December 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:	*What will be considered by the Court when deciding if a Conditional Fee Agreement is in fact a contentious business agreement*
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	Up to 5 marks

be in writing no statutory or secondary legislation that requires a CFA to be signed (although best practice) ***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.	
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	Up to 4 marks

61(1) of the Solicitors Act 1974 and section 61(4B) of the Solicitors Act 1974.	

Question 2:	*Describe the legislative process governing third party funding agreements and the potential liability of third party funders for the costs of proceedings*

Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	**Marks**
Candidates must explain what third party funding is, e.g: **Third party funding:** Is an alternative method of litigation funding where a commercial funder with no connection to the proceedings will pay some 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.	Up to 2 mark A pass must include the demonstration that the candidate understands what Third Party Funding is.
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 or against a non-party. Although historically the Court has been cautious in granting such an order there has more recently been a shift in stance. The was thought to be a cap on the liability of third party funders but this is not a principle that Courts are bound by and third party funders may be liable to the full extent of costs. Funders may be liable to full extent from date	Up to 8 marks

started funding. Whilst generally speaking the discretion to order a non-party to pay costs would not be exercised against pure funders the courts may make a non party costs order where a funder had gone beyond mere 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], Chapel Gate Credit Opportunity Master Fund Ltd v Money & Ors [2020] and Laser Trust v CFL Finance Ltd [2021]. ***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], Laser Trust v CFL Finance Ltd [2021] and Laser Trust v CFL Finance Ltd [2021].	
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	Up to 2 marks To achieve more than a pass, candidates must not simply cite law but should show a greater depth to their knowledge base.

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].	
Credit a discussion on whether there should be better oversight, e.g: ***Restrictions:*** Agreements based on champerty and maintenance still remain. Courts still have to decide on the facts of each litigation funding agreement whether the contract is unenforceable on the grounds of public policy. This may restrict access to justice. There has been a change in approach by both the legislative and judiciary but there has been no legislation around this type of funding meaning it only tends to get used in a commercial context. ***Association of Litigation Funders:*** Third party funding in England and Wales is self-regulated by the Association of Litigation Funders (ALF). The ALF is a private company limited by guarantee, owned and directed by its member firms. A voluntary code of conduct for litigation funders was first published in November 2011. It was developed by a Ministry of Justice working group on third party funding, which was set up in response to a recommendation by leading judge Lord Justice Jackson in his comprehensive review of civil litigation costs. ALF members which fail to meet the requirements of the code may be subject to a fine and/or termination of their membership. ***2017 Government has no plans to regulate:*** The UK government had no plans to formally regulate third party providers of litigation funding, as there are no "specific concerns" about the current voluntary framework.	Up to 2 marks To achieve a distinction, candidates will provide some commentary on the regulation and better oversight.

Question 3:	Describe the types of lien a Solicitor may have over a client's property and discuss how this may be exercised

Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	**Marks**
Required: Candidates must explain what a lien is and the distinction between the types of lien, e.g: ***A lien is:*** A right to keep possession of property belonging to another person until a debt owed by that person is discharged. ***A solicitor with unpaid fees has a potential lien over the client's property in one of three ways:*** Common law lien, an equitable lien or a statutory lien under section 73 of the Solicitors Act 1974. ***Common law lien:*** Retaining – this is the right to hold property already in possession. it is a lien that can only exist where the party claiming the lien has property in their hands over which they can assert a claim, and in respect of which they have a right to keep. ***Equitable lien:*** Preserving – the equitable lien arises in cases where funds do not pass into the solicitor's hands and so the solicitor does not have the basic 'possession' required in order for a common law lien to arise. The court has an equitable jurisdiction to intervene to protect the solicitor's interests and to order that a payment is made to the solicitor direct. ***Section 73 of the Solicitors Act 1974:*** Solicitors have the right to apply to the court for a charge on any property recovered or preserved through their efforts.	Up to 5 marks
Candidates may explain in more detail what a retaining lien is and demonstrate knowledge of how it operates, e.g:	Up to 5 marks To achieve more than a pass,

