply in certain circumstances e.g. legal aid. This does not appear to be a situation where the indemnity principle will not apply. Signature on the bill is sufficient to show that the indemnity principle has not been breached. However, if a genuine issue is raised by the paying party then the court is likely to consider this. A bill of costs is not properly certified if the signatory's name is not identifiable. ***Credit reference to the citation of any authority cited on the retainers and the indemnity principle, e.g:*** JH Milner v Percy Bilton [1966], Scott v Hull and East Yorkshire Hospitals NHS Trust [2014], Bailey v IBC [1998] and Barking, Havering and Redbridge University Hospitals NHS Trust v AKC [2021].	
Discussion on next procedural steps e.g: ***Points of dispute:*** The paying party and any other party to the detailed assessment proceedings may dispute any item in the bill of costs by serving points of dispute. The period for serving points of dispute is 21 days after the date of service of the notice of commencement. Only items specified in the points of dispute may be raised at the hearing, unless the court gives permission. The RP may file a request for a DCC if	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

the 21 days (or relevant period) has expired and the RP has not been served with any POD. ***Credit reference to any authority cited on points of dispute, e.g:*** CPR 47.9 (1), CPR 47.9 (2), CPR 47.14 (6), CPR 47.9 (4), Edinburgh v Fieldfisher LLP [2020] and Ainsworth v Stewarts Law LLP [2020]. ***Default Costs Certificates:*** The RP may file a request for a DCC if the 21 days (or relevant period) has expired and the RP has not been served with any POD. Application for requesting a DCC is on Form N254. Will include an order to pay costs to which the DCC relates. Sum payable is set out in PD (£80 fixed costs plus court fee). ***Credit reference to any authority cited on default costs certificates, e.g:*** CPR 47.9 (4), CPR 47.11(1), CPR 47.11(2), CPR 47.11(3), CPR PD 47 para 10.7, Masten v London Britannia Hotel Ltd [2020], National Bank of Kazakhstan & Another v The Bank of New York Mellon & Ors [2021], Gregor Fisken Ltd v Carl [2021], Serbian Orthodox Church – Serbian Patriarchy v Kesar & Co [2021] ***Replies:*** Where any party to the detailed assessment proceedings serves POD, the RP may serve a reply on the other parties to the assessment proceedings. RP may do so within 21 days after being served with the POD to which the reply relates. Replies must be limited to points of principle and concessions only, must not contain general denials, specific denials or standard form responses. When practicable replies must be set in the form of Precedent G. ***Credit reference to any authority cited on replies, e.g:*** CPR 47.13 (1), CPR 47.13(2), CPR PD 44, 12.1 and CPR PD 47, 12.2. ***Request for a Hearing:*** RP must file request for DA Hearing within 3 months of expiry of period for commencing DA proceedings. N258 needs to be filed plus NOC, Bill, Order/Judgment/Doc giving right to DA, Precedent G PODS and Replies, Any other orders, Fee notes and written evidence of disbursements (over £500). Statement signed by legal representative and estimate of the length of time the DA hearing will take. Court fee will also need to be paid. ***Credit reference to any authority cited on requesting a hearing, e.g:*** CPR 47.14, CPR PD 47 para 13.1, CPR PD 47 para 13.2 and CPR PD 47 para 5.2	

Discussion on the assessment e.g: ***Basis of Assessment and reasonableness:*** Court has discretion as to costs BUT emphasis on proportionality because of the standard basis of assessment (CPR 44.3(2) and the overriding objective). Where the amount of costs is to be assessed on the standard basis, the court will only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party. Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party. Whatever basis: Reasonableness would always be 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'.	Up to 5 Marks To achieve more than a pass, candidates must not simply cite law but should show a greater depth to their knowledge base and apply the authority to the question posed

Credit reference to any authority cited on assessment and good reason, e.g: CPR 3.18, CPR PD 44, 3.2, Vertannes v United Lincolnshire Hospitals NHS Trust [2018] and Harrison v University Hospitals Coventry and Warwickshire NHS Trust [2017].	

