

## 4 December 2023: 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 shared with you along with this document)
- the marking rubric (see below)

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 what is meant by a 'default judgment' and the circumstances in which a default judgment may be obtained and/or set aside. What factors will a court consider when deciding whether to set judgment aside?</p>
<p><b>Total Marks Attainable</b></p> <p>Fail = 0-4.9          Pass = 5+          Merit = 6+          Distinction = 7+</p>	<p><b>10</b></p>
<p><b>Indicative Content</b></p>	<p><b>Marks</b></p>
<p><b>Required: Candidate should explain what a Default Judgment is and how it may be obtained:</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 to file a defence, or where a claimant has failed to file a defence to a counter-claim, within the time periods stipulated by the CPR.</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 from the date of service of the claim, the claimant can apply for 'judgment by default'. Claimant does not serve defence to counter-claim within 14 days of service – provisions in relation to 'acknowledgment of service' do not apply to counterclaims.</p> <p><b>Credit a reference to procedure for obtaining Default Judgment:</b> A default judgment is requested by completing and returning to the court Form N225 (fixed sum) or Form N227 (sum to be assessed by the court), or on application under CPR 23. Judgment only entered if court satisfied claim/counterclaim served, and Defendant/Claimant is in default</p>	<p>Up to 4 marks</p> <p>A pass must refer to CPR 12 and set out what a default judgment is.</p>

<p><b>Credit reference to any authority cited on what a Default Judgment is and how it may be obtained:</b> CPR 12, CPR 12.1, CPR 12.2, CPR 15.3 and CPR 20.4.</p>	
<p><b>Required: Candidate should explain the basis upon which the Court must/may set aside a Default Judgment:</b></p> <p><b>The basis upon which the Court <u>must</u> set aside a Default Judgment:</b> The <u>mandatory grounds</u>: 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; D has otherwise complied with the rules.</p> <p><b>The basis upon which the Court <u>may</u> set aside a Default Judgment:</b> The <u>discretionary grounds</u>: D has a real prospect of successfully defending the claim; it appears to the court that there is some other good reason why the judgment should be set aside or varied; or there is some other good reason why the defendant should be allowed to defend the claim.</p> <p><b>Credit reference to when a DJ may not be obtained or when permission of the court is needed:</b> Delivery of goods subject to Consumer Credit Act 1974 agreement; Procedure under CPR 8 is used; CPR prohibits default judgment: D was served outside the jurisdiction; D is a child or protected party; tort claims between spouses/civil partners; C seeks costs beyond fixed costs – CPR 12.10 and 12.11</p> <p><b>Credit reference to any authority cited on setting aside a DJ:</b> CPR 13.2 and CPR 13.3.</p>	Up to 4 marks
<p><b>Required: Candidate should explain the factors a court will consider in deciding whether to set aside DJ:</b></p> <p><b>Setting aside a DJ: Late compliance with CPR:</b> Judgment must be set aside on mandatory grounds if 'defaulting' party files acknowledgement/defence before judgment entered, even if late under CPR</p> <p><b>Setting aside a DJ: Prospects of Success:</b> Applicant must show 'some' reasonable prospect of success; court will assess nature of proposed defence, merits of underlying case, whether party entering judgment</p>	Up to 6 marks

<p>seeking unfair advantage, relevance of any limitation period, effect of setting judgment aside, all facts of case</p> <p><b>Setting aside a DJ: Promptness:</b> A lack of promptness in applying to set aside 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>Setting aside a DJ: Compliance with other parts of CPR:</b> Whether application to set aside is 'relief from sanctions' requiring consideration of <i>Denton</i> factors?</p> <p><b>Credit reference to any authority cited on grounds/factors on setting aside default judgment:</b> <i>Cunico Resources v Daskalakis</i> [2018]; <i>Smith v Berrymans Lace Mawer</i> [2019]; <i>Page v Champion Financial Ltd</i> [2014]; <i>Akhtar v Habib Bank Ltd</i> [2019]; <i>Gentry v Miller</i> [2016]; <i>Stanley v London Borough Tower Hamlets</i> [2020]; <i>Ince Gordon Dadds LLP v Mellitah Oil &amp; Gas</i> [2022]; <i>PXC v AB College</i> [2022]; <i>FXF v English Karate Federation</i> [2023].</p>	
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<b>Question 2:</b>	Outline the changes that were made to the rules on recoverability of ATE insurance premiums with effect from 1 <sup>st</sup> April 2013. What has been the impact of these changes on the ability of a successful party to recover ATE premiums for policies taken out after this date?
<b>Total Marks Attainable</b>	<b>10</b>
Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	
<b>Indicative Content</b>	<b>Marks</b>
<b>Required: Candidates must demonstrate knowledge of what is meant by 'ATE premiums', and the legislative framework in which they operate:</b>	Up to 2 marks
<b>Definition and legislative framework:</b> After the Event (ATE) insurance – policy designed to cover the risks of adverse costs orders in litigation. Can be used in any litigation, but mostly used where claimants enter	

<p>Conditional Fee Arrangements (CFA). ATE premiums were originally recoverable in costs orders by successful claimants. This changed as result of primary and secondary legislation in 2012/13.</p> <p><b>Credit reference to any authority cited on the legislative framework and recoverability of ATE premiums:</b> Access to Justice Act 1999, Section 29; <i>Callery v Grey</i> [2002].</p>	
<p><b>Required: Candidates must demonstrate knowledge of the current rules governing the recoverability of ATE premiums post April 2013:</b></p> <p><b>Recoverability of ATE Premiums post April 2013:</b> Generally, ATE premiums no longer recoverable from the paying party. Exceptions provided for by legislation - some insolvency proceedings (until April 2016); mesothelioma claims; publication and privacy proceedings – and by delegated legislation/regulations made by Lord Chancellor – limited exception for clinical negligence cases. Regulations provide that ATE 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, which has drawn adverse judicial comments.</p> <p><b>Credit reference to any authority cited on recoverability of ATE premiums post April 2013:</b> Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO), Section 46; Courts and Legal Services Act 1990, Section 58C [as inserted by LASPO]; Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No 2) Regulations 2013; <i>Peterborough &amp; Stamford Hospital NHS Trust v McMenemy</i> [2017].</p>	Up to 4 marks
<p><b>Required: Candidate should discuss limitations on recoverability of premiums and potential challenges where premiums otherwise recoverable:</b></p> <p><b>Basis of Assessment and reasonableness:</b> 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).</p> <p><b>Credit reference to any authority cited on basis of assessment and reasonableness, e.g:</b> Section 51 of the Senior Courts Act 1981, CPR 44.2, CPR 44.3(2) and CPR 44.3(3)</p>	Up to 8 marks

**Credit reference to importance of proper notification to client about recoverability of premiums**

**Challenges to ATE premiums:** Not all money paid was premium; premium is too high compared to others available on the market; formula used leads to disproportionate premium. Identifying which part of the premium relates to experts' reports may be difficult. Costs judges do not have the expertise to second guess the insurance market, still less to deconstruct a policy that is offered as a package into its constituent parts. The Court require expert evidence if a premium is to be challenged.

**Credit reference to authority cited on ability to challenge premiums:**  
*Emily Noakes v Heart of England Foundation NHS Trust* [2015]

**Reasonableness:** A high limit of indemnity does not in itself indicate an unreasonable premium; block risk policies are not unreasonable; the premium to be allowed is the total premium paid; assessment fees and profit costs of complying with the policy are recoverable; reasonable to insure before sending pre-action letter.

**Credit reference to any authority cited on reasonableness of ATE premium:** *Allan Coleman v Medtronic Ltd* [2016], *Callery v Gray (No 1)* [2001], *Rogers v Merthyr Tydfil* [2007], *Peterborough & Stamford Hospital NHS Trust v McMenemy* [2017].