A retaining (common law) lien: Is passive and possessory, there is no right to actively enforce the demand just a right to withhold possession. ***Credit should be given where reference is made to authority on the nature of retaining liens, e.g:*** Bozon v Bolland [1839] and Barrett v Gough Thomas [1951] ***Property:*** An example of the property they may have in their possession is the file of papers, solicitors are entitled to hold the papers until his fees are paid. This lien only extends to the client's own property, any paper belonging to a third party cannot be subject to such a lien. The property over which such a client is exercised must have come into the solicitor's possession through employment and the work done on behalf of the client. The property over which such a client can be exercised may include money held on client account unless the money held is held for a specific purpose. Electronic data is not tangible property so no lien arises in respect of the same. ***Credit should be given where reference is made to authority on retaining liens and the type of property, e.g:*** Sheffield v Eden [1878], Leo Abse and Cohen v Evan G Jones Builders Limited [1984], Loescher v Dean [1950], Withers v Rybeck [2011] and Withers v Langbar [2011] and Your Response v Datateam Business Media [2014].	candidates must not simply cite law but should show a greater depth to their knowledge base and apply the authority to the question posed
Candidates may explain in more detail what a preserving lien is and demonstrate knowledge of how it operates, e.g: ***A preserving (or equitable) lien is:*** A right to ask the court to order that personal property recovered under a judgment obtained with the solicitor's assistance stand as security for his costs. ***Honest and fair dealing:*** An equitable or preserving lien exists because there should be honest and fair dealing, it is more in the nature of equitable relief to prevent the Solicitor from being deprived of his costs, rather than a lien. Authority sets out that a lien may exist to prevent defendants dealing directly with their lay opponents resulting in the solicitors not being paid. ***Notice:*** If a paying party has notice of solicitor's interest and pays lay opponent direct may have to pay again. A party with notice of the solicitor's preserving lien is not under an obligation, following a settlement as to costs, to pay any settlement monies directly to the solicitor. However, he might be liable to the	Up to 4 marks To achieve more than a pass, candidates must not simply cite law but should show a greater depth to their knowledge base and apply the authority to the question posed

solicitor if both of the following apply he had knowledge of the existence of the lien and there is evidence of collusion with the solicitor's client to defeat the lien. ***Credit should be given where reference is made to authority on honest and fair dealings and notice of unpaid fees, e.g:*** Welsh v Hole [1779], Read v Dupper [1765], James Bibby Ltd v Woods and Howard [1949], and Khans Solicitors v Chifuntwe and SSHD [2012] ***Security or charge:*** The equitable lien operates by way of security or charge. A preserving lien can only be asserted in respect of the costs debt that relates to the property recovered. It does not attach to all forms of property but may offer wider protection than a retaining lien, in that it covers property not in the solicitor's possession and provides him with an equitable right to have the property transferred into his possession and to apply to the court for a charge. ***Credit should be given where reference is made to authority on security or charge, e.g:*** Barker v St Quinton [1844] and Euro Commercial Leasing v Cartwright & Lewis [1995]. ***To apply:*** A solicitor must have been instructed, there must be fees owed as a result of the instruction, the property over which they are claiming the lien must have been recovered or preserved and that must have been as a result of the proceedings. ***Proceedings:*** Historically it was thought there must be proceedings in order to have the right to a preserving lien, however, there does not need to be proceedings. For example, if the matter settled through ADR the solicitor would still have the right to make an application to the court. The rationale for this is that modern day litigation, and the existence of the protocols, encourages parties to settle before the need to litigate. However, very recently it has been decided that where a firm helps a client write a letter of claim or complete an online form and the claim is paid directly to the client in response then the firm is not entitled to an interest in the compensation that equity would protect. This final point is currently being appealed. ***Credit should be given where reference is made to authority on an application and the issue of proceedings, e.g:*** Halvanon Insurance Co Ltd v Central Reinsurance [1988], Gavin Edmonson	