Question 6:	You work for a firm of solicitors, Carhop and Cunningham LLP, located in Wrexham. You are dealing with the detailed assessment of a claim for damages and losses incurred as a result of a fatal accident which occurred on the 26 December 2018. The claim was ultimately compromised at a Joint Settlement Meeting and a final order was made on 3 July 2022 which included authority for costs to be assessed. Mr Johal is the solicitor that has conduct of the matter. The bill of costs was drafted by a former colleague of yours and it takes into account a costs management order dated 19 May 2021. You have perused the file and have noted that you are seeking an upward departure from the budget in two phases and in the remaining phases you are seeking less in the bill of costs than was approved by the court in the costs management order. The paying party has indicated that at detailed assessment they will be seeking that if the Costs Judge reduces the hourly rates in relation to the incurred costs that those same reduced rates should also apply to the budgeted costs. The paying party contends that this should be done by the Costs Judge reviewing the estimated hours in the agreed budget and applying the assessed hourly rates to retrospectively arrive at a revised (reduced) figure for each phase. Write the body of a memo of advice to Mr Johal. Set out the hurdles you must overcome in order to achieve a departure from the costs management order in

	respect of all phases of the budget and the merits of the paying party's position in relation to hourly rates.
Total Marks Attainable	20

Note: When marking this question markers should be alert to the fact that CPR PD 3e became CPR PD 3d in December 2022.

Fail	up to 9.9	An answer which deals with the basic requirements of the question but in dealing with those requirements only does so superficially and does not address, as a minimum, all the criteria expected of a pass grade (set out in full below). The answer will only demonstrate an awareness of some of the more obvious issues, for example simply outlining the rules in relation to budgets and CMOs. The answer may not indicate any real understanding that costs management is in place in order to ensure cases are managed proportionately. The answer will be weak in its presentation of points and its application of the law to the facts. There will be little evidence that the candidate fully understands how the CPR operates and any view expressed will be unsupported by evidence or authority.
Pass	10+	An answer which addresses MOST of the following points: When a CMO will be made, in what circumstances a budget can be amended, what amounts to a significant development and the impact of a CMO on assessment. Candidates will demonstrate a good depth of knowledge of the subject with good application and some analysis, although the candidate may demonstrate some areas of weakness.
Merit	12+	An answer which addresses ALL of the points required for a pass (as set out above) PLUS there will be evidence that the candidate has a very good understanding of the law in some depth but this may be expressed poorly or may be weak in places and strong in others. The candidate is likely to have discussed the importance of assumptions in demonstrating whether there has been a significant development. There is also likely to be some discussion on significant developments not being just one change and that some developments will not be regarding as significant if they should have been foreseen at the point the budget was agreed/approved and the CMO was made. The candidate should show very good, appropriate references to the relevant law and authority. Work should be written to a very high standard with few, if any, grammatical errors or spelling mistakes etc.
Distinction	14+	An answer which includes ALL the requirements for a pass (as set out above) PLUS the candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. All views expressed by the candidate should be supported by relevant authority and/or case law throughout. The candidate may make the link between 'good reason' and 'significant development' (i.e. may include a discussion on the fact there is no real authority on the difference or relationship between the two but that one is prospective and one retrospective). The candidate should be able to show critical assessment and capacity for independent thought on the topic. Work should be written to an exceptionally high standard with few, if any, grammatical errors or spelling mistakes etc. taking into account it has been written under exam conditions.

Indicative Content	**Marks**
Required: Explanation as to what is meant by a Costs Management Order, e.g: ***Costs Management Order:*** Where a costs budget has been filed, the court will make a costs management order unless it considers the matter can be conducted justly and proportionately without a costs management order. A costs	Up to 5 marks To pass candidates MUST include an explanation of what a CMO is and the

management order will record the extent the incurred costs were agreed; the extent budgeted costs were agreed; and the approval of budgeted costs once revised. Once a CMO has been made, the court can control the recoverable costs. The court can record on the face of the order any comments on the incurred costs to be taken into account at detailed assessment. The CMO concerns only the phase totals; it is not the role of the judge to fix or approve hourly rates; and any detail within the budget is for reference purposes only. ***Credit reference to any authority cited on CMOs, e.g:*** CPR 3.15(2), CPR 3.15(3), CPR 3.15(4), CPR 3.15(8). ***Estimated Costs and Incurred Costs at CMC:*** The court may, in determining the amount of a given phase to which approval is given, take into account the costs incurred to date by setting a figure which impliedly criticises those costs as being excessive and leaving very little for prospective costs. When making a CMO it will be an error in principle in approving specific hours and disbursements rather than total figures for each phase of the proceedings and in expressly reserving matters, such as hourly rates, to be disputed at a detailed assessment. Incurred costs will be subject to DA and the estimated costs will be subject to the test of proportionality. ***Credit reference to any authority cited on estimated costs and incurred costs, e.g:*** Redfern v Corby Borough Council [2014], CIP Properties Ltd v Galliford Try Infrastructure Ltd [2015], Yirenki v Ministry of Defence [2018] and Harrison v University Hospitals Coventry and Warwickshire NHS Trust [2017].	impact where costs are assessed
Credit discussion on assessment and good reason to depart, e.g: ***Assessment:*** Where there is no CMO in place and the costs exceed the budget by 20% or more the receiving party must serve a statement of reasons with the bill. Where there is a CMO in place and costs are assessed on the standard basis consideration must be given to the last approved or agreed costs budget of the receiving party and there cannot be any departure from this unless there is good reason. Additionally, any comments made on incurred costs can be considered. CPR 3.18 is not ambiguous. Estimated costs agreed and subject to a Cost Management Order have already, in theory, been through a detailed assessment. It would be going against the intent of the rule to require another detailed assessment of estimated costs to be	Up to 8 marks To achieve more than a pass candidates should demonstrate real awareness that persuading the court to depart from a CMO will be difficult and case dependant depending on the evidence