**Proportionality:** Initial uncertainty on application of proportionality post-LASPO, but now resolved by CA. 'Old' (pre-LASPO) test of proportionality applies before April 2103; 'New' test for proportionality applies to post-LASPO premiums. The post LASPO test - costs which are disproportionate can be disallowed or reduced even where reasonably incurred. Factors on proportionality include: reasonableness of relationship to sums in issue; value of non-monetary relief; complexity of litigation; additional work generated by conduct; vulnerability of parties. Once reasonableness has been considered, Court should remove all unavoidable costs before making any deduction to reach a proportionate figure.

**Credit reference to any authority cited on proportionality and ATE premiums:** *King v Basildon & Thurrock Hospital NHS Trust* [2016]; *Murrell v Cambridge University Hospital NHS Trust* [2017], *Mitchell v Gilling Smith* [2017], *BNM V MGN LTD* [2017]; *Peterborough & Stamford Hospital NHS Trust v McMenemy* [2017]; *May v Wavell Group* [2017], *West and Demouilpied v Stockport NHS Foundation Trust* [2020].

**Question 3:**

Explain the main differences between contentious and non-contentious business in legal work and the significance of these

	differences in relation to rules about charging fees to clients and/or recoverability of costs from other parties. Does the distinction between contentious and non-contentious business serve any useful purpose?
<b>Total Marks Attainable</b>  Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	<b>10</b>
<b>Indicative Content</b>	<b>Marks</b>
<b>Required – Definitions of ‘contentious’ and ‘non-contentious’ business:</b>  <b>Definitions:</b> Contentious business is any work done with a view to commencing proceedings, so long as proceedings are commenced. All work done is ‘non-contentious’ up to the point that proceedings are commenced but becomes ‘contentious’ retrospectively when proceedings are begun. All other work is non-contentious.  <b>Credit reference to any authority cited on for definitions:</b> Solicitors Act 1974, section 59 and/or section 87(1); Senior Courts Act 1981, section 128; <i>Re Simpkin Marshall Ltd</i> (1959)	Up to 3 marks
<b>Required – Explanation of the significance of the differences between ‘contentious’ and ‘non-contentious’ business:</b>  <b>Contentious Business Costs:</b> Pre-issue work non-contentious, but deemed contentious, retrospectively, as soon as proceedings commenced; Cannot charge client more than can be recovered from other party on assessment – unless express written agreement or other specific rules; Conditional Fee Agreements (CFAs) permitted; Cannot charge client on ‘contingency’ (percentage) basis, unless meets strict requirements for ‘damages based agreement’  <b>Non-contentious Business Costs:</b> All work is ‘non-contentious’ up to the point of issue of proceedings; Can charge client on basis in retainer – not limited to amount recoverable from other party; may charge client on hourly rate or ‘percentage’ (contingency arrangement); ability to challenge costs limited  <b>Credit reference to any authority cited on rules relating to costs in contentious/non-contentious business:</b> Solicitors Act 1974, section 56, section 57(2), section 59, section 70, section 74; LASPO, section 45; CPR 46.9; Solicitors’ (Non-Contentious Business) Remuneration Order 2009	Up to 4 marks

<p><b>Required – Discussion of issues raised by the distinction and the need to maintain it:</b></p> <p><b>Issues:</b> Controversy of when proceedings 'commence'; Illogical to require proceedings to commence in work of obviously contentious nature; Controversy highlighted by introduction of 'portals' under CPR; What stage do proceedings 'commence' under portal? - claim notification or Part 7/8 claim form; potential conflict between Solicitors Act and LASPO on DBAs in contentious business; Calls for review/reform/abolition of distinction; Consultation by Civil Justice Council</p> <p><b>Advantages of distinction:</b> Enables parties to settle claims and control costs pre-issue; Some matters still within jurisdiction of court under statute and/or CPR – including conduct and pre-action protocol compliance and costs; Part 36 offers made pre-issue; Parties can avoid issues by written agreement;</p> <p><b>Disadvantages of distinction:</b> Restrictions on parties' ability to determine costs dependant on issue/non-issue of proceedings; restricts 'freedom of contract' between solicitor and client; rules only apply in County Court proceedings; Solicitor/Client costs challengeable in High Court only; low Fixed Costs recoverable in personal injury claims; very low fixed costs recoverable in portal claims; early stages of portals 'non-contentious' business; places barrier to early settlement; 'illogicality' of distinction in modern context; Conflict between statutory provisions and CPR</p> <p><b>Credit reference to any relevant authority cited as part of the discussion:</b> Solicitors Act 1974, section 57(2); Solicitors Act 1974, section 59; Solicitors Act 1974, section 74(1) and 74(3); Judicial Review and Courts Act 2022, section 24; CPR 36.7(1); CPR 46.9(2); <i>Re Simpkin Marshall Ltd</i> (1959); <i>Belsner v Cam Legal Services Ltd</i> (2022); RTA Portal; Small Claims Portal</p>	<p>Up to 7 marks</p> <p>Credit any points made that show reasoned discussion of the issues raised and/or the significance of maintaining the distinction</p>
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<p><b>Question 4:</b></p>	<p>Explain what is meant by 'Money Laundering' and outline the statutory and non-statutory provisions which regulate this activity. What impact do these provisions have on the activities of individual lawyers and law firms when dealing with clients' money?</p>
<p><b>Total Marks Attainable</b></p> <p>Fail = 0-4.9</p> <p>Pass = 5+</p> <p>Merit = 6+</p> <p>Distinction = 7+</p>	<p>10</p>

Indicative Content	Marks
<p><b>Required: Candidates must explain what money laundering is and the legislative framework:</b></p> <p><b>Money Laundering:</b> Money laundering is "the process by which criminal proceeds are sanitised to disguise their illicit origins".</p> <p><b>Criminal Offences:</b> Specific criminal offences: concealing, disguising, converting, transferring or removing criminal property; entering into, or becoming concerned in, an arrangement known or suspected to facilitate the acquisition, retention, use or control of criminal property; participating or being involved in fundraising that might be used for terrorist purposes; using or possessing money or other property for terrorist purposes, entering into or becoming concerned in an arrangement facilitating the retention or control of terrorist property</p> <p><b>Civil Liability:</b> Regulations apply to certain categories of persons acting in the course of a business permitting recovery of funds representing the proceeds of Money Laundering, Terrorist Financing and Transfer of Criminal Property.</p> <p><b>Credit refence to any authority cited on offences and/or civil liability:</b> Proceeds of Crime Act 2002, Section 327-329; Serious Crime Act 2015, section 45; Terrorism Act 2002, Sections 15-18; Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.</p>	<p>Up to 4 marks</p>
<p><b>Credit an explanation of the governance, systems and controls a firm should have in place:</b></p> <p><b>Governance:</b> Money laundering offences investigated by police, the National Crime Agency (NCA) or HM Revenue &amp; Customs (HMRC). Crown Prosecution Service (CPS) usually conducts criminal prosecutions. Other organisations (NCA, Serious Fraud Office, Financial Conduct Authority) may prosecute and/or pursue civil recovery actions. Firms also required to set up own systems of internal governance – see below</p> <p><b>Systems and controls:</b> Firms must appoint one individual in a senior management position as the Money Laundering Compliance Officer (MLCO). Depending on size/resources, firms should also appoint separate Money Laundering Reporting Officer (MLRO). Firms required to make Suspicious Activity Reports (SARs) to the National Crime Agency where necessary. Firms must take appropriate steps to identify and assess the risks of money laundering and terrorist financing, keep records of any identified risks, and establish and maintain policies, controls and procedures to mitigate and manage risks effectively. Firms</p>	<p>Up to 6 marks</p>