Solicitors Ltd v Haven Insurance Co Ltd [2018] and Bott and Co v Ryanair [2019].	
Candidates should explain what a statutory lien is and demonstrate knowledge of how it operates, e.g: ***Section 73 of the Solicitor Act 1974:*** This section replaces various earlier statutory provisions to the same effect going back least as far as the Attorneys and Solicitors Act 1860. It adds to the two common law remedies by giving a solicitor a right to apply for a charging order. The courts have stressed that the effect of the section is not to create any new right, but rather to give statutory aid to the existing common law liens. In other words, enabling them more cheaply and speedily to enforce a right they already possess. However, the section is expansive in at least one respect: it extends to a charge over real property, which the common law rights do not. ***To apply:*** Solicitor can apply to the court for a lien over property, the provisions are similar to that in Halvanon. The court may declare the solicitor is entitled to a charge on any property recovered or preserved through his instrumentality for his assessed costs in relation to that suit, matter or proceeding. A solicitor must also be able to make out a prima facie case that they will not be paid unless an order is made. The Court may also make such orders for the assessment of those costs and for raising money to pay or for paying them out of the property recovered or preserved as the court thinks fit. Costs belong to the client so any application under section 73 must be prompt. ***No absolute right:*** Section 73 does not confer an absolute right to a charging order. The court has a discretion and, like the equitable lien, it may be waived where a solicitor takes alternative security for his costs without expressly preserving those rights. ***Credit should be given where reference is made to authority on the statutory lien, e.g:*** Shaw v Neale (1858), Harrison v Harrison [1883], Re Born [1900], Re John Morris [1908] and Kahn Solicitors v Secretary of state [2013].	Up to 3 marks To achieve more than a pass, candidates must not simply cite law but should show a greater depth to their knowledge base and apply the authority to the question posed

Question 4:	Describe when an interim statute bill could be considered a request for payment on account with reference to interim invoices.

Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	**Marks**
Required: Candidates must explain what a bill is and demonstrate knowledge of the types of bill, e.g: **There are two kinds of interim 'bill': Interim invoices on account and interim statute bills;** the difference between them is crucial. Depending on what sort of interim bill has been sent out, a lawyer may be able to: sue the client on such bills (and not just the final bill) or seek a different amount from the client at the end of the case for the period that the interim bill covers. **Interim invoices on account:** Are merely requests for money on account of work undertaken. They must be for a reasonable sum. If these have been rendered, a solicitor will be able to seek a different amount from the client at the end of the case for the period that the interim bill covers. A solicitor cannot enforce them and a client cannot request an assessment of them. **An interim statute bill:** Is an invoice which is fully compliant with the requirements of s 69(2) of the Solicitor's Act 1974 (signed and delivered). A solicitor can enforce them and a client can request an assessment of them. Interim Statute bills are full and final for the work which they cover (i.e. no additional sums/adjustment for further work can be requested from the client later). **Final statute bills:** Are the same as interim statute bills, but rendered upon the termination of the contract of retainer rather than at an interim stage. Statute bills can be either "gross sum" bills or detailed. **A gross sum bill:** Will simply contain the total to be paid to the lawyer, without any breakdown of the figure.	Up to 4 marks
Any other relevant point to describe interim bills/invoices on account (credit any of the following and/or any other relevant point):	Up to 3 marks

Section 65(2) of the Solicitors Act 1974: A solicitor may seek a payment on account in respect of any contentious business. If the request is for a reasonable amount and the client does not pay then there is good cause to terminate. **Turner & Co v O Palomo SA [2000]:** If the client refuses to pay an interim invoice on account then the solicitor's remedy is to terminate the contract of retainer and render a final statute bill. 5 bills rendered during the course of the litigation had been headed 'on account of charges and disbursements incurred or to be incurred' could not be construed as final or statute bills. The time for assessment would not begin to run until a final bill had been rendered and served. **At the conclusion of a matter:** The solicitor should render a FINAL INVOICE, containing the required statutory information and taking into account the payments made to that date. **Rule 17 of the SRA Account Rules 2017:** Interim invoices on account must be restricted to costs incurred to ensure compliance with the Solicitor Accounts Rules 2011. Once a bill has been rendered, solicitors would be entitled to treat money that may previously have been client money as money belonging to the office so this will impact money held on account and money received once the bill has been rendered (rule 17.4 of the SRA Account Rules 2017).	
Any other relevant point to describe interim/final statute bills (credit any of the following and/or any other relevant point): **Contents of a statute bill:** A statute bill will specify the period of work covered and will describe the work done, as well as complying with section 69(2) of the Solicitors Act 1974. **Kingstons Solicitors v Reiss Solicitors [2014]:** This was held not to amount to a statute bill. A bill must be drafted in such a way as to be regarded as a demand for payment. **Carter-Ruck v Mireskandari [2011]:** An interim statute bill with insufficient information may not be considered an interim statute bill, but may be deemed to be a request for payment on account. **Entire contracts and natural breaks:** A retainer is deemed to be an entire contract and, as such, an interim statute bill cannot be rendered before the end. of the contract, other	Up to 4 marks