performed without 'good reason'. A CMO cannot be deemed superseded. Even where there is, on the face of it, a good reason to depart this isn't a good reason to depart from the CMO generally. ***Credit reference to any authority cited on the assessment of costs where there is a budget, e.g:*** CPR PD 44, 3.2, CPR 3.18, Harrison v University Hospitals Coventry and Warwickshire NHS Trust [2017] and Vertannes v United Lincolnshire Hospitals NHS Trust [2018]. ***Hourly rates:*** At one stage it was thought that, hourly rates were deemed a good reason to depart because they are a mandatory component in Precedent H which cannot be subjected to the rigours of detailed assessment at the CCMC. However the present position is that a reduction in hourly rates for incurred costs does not appear to mean it follows that there should be a reduction on budgeted costs. ***Credit reference to any authority cited on hourly rates, e.g:*** Merrix v Heart of England NHS Trust [2017], RNB v London Borough of Newham [2017], Bains v Royal Wolverhampton NHS Trust [2017], Nash v Ministry of Defence [2018] and Jallow v Ministry of Defence [2018]. ***The indemnity principle:*** The indemnity principle is a good reason to depart. Once you have established a good reason for a phase you are free to challenge any other sums within that phase without identifying further good reason. ***Credit reference to any authority cited on the indemnity principle, e.g:*** Merrix v Heart of England NHS Trust [2017] and Barts Health NHS Trust v Hilrie Rose Salmon [2019]. ***Underspend:*** Not spending the totality of the budgeted figure for a phase because of settlement is not in itself a good reason to depart. There would need to be very clear evidence of obvious overspending in a particular phase before the court could even begin to entertain arguments that there was a good reason to depart from the budgeted phase figure if the amount spent comes within the budget. ***Credit reference to any authority cited on underspend, e.g:*** Chapman v Norfolk and Norwich University Hospitals NHS Foundation Trust [2020] and Utting v City College Norwich [2020].	
Credit a discussion on what is meant by significant development, e.g: ***Meaning:*** There is no clear definition of what is meant by a significant development. A change in the value of the claim	Up to 4 marks To achieve more than a pass candidates should demonstrate real awareness

or a longer trial length has been held not to amount to a significant development in the case. Conduct may be a significant consideration for the court in arriving at their decision. 'Significant development' requiring budget revision need not be a specific event but can be a "collection of factors" which mean that the nature of the claim has changed. Not every development in litigation will amount to a significant development. ***Credit reference to authority on what is meant by a significant development, e.g:*** Churchill v Boot [2016], Thompson v NSL Ltd [2021] and Persimmon Homes Ltd & Anor v Osborne Clark LLP [2021] ***Disclosure:*** Claimants have been entitled to revise their trial budget because there had been a significant development in the litigation where disclosure was of a scale and complexity that was much larger than had actually been budgeted for, which was not envisaged and which could not have been reasonably envisaged. Disclosure that involved five times more documents than anticipated and expressly assumed in a claimant's budget has been held to be a significant development justifying its costs budget being updated. ***Credit reference to authority on disclosure amounting a significant development, e.g:*** Al-Najar v the Cumberland Hotel (London) Ltd [2018] and BDW Trading Ltd v Lantoom Ltd [2020]. ***Interim applications:*** Interim applications may be significant developments. If interim applications are made which, reasonably, were not included in a budget, then the costs of such interim applications shall be treated as additional to the approved budgets. It should be noted that whilst the application itself may sit outside of the budgeted costs the consequential costs as a result of the application may mean the budget needs revising. ***Credit reference to interim applications, e.g:*** Sharp v Blank [2017] and CPR 3.17(4).	that persuading the court there has been a change in circumstance to justify amending the budget may be difficult
Credit any explanation as to how to make an application to amend a budget, e.g: ***Applications to amend:*** Revising party must revise its budgeted costs upwards or downwards if significant developments in the litigation warrant such revisions. Revising party must revise its budgeted costs upwards or downwards if significant developments in the litigation warrant such revisions. Any budgets revised must be	Up to 4 marks