<p>must provide staff with appropriate training on money laundering and terrorist financing, and keep records of that training.</p> <p><b>Due diligence:</b> Firms must apply customer due diligence (CDD) measures for all newly established business relationships, including verifying the identity of the client and/or the source of funds in any transaction. Records must be kept of all such CDD measures. Any suspicious activity must be reported.</p> <p><b>Credit refence to any authority cited on governance, systems and controls, or due diligence:</b> Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, Reg 8, Reg 12(1), Regs 18-24, Regs 27-29, Reg 33, Reg 37; Legal Guidance, Proceeds Of Crime Act 2002 Part 7 - Money Laundering Offences; SRA Code of Conduct for Solicitors, RELs and RFLs, Para 7.1; SRA Code of Conduct for Firms, Para 3.1</p>	
<p><b>Credit a discussion of the impact of the money laundering etc offences and regulations on individuals and firms:</b></p> <p><b>Impact of offences/regulations:</b> Offences/Regulations have potential to widen the scope of criminal liability for lawyers and other professionals working in the non-regulated sector; Offences widely drawn – catch most forms of activity involving transactions in property or money; Required <i>mens rea</i> low – knowledge (including constructive knowledge) or ‘reasonable cause to suspect’; Individual responsibility to be aware of rules and changes to them; Imposes increased bureaucracy and cost on both individuals and firms; May cause difficulty with client relations; Increased record keeping</p> <p><b>Credit refence to any authority cited on impact of money laundering etc offences and regulations:</b> Proceeds of Crime Act 2002, Sections 327-329; Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017; <i>R v da Silva (2006)</i> Legal Guidance, Proceeds Of Crime Act 2002 Part 7 - Money Laundering Offences; SRA Code of Conduct for Solicitors, RELs and RFLs, Para 7.1; SRA Code of Conduct for Firms, Para 3.1</p>	Up to 4 marks

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

<p><b>Question 5:</b></p>	<p>You work in the Dispute Resolution Department for an SRA regulated firm, BisLaw LLP. You have been asked to help one of the Associate Solicitors in the firm with advice to the firm's client, Tony's Quality Builders Ltd.</p> <p>Tony's Quality Builders Ltd are a long-standing client of the firm and have used its services for general commercial and business advice.</p> <p>Tony's Quality Builders Ltd undertook some building, maintenance, and repair work for Ms Susan Shuttleworth at her business premises, a small shop from which Ms Shuttleworth trades as 'Sue's Second-Hand Emporium'. The total cost of the building work came to £7,500. The whole of this sum remains unpaid despite numerous reminders being sent and promises to pay being received but not fulfilled.</p> <p>Tony' Quality Builders Ltd initially instructed your firm to send letters seeking payment of the outstanding invoice and, when no response was received, to send a formal 'Letter of Claim' under the Pre-Action Protocol.</p> <p>On reviewing the file, you see that no written responses have been received to the firm's correspondence, but there is a file note of a telephone call received from Ms Shuttleworth in which she says that your client is 'a bunch of cowboys' who have 'destroyed her shop' and she is seeking her own 'legal advice'.</p> <p>You also see on the file that one clause in your client's 'standard terms and conditions of business' states "All work must be paid for in full within seven days of completion and invoice. No reduced payments, discounts, set offs or counterclaims will be accepted, unless notified to the company in writing within that period".</p> <p>Tony's Quality Builders Ltd have now lost patience with Ms Shuttleworth and instruct your firm to commence court proceedings. Your client has heard that Ms Shuttleworth's business is experiencing financial difficulties, and she is 'playing for time' with other creditors too. Your client has asked whether there is any way to 'short-circuit' the</p>
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	<p>normal court procedures and is also concerned about the likely costs of pursuing proceedings. The Associate Solicitor handling the case has suggested the possibility of seeking summary judgment against Ms Shuttleworth.</p> <p>You have been asked to draft the body of an email to your client giving advice on what summary judgment is, the procedure involved, the chances of success, and the likely costs implications of pursuing such an application.</p>
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<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 summary judgment is, how a summary judgment may be obtained, when permission may be needed to apply for a summary 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 grant summary judgment on the basis of the clause in the client's standard terms and conditions unless the defendant can present an arguable case that it is an unenforceable (unreasonable) exclusion clause. 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.

<p><b>Required: Candidate should set out the grounds for a summary judgment and the proceedings in which a summary judgment is available:</b></p> <p><b>Grounds for summary judgment:</b> CPR 24 sets out a procedure by which the court may decide a claim or a particular issue without a trial. Court may grant 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; <b>and</b> there is no other compelling reason why</p>	<p>Up to 4 marks</p> <p>A pass must refer to CPR 24 and set out what it means to apply for a summary judgment.</p>
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<p>the case or issue should be disposed of at a trial.</p> <p><b>Proceedings in which a summary judgment is available:</b> Any type of proceedings against a Claimant. Any type of proceedings against a Defendant, except proceedings for possession of residential premises against a mortgagor or protected tenant; or an admiralty action <i>in rem</i>.</p> <p><b>Credit reference to any authority cited on grounds for summary judgment and proceedings:</b> CPR 24.1, CPR 24.2, CPR 24.3(1) and CPR 24.3(2).</p>	
<p><b>Required: Candidate should discuss application of CPR and case law provisions to facts of case and merits of applying for summary judgment:</b></p> <p><b>Application of CPR/Case law to facts:</b></p> <p>Test applied is 'realistic' as opposed to 'fanciful' prospects of success; 'Realistic' means a case or argument with some degree of conviction and more than 'merely arguable'; Not suitable for summary judgment disposal if disputed issues of fact, or issues of credibility, or complex expert evidence required; 'claim' or 'issue' has to be 'stand alone' issue, decisive to determination of claim/ defence/issue</p> <p><b>Merits of summary judgment application (on facts):</b> Decides issues at an early stage without need for trial; unsuccessful application may give tactical advantage to opponent; is there 'stand alone' issue?; potential defences? - breach of contract; set-off/counter-claim; how realistic are possible defences?; breach of express or implied terms?; effect of 'no-set off' clause?; valid exclusion clause?; factors on 'reasonableness' of clause?; disputed facts?; complex expert evidence?; no 'mini-trial';</p>	<p>Up to 8 marks</p> <p>A pass must refer to CPR 24 and set out the grounds for granting summary judgment in favour of a claimant.</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 the court will take to an application for a Summary Judgment.</p>

<p>other compelling reason for trial? Court's powers on hearing application – grant/dismissal/conditional</p> <p><b>Credit reference to any authority cited on application of CPR to facts:</b> CPR 24.2, <i>The Saudi Eagle</i> (1996) <i>Swain v Hillman</i> [2001]; <i>Three Rivers District Council v Bank of England (No. 3)</i> [2001]; <i>ED &amp; F Man Liquid Products v Patel</i> (2003); <i>Okpari v Royal Dutch Shell</i> (2021); <i>Anan Kasei v Neo Chemicals</i> (2021)</p> <p><b>Credit reference to any authority cited on merits of application:</b> CPR 24.2; CPR 16.6; CPR 20; CPR 24.6; Supply of Goods &amp; Services Act 1982, s 4, s 13, s 16; Unfair Contract Terms Act 1977, s 2(2), s 3, s 11 and Sch 2; <i>Hanak v Green</i> (1958) <i>Shenkers Ltd v Overland Shoes Ltd</i> (1998); <i>Persimmon Homes v Ove Arup &amp; Partners</i> (2017)</p>	
<p><b>Required: Candidate should explain and apply procedure on SJ application:</b></p> <p><b>Procedure applicable to summary judgments:</b> Claimant unable to apply until Defendant acknowledged service or served defence; Application made on notice; Application notice states order being sought and (briefly) why; Minimum 14 days' notice of application; Application notice must be served on Respondent and accompanied by copies of written evidence (witness statement/documents) in support and draft of order sought; Respondent file and serve written evidence in response at least 7 days before hearing; Applicant may file and serve written evidence in reply no less than 3 days before hearing; Burden of proof on applicant – where applicant produces credible evidence in support of application, evidential burden on respondent to show</p>	<p>Up to 8 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 procedure to be followed on an application for a SJ.</p>