than in contentious work where it can be rendered by agreement or at a natural break. **Davidsons v Jones-Fenleigh [1980]:** Lawyers are entitled to require a bill to be treated as a completely self-contained bill of costs to date; they must make it clear to their clients, either expressly or by implication, that this is the purpose of sending the bill for that amount at that time. Where a client pays a bill in its entirety without question, it is not difficult to infer that the bill is to be treated as a complete self-contained bill of costs to date. **Abedi v Penningtons (a firm) [2000]:** Agreement to interim statute bills could be both inferred by the client's behaviour and from the express agreement. **Re Romer v Haslam [1893]:** Not entitled to payment because the solicitors had never asked for payment of any of their bills; they had simply asked for and received payments on account. **Wilson v William Sturges & Co (a firm) [2006]:** The bill delivered at the end of the first stage of proceedings was held to be a statute bill. This was despite the fact the court held the bill to be 20% in excess of the proper amount. The solicitors insisting on it being paid before proceeding further did not terminate the retainer and disentitle the solicitors to the reasonable costs. **Bari v Rosen (trading as RA Rosen & Co Solicitors) [2012]:** Interim statute bills are final bills in respect of the work they cover in that there can be no subsequent adjustment in the light of the outcome of the business. **Richard Slade and Company v Boodia and Boodia [2017]:** The QBD, in an appeal from the SCCO, upheld Master James' finding that interim statute bills must include disbursements. **Sprey v Rawlison Butler LLP [2018]:** High Court ruled monthly bills under discounted CFA were not statute bills but interim invoices. CFA provided that claimant would pay 40% of firm's normal rates if lost the claim and if won, he would pay the normal rates plus a 50% success fee. A statute bill cannot be amended and the CFA provided that the 40% invoices were liable to be changed later on.	

Masters v Charles Fussell & Co LLP [2021] EWHC B1 (Costs) – Master Rowley held that in order to "make it plain" to a client that he is receiving an interim statute bill, the information given at the outset needs to make clear that there are time limits and indeed give some indication of what those time limits are. Reference to Solicitors Act likely to be persuasive. **Section 69(1) of the Solicitor's Act 1974:** No action shall be brought to recover any costs due to a solicitor before the expiration of one month from the date on which a statute bill is delivered; a solicitor may also issue proceedings to recover the sums owed in that bill.	
Any other relevant point to describe final statute bills/Gross sum bills (credit any of the following and/or any other relevant point): **Section 64 (1) of the Solicitors Act 1974:** In respect of contentious business provides that a bill may be, at the option of the solicitor, either a bill containing detailed items or a gross sum bill. **Section 64(2) of the Solicitors Act 1974:** If a gross sum bill is delivered then, within 3 months, the party charged with the bill may require the solicitor to deliver a detailed bill. This must be done before the solicitor issues proceedings to recover costs. **Detailed bill following gross sum:** The gross sum bill is no longer effective and the detailed bill can therefore be for a different sum than the original bill.	Up to 2 marks

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

Question 5:	You work for a Costs Firm Turner and Carter Costs instructed to deal on behalf of the receiving party with the Detailed Assessment of a claim for damages and losses incurred as a result of a fatal Road Traffic Accident which occurred on 15th January 2017. The matter was settled at the end of a three day Trial and a final order made on 10th August 2023. The order made included an authority for costs to be assessed on the standard basis. Mrs Smith is the Solicitor that has conduct

	of the matter from Arkin and Bowers LLP located in Birmingham. The Bill of Costs was prepared by an in house Costs Draftsman at Arkin and Bowers LLP and takes into account a Costs Management Order dated 10th June 2022. Following review of the file you note that you are seeking less than the approved Costs Management Order in four of the phases with an upward departure in the remaining phases. There has been an interim application that had not been included in the budget and extensive disclosure which was not envisioned. The paying party have indicated that they consider the Band 1 Guideline Hourly rates applied to the Bill of Costs to be excessive and request for the Costs Judge to reduce the rates for incurred costs maintaining that this should be applied to budgeted costs. Prepare a letter of advice to Mrs Smith setting out the matters arising when seeking a departure from the Costs Management Order for all budget phases and the merits of the paying party's point 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 - 11.9	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 - 13.9	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 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	Up to 5 marks To pass candidates MUST include an explanation of what a CMO is and the impact where costs are assessed