submitted promptly by the revising party to the other parties for agreement, and subsequently to the court. The revising party must serve particulars of the variation proposed on every other party, using the form prescribed by Practice Direction 3E, confine the particulars to the additional costs occasioned by the significant development; and certify, in the form prescribed by Practice Direction 3E, that the additional costs are not included in any previous budgeted costs or variation. The revising party must submit the particulars of variation promptly to the court, together with the last approved or agreed budget, and with an explanation of the points of difference if they have not been agreed. When making an application to amend incurred costs should not be amended on the last approved budget. ***Credit reference to how to make an application to amend, e.g:*** CPR 3.15A(1), CPR 3.15A(1), CPR 3.15A(2), CPR 3.15A(3), CPR 3.15A(4) and Sharp v Blank [2017]. ***Mistake and timing:*** The court takes a dim view of amending a budget due to a mistake once it is approved. An application to amend after judgment has been held to be a contradiction in terms. Parties should be prompt in making an application. Any application to vary should be made immediately if it becomes apparent that the original budget costs have been exceeded by more than a minimal amount. There will be sanctions for not making an application albeit that the judge will not want to impose a disproportionate and unjust sanction to ensure compliance with the overriding objective. ***Credit reference to any authority cited on mistake and timing, e.g:*** Murray & Anor v Neil Dowlman Architecture Ltd [2013], Elvanite Full Circle Ltd. v Amec Earth & Environmental (UK) Ltd. [2013], Persimmon Homes Ltd & Anor v Osborne Clark LLP [2021] and Simpson v MGN Ltd [2015]. ***Courts powers:*** The court may approve, vary or disallow the proposed variations, having regard to any significant developments which have occurred since the date when the previous budget was approved or agreed, or may list a further costs management hearing. Where the court makes an order for variation, it may vary the budget for costs related to that variation which have been incurred prior to the order for variation but after the costs management order. ***Credit reference to authority cited on the courts powers, e.g:*** CPR 3.15A(5) and CPR 3.15A(6).	

Question 7:	You are a Costs Lawyer working in-house for a firm of solicitors in Birmingham. Mary Tenant, an Associate Solicitor at the firm, has been instructed by Mendway Ltd. Mendway LTD had contracted with a Malaysian company, Awang Construction, in respect of a project in Iraq. A dispute arose and, as per the agreement between the parties, the matter is proceeding to arbitration. A sole arbitrator was appointed in November 2022 in accordance with the Arbitration Agreement. The Arbitrator is an American lawyer who is a partner of an American law firm. Mary has approached you to assist her with drafting her initial letter of advice to Mendway Ltd. She has asked that you provide her with information in relation to the assessment of costs in arbitration proceedings. The agreement between the parties provides that the provisions of Arbitration Act 1996 will apply to the costs of proceedings. Prepare the body of a memo to your solicitor colleague. Describe the procedure for the assessment of costs in arbitration, in what circumstances an assessment must go to court and how an award may be enforced.
Total Marks Attainable	20

Fail	up to 9.9	This mark should be awarded to candidates whose papers fail to address any of the requirements of the question, or only touch on some of the more obvious points without dealing with them or addressing them adequately.
Pass	10+	An answer which addresses MOST of the following points: Costs should be determined by agreement or by the arbitrator, assessment as arbitrator 'sees fit', 3 categories of costs, matter may be referred to the court where costs of the arbitrator cannot be agreed, enforcement would be through the usual methods under the CPR. Candidates will demonstrate a good depth of knowledge of the subject (i.e. a good understanding of the framework for assessment of costs and the relationship between arbitration proceedings and the courts) with good application and some analysis having regard to the facts, although candidate may demonstrate some areas of weakness.
Merit	12+	An answer which includes ALL the requirements for a Pass (as set out above) PLUS candidates will demonstrate a very good depth of knowledge of the subject (i.e. a very good understanding of the framework for assessment) with very good application and some analysis having regard to the facts. Candidates are likely to observe that IN THIS SCENARIO we are told there are three main points that need addressing (assessment, court and enforcement) and candidates will demonstrate a sound knowledge base as to how the particular sections of the Arbitration Act relate to those points. Candidates may discuss and critically analyse why, for example, the assessment of costs by the court is very unlikely i.e that the starting point will be the parties agreement followed by the potential assessment by the arbitrator. Most views expressed by candidates should be supported by relevant authority and/or case law.

Distinction	14+	An answer which includes ALL the requirements for a Pass and Merit (as set out above) PLUS the candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. Candidates will provide an excellent advice setting out the right to refer the matter to the court and the difficulties faced with enforcing an order. All views expressed by candidates should be supported by relevant authority and/or case law. Work should be written to an exceptionally high standard taking into consideration that it is written in exam conditions.