<p>'reasonable prospect of success' or other 'compelling reason'.</p> <p><b>Credit reference to any authority cited on the procedure applicable to summary judgments:</b> CPR 24.4(1) and CPR 24.4(3); CPR 24.5(1) and 24.5(2); CPR 16.6; CPR 20; CPR 23.1, 23.6 and 23.7; <i>Three Rivers District Council v Bank of England (No. 3)</i> [2001]; <i>Sainsbury's Supermarkets plc v Condek Holdings</i> (2014); <i>Goldtrial Travel v Grumbridge</i> (2020)</p>	
<p><b>Required: Candidate should discuss possible costs consequences of SJ application:</b></p> <p><b>Fixed commencement costs and Legal representatives' charges:</b></p> <p>General position – costs in discretion of court; 'Normal' rule – 'loser' pays.</p> <p>Fixed commencement costs on a claim calculated by reference to amount claimed/value of goods. Sum in excess of £5,000 with court service = £100</p> <p>Fixed sum in respect of legal representatives' charges allowed where claim is for sum of money or goods not exceeding £25. Additional sum payable where judgment entered on application – in case of summary judgment, where sum ordered exceeds £5,000 = £210</p> <p>Court fee will be allowed in addition to the fixed costs provided for. £455</p> <p>If order for fixed costs not made, Court may order summary or detailed assessment. Will need convincing argument why fixed costs not appropriate in case.</p> <p><b>Credit reference to any authority cited on fixed costs and legal representatives' charges:</b> CPR 44.2(1); CPR 44.2(2); CPR45.1;</p>	<p>Up to 4 marks</p>

CPR 45.2 (Table 1); CPR 45.4 (Table 2); CPR 44.6; CPR PD 44 Para 8

**Question 6:**

You work in the Costs department of Morgan and Brighthouse Law, an SRA regulated firm that specialises in personal injury and clinical negligence claims. One of the partners in the firm has requested your help on an issue that has arisen on the file of Mr Matthew Cooper.

Mr Cooper suffered serious head and spinal injuries as a result of a road traffic accident. After an initial denial, breach of duty of care was admitted by the driver of the other vehicle involved, and the claim proceeded on causation and quantum issues. The main issue on causation was whether, and to what extent, the treatment Mr Cooper received at the Royal Norfolk Hospital was the cause of his ongoing symptoms. The NHS Trust responsible for the hospital was joined as a second defendant in the proceedings. There was also a dispute about the 'quantum' of gratuitous nursing care provided by Mr Cooper's partner, Jo. Both defendants allege that the time and rates charged for this head of damage are 'grossly excessive'.

The expert evidence obtained during the course of the proceedings largely agreed that the medical treatment received by Mr Cooper was of an acceptable standard and did not cause or contribute to Mr Cooper's ongoing symptoms. On receipt of the expert evidence, the claim against the hospital was discontinued on Mr Cooper's instructions.

On the claim for gratuitous nursing care, Mr Cooper's instructions are that the rates claimed are discounted from the rates charged by professional carers, based on an internet search, but Mr Cooper accepts that Jo may have 'exaggerated' some of the time spent providing care for him.

The claim against the other driver is proceeding to trial, but the NHS Trust has indicated that it intends to seek an order for its costs of defending the discontinued claim against Mr Cooper.

The partner in your firm has explained the protection offered to Mr Cooper by QOCS, but feels that the client is anxious about the prospect of losing a large portion of any damages he recovers from the other driver to pay the NHS Trust's costs.

You have been asked to write the body of an email to Mr Cooper advising him on the protection provided by the rules on QOCS and the prospects of being asked to pay the NHS Trust's costs.

**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 addresses MOST of the following points: Definitions and salient points in respect of QOCS, the protection provided to claimants under the QOCS rules and the exceptions to the general rule in respect of cases where grounds exist to disapply the basic protection, either with or without permission from the court. Candidates will demonstrate a good depth of knowledge of the subject (i.e. a good understanding of the legislative framework around the QOCS protection and when it can be removed) with good application and some analysis having regard to the facts, although candidates may demonstrate some areas of weakness.
Merit	12+	For a mark in this band, the answer will deal with ALL of the requirements required for a pass however, candidates will have produced responses that have more depth and more application and analysis, as appropriate. The answer should also address ALL of the following points: the applicability of the CPR and case law to protection provided by QOCS, the situations in which protection can be removed without permission from the court – recoverable costs do not exceed aggregate award, case struck out as no reasonable prospect of success; or with permission – fundamental dishonesty, third party benefit, mixed claims. Candidates will demonstrate a very good depth of knowledge of the subject (i.e. a good understanding of the legislative framework around the enforcement of costs orders under QOCS) 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. Candidates will provide an excellent advice setting out the likelihood of the challenges succeeding. 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+	
<b>Indicative Content:</b>	<b>Marks</b>
<p><b>Required: Candidates are required to explain what QOCS is and its effect:</b></p> <p><b>Discretion as to costs:</b> General position – costs in discretion of court; 'Normal' rule – 'loser' pays; Claimant normally liable for costs of defendant on discontinuance; Court retains discretion as to costs and QOCS does not alter this.</p> <p><b>Effect of QOCS:</b> Adverse costs orders against claimant normally enforceable only to the extent of any award made in favour of the claimant.</p> <p><b>Credit reference to any authority cited on the court's discretion as to costs:</b> CPR 44.2(1) and CPR 44.2(2); CPR 38.6(1); CPR 44.14</p>	Up to 3 marks
<p><b>Required: Candidates should outline scope of QOCS and extent of enforcement with/without permission:</b></p> <p><b>QOCS applies to:</b> Personal injury claims and claims on behalf of deceased's estate and/or dependency arising from fatal accidents under Law Reform (Miscellaneous Provisions) Act 1934, s 1 and/or Fatal Accidents Act 1976.</p> <p><b>QOCS does not apply to:</b> Applications for pre-action disclosure; CFAs entered before 1 April 2013.</p> <p><b>QOCS enforced without permission:</b> Exceptions to general rule – adverse costs enforceable without permission i) to extent aggregate amount of costs does not exceed total award of damages and costs in favour of claimant; ii) proceedings struck out as no reasonable grounds to bring them</p> <p><b>QOCS enforced with permission:</b> Exceptions to general rule – adverse costs ordered to full extent, with permission of court, where: i) claimant fundamentally dishonest; ii) claim for financial benefit of someone other than claimant; iii) 'mixed' claim for personal injury and non-injury damages</p>	Up to 5 marks

<p><b>Credit reference to any authority cited on the scope of QOCS and extent of enforcement:</b> CPR 44.13, CPR 44.17, CPR 48; CPR 44.14; CPR 44.15; CPR 44.16</p>	
<p><b>Credit candidates for development of relevant points on rules relating to QOCS in more depth with reference to appropriate authority:</b></p> <p><b>Limitation on enforcement, not award of costs:</b> Cost orders only enforceable to the extent that total enforced does not exceed total damages awarded to claimant. Discontinuance does not remove ability to deal with question of costs – normally discontinuing party liable for costs; Can only be enforced after proceedings concluded and costs have been assessed or agreed; Defendant previously unable to ‘set-off’ favourable costs orders against adverse ones – Credit reference to CPR amendment that reverses this position</p> <p><b>Examples of authority that may be considered:</b> CPR 44.14(1); CPR 44.14 (2); CPR 44.14(3); CPR 38.5(3); CPR 38.6; <i>Cartwright v Venduct Engineering</i> (2018); <i>Howe v MIB</i> (2020); <i>Ho v Adekun</i> (2021) CPR 44.12; CPR 44.14(4) [New after 6<sup>th</sup> April 2023]</p> <p><b>Claims Struck Out:</b> Orders enforced in full without permission where proceedings struck out because: no reasonable grounds for bringing claim; abuse of process of the court; misconduct of (or on behalf of) the claimant that impedes just disposal of proceedings.</p> <p><b>Examples of authority that may be considered:</b> CPR 44.15, <i>Wall v British Canoe Union</i> [2015]; <i>Brahilka v Allianz Insurance</i> (2015); <i>Kite v Phoenix Pub Group</i> [2015]; <i>Shaw v Medtronic Corevalve LLC</i> [2017].</p> <p><b>Fundamental dishonesty:</b> Costs orders enforced to full extent, with permission of court, where claim is found to be fundamentally dishonest. ‘Claim’, not Claimant, has to be ‘fundamentally dishonest’. Possible to have ‘dishonest’ claim advanced by ‘honest’ claimant. Small exaggeration or mistake in claim not ‘fundamental’</p> <p><b>Examples of authority that may be considered:</b> CPR 44.16(1); <i>Menary v Darnton</i> [2016], <i>Gosling v Hailo</i> [2014], <i>Zurich Insurance v Bain</i> [2015], <i>Wagett v Witold</i> [2015]; <i>Howlett v Davies</i> [2017]; <i>Michael v IE&amp;D Hurford Ltd</i> (2021)</p>	<p>Up to 8 marks</p>