[2018] and Harrison v University Hospitals Coventry and Warwickshire NHS Trust [2017].	
Credit discussion on assessment and good reason to depart, e.g: ***Assessment:*** CPR 44 PD3.1 whether or not there is a CMO in place 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 3D Para 12 When reviewing budgeted costs, the court will not undertake a detailed assessment in advance, but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs. CPR 3.18bIn any case where a costs management order has been made, when assessing costs on the standard basis, the court will…not depart from such approved or agreed budgeted costs unless satisfied that there is good reason to do so ***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	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

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]. Yeo v Times Newspaper ***The indemnity principle:*** The indemnity principle is a good reason to depart. Once Receiving Party has established a good reason for a phase, they 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. An underspend in one phase wont justify an overspend in another. ***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 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.	Up to 4 marks To achieve more than a pass candidates should demonstrate real awareness that persuading the court there has been a change in circumstance to justify amending the budget may be difficult

Credit 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 may be entitled to revise their trial budget where there has 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).	
Credit any explanation as to how to make an application to amend a budget, e.g: ***Budget revisions:*** Revising party must revise its budgeted costs upwards or downwards if significant developments in the litigation warrant such revisions. Any budgets revised must be submitted promptly by the revising party to the other parties for agreement, and subsequently to the court. The revising party must serve particulars of the variation proposed on every other party, using the form prescribed by Practice Direction 3E, confine the particulars to the additional costs occasioned by the significant development; and	Up to 4 marks

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 seeking a revision 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 seeking to amend 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 relief from sanctions. ***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, or for future work.	

Credit reference to authority cited on the courts powers, e.g: CPR 3.15A(5) and CPR 3.15A(6).	

Question 6:	You have received instructions from your client Mr Williams & Co Solicitors who acted on behalf of the Claimant Mr Yoki in a personal injury claim **against** the Ministry of Defence, which proceeded to a case and costs management conference (CCMC) on 1st August 2021 at the High Court of Justice, Queen's Bench Division before Master Johnson. Prior to the hearing, the Claimant duly filed and served his Costs Budget and some negotiations on future costs took place between the parties, however they were largely unfruitful and the parties were unable to agree the approach in respect of expert evidence. At the Costs and Case Management Conference case management directions were provided in relation to expert evidence and costs budgeting. Your Client's costs budget totalling £800,000 was approved of which £400,000 was for future costs. The Costs Management Order was made on 10th September 2021 and a Trial fixed for 10th May 2023 with a time estimate of four days. The parties found it hard to follow the timetable provided by the Court in respect of expert evidence and by consent, the date for disclosure of further witness evidence was extended to 4th February 2023. It also became apparent that the Trial would need to be extended to 6 days and a new Trial date was set for 10th January 2024 . Costs in respect of expert evidence as budgeted for in the Costs Management Order has almost been reached and there are still outstanding issues to be resolved. Your client has asked for you to provide a letter of advice setting out the steps that should be taken, in particular if an Application to amend the budget should be made and the procedure to be followed to do so.
Total Marks Attainable	20

Fail	up to 9.9	An answer which deals with the basic requirements of the question but in dealing with those requirements only does so superficially and does not address, as a minimum, all the criteria expected of a pass grade (set out in full below). The answer will only demonstrate an awareness of some of the more obvious issues, for example simply outlining the rules in relation to budgets and CMOs. The answer may not indicate any real understanding that costs management is in place in order to ensure cases are managed proportionately. The answer will be weak in its presentation of points and its application of the law to the facts. There will be little evidence that the candidate fully understands how the CPR operates and any view expressed will be unsupported by evidence or authority.
Pass	10+	An answer which addresses MOST of the following points: When a CMO will be made, in what circumstances a budget can be varied, 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 management order will record the extent the incurred costs were agreed; the extent budgeted costs were agreed; and the approval of budgeted costs once revised. Once a CMO has been made, the court can control the recoverable costs. The court can record on the face of the order any comments on the incurred costs to be taken into account at detailed assessment. The CMO concerns only the phase totals; it is not the role of the judge to fix or approve hourly rates; and any detail within the budget is for reference purposes only. ***Credit reference to any authority cited on CMOs, e.g:*** CPR 3.15(2), CPR 3.15(3), CPR 3.15(4), CPR 3.15(8). ***Estimated Costs and Incurred Costs at CMC:*** The court may, in determining the amount of a given phase to which approval is given, take into account the costs incurred to date by setting a figure which impliedly criticises those costs as being excessive and leaving very little for prospective costs. When making a CMO it will be an error in principle in approving specific hours and disbursements rather than total figures for each phase of the proceedings and in expressly reserving matters, such as hourly rates, to be disputed at a detailed assessment. Incurred costs will be subject to DA and the estimated costs will be subject to the test of proportionality. ***Credit reference to any authority cited on estimated costs and incurred costs, e.g:*** Redfern v Corby Borough Council [2014], CIP Properties Ltd v Galliford Try Infrastructure Ltd [2015], Yirenki v Ministry of Defence [2018] and Harrison v University Hospitals Coventry and Warwickshire NHS Trust [2017].	Up to 4 marks To pass candidates MUST include an explanation of what a CMO is and the impact where costs are assessed