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

Indicative Content:	**Marks**
Required: A discussion on what is meant by costs under the legislation, e.g: ***Costs in arbitration proceedings:*** Costs in arbitration proceedings fall into three categories - the arbitrator's fees and expenses, the fees and expenses of any arbitral institution concerned and the legal or other costs of the parties. Costs will also include the costs of or incidental to any proceedings when determining the amount of the recoverable costs of the arbitration which may include premiums charged by third party funders. ***Credit reference to any authority cited on costs in arbitration proceedings, e.g:*** Section 59(1) of the Arbitration Act 1996, Section 59(2) of the Arbitration Act 1996 and Essar Oilfields Services Limited v Norscot Rig Management PVT Limited [2016].	Up to 2 marks
Credit any points advanced on agreements, e.g: ***Agreement:*** Parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest. The tribunal may make an award allocating the costs of the arbitration as between the parties, subject to any agreement of the parties. An agreement can only extends to such costs as are recoverable, unless the parties decide otherwise. An agreement to pay costs in any event, for a party to pay the whole or part of the arbitration, can only be valid in the arbitration if made after the dispute arose. Prohibiting such agreements may be aimed at protecting a weaker party from having such an onerous obligation imposed upon them where there is some inequality of bargaining power.	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 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.	
Credit any points advanced on the arbitrator's assessment of costs, e.g: ***Arbitrator's assessment of costs:*** The arbitrator can allocate the costs of the arbitration between the parties. For any award of costs, unless the parties have agreed otherwise, the arbitrator shall award costs on the general principle that costs should follow the event. The arbitrator must assess costs as he 'sees fit'. Where costs are determined by the arbitrator, they are assessed on the standard basis as it was defined before the introduction of the CPR, unless the arbitrator or the court orders otherwise. However, the CPR state that where an arbitrator determines the costs of proceedings that CPR 44-47 should apply. ***Credit reference to any authority cited on the Arbitrator's assessment of costs, e.g:*** Section 61(1) of the Arbitration Act 1996, Section 61(2) of the Arbitration Act 1996, Section 63(3) of the Arbitration Act 1996, Sections 63(4) of the Arbitration Act 1996, Sections 63 (5) of the Arbitration Act 1996, CPR 44.1(2) and CPR 44- 47. ***Recoverable fees and expenses of arbitrators:*** Unless otherwise agreed by the parties, the recoverable costs of the arbitration shall include in respect of the fees and expenses of the arbitrators only such reasonable fees and expenses as are appropriate in the circumstances. If there is any question as to what reasonable fees and expenses are appropriate in the circumstances an application may be made to the court by either party for the court to determine the matter, or order that it be determined by such means and upon such terms as the court may specify. ***Credit reference to any authority cited on the recoverable fees and expenses of arbitrators, e.g:*** Section 64(1) of the Arbitration Act 1996 and Section 64(2) of the Arbitration Act 1996. ***Power to limit costs:*** The arbitrator, unless the parties have agreed otherwise, may limit the recoverable costs of the arbitration, or of any part of the arbitral proceedings, to a specified amount. This can be done at any stage, but it must be done sufficiently in advance	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

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 process of appeal or review and any available recourse under the Act.	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

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 for an SRA regulated firm, Parsons and Pattenden LLP, located in Buckingham. Mr Parsons, a Senior Partner, has approached you for your help with one of his matters. The client matter he is seeking assistance with is Buckingham Commercial Metalcraft Ltd. Buckingham Commercial Metalcraft Ltd is the defendant in proceedings which the claimant brought for passing off. The claimant has supplied the hospitality industry with metal furniture and other items for a considerable number of years under the name Commercial Metalcrafters. The total sales of Commercial Metalcrafters are approximately £12 million. In November 2022, the claimant sent a letter of claim alleging passing off and seeking to prevent the use of the company name. Subsequently, a claim form has been issued and the claimant has also applied for interim relief. Buckingham Commercial Metalcraft Ltd have agreed to change the name of the company. They have instructed Mr Parsons not to put in evidence on the application for interim relief or to serve a Defence but

	they have instructed him to indicate, in correspondence, that they will say that the words "Commercial Metalcraft" are merely descriptive. Buckingham Commercial Metalcraft Ltd have instructed that they will agree to give undertakings at the hearing so the only issue outstanding is the costs of the application. Write the body of an email advising Mr Parsons whether costs are likely to be ordered in favour of the claimant in any event or if the costs should be reserved.
Total Marks Attainable	20