<p><b>Financial benefit of a person other than claimant/ dependant:</b> Costs orders enforced to full extent, with permission of court, where claim is for financial benefit of person other than the claimant/dependant of deceased. Exceptions for gratuitous care, earnings paid by employer, medical expenses. Covers, e.g., subrogated claims, credit hire claims</p> <p><b>'Mixed' Claims:</b> Costs orders against claimants can be enforced to their full extent, with permission of court, where claim includes a claim for financial benefit unrelated to claimant's personal injury. Covers, e.g., claims primarily for property damage with secondary element of personal injury</p> <p><b>Examples of case authority that may be considered:</b> CPR 44.16(2)(a), CPR 44.16(2)(b), CPR PD 44, para 12.2, <i>Howlett v Davies</i> [2017], <i>Jeffreys v Commissioner of Police for the Metropolis</i> [2017]; <i>Brown v Commissioner of Police of the Metropolis</i> [2019].</p>	
<p><b>Credit candidates for application of rules relating to QOCS to facts of case and providing reasoned advice:</b></p> <p><b>Application of QOCS rules/Case law to facts:</b></p> <p>Claimant discontinued - normally liable for costs of defendant on discontinuance; Subject to court's overriding discretion on costs; QOCS applies as personal injury claim; QOCS protects Claimant against enforcement of costs to extent that total costs do not exceed total damages; Proceedings continuing – adverse costs only enforceable after conclusion/assessment/agreement; Exceptions – enforcement in full with/without permission; Claimant likely to be awarded substantial damages in excess of likely costs; claim not 'struck out' - or evidence of grounds for strike out; enforcement of costs in full with permission where 'fundamentally dishonest'; claim for benefit of third party – specific exception in case of 'gratuitous care'; not a 'mixed' claim – mostly personal injury</p>	<p>Up to 8 marks</p>

<p><b>Prospects of costs enforcement of NHS Trust's costs:</b></p> <p><b>Credit:</b> Discussion of: Client likely to be liable for NHS Trust's costs on discontinuance; amount of costs subject to assessment/agreement at conclusion of whole case; possible argument on <i>Bullock/Sanderson</i> order – other defendant to pay NHS Trust's 'reasonable' costs; client likely to receive substantial damages considerably in excess of any adverse costs order; high likelihood NHS Trust will seek to enforce without permission against final award of damages – unless court orders otherwise (as above); adverse costs will be standard basis and assessed/agreed; argument on 'fundamental dishonesty'; no suggestion client is dishonest - but claim may be; extent of 'exaggeration' may be crucial in deciding 'fundamental' dishonesty; costs enforcement not limited to 'dishonest' element of claim</p> <p><b>Credit reference to any authority cited on application of QOCS rules/case law to facts:</b> CPR 38.5; CPR 38.6(1); CPR 44.2(1) and CPR 44.2(2); CPR 44.14 -16; CPR PD 44 Para 12.3; <i>Wall v British Canoe Union</i> [2015]; <i>Gosling v Hailo</i> [2014], <i>Zurich Insurance v Bain</i> [2015], <i>Wagett v Witold</i> [2015]; <i>Howlett v Davies</i> [2017]; <i>Brown v Commissioner of Police of the Metropolis</i> [2019]</p> <p><b>Credit reference to any authority cited on prospects of enforcement:</b> CPR 44.14; CPR 44.15, CPR 44.16(1); CPR PD 44 Para 12.4; <i>Bullock v London General Omnibus Co</i> (1907); <i>Sanderson v Blyth Theatre Co</i> (1903); <i>Gosling v Hailo</i> [2014], <i>Zurich Insurance v Bain</i> [2015], <i>Wagett v Witold</i> [2015]; <i>Howlett v Davies</i> [2017]; <i>Michael v IE&amp;D Hurford Ltd</i> (2021)</p>	
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<p><b>Question 7:</b></p>	<p>You are a qualified Costs Lawyer working for a firm of specialist Costs Lawyers, White and Lyndhurst Legal Costs Services.</p> <p>You have been consulted by Mr Paul Adeboyo, who has sought your advice regarding the outcome of a claim for damages for personal injury, which was</p>
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handled by a local firm of solicitors, Scott & Wayne LLP.

Mr Adeboyo's claim for damages arose out of an accident when he was knocked off his bicycle by a motor car and received hospital treatment for minor leg, arm and head injuries. Mr Adeboyo instructed Mr Kevin Duneen of Scott & Wayne LLP to pursue a claim against the driver of the car. Mr Adeboyo tells you that when he first instructed the solicitors, he was told that his claim was worth 'around £6,000' and the cost of pursuing the claim would be 'around £5,000'. Mr Adeboyo says that he was assured the claim would be pursued on a 'no win, no fee' basis and 'all the costs' would be paid by the other party when the claim settled.

Reassured by this, Mr Adeboyo instructed the solicitors to proceed with his claim and signed a 'client care letter' and a 'conditional fee agreement' (CFA). Mr Adeboyo noticed one clause in the client care letter that said the solicitors expected to recover 'some of our charges and expenses from your opponent'. When Mr Adeboyo queried this, he says he was told 'not to worry' and 'all costs would be paid by the other side, apart from the success fee, which is capped anyway'. The CFA stated that the 'success fee' was 100% of basis costs, but was capped at 25% of general damages and pecuniary loss.

Mr Adeboyo tells you that after about one year his claim was settled in the sum of £3,000 in total damages. Although Mr Adeboyo felt that his claim was worth more, he had accepted Mr Duneen's advice that some of the losses he wanted to claim for were 'not recoverable in law' and the offer was a 'very good offer' for the injuries Mr Adeboyo had suffered.

Mr Adeboyo was generally satisfied with the outcome but is concerned about the costs position. He received a letter from the solicitors confirming that the claim had settled at 'stage 2 of the RTA Portal', costs of £500 +VAT + disbursements (£750) had been recovered from the insurers, Scott &

Wayne's 'success fee' of 100% base costs was £4,000, but this was 'capped' at 25% of damages (£750). The letter enclosed payment to Mr Adeboyo of £2,250.

Mr Adeboyo informs you that he does not understand what the 'RTA Portal' is and, more importantly to him, does not understand why all the costs were not recovered from the opponent when he had been assured that they would be. Mr Adeboyo feels that he has been 'scammed' by Scott & Wayne and wants you to challenge the whole of the £750 fee on the basis that it was obtained by 'fraud and deception'.

You see from the documents that Mr Adeboyo has supplied you with that the CFA agreement is in the Law Society's standard form **[NOTE: Candidates are not expected to discuss the rules around the validity of CFAs when answering this question]**. The documents also contain an email from the solicitors explaining that the original estimated value of the claim was based on information supplied by Mr Adeboyo that was not supported by the available evidence, as a result of which the RTA Portal is now the appropriate forum for pursuing the claim. The email explains what the RTA Portal is, but does not explain the costs consequences of this for the client.

Write an advisory email to Mr Adeboyo explaining the legal position on solicitor's fees, the recoverability of costs, and any potential remedies that may be open to him.