Credit any explanation as to how to make an application to amend a budget, e.g: ***Applications to amend:*** Either party must revise its budgeted costs upwards or downwards if significant developments in the litigation warrant such revisions. Any budget revisionmust be submitted promptly by the revising party to the other parties for agreement, and subsequently to the court. The revising party must serve particulars of the variation proposed on every other party, using the form prescribed by Practice Direction 3E, confine the particulars to the additional costs occasioned by the significant development; and certify, in the form prescribed by Practice Direction 3E, that the additional costs are not included in any previous budgeted costs or variation. The revising party must submit the particulars of variation promptly to the court, together with the last approved or agreed budget, and with an explanation of the points of difference if they have not been agreed. When making an request 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 relief from sanction. ***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	Up to 7 marks

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).	
Credit a discussion on what is meant by significant development, e.g: ***Meaning:*** There is no clear definition of what is meant by a significant development. A change in the value of the claim or a longer trial length has been held not to amount to a significant development in the case. Conduct may be a significant consideration for the court in arriving at their decision. 'Significant development' requiring budget revision need not be a specific event but can be a "collection of factors" which mean that the nature of the claim has changed. Not every development in litigation will amount to a significant development. ***Credit reference to authority on what is meant by a significant development, e.g:*** Churchill v Boot [2016], Thompson v NSL Ltd [2021] and Persimmon Homes Ltd & Anor v Osborne Clark LLP [2021] ***Disclosure:*** Claimants have been entitled to revise their trial budget because there had been a significant development in the litigation where disclosure was of a scale and complexity that was much larger than had actually been budgeted for, which was not envisaged and which could not have been reasonably envisaged. Disclosure that involved five times more documents than anticipated and expressly assumed in a claimant's budget has been held to be a significant development justifying its costs budget being updated. ***Credit reference to authority on disclosure amounting a significant development, e.g:*** Al-Najar v the Cumberland Hotel (London) Ltd [2018] and BDW Trading Ltd v Lantoom Ltd [2020]. ***Interim applications:*** Interim applications may be significant developments. If interim applications are made which, reasonably, were not included in a budget, then the costs of such interim applications shall be treated as additional to the approved budgets. It should be noted that whilst the application itself may sit outside of the budgeted costs the consequential	Up to 7 marks To achieve more than a pass candidates should demonstrate real awareness that persuading the court there has been a change in circumstance to justify amending the budget may be difficult

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).	
Credit discussion on assessment and good reason to depart, e.g: ***Assessment:*** Whether or not there is a CMO in place if 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. , would be going against the intent of the rule to require another assessment of estimated costs to be performed without 'good reason'. A CMO cannot be deemed superseded. ***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 the paying party has established a good reason for a phase they are free to challenge any other sums within that phase without identifying further good reason.	Up to 4 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

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].	

Question 7:	You are a Costs Lawyer working in house for a firm of Solicitors in Liverpool. Miss Neville, a Solicitor at the firm has received instructions from Mrs Joyce in respect of her Daughter Taylor. Taylor is thirteen years old and has been diagnosed with Autism Spectrum Disorder (ASD). She has significant sensory difficulties and also had a profile of suggestive Pathological Demand Avoidance. She had never attended school and had been educated at home. A placement had been proposed by the local authority at a local academy which Mrs Joyce did not think suitable for her Daughter. Miss Neville is advising Mrs Joyce on her right of appeal to the First Tier Tribunal (Special Educational Needs and Disability). The Tribunal will need to review the relevant statutory provisions and if an additional assessment of Mrs Joyce's Daughter will need to be made, You have been asked to provide an email advice setting out the requirements for the Tribunal to make a decision, and any adverse costs considerations. Set out in your advice the rules in the lower tribunal in respect of costs specifically where an adverse costs order is made.	
Total Marks Attainable		20