Fail	up to 9.9	This mark should be awarded to candidates whose papers fail to address any of the requirements of the question, or only touch on some of the more obvious points without dealing with them or addressing them adequately. An answer which makes little or no sense OR is so poorly written as to lack coherence OR the answer will only demonstrate an awareness of some of the more obvious issues and is likely to be poorly written.
Pass	10+	An answer which includes MOST of the requirements, namely: An explanation of the normal rule in costs and the three situations that need to be considered when offering advice on costs in relation to injunctions. The primary focus of the question may have been missed with candidates simply providing a general framework, although there will be evidence that the candidate has the knowledge that is fit for purpose. The answers will be written to a reasonable standard, but may contain some grammatical errors or spelling mistakes etc. Appropriate authority will be used throughout although some points advanced may not be supported.
Merit	12+	This band will deal with ALL the requirements and the focus of the response will be injunctions granted on the balance of convenience. Candidates will have produced responses that have more depth and with more application to the facts provided. There will also be a demonstration that the candidate is able to analyse, as appropriate. Candidates will have produced responses which are written to a high standard with few, if any, grammatical errors or spelling mistakes etc. taking into account it is written under exam conditions.
Distinction	14+	An answer which includes ALL of the requirements for a pass (as set out above) PLUS demonstrates an excellent depth of knowledge. Excellent application of the law to the arguments made and critical analysis of the same. All views expressed by candidates should be supported by relevant authority and/or case law. Work which is written to an exceptionally high standard with few, if any, grammatical errors or spelling mistakes etc.

Indicative Content	**Marks**
Required (consideration as to the court's jurisdiction, e.g):	Up to 6 marks

Jurisdiction in relation to making injunctions: The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so. Guidelines to establish whether an applicant's case merited the granting of an interlocutory injunction are: whether there is a serious question to be tried, what would be the balance of convenience of each party should the order be granted (in other words, where does that balance lie?) and whether there are any special factors. ***Credit reference to any authority cited on the principles behind granting an injunction, e.g:*** Section 37(1) of the Senior Courts Act 1981 and American Cyanamid Co v Ethicom Ltd [1975] ***Jurisdiction in relation to costs:*** The court shall have full power to determine by whom and to what extent the costs are to be paid. The 'normal' rule that 'costs follow the event' applies therefore a claimant granted an interim injunction may understandably expect the court to order the defendant to pay the costs of the application. The court may however make any other order. Orders the court may/can make include reserving the costs of the application. ***Credit reference to any authority cited on the principles behind making a costs order in injunction proceedings, e.g:*** Section 51(3) of the Senior Courts Act 1981, CPR 44.2(1), CPR 44.2(2)(a), CPR 44.2(2)(b), CPR 44.2(6) and CPR PD 44, 4.2.	
Credit a discussion on how costs or interim applications will usually be dealt with e.g: ***Summary Assessment:*** Where the court orders costs at the end of an interim injunction hearing which has lasted one day or less, it can summarily assess the costs of the application at the end of that hearing. It is the duty of the parties and their legal representatives to assist the judge in making a summary assessment of costs. Each party who intends to claim costs must prepare and file either a statement of costs (N260) or a schedule: not less than 2 days for fast track trial or not less than 24 hours before other hearings. Disproportionate and unreasonable costs will be disallowed. ***Credit reference to any authority cited on summary assessment in injunction proceedings, e.g:*** CPR PD 44, 9.2, CPR PD 44, 9.5, N260A, CPR PD 44, 9.10 and CPR 44.3(1)–CPR 44.3(3) ***Impact of an Order:*** A final order might award a party costs which, upon fuller consideration at trial, he would not have been given. A failure to make a final order might have the practical effect of depriving a party of some or all of the costs, which in fairness he ought to have recovered. The possibility that there might be no further trial should be kept in mind. It might be unfair to order payment by a party whom might, as a result of trial, become entitled to set off an award for costs in his favour, such as where an order for immediate payment might hamper the party's conduct of the action or	Up to 8 marks To achieve more than a pass the candidate must not simply cite the law but demonstrate an understandin g of how the rules operate