<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 what is meant by a 'retainer', the duties of lawyers to clients in relation to costs, and the remedies

		available in relation to disputed costs. . 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 rules pertaining to retainers, the duties to explain costs recoverability to clients, and the application of the relevant remedies available to clients in relation to disputed costs 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 – Explanation of regulation of solicitor/client relationship by retainer:</b></p> <p><b>Retainers:</b> Contract (retainer) between lawyer and client regulates all parts of relationship – including ability to charge client for services. Follows common law rules on formation of contract, with some exceptions. No retainer = no ability to seek payment from client</p> <p><b>Credit reference to any authority cited on retainers:</b> <i>Milner v Bilton</i> (1966)</p> <p><b>Required – Discussion of types of 'business' under retainers:</b></p> <p><b>Contentious Business:</b> Work done with a view to commencing proceedings and proceedings commenced. Pre-issue work retrospectively contentious once proceedings commenced</p> <p><b>Non-Contentious Business:</b> All work that is not contentious business or pre-issue work before proceedings are commenced is non-contentious business.</p> <p><b>Credit reference to any authority cited for different types of business:</b> Solicitors Act 1974, section 87(1); Senior Courts Act 1981, section 128; <i>Re Simpkin Marshall Ltd</i> (1959)</p>		<p>Up to 3 marks</p> <p>Candidates should at least be able to demonstrate an understanding of the significance of retainers in regulating the lawyer/ client relationship</p>
<p><b>Required: Candidates must explain duties of lawyers in relation to fees:</b></p> <p><b>Duties in relation to fees:</b> Conditional Fee Agreements (CFAs) permitted for 'contentious' business only; Must</p>		Up to 6 Marks

<p>give clients information in way they can understand; Fully 'informed consent'; Must give best possible information on costs of matter at outset and as matter proceeds; Full disclosure to client; no fiduciary duty to client, but professional duties under Code of Conduct</p> <p><b>Credit reference to any authority cited in relation to duties of lawyers to clients on fees:</b> Solicitors' Code of Conduct, Para 8.6; Para 8.7; <i>Davies v London &amp; Provincial</i> (1878); <i>Motto v Trafigura</i> (2012); <i>Belsner v Cam Legal Services Ltd</i> (2022)</p> <p><b>Required: Candidates must explain rules on recoverability of costs:</b></p> <p><b>Limits on Recovery of Costs:</b> Must have retainer in place; Recoverability of 'fixed' costs only in cases in RTA and Personal Injury Portals; Fixed commencement costs if settlement after commencement; Portal limits</p> <p><b>Contentious Business Costs:</b> Cannot charge client more than can be recovered from other party on assessment – unless express written agreement or other specific rules; Cannot charge client on 'contingency' (percentage) basis</p> <p><b>Non-contentious Business Costs:</b> Fees to client not limited to amount recoverable from other party; may charge client on hourly rate or 'percentage' (contingency arrangement)</p> <p><b>Credit reference to any authority cited on rules relating to costs in contentious/non-contentious business:</b> Solicitors Act 1974, section 57(2), section 59, section 60(3); section 74; CPR 45.2; CPR 45.17; CPR 46.9; Solicitors' (Non-Contentious Business) Remuneration Order 2009</p>	
<p><b>Required: Candidates must provide explanation of potential remedies on disputed costs:</b></p> <p><b>Court Assessment of Costs:</b> Non-contentious retainer set aside under common law contract rules, or challenged as unfair or unreasonable, or hours excessive; Contentious business retainer not subject to assessment, except in limited circumstances provided in Act; Contentious business in County Court subject to recoverability rules; Assessment by application to High Court; Assessment of costs permitted (in limited circumstances) after costs paid; Application brought more than 1 month but within 12 months</p>	Up to 7 Marks

<p><b>Credit reference to any authority cited on the Assessment of Costs:</b> Solicitors Act 1974, section 57, section 60, section 60(5), section 61, section 70, section 74</p> <p><b>Complaints:</b> Regulatory requirement that regulated firms have complaints procedures – Clients must be advised at outset of case; Professional duties: not to mislead client; give appropriate advice on costs; keep client updated as case progresses; make client aware of significant changes in case and/or costs; Firm's internal complaints procedures; Legal Ombudsman.</p> <p><b>Credit reference to any relevant authority cited on complaints:</b> Legal Services Act 2007, section 21, section 112, section 114; SRA Code of Conduct for Firms, Para 7.1; SRA Code of Conduct for Solicitors, RELs and RFLs, Para 2, Para 8.2-8.5, Para 8.6 and 8.7</p>	
<p><b>Credit candidates for application of rules relating to retainers, recoverability of costs and potential remedies to facts of case:</b></p> <p><b>Application of rules on retainers:</b>  <b>Credit:</b> Discussion of: Retainer formed in normal way; possible argument on 'misleading' advice, especially when term queried; no 'fiduciary' duty to potential client when negotiating fees; cannot pursue 'unarguable' points on client's instructions – duty to court; CFAs only apply to 'contentious' business</p> <p><b>Application of rules on recoverability of costs:</b>  <b>Credit:</b> Portal claims not 'contentious' business until Stage 3/commencement of proceedings; all work deemed 'contentious' only on issue; only 'fixed costs' recoverable in Portal claims; 'fixed costs' even if proceedings issued – but more generous post-issue; limits on fees payable by client not applicable to non-contentious business;</p> <p><b>Application of rules on remedies:</b>  <b>Credit:</b> Application for assessment to High Court only; need to clarify time limits; fact already paid not barrier to assessment; Client will have to show common law grounds to set aside agreement (whole or in part) or 'unfair/unreasonable' or hours worked</p>	<p>Up to 8 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>

'excessive'; additional costs of assessment – unless reduce costs by 20%; pursue internal complaints procedures – not limited to where agreement could be set aside; Ombudsman once internal procedures exhausted

**Prospects of success of potential remedies:**

**Credit:** Discussion of: Retainer unlikely to be set aside or varied – arguments not supported by documentary evidence, no 'fiduciary' duty to client, breach of professional duty not necessarily breach of contract; unlikely prospects pursuing allegations of 'fraud/ deception'; if CFA only applied post-issue, court still look at whether fee charged was 'fair and reasonable'; charges in line with retainer; arguable 100% success fee 'excessive' but 'capped' in line with statute; poor prospects that overall charges 'unfair/unreasonable' or hours 'excessive' in circumstances; unlikely to better the 1/5<sup>th</sup> rule; good prospects of some remedy for breach of professional duties on internal complaint – possible further reduction

**Credit reference to any authority cited on application of rules and prospects of success:** Solicitors Act 1974, section 57, section 70, section 74; CPR 45.2; CPR 45.17; CPR 46.9; *Davies v London & Provincial* (1878); *Buxton v Mills-Owens* [2010]; *Belsner v Cam Legal Services Ltd* (2022); Solicitors' Code of Conduct, Para 1.4; Para 8.6; Para 8.7; CLSB Code of Conduct Para 2.1, Para 2.2

**Question 8:**

You are a trainee Costs Lawyer working for Derek and Clyde, Legal Costs Consultants. Your supervisor has asked you to review a file for a new client, Ms Raquel Duvall.

Ms Duvall was involved in a complex and protracted civil claim, which was eventually resolved partially in her favour at trial. The difficult procedural history of the claim meant that various costs orders had been made at different stages of

	<p>the litigation, some in Ms Duvall's favour and others against her. A detailed assessment hearing was listed before a Costs Judge to determine the amounts to be allowed under these various orders.</p> <p>The solicitors who had acted for Ms Duvall in the proceedings indicated that their expertise in costs matters was insufficient to deal with the detailed assessment hearing, and they suggested instructing a 'Specialist Costs Advocate', Mr Tom Trotter, to represent Ms Duvall at the hearing. The solicitors said that they had used Mr Trotter in the past and he would 'do a good job' for the client.</p> <p>Ms Duvall says that the assessment hearing was 'a disaster'. Large portions of her claimed costs were disallowed, whilst the costs orders against her were mostly allowed as drawn in the bills. The Costs Judge indicated that the pleadings had shown arguable points in Ms Duvall's favour, but these points had not been pursued before her. Instead, Mr Trotter had pursued arguments not pleaded and which relied on authorities which had been overruled by a decision of the Supreme Court 6 months earlier.</p> <p>Due to lack of court time, the hearing was adjourned to another day to determine who should pay the costs of the assessment proceedings.</p> <p>Ms Duvall has lost all confidence in Mr Trotter. She has found out since the hearing that he is not a qualified lawyer of any description and does not have rights of audience in his own name. Ms Duvall has come to your firm to seek advice about her position. She feels very strongly that Mr Trotter should compensate her for the costs that were disallowed and pay the costs of the assessment hearing.</p> <p>You have been asked to review Ms Duvall's file of papers and draft a memo of advice on her position and the options open to her.</p>
<p><b>Total Marks Attainable</b></p> <p>Fail = 0-9.9  Pass = 10+  Merit = 12+</p>	<p>20</p>