Fail	up to 9.9	This mark should be awarded to candidates whose papers fail to address any of the requirements of the question, or only

		touch on some of the more obvious points without dealing with them or addressing them adequately.
Pass	10+	An answer which addresses MOST of the following points: This matter is a matter before a first tier tribunal Health, Education and Social Care Chamber, it is not one of the first tier tribunals that cannot make orders for costs, the framework of provisions in the Tribunals, Courts and Enforcement Act 2007 and the relevant rules specific to this tribunal - Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008. Candidates are also likely to have explored wasted costs orders. Candidates will demonstrate a good depth of knowledge of the subject with good application and some analysis having regard to the facts, although candidates may demonstrate some areas of weakness.
Merit	12+	An answer which includes ALL the requirements for a pass (as set out above) PLUS candidates will demonstrate a very good depth of knowledge of the subject (i.e. a very good understanding of the law on wasted costs in tribunals) with very good application and some analysis having regard to the facts. Candidates are likely to observe that, in this scenario, that, whilst the tribunal does have jurisdiction to make orders for costs, that they will only be made where conduct is relevant. Most views expressed by candidates should be supported by relevant authority and/or case law.
Distinction	14+	An answer which includes ALL the requirements for a pass and merit (as set out above) PLUS the candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. Candidates will provide an excellent advice setting out when a costs order may be made and the provisions around such an order. All views expressed by candidates should be supported by relevant authority and/or case law. Work should be written to an exceptionally high standard taking into consideration that it is written in exam conditions.

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

Indicative Content:	**Marks**
Required: Candidate should refer to legislative framework to describe the jurisdiction, e.g:	Up to 6 marks

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

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

Care Chamber) Rules 2008 and Rule 10(6) of the Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008. ***Assessment:*** The amount of costs to be paid under an order may be ascertained by summary assessment by the Tribunal, agreement of a specified sum by the paying person and the person entitled to receive the costs ("the receiving person"); or assessment of the whole or a specified part of the costs incurred by the receiving person, if not agreed. Following an order for assessment under paragraph 7 (c) the paying person or the receiving person may apply to a county court for a detailed assessment of costs in accordance with the CPR 1998 on the standard basis or, if specified in the order, on the indemnity basis. ***Credit reference to any authority cited on the assessment of the costs, e.g:*** Rule 10(7) of the Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 and Rule 10(8) of the Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008.	
Candidate should refer to any specific authority on wasted costs orders, e.g: ***Principles on wasted costs orders:*** Wasted costs orders are discretionary. A mere mistake is not sufficient for a wasted costs order, there must be unreasonable, improper or negligent conduct. Wasted costs orders should not be used as a threat. The respondent must be alerted to the possibility of a wasted costs order, must be apprised of the case against him and must be given adequate time and opportunity to respond. A wasted costs order can never be made where the causal link between conduct and costs incurred does not exist. The Tribunal should exercise its power to make a wasted costs order of its own motion with restraint. Indemnity costs orders are no longer limited to cases where the court wishes to express disapproval of the way in which litigation has been conducted. Can be made even when the conduct could not properly be regarded as deserving of moral condemnation. The court must consider each case on its own facts. Conduct must be unreasonable to a high degree. 'Unreasonable' in this context does not mean merely wrong or misguided in hindsight. Whilst the pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, the pursuit of a hopeless claim (or a claim which the party pursuing it should	Up to 7 marks To achieve more than a pass, candidates must not simply cite law but should show a greater depth to their knowledge base and apply the authority to the question posed

have realised was hopeless) may well lead to an indemnity basis order. ***Credit reference to any authority cited on the principles behind making a wasted costs order, e.g:*** Harley v McDonald [2001], Ridehalgh v Horsefield [1994], Orchard v SE Electricity Board [1987], Cancino [2015], Awuah and Others [2017], Noorani v Calver [2009], Kiam v MGN Limited No2 [2002] and Wates Construction Limited v HGP Greentree Alchurch Evans Limited [2006].	