destroy his business or because the opposing party might not have the means to repay if there should be a subsequent order against it. ***Credit reference to any authority cited on the impact of an order, e.g:*** Kickers International SA v Paul Kettle Agencies Ltd [1990], Picnic at Ascot v Derigs (unreported) [2001] and Hospital Metalcraft Ltd v Optimus British Hospital Metalcraft Ltd [2015]. ***Three situations that should be considered:*** Interim injunction application granted on (or agreed by consent on the basis of) the balance of convenience. A defendant that successfully resists an injunction application. An injunction on a quia timet basis.	
Credit discussion on Interim injunction applications granted on (or agreed by consent on the basis of) the balance of convenience, e.g: ***Balance of Convenience:*** When granting an injunction on the balance of convenience the court will weight up the inconvenience/loss to each party. The Court of Appeal has held that the costs of an interim injunction application granted on (or agreed by consent on the basis of) the balance of convenience should usually be reserved until trial of the substantive issue because, in such a situation, there is no successful or unsuccessful party at that stage for the purposes of CPR 44.2(2). However it will depend on whether the application can be classed as free standing – in which case the usual rule should apply unless there is another reason for the court to depart from that rule. Additionally, where the balance of convenience was significantly against the claimant it may be possible to deal with costs at the time of the application. ***Credit reference to any authority cited on the courts approach in balance of convenience cases, e.g:*** Desquenne et Giral UK Ltd v Richardson [1999], Interflora v Marks & Spencer PLC [2014] and Koza Ltd v Koza Altin Isletmeleri AS [2020].	Up to 3 marks
Credit should be given to a discussion on when a defendant successfully resists an injunction application e.g: ***A defendant that has successfully resisted an injunction:*** May expect the court to order that his costs of the application be paid by the claimant. For costs not to follow the event, the applicant would need to justify coming to court and it can do that by showing that there was a 'sufficiently strong probability that an injunction would be required to prevent the harm to the claimant to justify bringing the proceedings'. Were an interim injunction is not granted because damages would be a sufficient remedy then costs should be decided at the time and should not be reserved. ***Credit reference to any authority cited on the courts approach where a defendant successfully resists an injunction application, e.g:*** Merck Sharp Dohme Corp v Teva Pharma BV [2013] and Neurim Pharmaceuticals (1991) Ltd and another v Generics UK Ltd and another [2020].	Up to 3 marks

Credit should be given to a discussion on an injunction on a *quia timet* basis, e.g: ***Quia timet ("because he fears"):*** Is an injunction to restrain wrongful acts which are threatened or imminent but have not yet commenced. The position needs to be considered in light of the fact that by the time of trial it may be clear that there was no threat by the respondent to violate the applicant's legal right, but the applicant says there was a threat when it started proceedings.	Up to 2 marks

Question 9:	You work for a city law firm, Parmenter Law. Royce Parmenter, a Partner in the firm, has approached you for advice in relation to a case he has conduct of in which he is acting for the claimants in a claim for judicial review. The claimants include a high-profile Professor, Mr Henry Grimshaw, four senior Academics and a team of Doctors. The Department for State for Health and Social Care has decided it will be introducing Corporate Care Organisations. It is this decision that the claimants are seeking a judicial review of. Corporate Care Organisations are commercial non-NHS bodies designed to run health and social services. It is proposed that the Corporate Care Organisations be governed by company and contract law and can therefore be given full responsibility for NHS and adult social services. The claimants' case is that introducing these organisations could lead to most of a local area's NHS services being provided for under a single budget run by one organisation. It is their case that this may then allow for greater privatisation of the NHS. The claimants argue that legislation is required allowing scrutiny of the proposals before the policy is implemented and any changes to Regulations are made. The claimants are, rather unusually, funding the matter through crowdfunding. This type of donation-based funding enables litigants to raise funds and gain community support for their case. The claimants have established an online presence and are receiving donations from supporters of their case. The claimants are using an established crowdfunding website, FundingJusticeForAll.com and once they hit their fundraising target funds are transferred directly to Parmenter Law's client account.

	The claimants have now hit their funding target and are ready to make their application for permission to bring a judicial review challenging the lawfulness of the government's policy to create Corporate Care Organisations. They also wish to apply for a costs capping order and it is this aspect in relation to which Mr Parmenter is calling upon your expertise. Write the body of a memo to Mr Parmenter setting out the statutory tests for costs capping orders in judicial review cases.
Total Marks Attainable	20

Fail	up to 9.9	This mark should be awarded where candidates: Fail to advise on the framework of the rules governing the granting of a costs capping order. Fail to adhere to the instructions provided in the question completely or in a substantial part of the answer. An answer which makes little or no sense or is so poorly written as to lack coherence.
Pass	10+	Candidates may have considered MOST of the following: the definition of public interest proceedings, the factors the court will consider when determining if proceedings are public interest proceedings and how an application for a costs capping order will be made. Credit will be given to any reasonably written answer and any reasonable conclusion that, providing it can be demonstrated the proceedings are public interest proceedings and the financial resources of the parties suggest there should be an order that an order will be made. Candidates should use appropriate references to the relevant law and authority throughout but not all points advanced may be appropriately supported.
Merit	12+	An answer which includes ALL of the requirements for a pass (as set out above) PLUS Candidates will have produced responses that have more depth and with more application to the facts provided. There will also be a demonstration that the candidate is able to analyse, as appropriate. Candidates will have produced responses which are written to a high standard with few, if any, grammatical errors or spelling mistakes etc. taking into account it is written under exam conditions.
Distinction	14+	An answer which includes ALL of the requirements for a pass (as set out above) PLUS the candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. All views expressed by candidates should be supported by relevant authority. Candidates should have a clear and reasoned view as to the rules on costs capping orders. The advice should be very well structured. Work should be written to an exceptionally high standard with few, if any, grammatical errors or spelling mistakes etc. taking into account it has been written under exam conditions.