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 what it means to be an authorised person, an explanation of the costs lawyers duty to the court, an explanation of the professional conduct rules, an explanation of what a reserved legal activity is and what work can be undertaken by non-qualified costs professionals. 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 authorised persons/reserved legal activities) 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:</b></p> <p><b>Regulation of lawyers:</b> Authorised persons only to undertake reserved legal activities. Authorisation by 'approved regulator'. ACL approved regulator of Costs Lawyers.</p> <p><b>Credit reference to any authority cited on the regulation of lawyers:</b> Legal Services Act 2007, section 18, Legal Services Act 2007, section 20 and schedule 4</p> <p><b>Reserved legal activities:</b> 'Reserved' legal activities defined by statute; Entitlement to carry on reserved legal activity determined solely under Act; Reserved legal activities include conduct of litigation and rights of audience; Criminal offence to carry out reserved legal activities unauthorised; 'non-reserved' legal activities can be undertaken by anyone, regardless of authorisation; Exceptions where person carrying out reserved legal activity is 'exempt'; Exempt persons include those granted right by court or acting under supervision of authorised person</p> <p><b>Credit reference to any authority cited on undertaking reserved legal activities:</b> Legal Services Act 2007,</p>		<p>Up to 5 marks</p> <p>An explanation should be given as to what it means to be an authorised person and to undertake reserved legal activities</p>

<p>section 12 and Sch 2; section 13(1); section 13(2); section 14; section 19 and Sch 3</p>	
<p><b>Required: Candidates must explain rules on liability of lawyers and duties to the court:</b></p> <p><b>Liability:</b> Duty to client to conduct case with proper skill and care; Standard acceptable to responsible body of profession; Liability restricted in relation to advocacy in court; Instructing solicitor responsible for actions of those to whom work delegated – whether employee or independent. This includes the ‘concession’ which enables non-qualified costs draftspeople to be deemed an employee of the firm by whom they are instructed.</p> <p><b>Credit reference to any relevant authority cited on liability:</b> <i>Bolam v Friern Barnet Hospital</i> [1957]; <i>Rondel v Worsley</i> [1967]; <i>Moy v Pettmann Smith (A Firm)</i> [2005]; <i>Arthur J S Hall &amp; Co v Simmons</i> [2007]; <i>Ahmed v Powell</i> [2003]; <i>Crane v Cannons Leisure</i> [2007]; <i>Gempride Ltd V Bamrah</i> [2018]; SCCO Guide 2023, cl 1.2(d);</p> <p><b>Lawyer's duty to the court:</b> Lawyers must act within the law; Not knowingly or recklessly mislead the court; Duty to act in best interests of client overridden by duties to court; Duty of advocate to direct judge to all relevant authority, even if adverse to case; Duty not to advance unarguable points</p> <p><b>Credit reference to any authority cited on duties to the court:</b> Legal Services Act 2007, Section 176; SRA Code of Conduct, Para 1.4; CLSB Code of Conduct Principle 2; <i>Copeland v Smith</i> [2002]; <i>Buxton v Mills-Owens</i> [2010]</p>	<p>Up to 5 marks</p>
<p><b>Required: Candidates must explain rules on Wasted Costs Orders:</b></p> <p><b>Wasted Costs:</b> Court has discretion on costs; Court full power to determine by whom and what amount costs whole or part proceedings to be paid; Court may disallow all or part of costs of party; Court may order legal or other representative to meet all or part of costs wasted.</p> <p><b>Credit reference to any relevant authority cited on wasted costs:</b> Senior Courts Act 1981, Section 51; CPR 44.2; CPR 46.8</p> <p><b>Principles on Wasted Costs Orders:</b> Discretionary; Must be ‘unreasonable, improper or negligent’ conduct by</p>	<p>Up to 6 marks</p>

<p>representative; Mere mistake or error of judgment insufficient; Must be causal link between conduct and costs incurred; Should not be used as a threat or frustration at inability to enforce costs elsewhere; If awarded, usually on 'indemnity' basis; Court considers each case on own facts.</p> <p><b>Credit reference to any authority cited on principles behind Wasted Costs Orders:</b> <i>Ridehalgh v Horsefield</i> [1994], <i>Orchard v SE Electricity Board</i> [1987], <i>Symphony Group v Hodgson</i> [1993]; <i>Harley v McDonald</i> [2001]; <i>Wates Construction Ltd v HGP Greentree Alchurch Evans Ltd</i> [2006].</p> <p><b>Making a Wasted Costs Order:</b> Orders made at any stage in proceedings; Court can make order on own initiative or on application of any party; Respondent must be alerted that order may be sought; Court will give Respondent reasonable opportunity to make written/oral submissions; If granted, Court will determine amount or direct assessment by costs judge</p> <p><b>Credit reference to any relevant authority cited on making order:</b> CPR 46.8 - 46.10; CPR 23</p>	
<p><b>Credit candidates for application and discussion of rules relating to reserved legal activities, liability of lawyers and wasted costs orders to facts of case and providing reasoned advice:</b></p> <p><b>Application of rules on reserved legal activities:</b></p> <p><b>Credit:</b> Discussion of: Conducting litigation and/or exercising rights of audience reserved legal activities; Unauthorised advocate carrying out reserved legal activity; Exempt if granted rights of audience by court (no instructions on this) or under supervision of authorised person; Instructing solicitor authorised person, even if advocate is not; whether sufficient supervision of 'independent' advocate; Unauthorised advocate does not invalidate proceedings.</p>	<p>Up to 8 Marks</p>

**Application of rules on liability/duties to court:**

**Credit:** Discussion of: Whether actions of advocate met standard acceptable to responsible body of costs lawyers' profession; previous immunity from liability for negligence as advocate no longer applies; Whether duties to court extend to 'non-authorized' persons; Solicitors with conduct remaining liable for actions of 'independent' agent; Whether advocate 'knowingly or recklessly' misled court; Failure to advance all relevant authorities; Arguing unarguable points.

**Application of rules on wasted costs orders:**

**Credit:** Discussion of: Whether actions of advocate amounted to 'unreasonable, improper or negligent' conduct or 'merely mistake or error of judgment'; Discretionary nature of remedy, depend on view judge takes on facts of case; Not designed to 'penalise' representative; Needs 'high level' of misconduct to justify order; Need to make application on notice for WCO

**Alternative remedies**

**Credit: Any relevant possible alternative remedies available to client, such as a solicitor/own client assessment**

**Prospects of favourable outcome:**

**Credit:** Discussion of: Arguable that advocate was 'exempt' person carrying out reserved legal activity – either court granted or by 'supervision' of authorised person; Even if not exempt, does not invalidate detailed assessment – appeal only route to challenge; Likely to have failed in duties to client and to court; Arguable whether 'caused' loss as court was aware of authority and not misled; Likely to have been 'negligent' by standards of profession; Arguable CLSB no power to regulate 'non-authorized' Costs Lawyer; Solicitors with conduct liable for acts of agent, even if 'independent' expert; Whether 'negligent' or other

'improper' conduct was sufficiently 'high level' to justify award of Wasted Costs against advocate; Discretionary remedy, relief not guaranteed even in strong case.