Question 8:	You work as an in house Costs Lawyer for Machells LLP. A Director of the Business has asked you to provide advice on a case where he is acting for the Claimant Mr Owens for Judicial Review. Leeds Council have reduced the Housing benefit of Mr Owens, who is the main carer for his partner, who has severe disabilities. They live in a two bedroom flat for which he claims Housing Benefit. In 2018 their local Council reduced their housing benefit by 14% as they deemed Mr Owens to have a spare room. It is Mr Owens' case that the Council have acted unlawfully and the second room is required to accommodate his partners medical equipment and supplies. The Claimant is now ready to make an application for permission to bring a judicial review challenging the lawfulness of the Council's actions and policy together with a costs capping order. You are asked to provide a written advice on costs capping in judicial review cases setting out the statutory tests to do so.
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 proceedings and that, in the absence of the order, the applicant for judicial review would withdraw the	Up to 4 marks

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 Protective Costs Orders cannot be made in private 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	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

£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). 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 for the 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.	Up to 2 marks

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).	

Question 9:	You work in house for an SRA regulated firm in Tunbridge Wells, Slatter and Co. Mr Slatter, a Partner at the firm has been instructed by Mr Penny who had applied on short notice for an interim injunction against the Defendant Mr Smith Managing Partner of Denford and Co for restraining the use of certain confidential information and seeking delivery up of a laptop. The form of the injunction was largely agreed between the parties in advance. It was granted at the Injunction Hearing with costs reserved. Mr Smith had given in principle his consent to the continuation of the Injunction, it was continued by the Judge at the return hearing. In doing so, the Judge noted that it had not been "*possible or necessary to resolve the underlying merits of what is clearly a hotly disputed case*", and that he was "*not resolving who is right or wrong*". Mr Slatter had discussed the matter with Mr Penny, who was of the view that an Order should be made for the Defendant to pay his costs with immediate assessment and payment on account. Prepare the body of a letter to Mr Penny detailing how the costs of any injunction proceedings would usually be dealt with.
Total Marks Attainable	20

Fail	up to 9.9	This mark should be awarded to candidates whose papers fail to address any of the requirements of the question, or only touch on some of the more obvious points without dealing with them or addressing them adequately. An answer which makes little or no sense OR is so poorly written as to lack coherence OR the answer will only demonstrate

		an awareness of some of the more obvious issues and is likely to be poorly written.
Pass	10+	An answer which includes MOST of the requirements, namely: An explanation of the normal rule in costs and the three situations that need to be considered when offering advice on costs in relation to injunctions. The primary focus of the question may have been missed with candidates simply providing a general framework, although there will be evidence that the candidate has the knowledge that is fit for purpose. The answers will be written to a reasonable standard, but may contain some grammatical errors or spelling mistakes etc. Appropriate authority will be used throughout although some points advanced may not be supported.
Merit	12+	This band will deal with ALL the requirements and the focus of the response will be injunctions granted on the balance of convenience. Candidates will have produced responses that have more depth and with more application to the facts provided. There will also be a demonstration that the candidate is able to analyse, as appropriate. Candidates will have produced responses which are written to a high standard with few, if any, grammatical errors or spelling mistakes etc. taking into account it is written under exam conditions.
Distinction	14+	An answer which includes ALL of the requirements for a pass (as set out above) PLUS demonstrates an excellent depth of knowledge. Excellent application of the law to the arguments made and critical analysis of the same. All views expressed by candidates should be supported by relevant authority and/or case law. Work which is written to an exceptionally high standard with few, if any, grammatical errors or spelling mistakes etc.

Indicative Content	**Marks**
Required (consideration as to the court's jurisdiction, e.g): ***Jurisdiction in relation to making injunctions:*** The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so. Guidelines to establish whether an applicant's case merited the granting of an interlocutory injunction are: whether there is a serious question to be tried, what would be the balance of convenience of each party should the order be granted (in other	Up to 6 marks

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	Up to 8 marks To achieve more than a pass the candidate must not simply cite the law but demonstrate an understanding of how the rules operate

the action or destroy his business or because the opposing party might not have the means to repay if there should be a subsequent order against it. ***Credit reference to any authority cited on the impact of an order, e.g:*** Kickers International SA v Paul Kettle Agencies Ltd [1990], Picnic at Ascot v Derigs (unreported) [2001] and Hospital Metalcraft Ltd v Optimus British Hospital Metalcraft Ltd [2015]. ***Three situations that should be considered:*** Interim injunction application granted on (or agreed by consent on the basis of) the balance of convenience. A defendant that successfully resists an injunction application. An injunction on a quia timet basis.	
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	Up to 3 marks

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].	
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