Indicative Content	**Marks**
Required: Candidates MUST identify the framework of rules governing costs capping orders e.g: ***The rules and definition:*** The current rules on 'Costs-Capping' replaced the common law rules on protective costs order in Judicial Review proceedings. A costs capping order is an order limiting or removing the liability of a party to judicial review proceedings to pay another party's costs in connection with any stage of the proceedings. ***The court may make a costs capping order:*** Only if it is satisfied that the proceedings are public interest	Up to 4 marks

proceedings and that, in the absence of the order, the applicant for judicial review would withdraw the application for judicial review or cease to participate in the proceedings, and it would be reasonable for the applicant for judicial review to do so. ***Credit reference to any authority cited on the framework of rules governing costs capping orders, e.g:*** Sections 88-90 of the Criminal Justice and Courts Act 2015, section 88(2) of the Criminal Justice and Courts Act 2015 and section 88(6) of the Criminal Justice and Courts Act 2015.	
Credit a discussion on what amounts to public interest proceedings, e.g: ***Proceedings must be public interest proceedings:*** A PCO cannot be made inprivate litigation. Proceedings are public interest proceedings only if a subject of the proceedings is of general public importance, the public interest requires the issue to be resolved, and the proceedings are likely to provide an appropriate means of resolving it. The court must have regard when determining whether proceedings are public interest proceedings include the number of people likely to be directly affected if relief is granted to the applicant for judicial review, how significant the effect on those people is likely to be, and whether the proceedings involve consideration of a point of law of general public importance. ***Credit reference to any authority cited on public interest proceedings, e.g:*** Eweida v British Airways [2009], section 88(7) of the Criminal Justice and Courts Act 2015, section 88(8) of the Criminal Justice and Courts Act 2015, R (on the application of Hawking) v Secretary of State for Health and Social Care [2018], Morgan v Hinton Organics [2009] and Maugham QC v Uber London Ltd [2019].	Up to 5 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 a discussion on how the court may decide to make an order and the content of an order, e.g: ***A judicial review costs capping order:*** May take a number of forms. Usually, the order will specify a limit on the amount that a claimant can be ordered to pay in respect of other side's costs if the claimant loses (e.g. the claimant's liability for costs will be capped at £5,000). Where a CCO is granted, the order must be coupled with an order placing a limit on the amount that a claimant who is successful can recover from a defendant if the claimant ultimately wins the case (sometimes called a reciprocal costs capping order).	Up to 10 marks Candidates that achieve more than a pass MUST show evidence of their ability to apply the legal framework to the facts of the question

There is no requirement that the reciprocal cap should be set at the same level as the costs liability of the claimant. ***Credit reference to any authority cited on the form and content of an order, e.g:*** Section 89(2) of the Criminal Justice and Courts Act 2015, R (Elan-Cane) v Secretary of State for the Home Department [2020], R (On the application of Hannah Beety & Ors) (Claimant) v Nursing & Midwifery Council (Defendant) & Independent Midwives UK [2017] and R (Western Sahara Campaign UK) v Secretary of State for International Trade [2021]. ***The court will consider:*** The matters to which the court must have regard when considering whether to make a costs capping order in connection with judicial review proceedings, and what the terms of such an order should be, include the financial resources of the parties, the extent to which the applicant for the order is likely to benefit, the extent to which any person who has provided financial support may benefit, whether legal representatives for the applicant forthe order are acting free of charge and whether the applicant for the order is an appropriate person to represent the interests of other persons or the public interest generally. ***Credit reference to any authority cited on the considerations of the court, e.g:*** Section 89(1) of the Criminal Justice and Courts Act 2015 and R (Corner House Research) v Sec of State for Trade and Industry [2005].	
Credit a discussion on the procedural steps for making such an application, e.g: ***An application for a judicial review costs capping order:*** Must be made on notice and can only be made without notice where a rule or PD allows it. An application should be made on the claim form. Applications must be supported by evidence setting out why a judicial review costs capping ***Credit reference to any authority cited on making an application for a costs capping order, e.g:*** CPR 46.17(1)(a), CPR 23.3(2)(b), CPR PD 46, 10.2 and CPR 46.17(1)(b).	Up to 2 marks