**Credit reference to any authority cited on application of rules to facts and/or prospects of success:**

Legal Services Act 2007, section 12, section 13, section 18 and section 19; Legal Services Act 2007, section 176; Senior Courts Act 1981, Section 51; CPR 23; CPR 44.2; CPR 46.8-46.10; *Allen v Brethertons* [2019]; *R v AUH* [2023]; *Bolam v Friern Barnet Hospital* [1957]; *Arthur J S Hall & Co v Simmons* [2007]; *Ahmed v Powell* [2003]; *Crane v Cannons Leisure* [2007]; *Gempride Ltd V Bamrah* [2018]; *Copeland v Smith* [2002]; *Buxton v Mills-Owens* [2010]; *Ridehalgh v Horsefield* [1994]; *Harley v McDonald* [2001]; SRA Code of Conduct, Para 1.4; CLSB Code of Conduct Principle 2.

**Question 9:**

You work in the Costs Department of Morgan, Freeman, and Murphy LLP, a small-medium sized high street firm. You have been approached by one of the Senior Partners in the firm, who has recently been appointed as the firm's new COFA, for your advice about the activities of a particular client, Mr Pedro Escobar.

Mr Escobar is a new client who has been recommended to the firm by one of its longstanding existing clients, for whom the firm carries out a lot of commercial and conveyancing work. Mr Escobar has instructed the firm to act on his behalf in relation to a property transaction. The COFA is new to the role and has sought your advice on the legal and regulatory position in relation Mr Escobar's instructions.

Mr Escobar has provided the firm with funds to commence work on his transaction. These funds comprise a cheque for £12,000 and £25,000 in cash in a mixture of notes and coins of various denominations. Mr Escobar's instructions are that these funds are to cover the deposit on the

	<p>purchase of the property and the firm's fees. Mr Escobar's instructions are that in order to free up the rest of the money for the transaction, it is crucial that the firm transfers the equivalent in US Dollars of £10,000 to his mother's account in a bank in the British Virgin Islands.</p> <p>The COFA is unsure whether the firm has the correct financial systems in place to handle such unorthodox instructions and seeks your advice on what the firm should do in response to Mr Escobar's requests.</p> <p>Write a memo to the COFA setting out the management systems the firm should have in place to comply with the regulatory requirements on handling clients' money, and how to deal with financial transactions of this nature. Your memo should include advice on what steps the firm needs to take to ensure compliance with the legal and regulatory requirements.</p>
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<b>Total Marks Attainable</b>	20
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Fail	up to 9.9	An answer which deals with the basic requirements of the question, but in dealing with 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: 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.

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

Indicative Content	Marks
<p><b>Required: Candidates must explain the regulatory framework for financial management of firms:</b></p> <p><b>Governance:</b> Framework for protection of client money and how it is dealt with in Solicitors' Accounts Rules 2019 (SARs); Firms must appoint Compliance Officers for Finance and Administration (COFAs) and Compliance Officers for Legal Practice (COLPs). Duties to ensure compliance with SRA authorisation of firms. COFA specific duty to ensure compliance with and reporting breaches of Solicitor's' Accounts Rules; Also, must appoint Money Laundering Compliance Officer (MLCO)/Money Laundering Reporting Officer (MLRO).</p> <p>Can be same individuals in small firms</p> <p><b>Systems and controls:</b> Firms must comply with requirements of SRA; Firms required to make Suspicious Activity Reports (SARs) where necessary. Firms to provide staff with appropriate training on SARs and Money Laundering; Customer due diligence (CDD) measures for new clients</p> <p><b>Credit reference to any authority cited on regulatory framework:</b> Solicitors' Accounts Rules 2019; SRA Code of Conduct for Firms, Para 2.1; Para 5 and Para 9.1 and 9.2; Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, Reg 21 and Regs 27-30</p>	<p>Up to 5 marks</p> <p>To achieve a pass, an explanation should be given about the Solicitors' Accounts Rules, protection of clients' assets and money laundering</p>
<p><b>Required: Candidates must explain what client money is and how it should be treated by firms:</b></p> <p><b>No Specific Definition:</b> Nothing in CLSB Rules or Codes of Practice; SRA includes 'money held or received relating to regulated services delivered to a client and/or in respect of fees and disbursements prior to delivery of bill'. <b>Treatment of Client Money:</b> Client money paid 'promptly' into client/customer account and returned 'promptly' when no longer</p>	<p>Up to 4 marks</p>

<p>proper reason to hold funds; No longer any definition of 'promptly'; Exceptions include where payment would conflict with other rules or regulations; transfers/withdrawals only for 'regulated services'; payment of costs/disbursements after delivery of bill</p> <p><b>Credit reference to any authority cited on the definition and treatment of client money:</b> SRA Solicitors' Account Rules 2019, Rule 2.1, Rule 2.3, Rule 2.3(a), Rule 2.5, Rule 3.3, Rule 4.3; CLSB Guidance Note Handling Client Money (Principle 3.6)</p>	
<p><b>Required: Candidates must explain the rules on compliance with Solicitors Accounts Rules and Money Laundering Regulations:</b></p> <p><b>Solicitors' Accounts Rules:</b> Duty to pay client money into separate client account 'promptly'; Exception to 'promptness' where payment to client account would breach legislation of other rules; treatment of 'mixed payments' of client and solicitor's own money; payment of 'costs on account' permitted but remains client's money; no transfer to business account until bill delivered; prohibition on use of client account as 'banking facility; Client's money 'sacrosanct'</p> <p><b>Money Laundering Regulations:</b> Avoiding criminal offences under Act - concealing, converting or transferring criminal property, becoming concerned in criminal arrangement; Firms to apply 'due diligence' measures on new business relationship; proof of identity of customer; nature of business relationship; due diligence can be 'enhanced' or 'simplified'; duty on MLRO to consider internally and/or report 'suspicious activity'; duty to maintain CDD records, even if not suspicious; avoid 'tipping off' client</p> <p><b>Credit reference to any authority cited on Solicitors' Accounts Rules and/or Money Laundering Regs:</b> SRA Solicitors' Account Rules 2019, Rule 2.1, Rule 2.1(d), Rule 2.3(a), Rule 3.3, Rule 4.2, Rule 4.3; SRA v Ahmed (2019); Proceeds of Crime Act 2002, sections 327-329, section 333A; Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, Regs 27-30, Reg 33, Reg 37</p>	<p>Up to 6 marks</p>
<p><b>Credit Candidates for discussion of application of rules to factual scenario and provision of advice:</b></p>	<p>Up to 9 marks</p>

**Management systems and controls:**

**Credit:** Discussion of: COFA appointed and has specific duty to ensure compliance with SRA Accounts Rules; Does firm also have MLRO?; Does firm have systems in place for reporting breaches of SARs and/or MLRs?; Record keeping systems of firms; Training of staff?

**Treatment of Client Money:**

**Credit:** Discussion of: Funds provided by client fall within definition of 'client money'; Normally client money 'sacrosanct'; May be exception to 'prompt' payment requirement; MLRs may provide statutory exception to 'prompt payment'; Sufficiently wide interpretation of 'prompt' to enable at least delay in payment to client account; payment on account of costs still client money, no bill issued yet; payment not 'mixed' as no part of it solicitor's money prior to delivery of bill; Request to transfer to third party and convert foreign currency may be use as banking facilities

**Next Steps:**

**Credit:** Discussion of: New 'business relationship' - customer due diligence required; Checks on identity of client; Cannot rely on recommendation from existing client – liability on firm if CDD not carried out; Enquiries about sources of cash; No evidence that client's position requires 'enhanced' due diligence; Records of enquiries and documents retained; Consider internally whether activity 'suspicious'; Whether client can provide reasonable explanation; Whether adequacy or veracity of documents in question; Report 'suspicious' activity to National Crime Agency; Decline instructions on overseas transfer, with reason under SARs; If 'suspicious' activity and reported, do not inform client – tipping off

**Credit refence to any authority cited on application of rules to factual scenario and advice:** Proceeds of Crime Act 2002, sections 327-329, section 333A; SRA

Solicitors' Accounts Rules 2019 Rule 2.3(a), Rule 3.3; Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, Regs 27-30, Reg 33, Reg 37; <i>R v da Silva</i> (2006); <i>SRA v Ahmed</i> (2019); CLSB Guidance Note Handling Client Money (Principle 3.6)	
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